GUIDE TO THE APPOINTMENT OF CONSULTANTS & CONTRACTORS

SECOND EDITION
FEBRUARY 1998
ACKNOWLEDGEMENTS

The development of the Guide to the Appointment of Consultants and Contractors (GACC) was facilitated by PACE Central Advice Unit under the direction of the interdepartmental Joint User Group (JUG).

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This guide is suitable for use under the Scottish legal system as well as that of England and Wales.

Where there are substantial legal differences or procedural requirements between the English and Scottish systems, separate sections have been written.

The relevant Scottish sections are numbered with the suffix ‘SCOT’, for example:

- LE 1.2 SIMPLE CONTRACTS (English version)
- LE 1.2(SCOT) SIMPLE CONTRACTS (Scottish version)

To facilitate even easier identification the relevant Scottish sections are printed on green paper. If there is only one section (with no SCOT suffix) then it can be taken as applicable under both legal systems.

The amendments made to enable the guide to be compatible with the Scottish legal system were developed in conjunction with Scottish Executive and their legal advisers.
## CONTENTS

### ACKNOWLEDGEMENTS

### INTRODUCTION (INT)

#### CONTENTS

**INTRODUCTION**

- **BACKGROUND**
  - INT 1.1
- **GUIDE TO THE APPOINTMENT OF CONSULTANTS AND CONTRACTORS**
  - INT 1.2
- **PURPOSE OF THE GUIDE**
  - INT 1.3
- **STRUCTURE OF THE GUIDE**
  - INT 1.4
- **USE OF THE GUIDE**
  - INT 1.5
- **LIST OF RELATED REFERENCE DOCUMENTS**
  - INT 1.6
- **ABBREVIATIONS AND DEFINITIONS**
  - INT 1.7
- **PRINCIPAL TERMS AND CONCEPTS IN THE CONSTRUCTION INDUSTRY**
  - INT 1.8

### PROCUREMENT STRATEGIES (PS)

#### CONTENTS

**GENERAL PRINCIPLES**

- **THE PROCUREMENT PROCESS**
  - PS 1.1
- **THE 'INTELLIGENT CUSTOMER' AND THE ROLE OF CAU**
  - PS 1.2
- **PRINCIPLES OF ‘BEST PRACTICE CLIENT’**
  - PS 1.3
- **THE CONDUCT OF STAFF**
  - PS 1.4
- **MANAGEMENT ROLES**
  - PS 1.5
- **EFFECTIVE DECISION-MAKING**
  - PS 1.6
- **FOCUS ON OUTPUT VALUE**
  - PS 1.7
PROJECT REQUIREMENTS

Project Identification  PS 2.1
Defining Project Objectives  PS 2.2
Risk Management  PS 2.3
Contract Strategy  PS 2.4
Defining the Project Brief  PS 2.5

PROCURING AND MANAGING THE TEAM  PS 3.0

The Need for a Project Manager  PS 3.1
Defining the Project Team  PS 3.2
Appointment Through Competition  PS 3.3
Fostering Teamwork  PS 3.4
Performance Incentives  PS 3.5
Monitoring Performance  PS 3.6
Record Keeping  PS 3.7

PERFORMANCE EVALUATION  PS 4.0

Evaluating Performance  PS 4.1
Project Critiques  PS 4.2

OTHER ISSUES  PS 5.0

Partnering  PS 5.1
Private Finance Initiative  PS 5.2
LEGAL ENVIRONMENT (LE)

CONTENTS

LEGAL FRAMEWORK

PRINCIPLES COVERING THE LAW OF CONTRACT IN ENGLAND & WALES

PRINCIPLES COVERING THE LAW OF CONTRACT IN SCOTLAND

SIMPLE CONTRACTS

SIMPLE CONTRACTS

CONTRACTS BY DEED

SELF-PROVING CONTRACTS

PERFORMANCE AND DETERMINATION

PERFORMANCE AND TERMINATION

DISCHARGE OF A CONTRACT

MISTAKE AND MISREPRESENTATION

MISTAKE (ERROR) AND MISREPRESENTATION

BREACH OF CONTRACT

DAMAGES FOR BREACH OF CONTRACT

LIMITATION

PRESCRIPTION

EVIDENCE OF CONTRACT

EVIDENCE OF CONTRACT

ASSIGNMENT

ASSIGNATION

NOVATION

TRANSACTIONS WITH OUTSIDE BUSINESSES

PARENT COMPANY GUARANTEES

PERFORMANCE BONDS

STAMP DUTY

PROCEEDINGS INSTITUTED AGAINST

PROCEEDINGS INSTITUTED AGAINST

LE 1.0

LE 1.1

LE 1.1(SCOT)

LE 1.2

LE 1.2(SCOT)

LE 1.3

LE 1.3(SCOT)

LE 1.4

LE 1.4(SCOT)

LE 1.5

LE 1.6

LE 1.6(SCOT)

LE 1.7

LE 1.8

LE 1.9

LE 1.9(SCOT)

LE 1.10

LE 1.10(SCOT)

LE 1.11

LE 1.11(SCOT)

LE 1.12

LE 1.13

LE 1.14

LE 1.15

LE 1.16

LE 1.17

LE 1.17(SCOT)
EC PROCUREMENT PROCEDURES (EPP)

CONTENTS

THE SCOPE OF APPLICATION OF THE EC PROCUREMENT RULES

- General
- The Directives
- Deciding which Directive Applies
- Exclusions
- Thresholds
- Estimating the Value of Commissions and Aggregation
- Publicity and the Types of Notice Required
- Procedure for Advertising and Awarding Contracts
- Accelerated Timescales
- Model Notices and Their Content
- Number of Tenderers
- Tenderer Selection
- Award Criteria
- Contract Notice, Decline and Debriefing

EC/GATT Reporting Requirements

ANNEX

EPP 1.1 Categories of Services

EPP 1.2 Notices Required under EC Public Procurement Rules

EPP 1.3 Procedures and Timescales for Advertising and Awarding Contracts

EPP 1.4 Works Contracts - Model Contract Notices

EPP 1.5 Services Contracts - Model Notices

Annex

EPP 1.1.1

Annex

EPP 1.2.1

Annex

EPP 1.3.1

Annex

EPP 1.4.1

Annex

EPP 1.5.1
# CONSULTANTS (CST)

## CONTENTS

### COMMISSIONING STRATEGIES
- CST 1.0
  - CST 1.1: Procurement Process and Programme
  - CST 1.2: Application of EC Public Procurement Rules
  - CST 1.3: Property Management Type Commissions
  - CST 1.4: Individual Project Management Type Commission
  - CST 1.5: Individual Discipline Commissions
  - CST 1.6: Term Commissions

### COMMISSION FILE
- CST 2.0
  - CST 2.1: Identification
  - CST 2.2: Sub Files
  - CST 2.3: Retention Periods
  - CST 2.3(SCOT): Retention Periods

### CONSULTANT SELECTION
- CST 3.0
  - CST 3.1: Selection of Firms
  - CST 3.2: New Qualification System (NQS)
  - CST 3.3: The Long Listing Process
  - CST 3.4: Identify Pre-selection Criteria
  - CST 3.5: Pre-Selection Information
  - CST 3.6: Compilation of Short Lists
  - CST 3.7: The Number of Tenderers
  - CST 3.8: Quality Price Mechanism
  - CST 3.9: Pre-tender Interview Stage
  - CST 3.10: Single Tender
<table>
<thead>
<tr>
<th>TENDER PROCESS</th>
<th>CST 4.0</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>CST 4.1</td>
</tr>
<tr>
<td>Forms of Tendering</td>
<td>CST 4.2</td>
</tr>
<tr>
<td>Tender Documents</td>
<td>CST 4.3</td>
</tr>
<tr>
<td>Tender Periods</td>
<td>CST 4.4</td>
</tr>
<tr>
<td>Tender Boxes</td>
<td>CST 4.5</td>
</tr>
<tr>
<td>Secure Information</td>
<td>CST 4.6</td>
</tr>
<tr>
<td>Documentation Standards</td>
<td>CST 4.7</td>
</tr>
<tr>
<td>Dispatch of Tenders</td>
<td>CST 4.8</td>
</tr>
<tr>
<td>Queries by Tenderers</td>
<td>CST 4.9</td>
</tr>
<tr>
<td>Tender Boards</td>
<td>CST 4.10</td>
</tr>
<tr>
<td>Opening the Tender Box</td>
<td>CST 4.11</td>
</tr>
<tr>
<td>Opening of Tenders</td>
<td>CST 4.12</td>
</tr>
<tr>
<td>The Tender Record Book</td>
<td>CST 4.13</td>
</tr>
<tr>
<td>Late Tenders</td>
<td>CST 4.14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TENDER EVALUATION</th>
<th>CST 5.0</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evaluation Criteria</td>
<td>CST 5.1</td>
</tr>
<tr>
<td>Fee Schedules</td>
<td>CST 5.2</td>
</tr>
<tr>
<td>Incentive Fees</td>
<td>CST 5.3</td>
</tr>
<tr>
<td>Evaluation Procedure</td>
<td>CST 5.4</td>
</tr>
<tr>
<td>Tender Anomalies</td>
<td>CST 5.5</td>
</tr>
<tr>
<td>Qualified Tenders</td>
<td>CST 5.6</td>
</tr>
<tr>
<td>Amended Tenders</td>
<td>CST 5.7</td>
</tr>
<tr>
<td>Amended Tender Documents</td>
<td>CST 5.8</td>
</tr>
<tr>
<td>Re-invitation of Tenders</td>
<td>CST 5.9</td>
</tr>
<tr>
<td>Recommendation for Acceptance</td>
<td>CST 5.10</td>
</tr>
</tbody>
</table>
AWARDING COMMISSIONS AND DECLINING TENDERS

LEGAL CONTRACT FORMATION

ACCEPTANCE OF TENDER

LETTER OF ACCEPTANCE

DECLINE OF UNSUCCESSFUL TENDERS

EXECUTION OF FORMAL AGREEMENT

DEBRIEFING

REQUEST FOR DEBRIEFING

DEBRIEFING INTERVIEWS

MANAGEMENT OF COMMISSIONS

ROLES AND RESPONSIBILITIES OF THE COMMISSION MANAGER/THE PROJECT SPONSOR

CONSULTANT AND SUB-CONSULTANTS

PROFESSIONAL INDEMNITY INSURANCE

BILL PAYING AND CHECKING PROCEDURES

DETERMINATION/Termination Procedures

DETERMINATION/Termination Due to Default

CLAIMS AND DISPUTES

HANDLING OF CLAIMS BY AND AGAINST THE

CLAIMS ARISING FROM DEFAULT OR NEGLIGENCE BY A CONSULTANT OR CONTRACTOR

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

ARBITRATION

WRITS AND SUMMONSES

EX GRATIA CLAIMS

PERSONAL INJURY CLAIMS
PERFORMANCE REPORTING

Performance Reporting Generally

Performance Reporting to the New Qualification System (NQS)

Consult Notices within NQS

CONTRACTORS (CRS)

CONTENTS

CONTRACTING STRATEGIES

Procurement Process and Programme

Application of EC Public Procurement Rules

Introduction to the Choice of Contract

Contracts using Bills of Quantities

Contracts using Schedules of Rates

Simple Lump Sum Contracts

Traditional Lump Sum Contracts

Design and Build Contracts

Prime Cost Contracts

Management Contracts

Construction Management Contracts

Design and Manage Contracts

Extension Contracts and Variations

Term Contracts

Standard Government Contracts

GC/WORKS/1 (1998) - Lump Sum with Quantities

GC/WORKS/1 (1998) - Lump Sum without Quantities

GC/WORKS/1 (1998) - Single Stage Design and Build Version

GC/WORKS/1 (1999) - Two Stage Design and Build Version

GC/WORKS/1 (1999) - With Quantities Construction Management Trade Contract

GC/WORKS/1 (1999) - Without Quantities Construction Management Trade Contract
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<td>GC/Works/3 (1998) - Mechanical and Electrical Engineering Works</td>
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<td>1.15.9</td>
<td>GC/Works/6 (1999) - Daywork Term Contract</td>
</tr>
<tr>
<td>1.15.10</td>
<td>GC/Works/7 (1999) - Measured Term Contract</td>
</tr>
<tr>
<td>1.15.11</td>
<td>GC/Works/8 (1999) - Specialist Term Contract for Maintenance of Equipment</td>
</tr>
<tr>
<td>1.15.13</td>
<td>C1303 - Window Cleaning and</td>
</tr>
<tr>
<td>1.15.14</td>
<td>C1306 - Maintenance of Gardens, Grounds, Etc. And</td>
</tr>
<tr>
<td>1.15.15</td>
<td>C1304 - Chimney Sweeping</td>
</tr>
<tr>
<td>1.15.16</td>
<td>C1312 - Supply and Application of Herbicides, Etc.</td>
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<tr>
<td>1.15.17</td>
<td>C1804 - Repair of Plant</td>
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**CONTRACTS FILE**

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<tr>
<td>2.2</td>
<td>Sub-Files</td>
</tr>
<tr>
<td>2.3</td>
<td>Retention Periods</td>
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<tr>
<td>2.3(SCOT)</td>
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**CONTRACTOR SELECTION**

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</tr>
<tr>
<td>3.1</td>
<td>Selection of Firms</td>
</tr>
<tr>
<td>3.2</td>
<td>New Qualification System (NQS)</td>
</tr>
<tr>
<td>3.3</td>
<td>The Long Listing Process</td>
</tr>
<tr>
<td>3.4</td>
<td>Pre-Selection Procedures</td>
</tr>
<tr>
<td>3.5</td>
<td>Compilation of Short Lists</td>
</tr>
<tr>
<td>3.6</td>
<td>The Number of Tenderers</td>
</tr>
</tbody>
</table>
TENDERING PROCESS

DOCUMENTATION

INSTRUCTIONS/NOTICES TO TENDERERS/TENDER PERIODS

MID TENDER INTERVIEWS

TENDER BOARDS

OPENING OF TENDERS

THE TENDER RECORD BOOK

LATE TENDERS

TENDER EVALUATION

GENERAL

CRITERIA FOR EVALUATION

QUALIFIED TENDERS

ALTERNATIVE OFFERS

AMENDED TENDERS

ERRORS IN PRICED BILLS

POST TENDER NEGOTIATION

RE-INVI TATION OF TENDERS

TENDER REPORTING

AWARDING CONTRACTS & DECLINING TENDERS

LEGAL CONTRACT FORMATION

ACCEPTANCE OF TENDER

LETTERS OF ACCEPTANCE

DECLINE OF UNSUCCESSFUL TENDERERS

EXECUTION OF FORMAL AGREEMENT
DEBRIEFING
REQUESTS FOR DEBRIEFING CRS 7.0
DEBRIEFING INTERVIEWS CRS 7.1
DEBRIEFING CRS 7.2

NOMINATION OF SUB-CONTRACTORS
NOMINATION PROCEDURES CRS 8.0
PRIME COSTS CRS 8.1
ARRANGING A NOMINATED SUB-CONTRACT CRS 8.2
ESTABLISHING A CONTRACT CRS 8.3
LIQUIDATION OF A NOMINATED SUB-CONTRACT CRS 8.4
SELECTED OR APPROVED SUB-CONTRACTORS CRS 8.5

MANAGEMENT OF CONTRACTS
ROLE OF THE PROJECT MANAGER CRS 9.0
ROLE OF THE PROJECT SPONSOR CRS 9.1
BILL PAYING CRS 9.2
CHECKING PROCEDURES CRS 9.3
DETERMINATION/Termination PROCEDURES CRS 9.4

CLAIMS & DISPUTES
GENERAL CRS 10.0
CONTRACT CLAIMS AGAINST THE DEPARTMENT CRS 10.1
AVOIDANCE OF CLAIMS CRS 10.2
MANAGING CLAIMS CRS 10.3
PRESENTATION OF CLAIMS CRS 10.4
CLAIMS AGAINST CONTRACTORS CRS 10.5
ARBITRATION CRS 10.6
EX GRATIA CLAIMS CRS 10.7
MATTERS ARISING ON COMPLETION

LIQUIDATED AND ASCERTAINED DAMAGES

MAINTENANCE PERIODS

PAYMENTS

OVERPAYMENTS

HANDOVER

PERFORMANCE REPORTING

GENERAL

PERFORMANCE REPORTING TO NQS
INT 1.0 INTRODUCTION

INT 1.1 BACKGROUND
INT 1.2 GUIDE TO THE APPOINTMENT OF CONSULTANTS AND CONTRACTORS
INT 1.3 PURPOSE OF THE GUIDE
INT 1.4 STRUCTURE OF THE GUIDE
INT 1.5 USE OF THE GUIDE
INT 1.6 LIST OF RELATED REFERENCE DOCUMENTS
INT 1.7 ABBREVIATIONS AND DEFINITIONS
INT 1.8 PRINCIPAL TERMS AND CONCEPTS IN THE CONSTRUCTION INDUSTRY
On 1 April 1996 Departments took over from Property Holdings responsibility as principals for the property they occupy. At the same time Property Holdings was disbanded and replaced by the new executive agency ‘Property Advisers to the Civil Estate (PACE)’. PACE would:

• co-ordinate the Government’s activity on the Civil Estate;
• promote rationalisation of the Estate;
• provide Departments with a body of “off-the-shelf” advice and support;
• provide intelligent customer support; and
• provide management of the Government’s vacant properties.
GUIDE TO THE APPOINTMENT OF CONSULTANTS AND CONTRACTORS - EDITION 2

The first edition of the Guide issued in September 1996 provided essential advice and guidance to assist Departments and Agencies in discharging their responsibilities for the management of their property-related procurement.

This second edition has been developed by the PACE Central Advice Unit (CAU) to reflect the various changes in legislation, systems and accepted practices which have occurred since then. It also takes account of interim changes in the organisation of other departmental advice providers.
PURPOSE OF THE GUIDE

The Guide has been written to assist Departments in their role as the "intelligent customer" whereby they are required to have sufficient intelligent customer support to be able to brief, appoint and monitor consultants or contractors in a clear and cost effective manner. Departments may either rely on their own in-house expertise or buy in such support from PACE.W whichever route they choose Departments will retain the final responsibility for all decisions on the properties they occupy.

The Guide is intended to provide guidance on procurement in the context of property management. Much of the work to be procured in this context will therefore involve the management and maintenance of existing facilities rather than the procurement of projects involving large scale development, redevelopment or extension work. Such work does however fall under the general heading of property management and is considered in the Guide.

Its purpose is to encourage the most efficient and cost effective means of engaging consultants and contractors to carry out necessary services and works. In particular the Guide promotes the procurement of services on the basis of 'best value for money', where quality is a major criteria for selection and service providers are not commissioned solely on the basis of the cheapest price. It promotes a view of procurement which embraces the overall long-term objectives of a project and gives consideration to whole-life costs.

It is recognised that there is a wide variation in the number, experience and qualification of procurement staff within the departments. For this reason the Guide is intended to be a practical document for use by administrative and professional staff at all levels and has been written specifically to assist informed lay persons and as an aide memoire. The Guide is generally not mandatory and given procedures may be adapted to suit the specific requirements of any particular commission or project.

The Guide will be updated from time to time when necessary and the CAU will publish Information Notes giving details of any important changes.
STRUCTURE OF THE GUIDE

It is divided into five main sections: Procurement Strategies, Legal Environment, EC Procurement Procedures, Consultants Section and Contractors Section. Each section is further divided into subjects (e.g. general principles), headings and where necessary subheadings. The contents pages are structured to allow direct access to heading references. Alternatively, there is a fully cross-reference index at the back of the Guide.

The top of the page carries the heading and any subheading together with an index card icon confirming the page's location in the context of the whole Guide. At the bottom of the page is the page reference. The reference system is in numerical order based on section prefix followed by the section reference. The abbreviations denote the main sections as follows:-

- PS  Procurement Strategies
- LE  Legal Environment
- EPP EC Procurement Procedures
- CST Consultants Section
- CRS Contractors Section

The right hand margin contains, where appropriate, icons relating to the adjoining text. These are shown below:

- ! This warning triangle indicates where particular care should be taken to ensure that departments or their advisers are taking relevant action. Generally, this will relate to situations where specialist advice may need to be sought on particular issues.

- CRS 3.1 This blue icon is the cross-referencing code to other related sections of the Guide. The reference is in the abbreviated code found at the bottom of the page.

- This icon indicates where a cross-reference to other documents or further reading is made.

- Where it is appropriate to do so, a topic is concluded with a list of actions or points for consideration under the heading 'Key Points'.

The footer to each page also contains publishing information consisting of the edition number and the date of issue.
• **Volume 2** is not procedural but is intended to give Departments “best examples” of commissioning documentation and Tender packages. It is only available on CD Rom disk.

It contains the following:

**PACE Documentation:**
- Property Management Commission (CU version)
- Estates Management Commission
- Works Management Commission
- The PMC Guide (CU version)
- Term Works Commission
- Estates Commission
- Term Estates Commission
- Term Audit Commission
- Project Advisor Commission
- PH Legal Services Contract

**Government Forms of Contract**
There are various Government forms of contract available. For ease of reference a copy of section CRS 1.15.1 to 1.15.14.1 is incorporated into **volume 2**, as is a copy of contract forms C910, C1102, C1301, C1303, C1304, C1306, C1312, C1401, C1501 and C1804. The GC forms referred to in CRS 1.15.1 to 1.15.6 are obtainable from HMSO.


**Scottish Office (Leith) FM Contract Cleaning Contract**

**Employment Service Security Services Contract**

**Duties of Clerk of Works**

**Property Holdings Building Control Compliance Checking Commission**

All relevant **supplementary conditions** as listed in Section CRS 1.15.15 of GACC

**Example schedules used by Employment Service**

Schedule for window cleaning for use with c1303 form of contract.
Schedule for clerk of work contract.
Schedule for legal services contract.
Schedule for office cleaning contract.
USE OF THE GUIDE

The Guide covers general advice and recommended procedures that may be followed in connection with the selection, appointment and management of consultants and contractors. As such, it necessarily includes material on EC procurement requirements, purchasing policy, strategic issues and procedural advice. In short, it covers a range of issues with which Departments should be familiar when taking on and managing consultants and contractors. It is one of a family of CAU produced guidance material which has been, or is in the process of being, compiled. They are:

- The Estates Services Guide (ESG) 3rd Edition (England/Wales version) published in June 1999 provides advice relating to property management under the subject headings: Strategic, Acquisition, General Estate Management and Disposal;

- The Premises Management Guide (PMG) 2nd Edition published in September 1999 provides advice on policy and functions associated with premises management.


- Crown Fire Standards, published in December 1997, provides guidance to those involved in the design of new buildings and in the refurbishment and alteration of existing buildings.

- Business Continuity Planning Guide, published in May 1998, assists Departments in discharging their responsibilities for the management of their properties and the activities which are carried out at those properties. It guides towards the most efficient and cost effective means of enabling managers and users to plan against, and recover from, the effects of an incident affecting individual properties.

- Guide to Requirements for Office Buildings, and its associated schedule, highlight the requirements which normally should be incorporated in office schemes. Two versions exist:
  - Version 1 deals with the physical standards/requirements for new projects and refurbishments procured as Private Developer Schemes;
  - Version 2 covers the standards for Crown Build type schemes.
# List of Related Reference Documents

<table>
<thead>
<tr>
<th>SHORT TITLE</th>
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<tbody>
<tr>
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<td>Essential Requirements for Construction Procurement</td>
<td>HM Treasury</td>
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<tr>
<td>Procurement Group Guidance No. 2</td>
<td>Value for Money in Construction Procurement</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Procurement Group Guidance No. 3</td>
<td>Appointment of Consultants and Contractors</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Procurement Group Guidance No. 4</td>
<td>Teamworking, Partnering and Incentives</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Procurement Group Guidance No. 5</td>
<td>Procurement Strategies</td>
<td>HM Treasury</td>
</tr>
<tr>
<td>Procurement Group Guidance No. 6</td>
<td>Financial Aspects of Projects</td>
<td>HM Treasury</td>
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<td>Value by Competition; A Guide to the Competitive Procurement of Consultancy Services for Construction</td>
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### Abbreviations and Definitions

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>CAU</td>
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<td>CDM</td>
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</tr>
<tr>
<td>commission</td>
<td>Any services or works required to be procured to satisfy a particular property management requirement.</td>
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<tr>
<td>commission/contract manager</td>
<td>Officer, other than a project sponsor, who is responsible for the delivery of a consultancy contract or works contract</td>
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<tr>
<td>CUP *</td>
<td>Central Unit on Procurement</td>
</tr>
<tr>
<td>Department</td>
<td>Department or Authority with procurement responsibilities</td>
</tr>
<tr>
<td>DETR</td>
<td>Department of Environment Transport and the Regions</td>
</tr>
<tr>
<td>GACC</td>
<td>Guide to the Appointment of Consultants and Contractors</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>legal adviser</td>
<td>Solicitor/Contracts Consultant</td>
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<tr>
<td>PACE</td>
<td>Property Advisers to the Civil Estate</td>
</tr>
<tr>
<td>PFI</td>
<td>Private Finance Initiative</td>
</tr>
<tr>
<td>project</td>
<td>Work of a type which requires the appointment of a project sponsor such as development, redevelopment or large scale extension projects.</td>
</tr>
<tr>
<td>project sponsor</td>
<td>Officer responsible for the delivery of a project</td>
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<tr>
<td>the Secretary of State</td>
<td>the Secretary of State for the Environment, Transport and the Regions</td>
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</tbody>
</table>
|------------------------|-------------------------------------------------------------------------------------------------
| TUPE                   | The Transfer of Undertakings (Protection of Employment) Regulations 1981                      |
| works                  | Contracts for physical construction work rather than consultancy or services commissions. |

Note: * HM Treasury's 'Central Unit on Procurement' has now changed its name to 'Procurement Practice and Development'. However, for the time being at least, the series of CUP Guidance Notes will retain their current CUP references and numbers.
PRINCIPAL TERMS AND CONCEPTS IN THE CONSTRUCTION INDUSTRY

There are technical terms which are generally accepted in the building industry but which not all readers may be familiar with. These are explained below:

1. **Bill of Approximate Quantities (BAQs)** - contains correctly described items of work but only estimated or approximate quantities. It is based on provisional or assumed information before the design is fully developed. The work subsequently ordered is measured and priced on the basis of the BAQs in order to arrive at the final cost of the contract.

2. **Bill of Quantities (BQs)** - contains correctly described items and accurate quantities taken from firm and detailed information at the completion of the design. It may contain some sections marked “provisional” where there is no firm design information but this should be minimal. Re-measurement only takes place on those sections of the bill which are provisional, or are the subject of variation, or where there is a discrepancy between the bill and the drawings issued to the contractor.

3. **Design and Construct** - or design and build describes the method of procuring works contracts which involve the contractor in developing a detailed design solution based on a set of employer’s requirements and then building to the design. The contractor therefore assumes both design and construction risks.

4. **Facilities Management (FM)** - is an integrated approach to maintaining, improving and adapting the buildings of an organisation in order to create an environment that strongly supports the primary objectives of that organisation. Treasury guidance identifies FM as Contracting for Strategic Services.

5. **Joint Ventures** - these are usually only used on very large projects where a single contractor lacks the technical or financial resources to handle the project alone. Two or more companies set up a consortium for the execution of the contract, after which it is dissolved, so arrangements must be made to ensure that services are available to deal with any matters arising once the final certificate is signed and the works handed over.
(6) **Liquidated and Ascertained Damages (LADs)** -
Contractual damages (stated in the contract) to be paid by the contractor to the employer for any period of delay to the completion of a project for which the contractor is not entitled to extensions of time.

(7) **Partnering** - is about fostering open and co-operative relationships between members of the construction team, the contractor and the Department.

One of the principal objectives is to reduce or avoid conflict. The principle is generally appropriate but not limited to the forging of longer-term relationships with suppliers which are based on mutual trust and a joint aim to produce a product from which both benefit.

(8) **Prime Cost Items/Sums (PC)** - where a specialist service cannot be fully described in the specification the estimated cost is included as a PC item. The PC sum is deducted from the contract figure and the actual cost of the service included.

(9) **Project Manager (PM)** - the PM is usually appointed by a Department to act as the Department’s representative in dealings with other members of the construction team. The PM may also directly supervise the construction works.

(10) **Project Sponsor (PS)** - the PS for any major project should be an executive from within the Department. The PS need not have a background in construction/contract management but should have a clear understanding of the organisation’s requirements and approvals procedure. The PS must have the delegated responsibility to act quickly and effectively. The prime project related tasks of the PS are:

(a) to establish a clear statement of objectives;

(b) to be responsible for the definition of the project at each stage approval decisions are required;

(c) to ensure that funding is available when required and all necessary approvals are obtained;

(d) to establish the day-to-day requirement for project management and professional services for the project including delegations to the project manager and reporting requirements;
(e) to manage and monitor the performance of the project manager; where it is deemed appropriate to appoint one;

(f) to provide the sole source of contact and decision-making to all parties concerned with the project from outside the Department, and to provide decisions as required by the programme. The PS is responsible for the completion of the project to programme within the budget, and to the required level of quality.

(11) **Provisional Sums** - A sum included when it has not been decided whether work may or may not be required to be carried out. This provisional sum is deleted from the contract figure and the actual cost (if required) is included when appropriate. Provisional and PC sums are included in order to ensure that all contractors tender on the same basis and parity of tender is obtained. Provisional sums are either known, or ‘undefined’ - where the workscope is unknown.

(12) **Schedule of Rates or Prices** - where the requirement is indeterminate, or it is not necessary to quantify components, a list of correctly described items are shown. Any variations are based on the cost shown against described items.

(13) **Sequential Tendering** - the somewhat misleading name used for a system in which PC sums are used to cover more than half of the work, and in which the corresponding sub-contract tender invitations/nominations are made in a planned sequence after the main contract has started. Competition for the main contract is based on the price tendered for those parts of the work, on which design work is complete (usually just the foundations and mainframe of the building).

(14) **Turnkey Projects** - a type of “design and construct” in which even the basic design is entrusted to the single “turnkey” contractor (or equipment manufacturer where the building concerned is less important than its contents). In turnkey projects the Department commissions a specialist manufacturer to design a project and to execute the works. The Department then expects to be only minimally involved until it receives the completed project, i.e., all it has to do is turn the key.
(15) **Variation Orders or Instructions** - a written document given to the contractor changing or varying the contract e.g., in relation to the design of the works, or how they may be executed. Various contract forms use different terms, and allow different opportunities for the contractor to claim payment over and above its tendered sum or rates. Instructions may be given orally but must usually be confirmed in writing in order to be effective.

(16) **Variation of Price (VOP)** - when the contract prices are adjusted by means of an updating index or by reference to invoiced current prices (generally the former). Thus contracts incorporating VOP provisions recompense the contractor for inflationary costs during the period of the works contract.
PS 1.0 **GENERAL PRINCIPLES**

PS 1.1 The Procurement Process
PS 1.2 The 'Intelligent Customer' and the Role of CAU/PACE
PS 1.3 Principles of 'Best Practice Client'
PS 1.4 The Conduct of Staff
PS 1.5 Departmental Management Roles
PS 1.6 Effective Decision-Making
PS 1.7 Focus on Output Value

PS 2.0 **PROJECT REQUIREMENTS**

PS 2.1 Project Identification
PS 2.2 Defining Project Objectives
PS 2.3 Risk Management
PS 2.4 Contract Strategy
   PS 2.4.1 General
   PS 2.4.2 Property Management Functions
   PS 2.4.3 Facilities Management Strategies
   PS 2.4.4 Works Contract Strategies
PS 2.5 Defining the Project Brief

PS 3.0 **PROCURING AND MANAGING THE TEAM**

PS 3.1 The Need for a Project Manager
PS 3.2 Defining the Project Team
PS 3.3 Appointment Through Competition
PS 3.4 Fostering Teamwork
PS 3.5 Performance Incentives
PS 3.6 Monitoring Performance
PS 3.7 Record Keeping
PS 4.0 PERFORMANCE EVALUATION

PS 4.1 Evaluator Performance
PS 4.2 Project Critiques

PS 5.0 OTHER ISSUES

PS 5.1 Partnering
PS 5.2 Private Finance Initiative
To procure means to obtain by care and effort. It takes care, effort, judgement and clear decision-making to procure construction services.

There is a high level of service in any construction commission, and there are a number of features of services which make the procurement decision a difficult one. Services are:

- intangible - they cannot be stored, displayed, sampled before use, or easily communicated;
- frequently - non-standard prices are difficult to set and standardisation is difficult to achieve;
- inseparable - the consumer is involved to some extent in the production. Services are sold first and then produced and consumed simultaneously.

The quality of a service product is therefore difficult to evaluate before it is delivered. It is therefore essential to have in place effective, well structured and well managed procurement systems which enable the management and control of the risks inherent in any procurement decision.

The procurement process is a circular process which involves the general steps set out in Figure 1.1 on the next page:
The performance review and feedback is an important step in the process. It is most useful if it is a formal process. If in the form of a critique it helps procurement staff to consider lessons that can be learnt by the Department from the commission as a whole as well as a close examination of the performance of each consultant or contractor. The feedback is an all important part of improving Departmental knowledge and expertise in the “intelligent customer” role.

Departments can make the greatest contribution to the enhancement of the competitiveness of suppliers by managing their own procurement intelligently and well. An important element of this is to combine competition and co-operation in an optimum way.

Key Points

- Effective procurement is about having a clear set of objectives, defining the scope and content of what is required from the supplier and being clear about and managing expectations. Improvement in this area will have a direct effect in reducing the scope for disputes.
Intelligent Customer Role

In devising the appropriate procurement strategy to suit Departmental operations it is essential to appreciate the minimum requirements for the in-house (within Government) role. The Treasury requires Departments to retain sufficient competent intelligent customer support resource to be able to brief and manage professionals, ask the right questions, know when the correct answers are being given and decide what further action to take. The required expertise can be achieved by:

- training in-house administrative staff to the appropriate level of competency; or
- employing the requisite professionals in-house; or
- retaining PACE.

Buying the intelligent customer support from the private sector under a framework agreement or contract is not an option open to Departments.

To help Departments assess their resource needs some amplification of the role is set out below.

The term ‘intelligent customer’ relates to a residual function that remains with the purchaser of the services once the provision of such services has been outsourced. It is a role that must remain within Government. Whatever the source of supply the purchaser of property related procurement or supply functions needs to retain sufficient in-house knowledge, experience or expertise relating to those functions to plan, specify, commission and subsequently to manage the services being procured to ensure best value for money is obtained.
The scope of the intelligent customer capability will necessarily be a matter of judgement based not only on the nature of Department's property management but also its approach to property management. Whilst it might for example be possible in some areas to set a consultant to judge other consultants, and therefore reduce the number of in-house purchasing and contract management staff, that is not always feasible. Ultimately, there remains with Departments the residual responsibility for both sound management and public accountability.

Purchasers must be able to demonstrate value for money in the services procured through the management of budgets, monitoring of expenditure and benchmarking of services.

**Key Points**

- Ensure that in deciding procurement strategies full account is taken of the associated intelligent customer role and its economic provision.
On 1 April 1996, Property Holdings was disbanded and succeeded by Property Advisers to the Civil Estate (PACE). The principal role of PACE is to co-ordinate Departments' activities on the civil estate and provide “intelligent customer” support. It is also responsible for the management of all Government's vacant space/properties.

The Central Advice Unit (CAU) is a part of PACE but was set up on 1 April 1995 to provide adequate advice and support to Departments to help them assess the impact of the activities which they would become responsible for in April 1996 and deal with issues that flow from transfer of responsibility. The scrutiny team clearly saw the provision of advice and support as a key component of the new executive agency (PACE).

The aim of the CAU is to provide central property guidance to Departments.

Its objectives are:

- to assess the need for and provide user friendly general guidance on property matters;
- to provide early notice and appraisal of key issues, including forthcoming property legislation and other consultation documents; and to act as a focal point for feedback from Departments;
- to provide quality advice on the acquisition, management and disposal of property and associated services; and
- to facilitate the sharing of best practice through a network of Departments/agencies.

The Guide is one of a number of guides which have been prepared in furtherance of these objectives.
Key Points

• The CAU is here to help you.

• If you have any queries or require advice in respect of the Guide or any matters not specifically covered by the Guide, please contact the CAU at:

  Central Advice Unit
  Property Advisers to the Civil Estate (PACE)
  5th Floor
  Trevelyan House
  Great Peter Street
  London SW1P 2BY

  Tel: 0171 271 2756/2833
  Fax: 0171 271 2715
Government policy is that Departments will strive for ‘best practice’ procurement performance. It is intended that this should be a central element in Departments’ business at all management levels. The aim is to achieve best “value for money”, whilst ensuring that the objectives of any commission are properly met.

‘Construction Procurement by Government’ at paragraph 29 gives guidance on where Departments should focus their attention in order to attain and surpass the best in the private sector. Departments should focus on:

- quality of supplies, materials and results;
- the value of the finished product to the business;
- life-cycle costs not just initial costs; and,
- appointing, retaining and improving the best team to manage and deliver a project.

Departments are a major construction industry client and have a key role to play in leading the way with improvements in procurement and industry performance.

Action point 5 of The Latham Report suggests that this may be done by:

- openly finding out which designers, contractors or specialist suppliers are the best;
- tendering with the aim of getting those who offer the best service;
- working with their people as a team not opponents; and
- making no compromises with people or suppliers who are unco-operative or adversarial.’

These are all activities which are carried out by leading or ‘best practice’ industry clients.
PS 1.4

THE CONDUCT OF STAFF

The activities of Departments include the expenditure of public funds for which they are accountable. Such Departments are therefore frequently subjected to close scrutiny.

In addition, best practice clients and in particular Departments are and should be seen to be associating with honest suppliers. Since it is important that competitors are able to compete on a level playing field, it is essential that Departments procure and are seen to procure supplies in an ethical and honest way.

The aim should be that organisations and the people they employ should be trusted by those with whom they deal, and they should conduct their business in a fair and reasonable manner.

Key Points

• Self-discipline must be exercised if offers of hospitality, gifts etc., are received from suppliers with whom staff deal in the course of their official duties.

• Rules on the acceptance of gifts and hospitality are normally set out in Departmental hand-books, and it is essential that the procedures and requirements set out therein are followed.

• Circular letter DAO (GEN) 17/96 concerning the prevention of fraud and irregularity was issued to Departments by HM Treasury on 18 December 1996. It reminds them of the risks and outlines some key principles of control to minimise the possibility of fraudulent activities occurring.
Commitment by senior management to a project and to the project sponsor or staff directly responsible for the execution of a commission is an important factor in the success of a project or commission.

In respect of any project or commission, it is best practice to ensure that:

- the commission manager is empowered with sufficient authority and knowledge to make quick and effective decisions;
- the chain of management command is short and accessible to commission managers;
- there is only one commission manager who deals with the commission from start to finish to ensure continuity and to avoid conflicting instructions to suppliers.

In the context of works contracts where a project sponsor is appointed, the 'Construction Procurement by Government' report states that project success depends upon the fulfilment of three key management tasks. These are:

- investment decision maker - at the head of the Department capable of making informed investment decisions;
- project owner - a senior manager in the business line who is responsible for strategic management of the project;
- project sponsor - a single person who has responsibility for the day to day management of the Department's interest in the project.

The report also says that the first two or the last two roles may be combined in one person but one person should not be responsible for all three roles.

The role of the investment decision-maker is to approve the project and to demonstrate senior management commitment to it. This person will also give guidance or re-approval in the event of threats or proposed changes to the project which might affect the original approval.
The project owner should report to the investment decision-maker and should manage all inputs from the top and act as a channel for reports to and from the project sponsor. The project owner should also be accessible to and foster good relations with senior users.

The project owner's responsibility should be to:

- oversee the preparation of the business case and budget, ensure that proposals realistically meet business objectives, and seek approval from the investment decision-maker;
- ensure that users are involved with and committed to the project;
- appoint, manage and support the project sponsor;
- ensure that the brief, when developed, clearly reflects project objectives;
- hold regular progress meetings with the project sponsor and maintain a strategic overview of the development of the project;
- act as arbiter for disputes on the Department side;
- approve changes to project scope and where necessary seek the approval of top management; and
- ensure that a post completion critique is carried out and considered by all project stake-holders.

The project sponsor must be the focal point for the intelligent customer role and should have clear responsibility for ensuring delivery of the project in accordance with the project objectives. The scope of the project sponsor's duties is more fully set out in the introduction to the Guide at Section 1.7. The project sponsor is in effect the clearing house for all Departmental and construction team inputs and outputs.
Key Points

- Each project should have clearly identified responsibilities for each of the management tasks, namely investment decision-maker, project owner and project sponsor.

- The project sponsor should be empowered to make effective and informed decisions and actively monitor and review the performance of the members of the project team.

- HM Treasury are in the process of issuing a number of guidance documents covering the clients' role in the construction procurement process. They are aimed at anyone who is undertaking or has involvement with the Government client role in construction; particularly those exercising the key roles of investment decision maker, project owner and project sponsor. The guidance documents making up the “family” of construction best practice advice will be numbered 1 to 9 and are structured to follow the logical sequence from the broader level aspects to the more specific. Six documents have so far been issued:

  - No. 1 - Essential Requirements for Construction Procurement.
  - No. 2 - Value for Money in Construction Procurement.
  - No. 3 - Appointment of Consultants and Contractors
  - No. 4 - Teamworking, Partnering and Incentives
  - No. 5 - Procurement Strategies
  - No. 6 - Financial Aspects of Projects.

Copies can be obtained from:

Public Enquiry Unit
Room 89/2
HM Treasury
Parliament Street
London SW1P 3AG

Tel: (STD) 020 (GTN) 7270 4558
http://www.hm-treasury.gov.uk
In order for Departments to ensure best value for money it is essential that commission managers are able to make quick, informed and effective decisions. They should also be able to make commercial decisions which in the long-run may substantially reduce the ultimate commission or project cost and risk. This is particularly so when it comes to managing and settling disputes.

There is a perception and indeed direct experience by those in the private sector that some Departments are hampered by procedures or systems which either impair or prevent effective decision-making. Guidance is often mistaken as prescriptive and is often followed to the letter to the detriment of flexible and creative thinking.

As explained in the introduction, the Guide is intended to be an aide memoire, not a set of procedures which must be rigidly adhered to. Some steps in the Guide may be unnecessary for certain types of commission for example. An element of judgement is therefore required in their application.

In addition best practice procurement requires quality judgements to be made.

Key Points

- Commission managers should be allowed and encouraged to use their judgement in both the procurement and management of commissions.

- The application of judgement or informed decision-making requires knowledge and experience. Where appropriate, commission managers’ skills should be enhanced through training.

- Where they require support for their procurement, management or commercial decisions, commission managers should seek advice from their managers, or CAU, or from professional procurement advisers.
FOCUS ON OUTPUT VALUE

It is important for Departments to focus not on the construction process itself or each commission in itself but upon the benefit of the completed project or commission to the overall business objectives of the Department.

Project or commission objectives will be set and strategies formulated to ensure that the value added to the business activities of the Department is maximised.

This means taking a broader view and a longer term view of the importance of the construction procurement process.

Competitive tendering is the only way of establishing a price range for the commission to be procured, and generally the only unbiased way to find the cheapest price.

However, price is only one of the project criteria by which the success of a commission is measured. It is far more important that the commission meets the objectives set by the Department.

A cut-price offer can mean a cut-price service. If a Department pays too little, then it may be that what is delivered fails to provide the Department with what it set out to obtain.

Accordingly Government policy on procurement by Departments is that a supplier is selected on the basis of an offer which represents the best value for money. This means using a procurement system which gives weight to quality as well as price. Quality judgements are therefore an essential part of good procurement practice.

With major works projects in particular, price must be considered in the context of the life cycle cost of the project.

The capital cost of a building is typically only say 10-20% of the cost of owning and operating it over its expected life. Professional fees might be around 10-15% of the capital cost and therefore represent 1 or 2% of the life cycle cost. Therefore the relatively minor additional cost of procuring higher quality services, in particular design services which focus on optimising the balance between capital cost and maintenance costs, will be far outweighed by long-term savings.
Whatever the scale and value of the commission it is acceptable to choose a tenderer who upon evaluation offers the best value for money, even though it may not have offered the cheapest price. This is a view confirmed by the National Audit Office.

The Guide sets out procedures for the assessment and evaluation of suppliers in terms of the quality they offer as well as the price they quote.

The Guide suggests use of an evaluation method which involves deciding which quality criteria are most important to the Department, giving each a weighting totalling 100 and then deciding on the relative importance of quality to price. For example the more complex the project or commission the greater the importance that is likely to be attached to quality. A total score is then calculated for each tenderer and the tenders ranked in order of preference.

An important advantage of this arithmetical approach is that it produces a logical and visible means of evaluation. However, in itself it requires a fair degree of judgement, and it is ultimately only an aid to decision-making.

The final choice will inevitably involve considerable value judgements by the Department, but it is essential to think carefully about the service the Department needs and how it is to be delivered, prior to arriving at this value judgement.
Before the Department considers the procurement of professional services or contract works it must first identify a need, and set down as clearly as possible what it is that has to be achieved and why.

Maintenance or alteration to existing premises and in particular construction of new premises takes time to procure both in the lead-in prior to work commencing and in the carrying out of the work itself. Such work can be highly disruptive to a Department and may result in the use of substantial Departmental resources. This implies the need for careful future planning and an allowance for such work in Departmental strategic business plans.

Government property requirements must be driven first and foremost by the operational needs of Departments.

There may be an immediately identified need which requires the appointment of consultants and/or works contractors, but hopefully needs will be future needs which have been identified as a result of the strategic planning process. In the case of future needs, there is an opportunity to give more consideration to the need and the options available to meet the need, as well as taking a planned approach to the procurement process.

It is therefore beneficial to Departments to produce plans for the ongoing development and maintenance of their estates.

When a current or future need is identified then an officer should be appointed to drive the commission forward. The process will begin with a clear definition of the need. The options for satisfying the need will then be identified and considered.
The principal needs required to satisfy the property management function, will, for many Departments, relate to the management and maintenance of their facilities. It will be necessary to decide on:

- the nature of the management and maintenance required for the facility in the context of the Department’s business objectives;
- the extent of management and maintenance services required;
- how the services should be provided or procured.

Where the Department has identified the need for new or altered property the options for satisfying premises needs are typically as follows:

- maintain and extend existing premises;
- move to new premises;
- construct premises which precisely meet the new or changing needs of the Department.

The feasibility of these options should be considered in the context of the benefits, risks and financial constraints they represent, and specific options identified. These options are then put in order of benefits and feasibility and a decision is taken at the appropriate level on whether in principal the project is necessary or feasible.

**Key Points**

- The identification and consideration of options is a very important part of the procurement process. It is particularly important to precisely define the nature and scope of the need.

- Where commission managers are not confident about carrying out feasibility studies, they should seek advice from a professional adviser. The professional adviser may come from any of the recognised construction professions, but should be able to demonstrate a strong experience and understanding of different procurement methods and project feasibility processes. Accordingly, project manager, quantity surveying and specialist firms of construction contracts consultants may be best suited to this role. Where a project manager is appointed, the work of the adviser should cease when the project manager is appointed. There is benefit therefore in retaining an independent professional adviser who is not viewed by project managers and other consultants as a competitor, particularly when it comes to them disclosing bid information.
DEFINING PROJECT OBJECTIVES

Defining a clear set of objectives for the project or commission is the foundation for setting a clear brief and for deciding on an appropriate contract strategy. Time spent on getting this right at the project inception stage will pay significant dividends when the work gets underway. When substantial resources are committed to the work, the risk of cost escalation due to delay or late changes by the Department is likely to be high. Setting clear objectives and defining realistic expectations does much to avoid disputes and substantially reduces the scope for cost escalations over and above approved cost estimates.

In the case of a building, a clear statement of the project objectives should be prepared in terms of:

- nature of the building’s use;
- number of people that are to occupy it together with their space requirements;
- quantification of equipment or machine space requirements;
- location of building, (i.e. geographical etc.);
- budgets, (i.e. amount available);
- programme, (i.e. when it needs to be in operation);
- life span, (i.e. how long is the economic life);
- how it fits into the corporate plan, (i.e. it may be part of a larger planned development).

Some indication should also be established on:

- the relative quality/price needs;
- environmental issues;
- visual impact; and
- planning and any other constraints.

Key Points

- The project objectives should be carefully defined as early in the decision-making process as possible.
All commissions for consultancy and works contracts involve some degree of risk to one, other or both parties. Some risks are easily foreseeable at the outset whereas others may not be so obvious. Risk management requires the identification of risks, consideration of when and how they might occur and what action must be taken to minimise their effect and maximise value for money.

As an introduction to risk management, it is useful to think of standard forms of contract as formal agreements which allocate to, or specify the balance of anticipated risk events between one or other party to the contract. A common aspect of standard forms of construction contract is that there are provisions for extensions of time to the contractor, and for liquidated damages which may be payable to the Department as a result of inexcusable delay on the part of the contractor. Standard forms of contract generally anticipate and allocate responsibility for all types of time related risk. Exceptionally adverse weather is for example nearly always a shared risk, the employer takes the risk of delay to project completion but the contractor takes the risk of any additional cost it incurs as a result of the delay.

Different standard forms are designed to allocate different risk to varying degrees. The choice of risk allocation largely dictates the selection of a particular standard form for procuring the construction works.

Risk management is far more than risk allocation. It is a process which should begin far earlier in the procurement cycle than at the stage of choosing the form of contract. It is a process of management which should continue until the project is finally complete.
Risk management involves the following elements:

- risk identification;
- risk assessment and analysis;
- risk response (policies which lead to risk reduction and control).

There are five strategies for responding to risk:

- avoidance,
- reduction,
- transfer,
- sharing,
- absorption;

- ongoing monitoring and control of risks throughout the life of the project.

Risk identification generally requires an understanding of all of the project or commission requirements at all stages from inception to completion. It involves reviewing the potential sources of risk and identifying and listing those risks which are likely to affect the project or commission in question.

In the whole life context of a works project there are four generic types of risk:

- department's special risks, including external risks such as those that arise from the economic, legal or political environments;
- design risks;
- construction risks;
- operational risks.
The principal causes of contractual prolongations, overspend, and disputes in respect of works commissions are as follows:

**Pre-Contract**

- incomplete pre-contract design;
- poor tender documentation;
- complex building works/novel design/lack of buildability;
- inadequate pre-qualification process - inexperienced/unsuitable consultants and contractors;
- lay clients;
- opting for the “cheap” alternative;
- restricted/occupied site;
- too many parties - designers/projects managers;
- inadequate co-ordination of design/production information/tender documentation;
- contractor/Department, and contractor/professional latent conflict;
- inadequate programme;
- non-standard contracts;
- amendments to standard contracts;
- legal/contractual inconsistencies generally;
On Site

- excessive changes, lots of variations;
- poor documentation - inconsistencies and errors;
- evolving design, late information;
- inadequate design, supervision and co-ordination of construction and services;
- poor management by professional team;
- tender price too low;
- claims conscious contractor;
- weak contract administrator/Project Manager;
- junior quantity surveying staff;
- force majeure/adverse weather conditions;
- fire/other insured risks;
- bad workmanship;
- late delivery of materials;
- contractor’s failure to manage/supervise sub-contractors;
- payment disputes:
  - contractor/Department
  - contractor/sub-contractor;
- inadequate resources on site;
- untidy site/disorganisation.

Many of these problem areas apply to any type of commission whether works or services. An awareness of these problems or sources of risk is essential in order to give focus to specific aspects of the procurement process. How these factors are to be dealt with will heavily influence the choice of contract strategy.
As described earlier, risk response strategies lead to the choice of a particular procurement strategy, but should also be part of the ongoing management of the project. It is important to strike a balance between the threat of risk and the chance of an outcome which will result in better value for money.

Risk management is for most procurers of services a subconscious process. However, it is here suggested that it is made a formal and inherent part of the procurement process. This will be particularly essential if private finance is to be considered for the procurement of a project in line with the Private Finance Initiative. A key feature of PFI projects, is the identification and genuine transfer of risks to the private sector.

**Key Points**

- Risk management should be a conscious process as part of the management ethos of any commission or project from inception to completion.

- Risk management is an inherent part of considering the procurement of projects to be funded by PFI.

- Further reading on risk management can be found in Procurement Group Guidance No. 2, available from:

  Public Enquiry Unit  
  Room 89/2  
  HM Treasury  
  Parliament Street  
  London SW 1P 3AG

  Tel: 020 7270 4558

  http://www hm-treasury.gov.uk
PS 2.4  

**CONTRACT STRATEGY**

PS 2.4.1  

**General**

The choice of contract strategy is one of the most important decisions to be made by the *commission manager* or *project sponsor*, and will be the outcome of a series of decisions made in the early stages of the *commission* or *project*.

Contract strategy is about choosing the right contract for allocating *commission* or *project* risks to the party who is best able to deal with them, in a way which is consistent with the *Department’s* objectives for the *commission* or *project*. The contract strategy will therefore depend on the objectives of the *commission* or *project* and how the *Department* wishes to manage risks.

With any *commission* or *project*, the *Department* should be seeking to secure the right quality of work at the right time and at a cost which represents best value for money. The three main types of objectives which must be set for the procurement of any *commission* are therefore:

- **Quality**
- **Cost**
- **Time**

Quality here represents the standard to which the work is done and the extent to which it meets those objectives other than cost or time.

It should be recognised that:

- a change in one of these main objectives is very likely to have an effect on one or both of the other objectives (for example, a reduction in cost and/or time is likely to adversely affect quality);
- if tight targets are set for all objectives then the likelihood of meeting them all is small;
• since an improvement in one objective is likely to be at the expense of others it is important for the Department to focus on which are the most important and to establish the right balance between them by choosing an appropriate contract strategy.

The contract strategy should also reflect the technical ability of the commission manager or project sponsor and the extent to which the Department wishes to be involved with or have direct control over the commission or project.

The principal steps required to decide on the contract strategy are:

1. Identify need for commission or project
2. Appoint Commission Manager or Project Sponsor
3. Appoint professional advisor where necessary
4. Define objectives and prioritise them
5. If project management, feasibility design or cost advice is needed then make temporary
6. Re-evaluate and prioritise objectives
7. Decide an appropriate contract strategy in light of objectives

In the case of a works project, the last step above would involve the appointment of a project manager who would develop the detailed contract strategy by evaluating the options for the contract strategy and the alternative types of contract available, resulting in the recommendation of a particular form of contract.
The formulation of a detailed contract strategy will involve the consideration of the following issues:

- factors outside the control of the project team (e.g. inflation, legislation, etc.);
- sponsor resources (or Departmental resources);
- project characteristics;
- ability to make changes;
- risk management;
- funding;
- cost issues;
- timing;
- quality and performance.

The commission manager or project sponsor will want to review their control of the above factors depending upon their relative importance.

**Key Points**

- The choice of contract strategy is one of the most important decisions facing the commission manager or project sponsor.

- It may be advisable to seek advice from a professional procurement advisor or project manager on the choice of strategy.

- In the case of works projects the chosen strategy will dictate which consultants are required to be procured and how, as well as how the works contractors are to be procured.
Property Management Functions

There are a number of functions which have to be fulfilled in order for the Department to manage and utilise its facility or facilities. These are principally as follows:

Generally

• Management Function;

• Estate Services including:
  - lease renewals,
  - rent reviews,
  - valuations,
  - options appraisal,
  - acquisition of existing properties,
  - disposal of properties;

• Maintenance Services, including:
  - mechanical and electrical plant and building services,
  - lift maintenance,
  - ground maintenance,
  - general building maintenance, doors, windows, redecoration, etc.
  - fire alarms,
  - security system,
  - computer maintenance;

• Domestic Services, including:
  - security,
  - general office cleaning,
  - window cleaning,
  - catering,
  - office furniture relocation services;
• Business Support Services, including:
  - typing,
  - finance,
  - admin support,
  - messenger service,
  - copying and graphics services;
• Statutory Compliance Services, including:
  - fire consultancy,
  - health and safety consultancy,
  - legal advice;

Minor Works

Major alterations and new projects

• **Project** Management;
• Design Services including:
  - architect,
  - structural engineer,
  - M & E engineer,
  - other specialists, such as lighting and interior designers,
  - landscape designers,
  - specialist contractor design input;
• **Cost Consultancy Services**;
• **Estate Services**;
• Legal/Procurement Advice;
• **Works** Contractors;
• Specialist **Works** Contractors.
There are a wide variety of alternative means available to the Department to provide or procure these functions. There are also therefore a number of alternative types of organisation structure which represent these alternatives.

When there is an identified need for works or services then the Department must decide how best to secure them to the maximum cost benefit of the Department. The Department must decide whether the services required to satisfy the property management function should be:

• provided in-house;
• obtained externally and managed in-house; or
• obtained and managed externally under the supervision of a commission manager.

The choice will be influenced by:

• the extent and types of services to be provided;
• what represents the best value for money to the Department;
• the size of the Department, and whether scale economies can be achieved through central purchasing;
• the level of in-house service available to the Department;
• the qualifications and experience of the Department’s property management staff.
The most common model to describe the way in which Departments organise their property management functions is as follows:

![Diagram of Property Management Organisation](image)

It is difficult to try to anticipate all of the possibilities which might be appropriate for all Departments. The attached grid of services and contract strategies has therefore been included in order to try to illustrate some of the different possibilities.

**Departments** with small and/or scattered estate should explore the possibilities of using other Departments' existing property and legal contracts.
## Contract Strategies for Procurement of Property Management and Works Functions

<table>
<thead>
<tr>
<th>Property Management Functions</th>
<th>Contract Strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Generally</strong></td>
<td>Provided In-House</td>
</tr>
<tr>
<td>Management Function</td>
<td>☑️</td>
</tr>
<tr>
<td>Estate Services</td>
<td>☑️ ☑️ ☑️ ☑️</td>
</tr>
<tr>
<td>lease renewals</td>
<td>☑️</td>
</tr>
<tr>
<td>rent reviews</td>
<td>☑️</td>
</tr>
<tr>
<td>valuations</td>
<td>☑️</td>
</tr>
<tr>
<td>options appraisals</td>
<td>☑️</td>
</tr>
<tr>
<td>acquisition of existing properties</td>
<td>☑️</td>
</tr>
<tr>
<td>disposal of properties</td>
<td>☑️ ☑️ ☑️ ☑️</td>
</tr>
<tr>
<td>Maintenance Services</td>
<td>☑️</td>
</tr>
<tr>
<td>mechanical and electrical plant and building services</td>
<td>☑️ ☑️ ☑️ ☑️</td>
</tr>
<tr>
<td>lift maintenance</td>
<td>☑️</td>
</tr>
<tr>
<td>ground maintenance</td>
<td>☑️</td>
</tr>
<tr>
<td>general building maintenance, doors, windows, redecoration, etc.</td>
<td>☑️ ☑️ ☑️</td>
</tr>
<tr>
<td>computer maintenance</td>
<td>☑️</td>
</tr>
<tr>
<td>fire alarms</td>
<td>☑️</td>
</tr>
<tr>
<td>security system</td>
<td>☑️</td>
</tr>
<tr>
<td>Domestic Services, including:</td>
<td></td>
</tr>
<tr>
<td>security</td>
<td>☑️</td>
</tr>
<tr>
<td>general office cleaning</td>
<td>☑️</td>
</tr>
<tr>
<td>window cleaning</td>
<td>☑️</td>
</tr>
<tr>
<td>catering</td>
<td>☑️</td>
</tr>
<tr>
<td>office furniture relocation services</td>
<td>☑️</td>
</tr>
<tr>
<td>Business Support Services</td>
<td></td>
</tr>
<tr>
<td>typing</td>
<td>☑️</td>
</tr>
<tr>
<td>finance</td>
<td>☑️</td>
</tr>
<tr>
<td>admin support</td>
<td>☑️</td>
</tr>
<tr>
<td>messenger service</td>
<td>☑️</td>
</tr>
<tr>
<td>copying and graphics services</td>
<td>☑️</td>
</tr>
<tr>
<td>Statutory Compliance Services</td>
<td>☑️ ☑️ ☑️ ☑️</td>
</tr>
<tr>
<td>fire consultancy</td>
<td>☑️</td>
</tr>
<tr>
<td>health and safety consultancy</td>
<td>☑️</td>
</tr>
<tr>
<td>legal advice</td>
<td>☑️</td>
</tr>
</tbody>
</table>
| Minor Works                    | ☑️ ☑️ }

*PS 2.4.2.5*
In line with the organisational structure illustrated in Figure 2.4.2.1, the most common approach to procuring the property management functions is:

- the Department retains strategic management control;
- the Department generally provides business support services in-house;
- the Department’s central office procures regional or national Property Management Commissions (PMCs);
- the Department directly employs domestic service suppliers such as security, office cleaning, window cleaning, etc.

The types of consultant commission which will generally be required to satisfy the property management function are described in more detail in the ‘Consultants’ chapter of the Guide.

The various types of Government works contracts are described in more detail in the ‘Contractors’ chapter of the Guide.

Key Points

- In considering the way to procure property management functions and business support services, it is important for the Department to consider in detail what it wants and why and whether there is scope for improvement in existing systems.
- It may be appropriate to consider the appointment of a facilities management company.
Facilities Management Strategies

Facilities management (FM) is an extension of the property management role, to the extent that its scope often covers all non-core business activities associated with the facility and with supporting the business unit occupying the facility. FM is the continuous process of tuning all such activities or services to satisfy business needs. Treasury (CUP) identify FM as strategic services in their literature.

All Departments are involved to a greater or lesser degree in FM and a consultant who undertakes a Property Management Commission on behalf of a Department is undertaking facilities management services on its behalf.

The reason for including this section however is because of the development in recent years of a separate professional FM discipline. There are now numerous organisations who offer FM services on the basis for example that they will:

- review business objectives;
- take control of and manage the facility and all non-core functions;
- rationalise non-core functions;
- save the Department money whilst maintaining the level of service required to satisfy business objectives;
- maximise value for money.

Three examples of organisational structures for the appointment of an FM company are as follows:

![Diagram of Department Agent]

Fig 2.4.3.1 Department Agent

With the client agent arrangement the facilities manager is simply a manager. The Department contracts directly with service providers and retains the cost risk.
Fig 2.4.3.2  Facilities Management Contracting

The management contracting arrangement is a hybrid between the client agent arrangement and total FM. The FM company is appointed for a fee and then the packages are let separately but in contract with the FM company. Warranties are commonly executed between package suppliers and the Department where appropriate.

Fig 2.4.3.3  Total FM

With total FM the Department pays a lump sum to the FM company who takes direct responsibility for all services and therefore all of the risk. It is clearly essential with this arrangement for the Department to very clearly specify minimum levels of service requirements.

Before considering the appointment of an FM company the Department should look carefully at its business objectives and how they are currently being met.

There is a very helpful guide called 'Thinking About Facilities Management' which sets out steps for successful FM, planning for effective FM and choosing the appropriate path. This is available from The Business Round Table Ltd, 18 Devonshire Street, London, W1N 1FS (0171 636 6951).
Thinking About Facilities Management sets out a number of areas where Departments should take care, including:

- Departments should not lose control of services by outsourcing, and should retain the strategic management function in-house;

- Departments should not expect services to run themselves, service quality depends on good management;

- Departments should not invite bids from the commercial sector without first rationalising their FM requirements; the Department’s business operations need to be as lean as possible to reduce the cost of outsourcing.

Key Points

- Facilities management is aimed at optimising the value of the facilities and organisational support services in such a way as to maximise value for money whilst meeting the strategic business needs of the Department.

- Read ‘Thinking About Facilities Management’.

- Included in volume 2 of the Guide is an example FM contract that has been developed by the Scottish Office.

- HM Treasury has issued detailed guidance on the documentation needed in the procurement process from appraising suppliers through to award of contract. It is in four parts:
  - Guidance Note No. 59A: Model Appraisal Questionnaire;
  - Guidance Note No. 59B: Pre-Qualification;
  - Guidance Note No. 59C: Model Invitation to Tender; and
  - Guidance Note No. 59D: Model Conditions of Contract.

A copy/copies can be obtained from HM Treasury, Allington Towers, 19 Allington Street, London SW1E 5EB (tel: 0171 270 4558).
PS 2.4.4  

**Works Contract Strategies**

*Works* contracts are required for the procurement of construction work, whether alteration, refurbishment or new construction work. *Works* contracts are generally divided into:

- minor *works* contracts; and
- major *works* contracts.

The distinction is usually a cost threshold which is likely to be individual to each Department. Minor *works* contracts have the following characteristics:

- a typical threshold for minor *works* contracts is contracts less than £50,000;
- they require less consultant input;
- they can be carried out by smaller contractors generally with a smaller variety of specialist input;
- they require simpler forms of contract which are easier to administer.

The various types of *works* contract are more fully described in the Contractors Section.

The form of contract chosen dictates the scheme of risk allocation as well as which consultants need to be procured and when. There will generally be more than one way to procure the *works*.

The various alternatives will be more or less successful in achieving project objectives. For major *works projects* a project sponsor will be appointed and the choice of procurement strategy will be decided in conjunction with an appointed project manager or procurement adviser.
The suggested procedure for selecting a contracting strategy is briefly summarised as follows:

- appoint a project manager to develop a fuller contract strategy in parallel with the outline design;
- the project manager formally reports to the project sponsor setting out the recommended strategy;
- identify and analyse the risks with the options considered;
- the project sponsor considers the report and challenges the recommendation and ultimately agrees on a suitable strategy.

In 1995 the Business Round Table re-launched the 'Thinking About Building' procurement guide. 'Thinking About Building' provides a checklist for identifying the various procurement options available and a systematic procedure for deciding on a particular procurement path. The procurement checklist is intended as an aid to decision-making and is reproduced overleaf with permission from the Business Round Table.

The table lists on the left-hand side the principal objectives affecting contract choice. Each type of contract can be scored in one of three alternative ways:

- the total number of bullets which coincide with the objectives;
- each objective is numerically weighted and the weighting is substituted for a bullet where it coincides with the objective;
- each contract is given a relative score in place of the bullet point, and each objective is weighted and the two are multiplied together to give a weighted average score.

**Key Points**

- Read CUP Guidance Note 12 - Contracts and Contract Management for Construction Works.
- Read Procurement Guidance Note No. 6, available from HM Treasury.
- Read 'Thinking About Building'.
### Identifying Your Priorities

<table>
<thead>
<tr>
<th></th>
<th>Lump Sum</th>
<th>Design and Build</th>
<th>Fee Construction</th>
<th>Design and Manage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A Timing</strong></td>
<td>How important is early completion to the success of your project?</td>
<td>Crucial 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>B Controllable Variation</strong></td>
<td>Do you foresee the need to alter the project in any way once it has begun on site, for example to update machinery layouts?</td>
<td>Definitely not 5</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>C Complexity</strong></td>
<td>Does your building (as distinct from what goes in it) need to be technically advanced or highly serviced?</td>
<td>Moderately so 7</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>D Quality Level</strong></td>
<td>What level of quality do you seek in the design and workmanship?</td>
<td>Good but not special 10</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>E Price Certainty</strong></td>
<td>Do you need to have a firm price for the project construction before you can commit it to proceed?</td>
<td>Yes 12</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>F Competition</strong></td>
<td>Do you need to choose your construction team by price competition?</td>
<td>Works 14</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>G Management</strong></td>
<td>Can you manage separate consultancies and contractors, or do you want just one firm to be responsible after the briefing stage?</td>
<td>Can manage separate firms 17</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>H Accountability</strong></td>
<td>Do you want direct professional accountability to you from the designers and cost consultants?</td>
<td>Yes 20</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>I Risk Avoidance</strong></td>
<td>Do you want to pay someone to take the risk of cost and time spillage from you?</td>
<td>Prepared to share agreed risks 22</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
DEFINING THE PROJECT BRIEF

The project brief is a formal statement of the objectives and functional and operational requirements of the finished project.

This is a very important document. It should be in sufficient detail to enable the construction team to execute the detailed design and specification of the work, and it is therefore an essential reference for the construction team.

It is through the brief that the Department must effectively communicate its needs whether for a major works project or for a term maintenance contract or a consultancy commission of some description.

A project brief might typically contain the following:

• project aim and objectives;
• the functional/operational requirements of the completed project;
• the project budget:
  - capital costs,
  - operating and maintenance costs;
• the project programme and, in particular, whether the project is to be carried out as a whole or divided into distinct parts;
• the standards required:
  - overall quality standards,
  - construction standards,
  - standards specific to end-use;
• environmental factors;
• statutory controls;
• special requirements.
The Department must go to great pains within its own organisation to ensure that it clearly defines what it and any other affected parties require in order to deliver work which satisfies the overall business objectives of the Department. In the case of a major works project, this may require an extensive consultative process.

The development of the brief is an interactive process and the brief should become progressively more defined as the Department's needs become clearer and conflicts are resolved.

The project manager and designers will usually assist the Department in the formulation of the brief to ensure that its scope is sufficient for design development.

Typically the brief will develop through three stages before detailed design commences:

- preparing the business case;
- concept design;
- scheme design.

When the scheme design has been developed (ideally in close cooperation with the Department) then it should be reviewed and signed off by the Department. This helps to confirm the commitment of all parties to the brief, and to reduce changes.

During concept design many of the key strategic decisions are taken which affect buildability, long-term maintenance and value for money. Commonly alternative design solutions will be tested.

The project manager will generally select appropriate designers. Depending on the contract strategy, designers may need to be appointed to carry out the concept design before the rest of the construction team is appointed.
Key Points

• The brief is central to defining the Department’s needs and should be comprehensive and clearly articulated.

• The project brief should be signed off at the completion of scheme design.

• It is important to ensure that the designer has sufficient resources to ensure design development to programme. Ideally resource levels should be defined at the outset.

• It is strongly recommended that general and specialist contractors are involved in design development of works projects where appropriate.
A common approach to project appraisal, and evaluation is for the Department to obtain a professional procurement adviser, who will advise on appraisal, assist in formulating the contract strategy and be responsible for assisting in procuring a project manager. Thereafter, the advisor will be disengaged.

When the course of the project is known, and project managers have been appointed, they will then take up management responsibilities and co-ordinate and organise the procurement of the required consultants. They will then push the project through design and construction to completion.

The appointment of a project manager should not, however, be an automatic decision. For example, it is unlikely that a project manager will be required for maintenance work. It is likely that the management role may be carried out by private sector estate manager under a Property Management Commission.

It may also be the case that the Department and its project sponsors feel sufficiently confident to appoint and manage the design team directly. If this is so then a design team leader should be appointed to ensure overall design co-ordination. This also has the advantage that ‘in-house’ project managers will clearly have authority to make decisions.

In any event it is generally inappropriate for a Department to rely solely on a project manager. The impetus and drive for suppliers to hit deadlines is at its most effective when it comes directly from the Project Sponsor.

A further point is that the chosen contract strategy may be design and build - where a large amount of risk is transferred to the contractor, which might arguably negate the need for a project manager.
DEFINING THE PROJECT TEAM

The size of the team will of course depend on the nature of the work being undertaken. In respect of property management and maintenance work for example it may be that just two estate management consultant practices will be appointed each to manage different parts of the estate.

In respect of works contracts, the number and disciplines of the consultants on the team will depend on the nature and scope of the work and also on the chosen contract strategy. Once a project is underway there will commonly be a project manager appointed to move the project forward and ensure it meets the Departmental project objectives. Under a traditional lump sum form of contract such as GC/Works /1(1998) the Department might typically expect to employ the following professionals:

<table>
<thead>
<tr>
<th>Architect</th>
<th>Principal Designer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structural Engineer</td>
<td>Structural Design</td>
</tr>
<tr>
<td>Mechanical and Electrical Engineer</td>
<td>M&amp;E Design</td>
</tr>
<tr>
<td>Quantity Surveyor</td>
<td>Cost control</td>
</tr>
<tr>
<td>Planning Supervisor</td>
<td>Required by CDM regulations to prepare health &amp; safety plan</td>
</tr>
</tbody>
</table>

and possibly also:

| Communications or computer specialist |
| Party Wall Surveyor                |
| Interior Designer                  |
| Landscape Designer                 |

Party wall agreements
For external works design

Under the management contracting route, the contractor joins the team earlier in the process to advise on buildability. In construction management the Department contracts directly with each specialist works contractor, and the construction manager is also on the team at an earlier stage. Conversely with the design and build strategy, the Department may engage professionals to develop outline designs but the contractor when engaged then takes on full design responsibility as well as responsibility for construction. The Department's designers may at that stage be disengaged or novated to the contractor.
Key Points

- However the team is structured, the best practice clients take time to assess the qualities of each potential team member and put time into getting the right team.

- It is highly advisable to insist on meeting the individuals who a tenderer actually proposes using for the specific commission.
PS 3.3

APPOINTMENT THROUGH COMPETITION

It is generally accepted that best value for money is achieved through competition, provided that quality and price are considered together in the final choice of supplier.

Competition provides a systematic approach to selecting the most suitable consultant or contractor, but it must be done in an impartial, fair and reasonable way, and must provide a level playing field for competitors.

It may be appropriate to appoint a supplier without competition if there is only one supplier who has the required expertise.

The majority of the Guide is devoted to providing recommended procedures for the procurement of professional and contract works services in such a way as to ensure as far as possible best value for money through competition.
FOSTERING TEAMWORK

The complexity and fragmentation inherent in the construction process make it essential to foster a culture of teamworking as early as possible. This is best achieved through the enthusiasm and direction of the project sponsor or commission manager.

Teamworking is facilitated by preparing briefs to professionals which are clear and unambiguous, and avoid gaps and overlaps between professionals. It is also facilitated by regular team building meetings at which those present are encouraged to take a stake in the success of the project as well as to see their positive contribution to satisfy the Departments needs.

Teamwork may also be encouraged from within the team by giving one or all of its members performance incentives to which they should work.

Key Points

• Teamworking requires leadership. This should come from the project manager where one is appointed, but the project sponsor or commission manager also has an important part to play.

• Partnering is a relatively new approach in the construction industry to develop non-adversarial relationships between Departments and contractors.
PERFORMANCE INCENTIVES

There are two principal forms of incentive:

- **Time Related** - where the contractor is given incentives to complete the whole of the works earlier than it is contractually bound to do or to complete certain critical elements of the works early. For certain types of commission it may be appropriate to provide consultants with incentives for early performance.

- **Cost Related** - where the contractor or consultant is encouraged to make savings to project cost whilst ensuring that other project objectives are still met.

**Time Related Incentives**

An effective means of encouraging good performance from professionals and contractors is to change conventional payment mechanisms such that performance milestones are identified. Payment is then made on the basis of an agreed payment schedule which defines sums to be paid when milestones are reached. The contractor is therefore encouraged to use good management and innovative solutions to ensure good cashflow. This approach should not result in any extra cost to the Department.

Where early completion of the whole or part of the work is desirable, and the Department stands to save money by having early completion, then it may be appropriate to consider cash bonuses to the contractor or consultant for early completion. The Department or its advisers may take the view that in any event it is worth offering such bonuses. It is possible to pay bonuses for early completion of stages e.g. on early completion of roof, but this may achieve little if the works are subsequently not completed on time. It is generally better to allow bonuses for the completion of the whole or part of the works. This can work in a number of ways, examples of which are as follows:

- the contractor is paid 0.1% of the value of any section of the works handed over before the completion date or an applicable sectional completion date up to a maximum of say 5% of the whole contract value;

- the contractor is paid a fixed sum per day for each day that the works are complete before the completion date. See option Q - Bonus for Early Completion in the Engineering and Construction Contract (2nd Edition). (Formerly the New Engineering Contract.)
Conversely liquidated damages clauses serve as a disincentive for a contractor to incur culpable delay.

**Cost Related Incentives**

Where there is a need to ensure that cost limits are not exceeded then it is appropriate to consider the use of incentives for the contractor or consultant to save costs.

Some organisations offer members of the consultant team half the savings it is able to make as a result of value engineering, in order to encourage reduction in project cost. Clearly this should be done with care. Consultants should not be given the opportunity to set high initial budgets and then make windfall gains as they go through design development securing cost savings.

The following are examples where the contractor to a works contract is given an incentive to secure cost savings:

- The contractor and the Department share equally in any cost savings achieved by the contractor. See clause 38 of GC/Works/1(1998).
- In the Engineering and Construction Contract 2nd Edition: Target Contract with Activity Schedule, the contractor receives an agreed percentage share of any actual saving on the target cost of each activity in the activity schedule. Conversely if the actual cost exceeds the target cost then the contractor must pay that same percentage share by way of contribution to the overspend.

**Key Points**

- Contract incentives may produce real benefits for the Department, in achieving time and cost targets and in encouraging closer cooperation between members of the team.
- Contract incentives may require amendments to standard forms where such forms are to be used. Such changes should be carefully considered.
- HM Treasury Guidance Note No. 58 provides a detailed background to the principles of incentivisation. A copy/copies can be obtained from HM Treasury, Allington Towers, 19 Allington Street, London SW 1E 5EB (tel: 0171 270 4558).
MONITORING PERFORMANCE

Performance monitoring is an important part of the ongoing management of commissions and works contracts. It particularly focuses the mind of team members if monthly meetings are held directly with the project sponsor or commission manager at which he or she shows an interest in the performance by each consultant of its tasks against the programme.

It is better to discuss problems at the time they arise rather than let customer dissatisfaction fester and let team members believe there is no problem. Consultants value positive and honest feedback so that they know what is expected of them and so that they know how to do better next time. If there are problems then they should be resolved as soon as possible. This ultimately benefits the Department and is an inherent part of risk management.

Key Points

• Active performance monitoring can improve performance.

• If consultants do not measure up it is helpful for them and the Departments to know why.
Record keeping and archiving is a discipline in itself, but there are a number of important general points about record keeping which are worth raising from a strategic point of view:

- The commission and contracts files should be kept as a record of the procurement practice adopted, and made available so that the procurement process can be audited if required.

- Key documents such as contracts, specifications, design drawings will need to be retained. It should be noted that the CDM regulations are now fully in force and place a statutory obligation on Departments to have prepared a health and safety file for the vast majority of projects. This contains specification drawings, product sheets and methods of construction. This must be retained for the life of the building and passed on in the event of disposal of the asset. The file must also be accessible.

- It is also advisable for the project sponsor or commission manager to ensure that they obtain and retain sufficient records to support or defend claims against or by consultants or contractors. It is true to say that the quality of a parties’ records can substantially influence the quality of any case advanced by it and the quality of a response to claims brought against it. It is important to keep good records of the following:
  - consultant’s and contractor’s actual progress against planned progress;
  - a schedule of when and what information and approvals were given by the project sponsor to any members of the construction team;
  - the dates of commencement and duration of delays to progress and reasons for any such delays;
  - the causes of cost escalation if not time related.

The existence of this type of evidence may well help to deter parties from bringing claims against the Department.
One of the key initiatives promoted by the Latham Report is the need to improve the efficiency of the construction industry and the quality of the service it provides. To secure high performance from their suppliers, best practice clients continually monitor and evaluate the performance of their suppliers. They keep themselves informed as to which companies offer good performance and good value for money.

A performance evaluation results in a report on the performance of the contractor or consultant which is useful for future reference, particularly when repeat projects are anticipated.

Departments have access to a central database to assist them in selecting suppliers. It is run by the DETR and is known as the New Qualification System (NQS).

Returning performance evaluations to these organisations ought to be a critical factor in their ongoing success.

If suppliers are aware that their performance will be evaluated and that this may affect their chances of selection on other Government contracts then they are much less likely to deliver sub-standard performance on contracts they might consider to be one-off projects.

More detailed consideration is given to performance evaluation in the consultants and contracts section of the Guide.
Any construction work gives rise to some degree of learning on the part of its participants. This arises from the fact that the majority of projects are unique and because rarely is a project team ever the same, by virtue of the personalities involved.

It is often useful therefore to evaluate the performance of the whole project rather than just that of the suppliers. Indeed such a review is essential if the contract is a stage in an overall programme, or part of a serial or maintenance contract.

The idea of a critique is not to attribute blame for problems but to engender positive feedback. It should examine what went right and the critical success factors which achieved that state of affairs as well as what went wrong and why, so that lessons learned may be applied to future projects.

This can be seen as the final step in the risk management process for a detailed critique might typically re-examine the risks identified at the outset of the project as well as those unexpected risks which may have materialised during the projects. The difference at this stage is that the outcomes are known. Some risks may not have materialised at all, others may have been more serious than expected. The critique can examine the effectiveness of the risk management strategies adopted to deal with those risks.
Some key issues which might be considered in a critique of a works project are as follows:

• **Departmental Risks**
  - was sufficient support and guidance available to the project sponsor or commission manager,
  - were lines of communication effective,
  - was the project sponsor empowered to make informed and effective decisions,
  - was liaison with users co-ordinated effectively,
  - were decisions and information provided to the construction team when required,
  - were complaints managed effectively,
  - were there personality problems,
  - was the project sponsor sufficiently involved to engender the good performance of the construction team,
  - were claims dealt with promptly,
  - were the project objectives clear and realisable;

• **Design Risks**
  - was the design brief consistent,
  - was the design adequately co-ordinated as between professional disciplines and specialist sub-contractors,
  - were there problems with boundaries between different roles in the design team,
  - were expectations and duties clear,
  - were sufficient resources employed by consultants;
• Construction Risks
  - were risks actively managed,
  - did the contractor understand what the Department wanted,
  - did the contractor’s terms of contract adequately match that expectation,
  - were problems identified and dealt with early enough,
  - were claims dealt with promptly,
  - were the contractor’s management systems effective,
  - how effectively were quality, cost and time criteria met,
  - were sufficient resources dedicated to health and safety,
  - were commissioning and handover procedures defined and effective,
  - were complaints dealt with effectively and satisfactorily,
  - did the Department get what it wanted.

**Key Points**

• A project critique is essential for certain types of work, especially stage or repeat contracts.

• A project critique can be distilled into a non-personal case study which can be distributed for the benefit of all interested parties.
Partnering is a managerial approach used by two or more organisations to achieve specific business objectives by maximising the effectiveness of each participant’s resources. This approach is based on shared mutual objectives; agreed methods of resolving problems; shared risks according to who can best manage them; and an active search for continuous measurable improvements.

Because of the scope for reducing adversarial relationships, partnering is consistent with procuring best value for money services. Partnering arrangements may be used by the public sector and are consistent with EC procurement regulations provided certain conditions are met. These are set out at paragraph 7.4 of Setting New Standards, and paragraph 240 of the Construction Procurement by Government. The conditions which must be met are:

- the initial procurement of the supplier must be through competition;
- the client’s needs and objectives must be clearly stated and there must be a clear definition of both parties’ contracted responsibilities; and
- in the case of strategic partnering contracts there should be specific milestones for improved performance with the contract being for a specific period and periodically re-let in competition.

There are two forms of partnering:

**Strategic Partnering**

Strategic partnering occurs where individual awards are made throughout the duration of a partnering contract. This type of arrangement is often used by Departments when engaging consultants on a term or call-off contract basis. This arrangement has also been very successful in relation to maintenance contracts and capital schemes.
Further advice on the principles behind Strategic Partnering can be found in CUP Guidance Note No. 57 and Procurement Guidance Note No. 4, available from HM Treasury (tel: 020 7270 4558).

**Project Partnering**

With Project Partnering the collaborative arrangement is established after the contract has been awarded and is project specific. Further information on Project Partnering can be found in the Construction Industry Board’s report “Partnering the Team” (Thomas Telford ISBN: 0 7277 2551 3) and the European Construction Institute’s publication “Partnering in the Public Sector” (ISBN: 1 873844 34 4).

**Key Points**

- Partnering is a challenging approach to procurement that requires high levels of commitment from both sides. It is not a universal panacea;

- Properly managed partnering has been shown to effectively reduce adversarial relationships, but partners must be procured through competition;

- Such arrangements should work equally well with situations where there is a specific need for a definable service over a specific period of time, and for specific one off projects;

- Strategic Partnering arrangements have been effective in reducing lead-times where elements of a work programme must be procured and completed;

- Although a non-contractual option partnering must still be supported by appropriate documentation, such as a Charter or Agreement and a joint workshop agenda. The effect on the formal contract terms will need to be assessed, and the need for consequential amendments to reflect the partnering arrangements may vary as between Strategic and Project Partnering.
Since the launch of the Private Finance Initiative by the Chancellor in November 1992, there has been increasing impetus from Central Government for all Departments to consider this procurement option.

The objective of PFI is to use private sector finance, flair, management skills and resources to secure the best possible value for money for the taxpayer to deliver capital intensive services to the public sector.

PFI funded projects typically involve a consortia of private sector design, construction and operator companies who take a stake in the life cycle cost of the asset. The private sector typically takes on both construction and programme risks as well as operational and economic risks. The public sector becomes a purchaser of services on the basis of the usage, availability and performance of the asset during its life. The public sector incurs no capital expenditure.

Private finance in respect of Government premises for example might result in the private sector taking design and construction risks but also operational risks in running and maintaining the premises. The Landlord will therefore have considerable interests at stake in ensuring the ongoing satisfactory performance of the premises. The public sector Department would typically be expected to pay a premium for risk transfer, but might get in return certainty of cost and flexibility of occupation.

There are two fundamental requirements for a PFI project:

- there must be a genuine transfer of risk to the private sector; and
- value for money must be demonstrated for public sector expenditure.

It is intended that risks are transferred to those best able to manage them. Certain type of public sector risk may not be capable of being transferred.

PFI operates within the same policy and legal frameworks as other procurement methods. As contracting authorities identify specific needs, the procurement option appraisal must be conducted on the basis of fitness for purpose and value for money.
If this appraisal concludes that PFI is the chosen procurement route, the contracting authority has certain responsibilities before launching a competition (through OJEC if appropriate). Many of these stem from the review of PFI conducted by Malcolm Bates in May and June 1997. The Government has accepted his recommendations which take into account:

- the formation of a new HM Treasury taskforce, the project arm of which will review all ‘significant’ projects prior to their release to competition;

- the requirement that the new taskforce should sign off the commercial viability of all ‘significant’ projects before the procurement process commences by way of publication in the Official Journal;

- contracting authorities will continue to be responsible and accountable for their own procurement decisions.

The definition of what is a ‘significant’ project will clearly influence the direction and handling of the procurement exercise. The Taskforce projects team will decide what constitutes a significant project in conjunction with relevant departments and agencies. The definition will probably comprise several different elements (e.g., importance in a policy or national context or the fact that a project is the first of a series). The underlying purpose is to prevent flawed projects being placed before the market - thus helping to avoid nugatory costs being incurred on either side.

Key Points

- Contracting authorities who feel that their PFI project(s) may fall into the ‘significant’ category should contact the PFI Taskforce projects team as soon as possible at:

  HM Treasury
  Parliament Street
  London SW 1P 3AG
  Tel: 020 7270 4865

- The PFI Task Force has published a “Standardisation of PFI Contracts” which Departments can use as a model on any PFI projects they may be pursuing. A copy can be obtained from HM Treasury (ISBN 0-406-92879-7).
This chapter of the guide concerns legal matters and seeks to address both English and Scottish law.

Where there are substantial legal differences or procedural requirements between the English and Scottish systems, separate sections have been written.

The relevant Scottish sections are numbered with the suffix ‘SCOT’ following them. An example is shown below:

• LE 1.2 SIMPLE CONTRACTS (English version)
• LE 1.2(SCOT) SIMPLE CONTRACTS (Scottish version)

To facilitate even easier identification the relevant Scottish sections are printed on green paper. If there is only one section (with no ‘SCOT’ suffix) then it can be taken as applicable under both legal systems.

This chapter has been developed in conjunction with Scottish Executive and their legal advisers.
LE 1.0 LEGAL FRAMEWORK

LE 1.1 PRINCIPLES COVERING THE LAW OF CONTRACT IN ENGLAND AND WALES
LE 1.1(SCOT) PRINCIPLES COVERING THE LAW OF CONTRACT IN SCOTLAND
LE 1.2 SIMPLE CONTRACTS
LE 1.2(SCOT) SIMPLE CONTRACTS
LE 1.3 CONTRACTS BY DEED
LE 1.3(SCOT) SELF-PROVING CONTRACTS
LE 1.4 PERFORMANCE AND DETERMINATION
LE 1.4(SCOT) PERFORMANCE AND TERMINATION
LE 1.5 DISCHARGE OF A CONTRACT
LE 1.6 MISTAKE AND MISREPRESENTATION
LE 1.6(SCOT) MISTAKE (ERROR) AND MISREPRESENTATION
LE 1.7 BREACH OF CONTRACT
LE 1.8 DAMAGES FOR BREACH OF CONTRACT
LE 1.9 LIMITATION
LE 1.9(SCOT) PRESCRIPTION
LE 1.10 EVIDENCE OF CONTRACT
LE 1.10(SCOT) EVIDENCE OF CONTRACT
LE 1.11 ASSIGNMENT
LE 1.11(SCOT) ASSIGNATION
LE 1.12 NOVATION
LE 1.13 TRANSACTIONS WITH OUTSIDE BUSINESSES
LE 1.14 PARENT COMPANY GUARANTEES
LE 1.15 PERFORMANCE BONDS
LE 1.16 STAMP DUTY
LE 1.17 PROCEEDINGS Instituted AGAINST DEPARTMENTS
LE 1.17(SCOT) PROCEEDINGS Instituted AGAINST DEPARTMENTS
LE 1.18 INSOLVENCY AND BANKRUPTCY
LE 1.18(SCOT) INSOLVENCY AND BANKRUPTCY
LE 1.19 RESERVATION OF TITLE
LE 1.20 UNFAIR CONTRACT TERMS ACT 1977
LE 1.21 LEGAL ADVICE
LE 1.21(SCOT) LEGAL ADVICE
<table>
<thead>
<tr>
<th>LE 2.0 OTHER ISSUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>LE 2.1 Health &amp; Safety (CDM)</td>
</tr>
<tr>
<td>LE 2.2 Transfer of Undertakings (TUPE)</td>
</tr>
<tr>
<td>LE 2.3 Racial Discrimination</td>
</tr>
<tr>
<td>LE 2.4 Fair Employment (Northern Ireland) Acts</td>
</tr>
<tr>
<td>LE 2.5 Intellectual Property, Copyright, and Royalties Etc.</td>
</tr>
<tr>
<td>LE 2.5(SCOT) Intellectual Property, Copyright, and Royalties Etc.</td>
</tr>
<tr>
<td>LE 2.6 Proprietary Components/Articles</td>
</tr>
<tr>
<td>LE 2.7 Firm Price and Variation of Price</td>
</tr>
<tr>
<td>LE 2.8 Liquidated and Ascertained Damages</td>
</tr>
<tr>
<td>LE 2.9 The Housing Grants, Construction &amp; Regeneration Act 1996</td>
</tr>
<tr>
<td>LE 2.10 The Arbitration Act 1999</td>
</tr>
<tr>
<td>LE 2.10(SCOT) Arbitration</td>
</tr>
<tr>
<td>LE 2.11 Construction Industry Tax Scheme</td>
</tr>
</tbody>
</table>
General

The procurement of consultants and contractors requires officials in Departments to initiate and prepare appropriate contracts. A lot of time and expertise has already been invested in the preparation of standard forms of contract, in order to ensure clear and consistent drafting. See the Government’s GC Works Series of Contracts and CUP Guide 42 for standard terms and conditions for services contracts. It is therefore recommended that standard forms are used without amendment.

Occasionally it may be necessary to adapt a standard form to satisfy the specific needs of a commission. It is imperative in the carrying out of this task that the contract conditions and insertions are drafted with clarity and that there are no intrinsic conflicts within the contract itself, and/or between the contract and associated documentation. Amendments to standard forms are one of the areas of risk which commonly give rise to disputes. It is recommended that legal advice should be sought for the drafting of amendments or to audit any amendments proposed by the Department. Officials involved in the preparation of works contracts should therefore have an understanding of elementary legal principles and the meaning of legal terms commonly used which is sufficient for them to know when legal advice should be sought. The following sections set out the basic principles to be understood in contract preparation.
Essential Elements for Formation of a valid contract

A contract is an agreement intended by the parties to it to have legal consequences and to be legally enforceable, the essential elements being:

• offer by one party and acceptance by the other;

• intention to create legal relations;

• agreement about the same thing i.e. genuine agreement;

• capacity of the parties;

• legality of objects;

• possibility of performance;

• certainty of terms;

• in the case of simple contracts not by deed, the presence of valuable consideration, i.e. some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other.

Only the parties who enter into the agreement are bound by it and a person who is not a party to the agreement cannot normally enforce the rights and liabilities created by a contract entered into by others, although the contract may have reference to the interests of that person. This principle is known as the doctrine of 'privity of contract'. Third parties may however acquire rights and liabilities by way of collateral contracts.

Contracts are divided into two main classes:

• simple contracts (contracts made orally or in writing);

• contracts by deed (contracts made in writing).
LE 1.0  LEGAL FRAMEWORK

LE 1.1(SCOT)  PRINCIPLES COVERING THE LAW OF CONTRACT IN SCOTLAND

General

The procurement of consultants and contractors requires officials in Departments to initiate and prepare appropriate contracts. A lot of time and expertise has already been invested in the preparation of standard forms of contract, in order to ensure clear and consistent drafting. See the Government’s GC/Works Suite of Contracts and CUP Guide 59D for standard terms and conditions for services contracts. It is therefore recommended that standard forms are used without amendment.

Note that the Scottish Building Contract Committee (SBCC) amend the JCT range of contracts for use in Scotland.

Occasionally it may be necessary to adapt a standard form to satisfy the specific needs of a commission. It is imperative in the carrying out of this task that the contract conditions and insertions are drafted with clarity and that there are no intrinsic conflicts within the contract itself, and/or between the contract and associated documentation. Amendments to standard forms are one of the areas of risk which commonly give rise to disputes. It is recommended that legal advice should be sought for the drafting of amendments or to audit any amendments proposed by the Department. Officials involved in the preparation of works contracts should therefore have an understanding of elementary legal principles and the meaning of legal terms commonly used which is sufficient for them to know when legal advice should be sought. The following sections set out the basic principles to be understood in contract preparation.
Essential Elements for Formation of a valid contract

A contract is an agreement intended by the parties to it to have legal consequences and to be legally enforceable, the essential elements being:

- offer by one party and unqualified acceptance by the other;
- intention to create legal relations;
- agreement about the same thing i.e. genuine agreement;
- capacity of the parties;
- legality of objects;
- possibility of performance;
- certainty of terms.

In the ordinary case where a contract is made between two parties it is they alone who acquire rights under and have liabilities imposed on them by it. One of the most important exceptions to this rule is that, where it appears that the object of the contract was to benefit a third party, the contract may be held to confer a jus quaesitum tertio on that person. Such a right will be held to have been conferred if the third party is named, or referred to, or is one of a distinct identifiable class referred to, in the contract. In the fields of contract and procurement, instances in which such a right exists are firstly, where money is placed on deposit receipt made payable to the third party, where that third party can uplift the sum on deposit, and secondly, where third parties acquire rights and liabilities by way of collateral contracts.

Contracts are divided into two main classes:

- simple contracts (i.e. made orally or in writing);
- self-proving contracts (i.e. made in writing).

Note that contracts in respect of devolved functions will run in the name of the Scottish Ministers, whilst contracts in respect of reserved functions will run in the name of a Minister of the Crown (usually the Secretary of State for the Environment, Transport and the Regions). Contracts should never be in the name of a Department as they have no legal personality. If however a departmental identity is desired the contract may run in the name of “the Scottish Ministers/Secretary of State, acting through [name of Govt. Dept. or Agency]”.

LE 1.2
LE 1.3
SIMPLE CONTRACTS

Simple contracts include all contracts which are not deeds. They may be made orally, in writing, or by implication from conduct, but must possess the essential elements for formation of a valid contract.

Most works contracts are simple contracts and are nearly always in writing, although they vary in form and comprise contracts made by exchange of letters (e.g., the contractor's tender and the department's letter of acceptance) and also contracts in the shape of a formal agreement (e.g., contracts for electricity supplies signed on behalf of the Secretary of State are ‘under hand’ and not ‘by deed’).

The essential elements of a simple contract should be borne in mind with particular regard to the following:

Need for Consideration

- simple contracts (as contrasted with contracts by deed) require there to be consideration;
- a gratuitous promise is not normally enforceable, and the presence of consideration demonstrates that the promise is not gratuitous;
- in every simple contract each party's promise is the consideration for the other party's promise. In other words there is an exchange of promises;
- past consideration will not create an enforceable contract since the reciprocal promise will not be present.

Form of Consideration

Consideration can take the form of:

- an act;
- a forbearance not to carry out an act; or
- a promise.
Examples of valid consideration would therefore be the payment of money, a promise to pay money, an agreement to provide a product or service, or forbearance from deducting liquidated damages. The monetary value of the consideration is not material, as long as it does have some value. Therefore a trifling payment which does not necessarily represent the true value of work or service provided will be sufficient consideration for the formation of a valid contract.

**Communication of Offer and Acceptance**

- the offer, and acceptance of the offer, must be communicated by the one party to the other;
- the contract is brought into existence upon communication of the acceptance;
- the act of acceptance creates the contract and once communicated the acceptance cannot be revoked;
- an exception to the general rule will be where the post is used as the medium of communication between the parties. The posting of the letter of acceptance is sufficient communication, even though the letter may fail to reach its destination.

**Time Allowed for Acceptance**

Acceptance must be made:

- within the time prescribed e.g., an offer may be made subject to acceptance within fifteen days; or
- within a reasonable time if no time has been prescribed.

The question as to what is a reasonable time is not capable of general definition and is dependent upon the circumstances of the individual case. To avoid the situation where a contractor disputes a Department's right to hold the contractor to the terms of the original offer, if there is any doubt whatsoever about the length of time elapsed since the offer was made, the Department should contact the contractor to obtain confirmation that the offer still stands.
Acceptance to be Identical with Offer

An agreement does not give rise to a contract unless its terms are certain or capable of being made certain, and a contract is not brought into existence by acceptance unless the acceptance is absolute and identical with the offer. As the Secretary of State is usually in the position of acceptor (of offers made by contractors in response to invitations to tender) it is important to be satisfied that the offer has been expressed with precision and that the unconditional acceptance is in accordance with the Department's requirements and intentions.

Conditional acceptance does not create a contract but amounts to a counter-offer needing unconditional acceptance by the contractor before a binding contract arises.

Similarly, when it is desired to make an offer on behalf of the Secretary of State its terms must be carefully drafted in the knowledge that a definite and unconditional offer becomes a binding promise upon acceptance by the party to whom the offer is made.

Withdrawal or Revocation of Offer

An offer can be revoked at any time before it is accepted. Revocation or withdrawal can take place before the time that the offeror has prescribed for acceptance if such time for acceptance has been prescribed.

To be effective, withdrawal or revocation must come to the knowledge of the other party before the offer is accepted and is not sufficiently communicated by the posting of a letter, bearing in mind this may well be received after the posting of the acceptance of the original offer.
SIMPLE CONTRACTS

Simple contracts include all contracts which are not self-proving. They may be made orally, in writing, or by implication from conduct, but must possess the essential elements for formation of a valid contract.

Most works contracts are simple contracts and are nearly always in writing, although they vary in form and comprise contracts made by exchange of letters (e.g. the contractor's tender and the department's letter of acceptance) and also contracts in the shape of a formal agreement (e.g. contracts for electricity supplies signed on behalf of the Scottish Ministers (for devolved functions) or the Secretary of State (for reserved functions)).

The essential elements of a simple contract should be borne in mind with particular regard to the following:

Communication of Offer and Acceptance

- the offer, and acceptance of the offer, must be communicated by the one party to the other;

- the contract is brought into existence upon communication of the acceptance;

- the act of acceptance creates the contract and once communicated the acceptance cannot be revoked;

- an exception to the general rule will be where the post is used as the medium of communication between the parties. The posting of the letter of acceptance is sufficient communication. Whilst however the offerer may be contractually bound for a few days before the offer is actually received, it is doubtful whether, in Scots law, a contract would be held to have been concluded if the letter ultimately fails to reach its destination;

- offerers may stipulate the means of communication by which the acceptance is to be communicated. If, e.g., acceptance by letter, recorded delivery mail or fax is stipulated, then this must be adhered to - it is a condition of the offer.
Time Allowed for Acceptance

Acceptance must be made:

- within the time prescribed e.g. an offer may be made subject to acceptance within fifteen days; or
- within a reasonable time if no time has been prescribed otherwise the offer will terminate.

Where a time-limit for acceptance has been prescribed the offer automatically falls at the expiry of that time. Note however that the offerer may waive the time-limit if desired.

The question as to what is a reasonable time is not capable of general definition and is dependent upon the circumstances of the individual case. To avoid the situation where a contractor disputes a Department’s right to hold the contractor to the terms of the original offer, if there is any doubt whatsoever about the length of time elapsed since the offer was made, the Department should contact the contractor to obtain confirmation that the offer still stands.

Acceptance to be Identical with Offer

An agreement does not give rise to a contract unless its terms are certain or capable of being made certain, and a contract is not brought into existence by acceptance unless the acceptance is absolute and identical with the offer. As the Scottish Ministers or the Secretary of State are usually in the position of acceptor (of offers made by contractors in response to invitations to tender) it is important to be satisfied that the offer has been expressed with precision and that the unconditional acceptance is in accordance with the Department’s requirements and intentions.

Conditional acceptance does not create a contract but amounts to a counter-offer needing unconditional acceptance by the contractor before a binding contract arises.

Similarly, when it is desired to make an offer on behalf of the Scottish Ministers or the Secretary of State its terms must be carefully drafted in the knowledge that a definite and unconditional offer becomes a binding promise upon acceptance by the party to whom the offer is made.
Recall or Withdrawal of Offer

To be effective, withdrawal or revocation must come to the knowledge of the other party before the offer is accepted and is not sufficiently communicated by the posting of a letter, bearing in mind this may well be received after the posting of the acceptance of the original offer.

The main rules as to recall or withdrawal of an offer summed up are:

• if the offerer undertakes to keep the offer open for a definite period, that promise is binding. The offer cannot be recalled within that time;

• if the offerer states that acceptance must be made within a specified time, and acceptance is not made within that time, the offer is automatically recalled;

• if the offerer does not state a time within which acceptance must be made, the offer remains open, not indefinitely, but only for a ‘reasonable’ time (see previously), and if not accepted within a reasonable time it is automatically recalled;

• where there is no promise to keep an offer open for a specified time, the offerer can recall his offer at any time before it has been accepted. As long as the parties are still at the stage of negotiation, and a contract has not yet been formed, either party has the right to ‘resile’ or draw back. An offer cannot be withdrawn after it has been accepted.
CONTRACTS BY DEED

Contracts of this class must be made in a formal written agreement (i.e., a single document executed by the parties by deed) and not, for example by exchange of documents or letters which is the normal practice for works contracts.

The written document in which a contract by deed is formally executed is known as a ‘deed’. A deed becomes operative when sealed and delivered by the parties to it. Where an individual is a party to a contract under seal, that party’s signature is also necessary.

Execution of a deed by a company is traditionally by affixation of the company seal, although if it is made very clear that the document is being executed ‘as a deed’, the affixation of the seal is not necessary.

Key Points

• Because of the form in which they are expressed, contracts by deed are legally enforceable even though they are sometimes made without valuable consideration.

• The right of action arising out of a contract executed by deed continues for twelve years rather than the six year period that applies to simple contracts.

• By law certain contracts must be executed by deed. Typically these include documents such as those for the conveyance of land. Deeds may be used if desired for any other contracts, however unimportant, particularly where a longer limitation period may be required.
SELF-PROVING CONTRACTS

Self-proving (probative) contracts must be made in a formal written agreement (i.e. a document executed by the parties; and witnessed if signing as individuals or partnerships, or properly for the company if a company) and not, for example by exchange of documents or letters which is the normal practice for works contracts.

The advantage to, or reason for, using probative writing is that if challenged, the contract carries a presumption of authenticity and proves its own date. It is therefore for the other party to prove it is not genuine.

Where additional documents, e.g. schedules or appendices (often comprising the conditions of contract in one, and the specification in another), or plans/drawings, are to form part of the formal contract document they must be properly incorporated into that contract. In order to be properly incorporated into the contract, such annexations must be both referred to individually in the contract and identified on the face of each as being the annexation referred to in the contract (generally by the wording “This is [Schedule [A]]/[Plan [A]] referred to in the foregoing contract between X and Y for …” handwritten or typed at the top of the first page of each such schedule/plan).

Key Point

• By law certain contracts must be self-proving. Typically these include documents such as those for the conveyance of land. Self-proving may be used if desired for any other contracts, however unimportant.
A party to a contract is entitled to have the contract performed in the manner described in the contract. That party cannot be compelled to accept a different mode of performance even though equally beneficial to that party. Whether what has been done constitutes performance of the contract is a question depending in each case on the construction of the terms of the contract and/or the facts of the case. The parties may by agreement or waiver substitute a different mode of performance for that originally agreed and by so doing create a new contract, providing that valuable consideration is present in so doing.

Contractual stipulations as to the time for performance are not generally construed as being essential such that failure to perform by the time for performance entitles the innocent party to elect to terminate the contract. The general principle is that performance must be carried out within a reasonable time. The exceptions to the general principle arise where time is made “of the essence” in the following situations:

- where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or have expressed that time is “of the essence”;

- where the circumstances of the contract or nature of the subject matter imply a requirement for performance by an exact time e.g. the sale of business land or the exercise of an option for the purchase of property;

- where time was not originally of the essence of the contract and one party has been guilty of undue delay, the innocent party may give notice requiring the contract to be performed within a reasonable time, in which case time becomes of the essence of the contract for both parties.

Determination

Where one party to a contract fails or refuses to perform the contract demonstrating an intention no longer to be bound by the contract, the other party may treat such conduct as repudiation and determine the contract by acceptance of the repudiation.

Alternatively, the conduct may be such as to entitle the injured party to operate a contractual determination clause which normally brings about the same end to further contractual performance as would an acceptance of repudiation.
A party who purports to operate a contractual determination clause when not entitled to do so is likely to be held to have repudiated the contract.

Contractual determination clauses do not exclude common law remedies available upon repudiation unless the agreement expressly provides that the contractual rights are to be the exclusive remedy for the breaches in question.

Contractual determination clauses will normally set out precise conditions to be fulfilled with respect to notice periods, along with practical requirements for the conclusion of performance. Some contracts, particularly consultancy agreements, allow for contractual determination to take place without default on the part of either party. Clauses of this nature do not, however, normally expressly entitle the Department determining the contract to recover damages from the other party. The Department must therefore recover any damages incurred by way of a claim in common law.

**Key Points**

- Determination of a contract is a serious matter, and a commission manager or project sponsor considering such an action should obtain authorisation from an officer with the appropriate delegated authority.

- The Department should be very clear about its grounds for determining a contract and should follow all contractual requirements regarding notice before doing so. (See for example Clause 56 of GC/W orks 1/(1998)).

- The benefits of removing a contractor or consultant who is not performing must be balanced against the following factors:
  - it takes time to procure a replacement contractor or consultant to complete the work, and they themselves require a learning curve and mobilisation time;
  - whilst extra costs can be claimed from the defaulting party it will commonly require legal action to secure recovery of such costs;
  - the liability for defects can become very difficult to attribute to the defaulting party or to the party engaged to complete the work unless there is a clear demarcation between their work.

- A very clear record (ideally photographic and measured) should be made of the state of the work as of the date of determination, and the site should be secured.
A party to a contract is entitled to have the contract performed in the manner described in the contract. That party cannot be compelled to accept a different mode of performance even though equally beneficial to that party. Whether what has been done constitutes performance of the contract is a question depending in each case on the construction of the terms of the contract and/or the facts of the case. The parties may by agreement or waiver substitute a different mode of performance for that originally agreed and by so doing create a new contract.

Contractual stipulations as to the time for performance are not generally construed as being essential such that failure to perform by the time for performance entitles the innocent party to rescind the contract. The general principle is that performance must be carried out within a reasonable time. The exceptions to the general principle arise where time is made “of the essence” in the following situations:

- where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or have expressed that time is “of the essence”;
- where the circumstances of the contract or nature of the subject matter imply a requirement for performance by an exact time e.g. the sale of land or the exercise of an option for the purchase of property;
- where time was not originally of the essence of the contract and one party has been guilty of undue delay, the innocent party may give notice requiring the contract to be performed within a reasonable time, in which case time becomes of the essence of the contract for both parties.

Termination

Where one party to a contract fails or refuses to perform the contract demonstrating an intention no longer to be bound by the contract, the other party may treat such conduct as repudiation and rescind the contract by acceptance of the repudiation. For repudiation, there must be a breach of contract, but note that not every breach will constitute a repudiation.
Alternatively, the conduct may be such as to entitle the injured party to operate a contractual termination clause which normally brings about the same end to further contractual performance as would an acceptance of repudiation.

A party who purports to operate a contractual termination clause when not entitled to do so is likely to be held to have repudiated the contract.

Contractual termination clauses do not exclude common law remedies available upon repudiation unless the agreement expressly provides that the contractual rights are to be the exclusive remedy for the breaches in question.

Contractual termination clauses will normally set out precise conditions to be fulfilled with respect to notice periods, along with practical requirements for the conclusion of performance. Some contracts, particularly consultancy agreements, allow for contractual termination to take place without default on the part of either party. Clauses of this nature do not, however, normally expressly entitle the Department terminating the contract to recover damages from the other party. The Department must therefore recover any damages incurred by way of a claim in common law.

**Key Points**

- Termination of a contract is a serious matter, and a commission manager or project sponsor considering such an action should obtain authorisation from an officer with the appropriate delegated authority.

- The Department should be very clear about its grounds for terminating a contract and should follow all contractual requirements regarding notice before doing so. (See for example Clause 56 of GC/Works 1/(1998)). For this reason it is strongly recommended that legal advice from the Department’s legal adviser also be obtained to ensure that the contract may be terminated. The consequences for wrongful termination can be serious.
• The benefits of removing a contractor or consultant who is not performing must be balanced against the following factors:

  - it takes time to procure a replacement contractor or consultant to complete the work, and they themselves require a learning curve and mobilisation time;

  - whilst extra costs can be claimed from the defaulting party it will commonly require legal action to secure recovery of such costs;

  - the liability for defects can become very difficult to attribute to the defaulting party or to the party engaged to complete the work unless there is a clear demarcation between their work.

• A very clear record (ideally photographic and measured) should be made of the state of the work as of the date of termination, and the site should be secured. Remember that these may be required as evidence in any subsequent arbitration or court action.
DISCHARGE OF A CONTRACT

There are a number of ways in which the parties may be released from further performance, or in other words the manner in which the contract ends. The parties may be released:

• by performance (by both parties) in accordance with the terms of the contract; in the case of part performance by a contractor of an ‘entire’ contract, the contractor would not be entitled to any payment; an entire contract is one where the performance to be provided by the provider (supplier) is required to be complete in its entirety before payment must be made by the purchaser/client (Department) - for example the delivery and installation of a functioning refrigerator; however, discharge can result from partial performance being voluntarily accepted by the purchaser/client where the purchaser/client had freedom of choice;

• by mutual agreement;

• by novation, where a fresh contract on the same subject may expressly or impliedly discharge the original one;

• where unforeseen events destroy the basis of contract, making performance impossible, impracticable or radically different from that originally intended by the parties (frustration);

• by material breach of a contract condition; what is a material breach will vary from case to case, but in the case of material breach of contract the innocent party may rescind the contract and claim damages;

• by mora, taciturnity and acquiescence, i.e. delay, silence and consent, inordinate delay by both parties which may justify the inference that the contract has been abandoned or that any rights under it have prescribed;

• by operation of an express contractual provision which provides for the contract to be discharged.
MISTAKE AND MISREPRESENTATION

Mistake

The courts will not seek to rectify a ‘mistake’ in the ordinary sense of the word, for example, to mend a bad bargain made by one or either party. However, there are situations where the courts will nullify or rescind the contract as a result of mistake by the parties concerning the contract. These situations are as follows:

• where there is a fundamental or radical difference between the document actually signed and what the signer believed it to be, and the signer has not been careless, the signer may raise the plea that the document is void; this plea is only likely to be successful in very limited circumstances;

• where the parties enter into contract on the basis of a false and fundamental assumption; this may be because the subject matter of the agreement does not exist or has ceased to exist, unknown to the parties at the time;

• where one party is mistaken as to the identity of the other party, and the identity of the other party is of crucial importance, the contract may be void at common law and of no effect.

Where the contract has been reduced to writing and the contract fails to reflect the intentions of the parties, the court will rectify the contract so as to carry out such intentions. Evidence of a contrary intention may be adduced by production of written or parol evidence. (This is a general exception to the parol evidence rule, which is that evidence of oral undertakings made by either of the parties is not normally admissible to add to or vary the terms of an agreement expressed in writing.) The courts will not seek to rectify a written agreement because the parties simply overlooked a matter, since there was no intention expressed in respect of such a matter.
Misrepresentation

Statements made during pre-contract negotiation can be either:

- incorporated into the contract as a term in which case the remedy for non-compliance with that term is an action for breach of contract;

- a representation not incorporated into the contract; if the representation proves false, the remedy will lie in an action for rescission and/or damages for actionable misrepresentation; rescission means that the contract is set aside with the object of putting the parties back in the position they would have been in had the contract never been made.

The essential ingredients of actionable misrepresentation are:

- a false statement of fact made by one party to the other; and

- inducement of the other party to enter into contract as a result of the false statement of fact.

The remedy available for actionable misrepresentation will depend upon the nature of the representation, since a representation can be fraudulent, negligent or innocent.

Rescission is available whether the misrepresentation is fraudulent, negligent or innocent, although in some circumstances the injured party may lose the right to rescind e.g. if the parties cannot be restored to their original position. Damages for misrepresentation are available for fraudulent and negligent misrepresentation but not for wholly innocent representation. In most cases the injured party will claim damages for negligent misrepresentation under S2(i) of the Misrepresentation Act 1967, and if liability is established the injured party will be able to recover as a minimum the “out of pocket expenses” incurred.
MISTAKE AND MISREPRESENTATION

Mistake (Error)

The courts will not rectify a ‘mistake’ or ‘error’ in the ordinary sense of the word, for example, to mend a bad bargain made by one or other party. However, there are situations where the courts can intervene, outlined below:

Errors may be ‘of expression’ or ‘of intention’.

• In the former case, if the courts accept the evidence, they will ‘reform’ the contract to make it truly express the bargain (for example, if by a slip of the pen, an offer of £100 was recorded as £10 and the other knew £100 was meant).

• In the latter case, if one or both parties laboured under a misapprehension which induced him or them to contract, such that had the true facts been known, no contract, or a different contract would have been made, two situations arise:

  - if only one party was in error, then, unless it was so vital an error as to exclude consent (e.g. identity, subject-matter or price) or unless the error was material and was induced by the other party’s statement, the courts will not come to his rescue;

  - where both parties are in error, the question of whether the contract is reducible depends on the nature of the error. If the error was, for example, of identity, subject-matter or price, then the contract will be void (null and void). There may, however, be other errors, important but not vital, which may render the contract voidable (capable of being made void) at the instance of either party (e.g. a house destroyed by fire before completion of the bargain).
Misrepresentation

This may be innocent or fraudulent.

- An **innocent** misrepresentation is one made in the honest belief that it is true (e.g. an art dealer believes a painting to be original when it is really a forgery).

- The essence of **fraudulent** misrepresentation is an intention to deceive. As the law puts it, a misrepresentation, to be fraudulent, must be made in the knowledge that it is untrue or else it must be made recklessly, careless whether it be true or false. There must be a moral wrong. A statement might be made negligently but provided the person making it believed it to be true (as opposed to not knowing if it was true or false) then there is no fraud. The misrepresentation must be made with the intention of bringing about the contract and, so far as reduction is concerned, must be made by one contracting party to the other.

The contracting party injured by fraudulent misrepresentation may ask for reduction of the contract and/or damages. If reduction is possible and he has suffered no loss, then although he will be able to reduce the contract, he will not be entitled to damages. If reduction has become impossible and no loss has been sustained, he will continue to be bound by the contract and will not be entitled to damages. If, however, loss has been sustained, damages will be awarded based upon the actual loss.

If the misrepresentation was innocent, then no claim for damages can arise. The only remedy of the party to whom the misrepresentation was made is to seek to have the contract reduced, if that is still possible. If it has become impossible he has no remedy.
Breaches of contract are material or non-material. Remedies available to the innocent party depend upon the materiality of the breach (i.e. degree of seriousness or importance).

**Non-material Breach**

One remedy for a non-material breach of contract in Common Law is damages by way of compensation, such damages being intended to compensate the one party rather than to punish the other. The innocent party may alternatively choose to use retention and lien, i.e. withholding delivery of goods or services, retaining possession of goods belonging to the party in breach etc. Another option is to go to the courts to force the other party to fulfil its obligations in an action known as 'specific implement'. Lastly, the simplest and most common action for breach of contract is an action for payment as money (usually the contract price) through the courts.

**Material Breach**

In the case of material breach, in addition to the remedy of damages, the innocent party may also break off the contractual relationship (that is to say, that as a result of the material breach, the contract has been repudiated and the innocent party may rescind the contract or treat it as repudiated).

The question of what is material in a breach situation is always a matter of circumstances and fact to be determined in each case.

**Damages**

Where the amount of compensation claimed is to be assessed by the court, the damages claimed are termed 'unliquidated' damages (see LE 1.8).
The parties may, however, choose to pre-determine or liquidate the amounts payable in the event of breach. These amounts are commonly termed ‘liquidated and ascertained’ damages. To be enforceable such amounts must be a genuine pre-estimate of the loss likely to be suffered as a result of the particular breach and not a penalty. Where the estimated amount is subsequently found not to be a genuine pre-estimate the court will not award damages as a liquidated sum but may pay an alternative assessment as unliquidated damages. (Further information on damages is at LE 1.8.)
LE 1.8

**DAMAGES FOR BREACH OF CONTRACT**

A party to a contract who suffers loss as a result of a breach of the other party will be entitled to an award of damages. Note however that a party seeking damages must be able to show not only that there has been a breach, but also that that breach is directly linked to the loss claimed. If the breach occurs when work has been partially completed then the injured party may bring a ‘quantum meruit’ (as much as it is worth) claim for the benefit of work partially completed.

Damages are normally awarded on the basis of putting the innocent party into the position that party would have been in but for the breach. The measuring tool in calculating damages however is the loss to the innocent party, not the gain to the party in breach.

**Limitation on Damages**

The damages that can be awarded are subject to the limitation imposed by the rules preventing claims for losses which are deemed to be too remote from the breach. The test established in the case of Hadley v Baxendale will generally be satisfied if:

- the damage or loss arises according to the usual course of things from such breach of contract, i.e. naturally;

- the damage or loss arises as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it; this may occur in situations where one party specifically draws to the attention of the other, a particular loss that may be suffered as a result of a breach, at the time of making the contract.

In addition to the above the injured party is required to take reasonable steps to reduce the loss and avoid taking action which may increase the loss suffered (i.e. to ‘mitigate’ their loss). The onus of proof of whether the innocent party has indeed mitigated its loss is on the party in breach.
The courts want to avoid stale claims. Legal actions must therefore be commenced or originated within time limits. These time limits are contained in various Limitation Acts. If proceedings are not commenced within the relevant time limit, the action will be “statute barred” and cannot normally be brought, regardless of the merits of the case. The law of limitation has, over recent years become an increasingly complex subject, culminating in the Latent Damage Act 1986. The basic limitation rules are set out below. However, as a result of the above Act, the period may be extended significantly in respect of non-personal injury actions in negligence, so if there is any doubt, legal advice should be sought.

Personal Injury. The basic rule is that an action must be brought within three years of the negligence or breach of contract which caused the injury. The basic period may be extended in certain cases where the injury is latent, i.e. if the injured person could not have known that he had been injured within the three year period.

Contract. An action must be brought within 6 years from the date of the breach of contract. If the contract is by deed, the period is 12 years. If there has been a breach of contract there may also be a cause of action in negligence which may produce a longer limitation period.

Negligence in Tort. The rules regarding limitation periods for actions in negligence are more complex than for contract, and in some cases allow more time. The basic rule is that the period of limitation expires six years after the damage occurs or comes into existence.

Alternatively, in accordance with the Latent Damage Act 1986, the period is three years from the earliest date, (in very simple terms), when the plaintiff knew:

- that the damage was sufficiently serious to justify proceedings;
- that the damage was attributable to the alleged negligence; and
- the identity of the defendant.

The above two periods relating to negligence are subject to an overall 15 year ‘longstop’ running from the date of the act or omission which is alleged to constitute the negligence, after which such actions shall not be brought even if the cause of action has not yet accrued or the ‘starting date’ for the three year period has not yet arrived.
The principle of prescription governs the length of time for which obligations subsist. The need for such a role is clear. Rights cannot exist forever.

‘Prescription’ is the term used to describe the process whereby a contractual obligation may simply extinguish itself by the passage of time during which no action is taken in respect of it. The same process in other areas of law may be used to establish legal rights (e.g. rights of way), and this operates so as to create a ‘positive’ prescription. The main effect of the process in the law of contract, however, is to extinguish legal rights by means of ‘negative’ prescription.

The Prescription and Limitation (Scotland) Act, 1973 establishes two negative prescriptions, the ‘long negative prescription’ (20 years) and the ‘short negative prescription’ (five years). According to which category a particular obligation falls within, it may be extinguished after five or twenty years, if the remaining essential conditions are satisfied. Some rights are said to be ‘imprescriptible’, and are therefore immune from both periods (e.g. real rights to ownership of land).

The vast majority of all contractual obligations will expire under the ‘short negative prescription’, i.e. after five years if the necessary conditions are satisfied.

However, before an obligation will prescribe, the relevant period of time must have passed without any ‘relevant claim’ by the creditor, or any ‘relevant acknowledgement’ by the debtor:

- A ‘relevant claim’ is a claim in a court of law, or in an arbitration, or a lodgement of a claim in the debtor’s sequestration or liquidation. Also classed as a relevant claim will be the execution of any diligence in pursuit of the debt, or the enforcement of the obligation.

- for a ‘relevant acknowledgement’ to occur, there must be some performance on the part of the debtor which indicates that he regards the obligation as still existing, or an unequivocal admission in writing, by or on behalf of the debtor, to the creditor or his agent.
If neither of these events occurs within the relevant prescriptive period, then the obligation is extinguished by prescription. However, excluded from the computation of this period is any time during which the making of a claim was delayed due to fraud on the part of the debtor, or an error on the part of the creditor included by the debtor. Also excluded is any period during which the creditor was under a ‘legal disability’.

The prescriptive period begins to run from the date when the obligation becomes enforceable.

Legal advice should be sought in relation to this subject.

With regard to personal injury the basic rule is that an action must be brought within three years of the incident giving rise to the claim. The basic period may be extended in certain cases where ‘material facts of a decisive character’ were not known until a later date (in which case the time runs from that date).
Government contracts should always be made or confirmed in writing irrespective of legal need for the use of written documents. It may be unavoidable, in very exceptional circumstances, to make oral arrangements which create contractual liabilities. It is most important that any necessary authority is sought and that the terms of such arrangements are confirmed in writing at the earliest possible moment in order that the rights and obligations of both contracting parties may be clearly defined.

Where written documents have been used the evidence of the contract is the documents themselves, and all contract problems should be considered from the starting point of the documents constituting the offer and acceptance and establishing the precise agreement between the parties.

Oral evidence and extrinsic documents not forming part of the contractual offer and acceptance are not normally admissible for the purpose of giving a different interpretation to alleged contract documents or to prove any subsequent variation of a contract which is required by law to be in writing, but it is allowed:

- to set aside a written contract on grounds of fraud or mistake;
- to explain a latent ambiguity, trade custom; or
- to show that a written document does not contain the whole agreement.

Original contract documents should always be retained in a safe place (i.e. a locked safe) and should be kept separate from day to day job files.
LE 1.10(SCOT)  EVIDENCE OF CONTRACT

Government contracts should always be made or confirmed in writing irrespective of legal need for the use of written documents. It may be unavoidable, in very exceptional circumstances, to make oral arrangements which create contractual liabilities. It is most important that any necessary authority is sought and that the terms of such arrangements are confirmed in writing at the earliest possible moment in order that the rights and obligations of both contracting parties may be clearly defined. Should a dispute later arise as to the scope of the obligations undertaken by a party, the intention of the parties will be looked at. In the absence of writing therefore, what the parties said (rather than what obligation they thought they had undertaken) will be the crucial point. If any aspect or term of the agreement was not discussed and agreed therefore, e.g. termination and duration, then this will not readily be implied. Oral contracts can be very risky therefore and, particularly for larger such contracts, are not to be recommended.

Where written documents have been used the evidence of the contract is the documents themselves, and all contract problems should be considered from the starting point of the documents constituting the offer and acceptance and establishing the precise agreement between the parties.

Oral evidence and extrinsic documents not forming part of the contractual offer and acceptance are not normally admissible for the purpose of giving a different interpretation to alleged contract documents or to prove any subsequent variation of a contract which is required by law to be in writing. Some contracts also specifically exclude all prior communications between the parties by including an ‘Entire Agreement’ clause which states that the contract constitutes the entire understanding between the parties and supersedes all prior writings and negotiations.

Original contract documents should always be retained in a safe place (i.e. a locked safe) and should be kept separate from day to day job files. Remember that contractual obligations do not expire under the short negative prescription for five years. The original contract documents will still be of importance therefore during that period.
ASSIGNMENT

In law, a party to contract cannot assign any of its liabilities or obligations ('burdens') under a contract although that party may be able to assign its rights or some of them ('benefits'). In view of the ability of a contractor or consultant to legally assign rights under the contract to a third party, it is normally advisable for the Department to include a term within the contract prohibiting assignment or the right to assign. Alternatively it may be stipulated that assignment can only be effected with the consent of the Department.

Key Points

- Care should be exercised in drawing up and executing contracts to ensure that the Department's rights to assignment are not prohibited.

- Most of the standard forms for construction works contain a clause preventing assignment or transfer of the contract or of any part, share or interest under it without the consent in writing of the Department. Clause 61 of GC/Works 1/(1998), for example, contains such provision.
ASSIGNATION

The general rule in Scots law is that rights and obligations under a contract may be assigned or sub-contracted to another party provided that the original contract does not involve ‘delectus personage’ (i.e. that the choice of one particular person to perform a particular task excludes all other persons - element of personal choice). Generally contracts for services are held not to be assignable due to this concept, but each contract must be considered individually to ascertain whether it is assignable (and, if so, the extent to which it is assignable). Each depends on its terms, subject and all other relevant circumstances.

By the Contractor

In view of the ability of a contractor or consultant to legally assign rights under the contract to a third party, it is normally advisable for the Department to include a term within the contract prohibiting assignation or the right to assign. Alternatively it may be stipulated that assignation can only be effected with the prior written consent of the Department.

By the Department

Care should be exercised in drawing up and executing contracts to ensure that the Department’s rights to assignation are not prohibited.

Key Point

• Most of the standard forms for construction works contain a clause preventing assignation or transfer of the contract or of any part, share or interest under it without the consent in writing of the Department. Clause 61 of GC/Works 1/(1998), for example, contains such provision.
NOVATION

Subject to the limitations discussed in Section LE 1.11, third parties may acquire rights under existing contracts by way of assignment/assignation. Alternatively, third parties can acquire rights and liabilities by way of a new contract with one of the original contracting parties. The substitute agreement makes provision for the discharge of all obligations under the original agreement.

Examples of the use of novation are as follows:

• as an option to secure completion of the works in the event of insolvency of a contractor;

• in the case of a design and build contract where the Department procures an outline architect's design and then novates it to the design and build contractor.

Key Points

• It is important for the parties in the new agreement to define clearly the responsibilities or liabilities of the original contractor to be assumed by the substitute third party.

• An example of an ‘English’ and ‘Scottish’ Government agreement for the novation of a consultant commission is provided overleaf (Standard Form LE1/SF1).

• Seek advice before proceeding.
STANDARD FORM 1

EXAMPLE NOVATION AGREEMENT (ENGLAND & WALES)

THIS AGREEMENT is made this [ ] day of ................. 200[ ]

between .................................................................................. (herein called the Consultant) of the first part, ................................................. (herein called “the Substituted Consultant”) of the second part, and the Secretary of State for [as appropriate] acting through [Department] (herein called “the Authority”) of the third part.

WHEREAS

1. This Agreement is supplemental to the following Commission (herein called “the Commission”) between the Consultant and the authority.

   Commission: ..........................................................................................

   [Department] Reference No. ....................................................................

   Consultant Reference No. ........................................................................

   As set out in the correspondence between the Authority and the Consultant dated [ ].

2. The Consultant desires to be released and discharged from the Commission and the Authority has agreed to release and discharge them on condition that the substituted consultant undertakes to perform and be bound by the Commission.

IT IS NOW AGREED as follows:

1. The Substituted Consultant undertakes to perform the Commission and to be bound by the terms of the Commission as if they were party to them in place of the Consultant.

2. The Consultant assigns and releases all benefits and liabilities under the Commission to the Substituted Consultant.

3. The Authority releases and discharges the Consultant from all claims and demands whatsoever in respect of the Commission and agrees to be bound by the terms of the Commission as if the Substituted Consultant were a party to them in place of the Consultant.
4. The Authority shall pay the Consultant all amounts due under the Commission for work carried out satisfactorily by the Consultant before the date hereof.

5. All work carried out under the Commission by the Consultant and all payments made under the Commission by the Authority to the Consultant shall be treated respectively as work done by the Substituted Consultant and payments made by the Authority to the Substituted Consultant.

Signed by ..............................................................................................

Name .....................................................................................................

On behalf of the Consultant.

Signed by ..............................................................................................

Name .....................................................................................................

On behalf of the Substituted Consultant.

Signed by ..............................................................................................

Name .....................................................................................................

On behalf of the Authority.
STANDARD FORM 1

EXAMPLE NOVATION AGREEMENT (SCOTLAND)

NOVATION AGREEMENT

among
[                                ] (“the Consultant”) of the first part
[                                ] (“the Substituted Consultant”) of the second part
and
THE SCOTTISH MINISTERS acting through [Department] (“the Authority”) of the third part.

WHEREAS

1. This Agreement is supplemental to the following Commission (herein called “the Commission”) between the Consultant and the Authority.

   Commission: ..........................................................................................

   [Department] Reference No. ....................................................................

   Consultant Reference No. ........................................................................

   As set out in [the correspondence]/[an agreement] between the Authority and the Consultant dated

   [.................................................................................................].

2. The Consultant desires to be released and discharged from the Commission and the Authority has agreed to release and discharge them on condition that the Substituted Consultant undertakes to assume the obligations of the Consultant under the Commission and to perform and be bound by the Commission.

3. The Substituted Consultant has agreed to assume the obligations of the Consultant under the Commission.

NOW THEREFORE the parties hereto AGREE as follows:

1. The Substituted Consultant accepts the liabilities, rights and obligations of the Consultant under the Commission and undertakes to perform the Commission and all the duties and to discharge all the obligations of the Consultant under it and to be bound by the terms of the Commission as if they were party to them in place of the Consultant, and that with effect from [             ] (“the Effective Date”).
2. With effect from the Effective Date, the Consultant assigns its whole rights, obligations and liabilities under the Commission to the Substituted Consultant.

3. With effect from the Effective Date, the Authority releases and discharges the Consultant from further performance of the Consultant's obligations under the Commission and from all claims and demands whatsoever in respect of the Commission and agrees to be bound by the terms of the Commission as if the Substituted Consultant were a party to them in place of the Consultant.

4. The Authority shall pay the Consultant at the Effective Date all amounts due under the Commission for work carried out satisfactorily by the Consultant before the Effective date.

5. All work carried out under the Commission by the Consultant and all payments made under the Commission by the Authority to the Consultant shall be treated respectively as work done by the Substituted Consultant and payments made by the Authority to the Substituted Consultant.

6. This Agreement shall be governed by, and construed in accordance with, the law of Scotland and the parties prorogate the jurisdiction of the Scottish courts so far as not already subject thereto: IN WITNESS WHEREOF these presents consisting of this and the preceding page(s) [together with the Schedule annexed hereto] are executed as follows:

for and on behalf of [insert name of consultant] (Consultant)

at .................... on .................... 200[  ] by:

........................................................ (Director's signature) .................................. (Director/Co Sec's signature)

........................................................ (full name) ................................................. (full name)

for and on behalf of [insert name of substituted consultant] (Substituted Consultant)

at .................... on .................... 200[  ] by:

........................................................ (Director's signature) .................................. (Director/Co Sec's signature)

........................................................ (full name) ................................................. (full name)
The Scottish Ministers (Authority)

at .................. on .................... 200[ ] by:

........................................................ (signature)

........................................................ (full name)

........................................................ (title)

in the presence of:

........................................................ (signature of witness)

........................................................ (full name)

........................................................ (address)

NB. Need to ensure that in any formal agreement at least part of the text of the agreement appears on the same page as the signatures. Do not have the signatures on a separate page from the foregoing text.
TRANSACTIONS WITH OUTSIDE BUSINESSES

General

Departments may carry out transactions with the following types of business associations:

• Sole traders;
• Partnerships;
• Companies.

Each of the above type of association is considered in relation to contractual capacity and liability.

Sole Traders

Sole trader is the name given to a person who sets up in business and trades in their own name. No formalities are required to set up as a sole trader. The debts of the business are the liability of the sole trader personally. There is no statutory requirement on the sole trader to keep accounts in any particular form.

The contractual capacity of the trader will be determined by the general rules for contractual capacity of the individual in the law of contract.

The sole trader will be personally liable for breaches of contract committed by employees in the course of business.

Partnerships

A partnership is the relationship between persons carrying on a business in common, with express or implied agreement as to the nature of the business, with a view to profit. The sharing of profit will not, however, of itself create a partnership. No formalities are required to form a partnership. The partners jointly and severally have unlimited personal liability for the firm’s debts.
As with sole traders, there is no limit on the contractual capacity of partners except the general rules of contract law. Employees of the firm will be agents of it when acting in the course of their employment and the partners will be liable for their acts.

The partnership is a legal person distinct from the partners of whom it is composed and may therefore sue or be sued in the firm's own name.

**Companies**

The term “company” is usually used to mean a corporation created by registration under the Companies Act 1985. On formation, a company becomes a legal person separate and distinct from its members. A number of documents must be filed with the Registrar of Companies before a company may commence trading, including the Memorandum of Association which sets out the purpose for which the company is formed and limits the scope of its contractual capacity.

The most important effect of registration is that the members of the company (shareholders) are not liable for the debts of the company and their liability to contribute to the company's assets, to enable it to pay its creditors, may be limited by share or by guarantee.

The company as a separate legal entity can contract in its own name, with limits on its capacity as follows:

- it has no capacity before incorporation and any person purporting to act on its behalf before this date will be personally liable on the contract;

- any contract not authorised by the objects clause is ultra vires and void, although the scope of this limitation is narrowed considerably by Sections 35, 35A and 35B of the Companies Act 1985 (as amended by the Companies Act 1989). The effect of these provisions is that the company's constitution cannot limit or call into question, the validity of a transaction or act, unless the person dealing with the company acts in bad faith. That person is not bound to enquire as to whether that act or transaction is permitted by the company's memorandum, or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so.
Key Points

- Departments should be aware, when procuring works, as to the type of business association with which it is proposed to enter into a contract.

- Departments should consider when procuring works, whether the person with whom the transaction is being discussed, has authority to bind that association in contract with that Department. Ensure that documents are signed correctly by that association according to its type in order that contracts are valid and binding. If in doubt as to how to have a document executed, or whether an outside body has executed it correctly, Departments should contact their legal adviser.
LE 1.14  

PARENT COMPANY GUARANTEES

Guarantees - Generally

There are two types of guarantee:

- parent company guarantee;
- performance bond.

Both are mechanisms designed to provide some extra-contractual protection to the Department generally in respect of works contractors.

Where the Department does make it a requirement for a tenderer to provide a guarantee or bond then this requirement must be clearly stated in the tender documents so that the tenderer has notice of the requirement and is able to price for it.

Parent Company Guarantees

This form of guarantee is given by a parent company or holding company to guarantee the proper performance of a contract by one of its subsidiaries (the contractor). The guarantee may require that the parent company completes the obligations of the subsidiary in the event of default by the subsidiary. The liability of the parent company can take several forms including a financial guarantee of completion of the project itself or the employment of another contractor to complete the project.

A parent company guarantee will only be of value if the parent company itself is financially strong and its financial resources are largely independent of those of the contractor. These matters should be generally scrutinised in the overall vetting of the contractor by the Department. In addition the form of wording of any parent company guarantee is usually complicated and legal advice should be sought.
Examples of ‘English’ and ‘Scottish’ financial parent company guarantees follow this section. They are:

- **individual guarantee** - (standard form LE1/SF2) for one-off appointments or where a blanket guarantee has not already been obtained;

- **blanket guarantee** - (standard form LE1/SF3) for all contracts awarded to that tenderer.

Ideally a blanket guarantee should be sought and a Departmental register kept of those companies from whom such guarantees have been obtained.

**Key Points**

- A parent company guarantee will not normally have a cost implication for the tenderer nor therefore the Department.

- Where there is a parent company or ultimate holding company it is recommended that a parent company guarantee is sought as a matter of course.

- The requirement for a guarantee should be stated in the tender documents and made a condition of acceptance of the tender.
STANDARD FORM 2

INDIVIDUAL GUARANTEE (100%) - DRAFT AGREEMENT

THIS AGREEMENT is made the ______________ day of ____________________ One Thousand Nine Hundred and Ninety ___________ BETWEEN ______________________________________________ PLC/LTD
whose registered office is situated at ____________________________________________ (hereinafter called "the Guarantor") of the one part and the Secretary of State for [as appropriate] acting through [Department] whose office is at ______________________________________________
__________________________________________________
(hereinafter called "the Employer") of the other part.

WHEREAS

A. ______________________________________________ PLC/LTD (hereinafter called "the Contractor") has submitted a tender dated __________ offering to carry out certain works on the ______________________________________________ to the Employer.

B. The Guarantor has agreed in the event of the Contractor’s tender being accepted, to guarantee the due performance by the Contractor of such works (hereinafter called "the Contract") in manner hereinafter appearing:

NOW THE GUARANTOR AGREES WITH THE EMPLOYER as follows:

1) If the Contractor (unless relieved from the performance by any clause of the Contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the Contract or commit any breach of its obligations thereunder then the Guarantor will pay to the Employer and its successors the amount of all losses, damages, costs and expenses which may be incurred by the Employer by reason of any default on the part of the Contractor in performing and observing the agreements and provisions contained in the Contract to the extent that such losses, damages, costs and expenses are or would otherwise be recoverable by the Employer.

2) THE Guarantor FURTHER AGREES with the Employer that it shall not in any way be released from liability hereunder by any alteration in the terms of the contract made by agreement between the Employer and the Contractor or in the extent or nature of the works to be constructed, completed and maintained thereunder or by any allowance of time or forbearance or forgiveness in or in respect of any matter or thing concerning the Contract or by any other matter or thing whereby (in the absence of this present provision) the Guarantor would or might be released from liability hereunder, and for the purposes of this Agreement any such alteration shall be deemed to have been made with the consent of the Guarantor and Clause 1 hereof shall apply in respect of the contract so altered.
IN WITNESS of which the Guarantor has executed this Agreement as a deed and has delivered it on the day and year first before written.

THE COMMON SEAL OF ........................................................... PLC/LTD was affixed to this deed in the presence of:

.........................................................................................................

Director

.........................................................................................................

Director/Secretary
STANDARD FORM 3

BLANKET GUARANTEE

THIS AGREEMENT is made the ......................... day of ........................... One Thousand N ine
Hundred and N inety ..................... BETWEEN ................................................................................PLC/LTD
whose registered office is situated at ............................................................................... (hereinafter called
"the Guarantor") of the one part and the Secretary of State for [as appropriate] whose
office is at ....................................................................................................................................... (hereinafter called
"the Employer") of the other part.

WHEREAS

A. Tenders for certain work may from time to time be invited by the Employer or by
[Department] acting as its agents (hereinafter called “Agents”) and
............................................................................ PLC/LTD (hereinafter called “the Contractor”) may
submit such tenders to the Employer or as the case may be its Agents.

B. The Guarantor has agreed in respect of each such tender accepted by the Employer or
one of its Agents (hereinafter called “the relevant Agent”) (such accepted tenders being
hereinafter individually called “the relevant Contract”) to guarantee the due
performance by the Contractor of the Contract in manner hereinafter appearing:

NOW THE GUARANTOR HEREBY AGREES WITH THE EMPLOYER as follows:

1) If the Contractor (unless relieved from the performance by any clause of the relevant
contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in
any respect fail to execute the relevant Contract or shall commit any breach of its
obligations thereunder then the Guarantor will pay to the Employer and its successors
the amount of all losses damages costs and expenses which may be incurred by the
Employer by reason of any default on the part of the Contractor in performing and
observing the agreements and provisions contained in the relevant Contract to the
extent that such losses damages costs and expenses are or would otherwise be
recoverable by the Employer or the relevant Agent from the Contractor under the
relevant Contract.

2) THE Guarantor FURTHER AGREES with the Employer that it shall not in any way be
released from liability hereunder by any alteration in the terms of the relevant Contract
made by agreement between the Employer or the relevant Agent and the Contractor
or in the extent or nature of the works to be constructed completed and maintained
thereunder or by any allowance of time or forbearance or forgiveness in or in respect
of any matter or thing concerning the relevant Contract or by any other matter or thing
whereby (in the absence of this present provision) the Guarantor would or might be
released from liability hereunder.
AS W ITNESS of which the Guarantor has executed this Agreement as a deed and has delivered it on the day and year first before written.

THE COMMON SEAL OF ........................................PLC/LTD )

) was affixed by order of their Board in )

the Presence of: )

)........................................................................................................................................................................

Director

)........................................................................................................................................................................

Director/Secretary
STANDARD FORM 2

INDIVIDUAL GUARANTEE (100%) - DRAFT AGREEMENT (SCOTLAND)

GUARANTEE AND UNDERTAKING
by
[ ] PLC/LTD, having their registered office at [ ]
(“the Guarantor”) of the one part
in favour of
THE SCOTTISH MINISTERS acting through [Department] (“the Employer”) of the other part

WHEREAS

A. ........................................................................................................... PLC/LTD (hereinafter called “the Contractor”) has submitted a tender dated ............ offering to carry out certain works on the
........................................................................................................... to the Employer.

B. The Guarantor has agreed in the event of the Contractor’s tender being accepted, to guarantee the due performance by the Contractor of such works (hereinafter called “the Contract”) in manner hereinafter appearing:

NOW THEREFORE THE GUARANTOR UNDERTAKE TO THE EMPLOYER as follows:

1) If the Contractor (unless relieved from the performance by any clause of the Contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the Contract or commit any breach of its obligations thereunder then the Guarantor will pay to the Employer and its successors the amount of all losses, damages, costs and expenses which may be incurred by the Employer by reason of any default on the part of the Contractor in performing and observing the agreements and provisions contained in the Contract to the extent that such losses, damages, costs and expenses are or would otherwise be recoverable by the Employer.

2) That the Guarantor shall not in any way be released from liability hereunder by any alteration in the terms of the Contract or in the extent or nature of the works to be constructed, completed and maintained thereunder or by any allowance of time or forbearance or forgiveness in or in respect of any matter or thing concerning the Contract or by any other matter or thing whereby (in the absence of this present provision) the Guarantor would or might be released from liability hereunder, and for the purposes of this Guarantee and Undertaking any such alteration shall be deemed to have been made with the consent of the Guarantor and Clause 1 hereof shall apply in respect of the Contract so altered.
3) This Guarantee and Undertaking shall be governed by and construed in accordance with the law of Scotland and the parties hereto prorogue the jurisdiction of the Scottish courts so far as not already subject thereto: IN WITNESS WHEREOF this Guarantee and Undertaking consisting of this page and the [ ] preceding page(s) is executed on behalf of the Company as follows:

......................................................................................... ...................................... ...................................................

Director Director/Secretary

......................................................................................... ...................................... ...................................................

Name in Capitals Name in Capitals

......................................................................................... ...................................... ...................................................

Place of Signature Place of Signature

......................................................................................... ...................................... ...................................................

Date of Signature Date of Signature

NB. Need to ensure that in any formal agreement at least part of the text of the agreement appears on the same page as the signatures. Do not have the signatures on a separate page from the foregoing text.
STANDARD FORM 3

BLANKET GUARANTEE (SCOTLAND)

GUARANTEE AND UNDERTAKING
by
[                                ] having its registered office at [                                ] (“the
Guarantor”) of the first part
in favour of
THE SCOTTISH MINISTERS acting through [Department] (“the Employer”) of the second
part.

WHEREAS
A. Tenders for certain work may from time to time be invited by the Employer and
............................................................................ PLC/LTD (hereinafter called “the Contractor”) may
submit such tenders to the Employer.
B. The Guarantor has agreed in respect of each such tender accepted by the Employer
(such accepted tenders being hereinafter individually called “the relevant Contract”) to
guarantee the due performance by the Contractor of the Contract in manner
hereinafter appearing:

NOW THEREFORE THE GUARANTOR HEREBY UNDERTAKES TO THE EMPLOYER as
follows:

1) If the Contractor (unless relieved from the performance by any clause of the relevant
contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in
any respect fail to execute the relevant Contract or shall commit any breach of its
obligations thereunder then the Guarantor will pay to the Employer and its successors
the amount of all losses damages costs and expenses which may be incurred by the
Employer by reason of any default on the part of the Contractor in performing and
observing the agreements and provisions contained in the relevant Contract to the
extent that such losses damages costs and expenses are or would otherwise be
recoverable by the Employer from the Contractor under the relevant Contract.

2) That the Guarantor shall not in any way be released from liability hereunder by any
alteration in the terms of the relevant Contract made by agreement between the
Employer and the Contractor or in the extent or nature of the works to be
constructed completed and maintained thereunder or by any allowance of time or
forbearance or forgiveness in or in respect of any matter or thing concerning the
relevant Contract or by any other matter or thing whereby (in the absence of this
present provision) the Guarantor would or might be released from liability hereunder.
3) This Guarantee and Undertaking shall be governed by and construed in accordance with the law of Scotland and the parties hereto prorogue the jurisdiction of the Scottish courts so far as not already subject thereto: IN WITNESS WHEREOF this Guarantee and Undertaking consisting of this page and the [    ] preceding page(s) is executed on behalf of the Company as follows:

......................................................................................... ...................................... ...................................................

Director Director/Secretary

......................................................................................... ...................................... ...................................................

Name in Capitals Name in Capitals

......................................................................................... ...................................... ...................................................

Place of Signature Place of Signature

......................................................................................... ...................................... ...................................................

Date of Signature Date of Signature


NB. Need to ensure that in any formal agreement at least part of the text of the agreement appears on the same page as the signatures. Do not have the signatures on a separate page from the foregoing text.
PERFORMANCE BONDS

A bond is a legally enforceable financial guarantee given by a third party (the guarantor) to a purchaser (the Department) to guarantee the obligations of a supplier of goods, works or services (the contractor) under a contract. The guarantor agrees to pay the Department a sum of money (usually expressed as 10% of the contract sum) if the contractor defaults on its obligations. The purpose of requiring a bond is to allow the Department to offset the extra expenses of remedying the default and/or completing the contract.

It is not common practice for a Department to require a bond. The decision to obtain one from a tenderer will normally be a high level Departmental decision. A bond may be required if:

- there is no parent company or holding company and the value of the contract is a significant proportion of the company's turnover;
- the company appears financially weak and there is a risk of its collapse.

Obtaining a bond cannot serve as a substitute for thorough scrutiny of contractor's financial standing and assessment of the contractor's ability to meet the terms and conditions of the contract satisfactorily. Any reasonable doubts should be followed through, since a contractor with inadequate financial resources may present a consequent risk to exchequer funds. A decision to require a bond must be part of an overall approach to risk management and should take account of available measures to reduce the risk of default, including a proper pre-qualification of tenderers.

The wording of commercial bonds can vary depending on which organisation is providing the bond, who is involved in drawing it up, and what the bond is expected to deliver. The courts have recently been very critical of bonds containing archaic language and terms found in "traditional" standard forms provided by banks or surety companies. Legal advisers should always be involved in their preparation and negotiation. A model form of bond was published in September 1995 by the Association of British Insurers to address the criticisms of standard form bonds.
Characteristics of Performance Bonds

Performance bonds should generally have an expiry date and should contain a mechanism for amendment in the event that the value of the contract increases or the duration of the contract extends.

Classification of Performance Bonds

There are two basic forms of performance bond, the “conditional on-default bond” and the much more onerous “conditional on-demand bond”.

Conditional On-Default Performance Bonds

Usually these can be called only following a serious breach by the contractor of the agreed terms and conditions of the contract (which will include the contractor going into liquidation/receivership or becoming bankrupt). Departments should seek legal advice that the wording clearly expresses the true transaction and not assume that a “traditional” form of wording will be appropriate.

Conditional On-Demand Bonds

This is an onerous form of bond which is not normally used by Departments. Although this bond in essence is one that can technically be called at any time “on-demand”, it should contain:

- a procedural mechanism for ‘calling’ the bond;
- a requirement for the Department to identify the reason for calling the bond; and
- a cooling off period (during which the contractor may remedy the default).

The place for use of such bonds is where the costs or other consequences of default by the contractor are very high and there is a need for payment without risk of dispute. This being said, the imposition of conditions should prevent the Department from acting in an arbitrary or unreasonable way and protect the contractor from the bond being called without the due and proper consideration of responsible people in the Department’s organisation.
Requirement for both Performance Bonds and Parent Company Guarantees

It will not normally be desirable or necessary for a contractor to provide both performance bonds and parent company guarantees, particularly when the cost of obtaining a performance bond will be passed on to the Department. A decision as to which form of protection is required must be taken as part of an overall approach to risk management.

Key Points

• The requirement for a bond will be an exception rather than the norm, and will normally require a high level Departmental decision.

• A bond will have a cost implication for the tenderer and therefore for the Department. The Department should be satisfied that this additional protection is necessary and worth paying for.

• When the decision is taken to request a bond, legal advice should be sought to ensure that a suitable form of bond is obtained.

• The requirement for a bond should be stated in the tender documents and the contract should not be formally awarded to the successful tenderer until the bond has been secured and provided to the Department.
LE 1.16  

**STAMP DUTY**

Principally by virtue of Section 55 of the Finance Act 1987 no stamp duty is chargeable on any conveyance, transfer or lease, made or agreed to be made to a Minister of the Crown or the Scottish Ministers.
Civil legal proceedings against the Crown are instituted in accordance with the Crown Proceedings Act 1947.

The Act specifies that proceedings should be instituted against the appropriate authorised Department. The list published under Section 17 of the Act specifies the various Departments which are authorised to receive proceedings for the purposes of the Act and the name and address for service of the person who is to be treated as the solicitor for each such Department. While most Departments are represented by the Treasury Solicitor, there are Departments which have their own legal advisers acting for them. Further, there are a number of public bodies who have market tested the provision of legal services and put the work out to the private sector: in such cases, proceedings should be served on their private sector solicitors.

Proceedings may also be instituted against the Attorney General.

**Key Points**

- Proceedings should be served on the solicitor retained to represent the Department. This will be the Treasury solicitor unless a private sector legal adviser has been engaged.
- Crown Departments may not sue other Crown Departments.
Civil legal proceedings against the Crown (either in right of Her Majesty's Government in the United Kingdom or in right of the Scottish Administration) are instituted in accordance with the Crown Proceedings Act 1947.

The Act specifies that proceedings should be instituted against the appropriate authorised Department. The list published under Section 17 of the Act specifies the various Departments which are authorised to receive proceedings for the purposes of the Act and the name and address for service of the person who is to be treated as the solicitor for each such Department. While most devolved function Departments are represented by the Solicitor to the Scottish Executive, there are Departments which have their own legal advisers acting for them. Reserved function Departments may also be represented by the Solicitor to the Scottish Executive acting on an agency basis, or by the Solicitor to the Advocate General, or again by their own legal advisers acting for them. Further, there are a number of public bodies who have market tested the provision of legal services and put the work out to the private sector: in such cases, proceedings should be served on their private sector solicitors.

Proceedings may also be instituted in Scotland against the Lord Advocate (where the action, suit or proceeding is on behalf of or against any part of the Scottish Administration), and the Advocate General for Scotland (in any other case).

Key Points

- Proceedings should be served on the solicitor retained to represent the Department. This will normally be the Solicitor to the Scottish Executive unless a private sector legal adviser has been engaged or the Solicitor to the Advocate General is acting.

- Ministers of the Crown may not sue other Ministers of the Crown. Since 1 July 1999 however, rights and liabilities may arise between the Crown in right of Her Majesty's Government in the United Kingdom and the Crown in right of the Scottish Administration by virtue of a contract, by operation of law or by virtue of an enactment as they may arise between subjects. The Scottish Ministers may therefore sue, and be sued by, Ministers of the Crown. Notwithstanding this, every attempt should be made by Departments to resolve disputes without recourse to court proceedings.
‘Insolvency’ is a legal term which covers the financial failure of individuals and companies and their position before and after the start of a formal insolvency procedure. Insolvency may be experienced in the short term or long term. Short term insolvency usually means a cash flow crisis where insufficient money is coming in to meet the company's outgoings. Long term insolvency relates to the situation where liabilities exceed assets even though the company may be able to meet its outgoings. In accordance with the Insolvency Act 1986 if a company fails either the “going concern” test or the “balance sheet” test then it will be insolvent.

**General**

In situations where individuals, partnerships or companies run into financial crises there are formal procedures for dealing with the situation. The procedures are different for individuals and companies; ‘bankruptcy’ for example only applies to individuals. The procedures are as follows:

**For an individual:**

- deed of arrangement whereby the debtor may agree with creditors as to how debts will be paid;
- administration order in the county court;
- voluntary arrangements whereby the insolvent debtor has an agreement with creditors, approved by a proportion of creditors, to an arrangement for repayment supervised by a qualified insolvency practitioner;
- bankruptcy as a result of creditors’ or debtors’ petition.

**For a partnership:**

- winding up the insolvent partnership as an unregistered company;
- winding up the partnership as above and petitioning for the bankruptcy of two or more insolvent partners;
- insolvency proceedings against some but not all of the partners;
For companies:

- receivership, whereby a receiver is appointed by a debenture holder (usually a bank) to take control of the assets subject to the charge; the administrative receiver may be invested with wide power to carry on the business to trade the company out of financial crises or to ‘hive the company down’;

- appointment by the court of an administrator who has similar powers to an administrative receiver; the role of the administrator is principally to trade the company out of its difficulties;

- voluntary arrangements, little used and complex arrangement;

- liquidation, which can be voluntary or compulsory; either way the liquidator is appointed to realise the assets and pay off debts.

Departmental Procedures

Upon being notified of the insolvency of a works contractor it is recommended that the following procedure should be adopted (many of the steps will be the same for any type of commission):

- arrange to have the site secured cost effectively, to prevent vandalism and unauthorised removal of any materials;

- establish the type of insolvency (since not all procedures result in the liquidation and cessation of trading by the company);

- inform the lead consultant and any other professionals involved in the project;

- consider obtaining legal advice;

- clearly record (preferably with photographs) the state of the work at the date of insolvency; and

- with the assistance of the lead consultant or an appointed QS, establish the value of works executed at the time of insolvency including all materials on and off site;

- instruct the lead consultant to negotiate with the contractor to establish whether the contractor will be able to continue with the works. If the contractor can, arrange access to the site for the main and sub-contractors;
• establish the position regarding unpaid certificates, retention, performance bonds and other contractual arrangements;

• establish the position regarding claims in title of materials on and off site. This is a very important point and must not be overlooked;

• establish a programme for completion;

• establish the estimated cost for completion;

• liaise with the insolvency practitioner, arrange meetings as appropriate;

• establish the next step and way forward, with critical dates, to achieve the satisfactory financial, contractual, chronological and physical conclusion of the project.

Options for Completion

There are essentially three options available for the completion of the project:

• novation;

• completion by the insolvent contractor; or

• completion by another contractor.

Key Points

• In situations where a contractor or consultant fails and the liquidator or receiver decides not to proceed with the contract, any case of dispute over ownership of goods resulting from the use of retention clauses should be referred immediately for legal advice.

• Any attempts by a supplier of the main contractor to remove goods should be discouraged.
**INSOLVENCY AND BANKRUPTCY**

‘Insolvency’ is a legal term which covers the financial failure of individuals and companies and their position before and after the start of a formal insolvency procedure. Insolvency may be experienced in the short term or long term. Short term insolvency usually means a cash flow crisis where insufficient money is coming in to meet the company's outgoings. Long term insolvency relates to the situation where liabilities exceed assets even though the company may be able to meet its outgoings. In accordance with the Insolvency Act 1986 if a company fails either the “going concern” test or the “balance sheet” test then it will be insolvent.

**General**

In situations where individuals, partnerships or companies run into financial crises there are formal procedures for dealing with the situation. The procedures are different for individuals and companies; ‘bankruptcy’ for example only applies to individuals. The procedures are as follows:

**For an individual or partnership:**

- deed of arrangement whereby the debtor may agree with creditors as to how debts will be paid;

- voluntary arrangements whereby the insolvent debtor has an agreement with creditors, approved by a proportion of creditors, to an arrangement for repayment supervised by a qualified insolvency practitioner;

- bankruptcy as a result of creditors’ or debtors’ petition.
For companies:

- receivership, whereby a receiver is appointed by a floating charge holder (usually a bank) to take control of the assets subject to the charge; the receiver may be invested with wide power to carry on the business to trade the company out of financial crises or to ‘hive the company down’;

- appointment by the court of an administrator who has similar powers to a receiver; the role of the administrator is principally to trade the company out of its difficulties;

- voluntary arrangements, little used and complex arrangement;

- liquidation, which can be voluntary or compulsory; either way the liquidator is appointed to realise the assets and pay off debts.

Departmental Procedures

Upon being notified of the insolvency of a works contractor it is recommended that the following procedure should be adopted (many of the steps will be the same for any type of commission):

- arrange to have the site secured cost effectively, to prevent vandalism and unauthorised removal of any materials;

- establish the type of insolvency (since not all procedures result in the liquidation and cessation of trading by the company);

- inform the lead consultant and any other professionals involved in the project;

- consider obtaining legal advice;

- clearly record (preferably with photographs) the state of the work at the date of insolvency; and

- with the assistance of the lead consultant or an appointed QS, establish the value of works executed at the time of insolvency including all materials on and off site;

- instruct the lead consultant to negotiate with the contractor to establish whether the contractor will be able to continue with the works. If the contractor can, arrange access to the site for the main and sub-contractors;
• establish the position regarding unpaid certificates, retention, performance bonds and other contractual arrangements;

• establish the position regarding claims in title of materials on and off site. This is a very important point and must not be overlooked;

• establish a programme for completion;

• establish the estimated cost for completion;

• liaise with the insolvency practitioner, arrange meetings as appropriate;

• establish the next step and way forward, with critical dates, to achieve the satisfactory financial, contractual, chronological and physical conclusion of the project.

Options for Completion

There are essentially three options available for the completion of the project:

• assignation or novation;

• completion by the insolvent contractor; or

• completion by another contractor.

Key Points

• In situations where a contractor or consultant fails and the liquidator or receiver decides not to proceed with the contract, any case of dispute over ownership of goods resulting from the use of retention clauses should be referred immediately for legal advice.

• Any attempts by a supplier of the main contractor to remove goods should be discouraged.
**RESERVATION OF TITLE**

The subject of title to materials and goods delivered to construction sites and intended for their incorporation into the *Works* is a complex area of the law. In general terms there are two sides to the problem:

- Suppliers of work and construction goods often seek to retain title in their products until they receive proper payment for them, at which time title passes. This is done by means of a retention of title clause in the conditions of supply such as that which formed the subject of the case of Aluminium Industrie Vaasen BV -v- Romalpa Aluminium Ltd. The Romalpa clause was held to be effective even though goods had been mixed in with other goods after delivery, forming other products.

- The Department does not want to be in the position of having paid the contractor or nominated sub-contractors for materials stored on or off-site if the contractor does not have title to them. If it does so and the contractor goes into liquidation then the supplier might be able to recover materials or goods for which the Department has paid, and the Department may end up paying for them twice.

It is a general common law principle that once materials (moveable property) have been permanently fixed to the heritage (immoveable or fixed property) they become part of the ground (title thus passing to the Department). Although this principle might limit the Department’s risk to only unfixed materials it may nevertheless be possible for a sub-contractor to have an effective retention of title clause which also gives the supplier a right of access to the property in the event of non-payment.

The general rule with regard to title is expressed by the legal maxim ‘nemo dat quod non habet’, which means that a party cannot pass title to another party if it does not itself have title.

Clause 30 of GC/Works 1/(1998) provides that all goods and materials intended for incorporation into the *Works* and all goods and materials necessary to facilitate their incorporation into the *Works* shall become the property of and vest in the authority. This does not make provision for situations where sub-contractors or suppliers are using retention of title clauses.
However, payments made in accordance with clause 48 (Alternative A) of GC/Works/1 (1998) are on the basis of stage payments for work completed to the satisfaction of the Project Manager. There are no specific provisions for the payment for materials on or off-site. In theory, stage payments are only in respect of workmanship and materials fixed to the site, thus protecting the Department as far as possible from retention of title clauses.

Where materials on site are to be included in an interim payment then it is recommended that the Department ensures that the contractor has good title to any such materials.

Payment for Materials Stored Off-Site

Occasionally, a Department may receive a request for advanced payment for materials stored off-site. It is recommended that such a request is resisted. The contractor already has a liability to finance off-site activities unless caused by delay on the part of the Department.

It may exceptionally be appropriate to pay for materials off-site if:

- there will be some real financial benefit to the Department, for example steel or mechanical plant may be given over to another contractor unless payment is secured in advance, thus avoiding remanufacturing delay for example;
- the contractor or sub-contractor can demonstrate good title;
- the materials are secure and protected from damage and bad weather;
- the goods are clearly marked as the property of the Department.

Note however that payment for materials must only be against a specific legal agreement. If by reason of the nature of the work carried out by a Department, payments for materials off-site are necessary then the Department should consider commissioning the redraft of these conditions to suit their specific requirements.

Key Points

- Seek advice before considering any payments for materials held off-site.
To provide additional protection in such situations, Departments generally make use of an instrument called a ‘Wharfingers Warrant’. This is a warranty signed by the contractor or sub-contractor depending on who is holding the materials, which confirms that the contractor or sub-contractor has good title to the material and that, upon payment, title of the listed materials has passed to the Department. A Wharfingers Warrant was used in conjunction with the following supplementary conditions to GC/Works 1/(Edition 2):

- 207 - vesting of goods and materials not on-site;
- 208 - advances on account including goods and materials held off-site.

These conditions have not been updated for use with GC/Works 1/(1998).

If by reason of the nature of the work carried out by a Department, payments for materials off-site are necessary then the Department should consider commissioning the redrafting of these conditions to suit their specific requirements.

**Key Points**

- Seek advice before considering any payments for materials held off-site.
LE 1.20

UNFAIR CONTRACT TERMS ACT 1977

The Unfair Contract Terms Act 1977 reduces the effectiveness of, or nullifies some contract terms and notices which seek to exclude or limit liability for negligence or breach of contract. It has no significant implications for the unamended provisions of standard conditions of contract such as, the GC/Works, JCT, ICE, forms.
LEGAL ADVICE

Responsibility for legal services to Departments in England and Wales is divided between the Treasury Solicitor and the Legal Adviser/Solicitor to the relevant Department. The Legal Adviser/Solicitor to the Department will consult with the Treasury Solicitor as necessary.

Furthermore, there are a number of public bodies who have put the provision of legal services out to the private sector following market testing and it may be necessary to obtain advice from these private sector solicitors.

Key Points

• Refer to Departmental procedures about seeking legal advice.
Except as otherwise arranged, responsibility for the provision of legal advice in Scotland rests with the Office of the Solicitor to the Scottish Executive (OSSE) for devolved functions. For reserved functions, responsibility in Scotland rests with the Office of the Solicitor to the Advocate General (OSSAG), although generally the larger OSSE will act for OSSAG on an agency basis in contract, procurement and intellectual property matters.

Where it has been arranged that OSSE (or OSSAG) do not represent a particular public body, it may be necessary to obtain advice from the solicitors acting for this body. If in doubt, check first with OSSE.

Key Points

- Refer to Departmental procedures about seeking legal advice.
The Health and Safety at Work etc. Act 1974 Part I makes provision for securing the health, safety and welfare of persons at work and for protecting others against risks to health or safety in connection with the activities of persons at work. There are various regulations and codes of practice (some of which are enforceable under the Act) covering aspects of health, safety and welfare.

The principal duties imposed by Part I of the Act are:

1. On the Employer (i.e., the contractor) to ensure, so far as is reasonably practicable the health and safety of the contractor’s employees and of other persons (i.e., supervisory officers, occupiers or visitors) who may be affected by the way the contractor conducts its undertaking. While the Authority in the contract is sometimes referred to as the employer of the contractor, its function as such is not that of an employer within the terms of the Act.

2. On a Person (i.e., agent, occupying department, contractor or sub-contractor) who has, to any extent, control of premises which are made available as place of work for persons who are not employees (e.g., sub-contractors’ employees), to take such measures as are reasonably practicable, to provide that the premises and plant (and substances) thereon are safe and without risk to the health of such persons.

On 31 March 1995 the Construction (Design and Management) Regulations 1994 (CDM regulations) were introduced, in the form of regulations and an approved code of practice. The regulations were made under section 16(1) of The Health and Safety at Work etc. Act 1974 and concern the management of health and safety on temporary or mobile construction sites. On 1 January 1996 the transitional provisions came to an end and all the regulations now apply to all qualifying projects. The CDM regulations place specific duties upon clients, designers and contractors and are designed to bring about the careful consideration and management of health and safety risks throughout the construction process from inception through to completion.
The regulations relate to the carrying out of any building, civil engineering or engineering construction work, which includes redecoration, maintenance and demolition works. (See Regulation 2 for definition of ‘construction work’).

The CDM regulations do not apply to projects being carried out for domestic clients.

The regulations will not apply to non-domestic construction work if the following conditions apply.

- the project is not notifiable to the Health and Safety Executive (HSE) (i.e. the work is expected to last less than 30 working days (Approved Code of Practice condition 27)); and
- where the largest number of persons at work at any time is less than 5.

The CDM regulations apply to construction work which involves the demolition or dismantling of a structure regardless of duration or the number of workers required.

The regulations therefore apply to the majority of construction projects.

Where the regulations apply, the Department has the following principal obligations:

- to make a declaration to the HSE that the Department or agent will act as ‘client’ for the purpose of the regulations in respect of a particular project (Regulation 4);

- to appoint a planning supervisor, (Regulation 6) who will be responsible for:
  - notifying the project to the HSE (Regulation 7),
  - developing a health and safety plan for the design and planning phase and prior to the commencement of work on site by the contractor (Regulation 15),
  - advising the Department on the satisfactory allocation or resources for health and safety (Regulation 14), and
  - preparing a health and safety file (Regulation 14);
to provide the planning supervisor with all information necessary for him to carry out the planning supervisor's duties (Regulation 11);

to appoint a principal contractor, who is responsible for developing the health and safety plan which should be the basis of the health and safety management of the construction phase (Regulation 6);

to be reasonably satisfied that the planning supervisor, designers and contractors are competent to carry out their duties (Regulation 8);

to be reasonably satisfied that the planning supervisor, designers and contractors have allocated or will allocate sufficient resources to deal with Health and Safety matters in compliance with the CDM regulations (Regulation 9);

to keep available for inspection the health and safety file once it has been prepared (Regulation 12).

Key Points

- The CDM regulations place statutory criminal and civil law obligations on Departments. These must be complied with.

- It is not necessary for the planning supervisor to be a separate professional from the designers, but arguably, benefits may derive from having a third party with a different perspective.

- In theory more practical and safer designs could result from a more active management of health and safety risks which could also benefit the client.

- Read the CDM regulations and Approved Code of Practice.
LE 2.2

TRANSFER OF UNDERTAKINGS (TUPE)

Purpose of TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 1981 as amended ('TUPE') are the regulations which brought about the implementation in the UK of the 1977 EC Acquired Rights Directive. The purpose of the Directive and therefore of TUPE is to protect employee's rights on the change of the operator of a business or undertaking. This may include the contracting out of services.

This is a difficult and developing area of law. The European Court of Justice is the main determinant as to whether the directive and therefore TUPE applies in a particular case.

Effect of TUPE Applying

Where TUPE applies then in cases where the employee's contract of employment would otherwise come to an end on termination of the employer's contract, the general principle is that employees, their terms and conditions of employment, acquired rights such as accumulated holidays, bonuses and redundancy rights are transferred from the outgoing consultant or contractor ('the transferor') to the incoming consultant or contractor ('the transferee').

Determining Whether or Not TUPE Applies

Since TUPE was introduced in 1981, case law has widened the interpretation of its provisions so as to include an increasing variety of commercial situations including:

- contracting out (outsourcing);
- replacement of a service provider.

It is not possible to give definite guidance on whether TUPE will apply to a particular situation. Application will turn on all the circumstances of a particular transaction.
The test to be applied was set out in the judgement in Spijkers -v- Gebroeders Benedik Abattoir [1986] 2 CMLR 296 in which it was stated:

“The decisive criterion for establishing whether there is a transfer within the meaning of the Directive is whether the business in question retains its identity as would be indicated, in particular, by the fact that its operation was continued or resumed.”

The factors to be assessed in satisfying the test will include:

• the type of business or undertaking concerned;
• whether or not tangible assets have been transferred and the value of such assets;
• the value of intangible assets transferred (e.g. contracts, goodwill, etc.);
• whether or not the majority of employees are taken over;
• whether or not customers are transferred;
• the degree of similarity between the pre and post transfer activities;
• the duration of any period during which those activities are suspended.

**Situations Where TUPE is Likely/Unlikely to Apply**

The following guidance has been given in relation to the outsourcing of works:

“Unlikely” to apply where:

• the new employer conducts the operation substantially differently;
• the identity of the previous undertaking is substantially changed or restructured.
‘Likely’ to apply where:

• the new employer employs substantially the same staff;

• key employees are required to carry out the work;

• the new employer takes on substantially the same employees as recognisably the same organisational unit;

• there is an understanding between the parties that the new employer will continue to use the same employees for the same work;

• in a change in the arrangements for property management and maintenance contacts.

Restrictions on the Widening Scope of TUPE

The trend to widen the scope of application of TUPE in cases interpreting its application has been reversed in the recent case of Rygaard v Stro Mølle Akustik A/S, C48/94 [1986] IRLR 51 ECJ where the European Court of Justice held:

“In order to be a transfer of an undertaking, business or part of a business within the meaning of Article 1(1) of EEC Directive 77/187, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. That is not the case where there is a transfer from one undertaking to another of building works with a view to their completion, and the transfer or undertaking merely makes available to the new contractor certain workers and material for carrying out the works in question. Such a transfer could come within the terms of the Directive only if it included the transfer of a body of assets enabling activities of the transferor undertaking to be carried on in a stable way.”

The Court in this instance did not consider that the transfer created the necessary stability.

It is perhaps too early to say whether the Rygaard case represents a permanent reversal of the widening trend.
The Practical Effect of TUPE for Departments

The consequences of TUPE applying are not likely to directly affect the Department requiring performance of the service, since TUPE provides that responsibilities and obligations in respect of employees are either owed by the “transferor” (the outgoing consultant or contractor) or the “transferee” (the incoming contractor).

TUPE is, however, likely to indirectly affect Departments in the following areas:

• consideration of what reference if any should be made to the application or otherwise of TUPE when inviting tenders; it may be appropriate merely to include a notice in the tender document warning potential bidders of the possible application of TUPE and advising tenderers that they should seek their own legal advice;

• the Department as client should take steps to ensure that existing contractors co-operate in the provision of information in relation to their employees so that prospective bidders will not be discouraged for lack of information concerning the extent of any TUPE liability; consideration should also be given to ensuring that any new contractor is obliged to co-operate and supply information towards the end of its contract;

• as a result of Regulations which came into force on 1 March 1996, consultation must take place with trade unions or elected representatives of the affected employees.

Key Points

• The matter of TUPE is a complex subject and each case must be treated on its merits. It is essential that legal advice is obtained before final action is taken in every case.
LE 2.3

RACIAL DISCRIMINATION

There is no direct legislation imposing upon Departments a duty to stipulate compliance by contractors and suppliers with the provisions of the Race Relations Act 1976.

The standard conditions of Government forms of contract do, however, contain conditions requiring that the contractor or supplier shall not “unlawfully discriminate within the meaning and scope of the provisions of the Race Relations Act 1976 or any statutory modification or re-enactment of it”. See for example clause 23 of GC/Works 1/(1998).

Government contracts were amended to incorporate this provision as a result of a written answer given in parliament by Mr Roy Jenkins on 22 October 1969 which reflected consideration of how Government influence as a major purchaser of goods and services could best be used in the interests of discouraging racial discrimination.

When inviting tenders specific departmental procedures should be consulted for selection criteria to be requested concerning findings of unlawful discrimination.

It is worthwhile noting that the Race Relations Act 1976 does not apply to Northern Ireland.
FAIR EMPLOYMENT (NORTHERN IRELAND) ACTS

As a result of the provisions of the Fair Employment (Northern Ireland) Acts of 1976 and 1989, Departments and public authorities are prohibited from entering into contracts with companies or partnerships operating in Northern Ireland who have been notified as ‘disqualified’ by virtue of default under the Act.

Where a contract has already been entered into, the Department shall take all such steps as are reasonable upon notification to secure that no work is executed or goods or services supplied for the purposes of the contract.

An aggrieved party claiming that a contravention by a Department in placing or continuing with such a contract has occurred will have recourse to the courts, asking them to require the Department to comply with the prohibition.

The scheme of the Fair Employment Acts is to ensure balance in employment trends and to encourage equal opportunity by requiring employers in Northern Ireland to monitor and review the composition of their workforces. The 1989 Act created the Fair Employment Commission for Northern Ireland and the Fair Employment Tribunal for Northern Ireland to monitor compliance and administer sanctions for non-compliance.

The sanction available to the Commission whereby notice is served on an employer stating that the employer is not qualified to enter into public works contracts along with the unwelcome publicity that it attracts, is a powerful way of endeavouring to ensure compliance.

The Act applies to any contract, whether or not:

• it is governed by the law of Northern Ireland; or

• the contract is to be procured by competitive tender or other means.

The Act is drafted to allow the Commission to serve notices on subsidiaries or connected people, thereby preventing an employer on whom notice has been served from benefiting from public contracts indirectly through those subsidiaries or connected people.
The prohibition on entering into contracts with unqualified persons does not apply in situations where the Secretary of State, the Scottish Ministers, the Department, or the relevant Northern Ireland department has certified in writing that the fulfilment of the contract is necessary or desirable for reasons of:

- national security;
- public interest;
- disproportionate expense.

In view of the above, it is therefore necessary for Departments when seeking to procure contracts from contractors or suppliers operating from, or with a connection to, Northern Ireland to check for relevant notifications from the Fair Employment Commission for Northern Ireland.

Departments will generally be advised of unqualified employers by the Fair Employment Commission. A list of unqualified employers will also be published on the first days of February, May, August and November in the Belfast Gazette, The Belfast Telegraph, the News Letter and the Irish News.
Definitions

Definitions of the various terms are:

i) **Intellectual Property** - is the term which should be taken to include patents, registered and unregistered designs, copyrights, trade marks and analogous rights such as plant breeders’ rights. The owner of intellectual property possess a proprietary right in the object, design or work which can be asserted against third parties.

ii) **‘Letters Patent’** are granted by the Patent Office to the patentee to prevent others from manufacturing, using, exercising or vending the invention which is the subject of the patent. ‘Invention’ here means broadly a new manner of manufacture and includes new methods of processing or testing applicable to the improvement or control of manufacture. The patentee is able at their discretion to grant a licence to others to exploit the invention commercially on terms acceptable to him, and the very act of granting a patent gives publicity to the invention.

iii) **A Registered Design** differs from a patent in that its subject must not be an invention but a ‘design’ defined as ‘features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which are judged solely by the eye but excluding a method or principle of construction of features of shape or configuration dictated solely by its function’.

Registration of a design gives the owners the exclusive rights in the UK to make or import for sale or use for the purpose of any trade or business, or to sell, hire or offer for sale or hire any article of which the design is registered. Registration is administered by the Patent Office.
iv) 'Copyright' describes the protection granted to literary, artistic, dramatic and musical works (including drawings and photographs and in certain circumstances models and samples), sound recordings, films and broadcasts. No application, registration or grant is necessary to establish copyright whether the work is published or not. The right conferred is to prevent copying as distinct from the right conferred by the registration of an industrial design which is to prevent the production of a similar article whether by copying or not.

A Design Right subsists in an original design comprising any aspect of the scope or configuration of the whole or part of an article, whether or not it has 'eye appeal'. It needs to be recorded as a 'design document' but is not subject to registration. It has similarity with copyright but copyright will take precedence over design right when both may subsist in a document.

v) Crown copyright is vested in the Controller of HMSO and applies to published or unpublished material produced under the control or direction of a Department or public authority.

vi) Royalties are paid to the owners of patents, designs or copyrights by those wishing to make use of them. They may be charged a flat rate, or on a sliding scale with reduction beyond a certain initial quantity or a lump sum irrespective of the extent of use.

**Protection of Copyright by Departments**

All drawings/sketches or original design should be dated at the time of drafting and copies retained.

In any event drawings or sketches, of which the copyright is owned by the Crown by virtue of original design or of contractual right, should have the following words printed or stamped on them before issue to a contractor or outside body:

“(C) CROWN COPYRIGHT (date of production of drawing e.g., 14.10.96) SUPPLIED STRICTLY IN CONFIDENCE TO RECIPIENT ONLY FOR (Name of Department) WORKS CONTRACT PURPOSES. THIS DRAWING SHOULD NOT BE REPRODUCED OR DISCLOSED TO THIRD PARTIES WITHOUT WRITTEN AUTHORITY FROM (Name of Department)”.
The endorsement of the drawings does not confer any protection in itself. It draws attention to the fact that copyright subsists in the drawings and that action could be taken against anyone who copies them without permission. Copyright is inherent in the work and is not registrable in the UK. Its protection is limited to actual copying and would not apply in the case of independent production of the same work.

Evidence of the date of production of the drawing or sketch or part of same is important on refuting any third party claims in respect of identical designs.

**Crown Use of Processes or Designs Owned by Contractors or Individuals**

The Patents Acts and the Registered Design Act give the Government Department or authorised contractors the right to use any patents or registered designs for the services of the Crown and to negotiate royalties before or after use. Exercise of this right is strictly for the services of the Crown and cannot be extended to bodies other than the Exchequer departments listed by the Treasury.

The Crown is liable to an action for infringement of copyright and has no statutory rights to copy and use for Government purposes drawings or documentary material belonging to others, the law on copyright being thus quite different from that on patents or registered designs. It follows that any rights to make use of drawings or documents are restricted to those acquired by a Department by contract or agreement. Any unauthorised use of such drawings may give rise to legal action against a Department.

Drawings or design, etc., owned by one firm should not normally be copied and given or shown to another firm or company for tendering or contract purposes. Contravention could result in action being taken against a Department for infringement and misuse of confidential information. Where it is considered essential, permission from the firm or company owning the design should be obtained.

Information such as drawings, specifications, reports and manufacturing data proprietary to a person or firm which is supplied to a Department without a contract is regarded as being supplied in confidence. To use such information for a purpose other than that for which it was supplied is an infringement of the owner's rights and any such use must have the owner's written consent. Such considerations also apply to similar information supplied by foreign or Commonwealth Governments.
Protection of Designs and Processes by Use of Standard Contract Supplementary Conditions

Departments may wish to consider the use of standard supplementary conditions in order to reinforce preservation of rights in inventions, processes or designs.
Definitions

Definitions of the various terms are:

i) **Intellectual Property** - is the generic term which should be taken to include patents, registered and unregistered designs, copyrights, trade marks and analogous rights such as plant breeders’ rights. The owner of intellectual property rights has exclusive rights as to certain acts which that owner can do, or authorise others to do, in relation to such objects, design or work. These rights can be asserted against third parties. Given that intellectual property rights are simply property rights, the owner can also do with them as he or she chooses, including exploiting that ownership by either (a) licensing another person to carry out certain activities in relation to those objects, designs or works, or (b) assigning, i.e. transferring ownership of all or part of the rights, e.g. the copyright.

ii) **‘Letters Patent’** are granted by the Patent Office to the patentee to prevent others from manufacturing, using, exercising or vending the invention which is the subject of the patent. ‘Invention’ here means broadly a new manner of manufacture and includes new methods of processing or testing applicable to the improvement or control of manufacture. The patentee is able at their discretion to grant a licence to others to exploit the invention commercially on terms acceptable to him, and the very act of granting a patent gives publicity to the invention.

iii) **A Registered Design** differs from a patent in that its subject must not be an invention but a ‘design’ defined as 'features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which are judged solely by the eye but excluding a method or principle of construction of features of shape or configuration dictated solely by its function'. Registration of a design gives the owners 'the exclusive rights in the UK to make or import for sale or use for the purpose of any trade or business, or to sell, hire or offer for sale or hire' any article of which the design is registered. Registration is administered by the Patent Office.
iv) 'Copyright' describes the protection granted to literary, artistic, dramatic and musical works (including drawings and photographs, computer programs and databases, and in certain circumstances models and samples), sound recordings, films and broadcasts. No application, registration or grant is necessary to establish copyright whether the work is published or not. The right conferred is to prevent copying as distinct from the right conferred by the registration of an industrial design which is to prevent the production of a similar article whether by copying or not.

A Design Right subsists in an original design comprising any aspect of the scope or configuration of the whole or part of an article, whether or not it has 'eye appeal'. It needs to be recorded as a 'design document' but is not subject to registration. It has similarity with copyright but copyright will take precedence over design right when both may subsist in a document.

v) **Crown copyright** was traditionally vested in the Controller of HMSO and applies to published or unpublished material produced under the control or direction of a Department or public authority. In Scotland, however, since 1 July 1999, the Queen's Printer for Scotland has been established to act on behalf of Her Majesty in connection with, amongst other things, Crown copyright in works made by Scottish Administration staff or copyright assigned to the Crown in works made in connection with the exercise of the functions of such staff. Copyright in work created by staff of the Scottish Administration (ie Scottish civil servants) will still therefore vest in the Crown, only its controller having changed.

vi) **Royalties** are paid to the owners of patents, designs or copyrights by those wishing to make use of them. They may be charged a flat rate, or on a sliding scale with reduction beyond a certain initial quantity or a lump sum irrespective of the extent of use.

**Protection of Copyright by Departments**

All drawings/sketches or original design should be dated at the time of drafting and copies retained.
In any event drawings or sketches, of which the copyright is owned by the Crown by virtue of original design or of contractual right, should have the following words printed or stamped on them before issue to a contractor or outside body:

“(C) CROWN COPYRIGHT (date of production of drawing e.g., 14.10.96) SUPPLIED STRICTLY IN CONFIDENCE TO RECIPIENT ONLY FOR (Name of Department) WORKS CONTRACT PURPOSES. THIS DRAWING SHOULD NOT BE REPRODUCED OR DISCLOSED TO THIRD PARTIES WITHOUT WRITTEN AUTHORITY FROM (Name of Department)”.

The endorsement of the drawings does not confer any protection in itself. It draws attention to the fact that copyright subsists in the drawings and that action could be taken against anyone who copies them without permission. Copyright is inherent in the work by virtue of statute and is not registrable in the UK. Its protection is limited to certain stipulated restricted acts, including actual copying and would not apply in the case of independent production of the same work.

Evidence of the date of production on the face of the drawing or sketch or part of same is important on refuting any third party claims in respect of identical designs.

**Crown Use of Processes or Designs Owned by Contractors or Individuals**

The Patents Acts and the Registered Design Act give the Government Department or authorised contractors the right to use any patents or registered designs for the services of the Crown and to negotiate royalties before or after use. Exercise of this right is strictly for the services of the Crown and cannot be extended to bodies other than the Exchequer departments listed by the Treasury.

The Crown is liable to an action for infringement of copyright and has no statutory rights to copy and use for Government purposes drawings or documentary material belonging to others, the law on copyright being thus quite different from that on patents or registered designs. It follows that any rights to make use of drawings or documents are restricted to those acquired by a Department by contract or agreement. Any unauthorised use of such drawings may give rise to legal action against a Department.
It is important therefore to ensure that intellectual property rights are dealt with properly in the contract conditions, generally in the supplementary or 'special' conditions to the standard building conditions. Note too that if commissioning work, e.g., a design from a consultant, the creator of the work will still have copyright in it unless the Department provides otherwise. This is often not appreciated.

Drawings or design, etc., owned by one firm should not normally be copied and given or shown to another firm or company for tendering or contract purposes. Contravention could result in action being taken against a Department for infringement and misuse of confidential information. Where it is considered essential, permission from the firm or company owning the design should be obtained.

Information such as drawings, specifications, reports and manufacturing data proprietary to a person or firm which is supplied to a Department without a contract is regarded as being supplied in confidence. To use such information for a purpose other than that for which it was supplied is an infringement of the owner's rights and any such use must have the owner's written consent. Such considerations also apply to similar information supplied by foreign or Commonwealth Governments.

**Protection of Designs and Processes by Use of Standard Contract Supplementary Conditions**

The standard contract conditions do not deal sufficiently with protection of intellectual property rights as they are obviously drafted for broad-based use and cannot therefore cover every contractual situation. Departments may therefore wish to consider the use of standard supplementary conditions in order to reinforce preservation of rights in inventions, processes or designs. Legal advice should be sought for assistance in drawing up suitable supplementary conditions.
PROPRIETARY COMPONENTS/ARTICLES

It is contrary to the requirements of the Procurement Regulations and to good procurement practice to limit by specification the supply of goods to those of a particular named manufacturer or supplier where this can be avoided, as this denies alternative suppliers the opportunity to tender and restricts competition.

Wherever possible specifications should be performance based rather than relying on prescription in terms of chemical/material composition and build. As a consequence, each selected supplier will be able to offer a trade pattern range of product which meets the particular performance parameters.

Where it is impracticable to provide descriptions which are sufficiently precise and intelligible by reference to objective standards, the use of proprietary names is permitted to make the description precise and intelligible. However the EC Directives state that the description containing the proprietary name should be qualified by adding the words 'or equivalent' (no variation from this wording is permissible).

Departments using outside agents to prepare works specifications may need to impose suitable constraints on the specification of proprietary articles, which is common practice in the private sector. Such agents should be advised to use the words 'or equivalent' even when the use of proprietary articles is agreed or in case other suppliers subsequently become available or in case other suppliers have to be used in the event of the specified proprietary product(s) ceasing to be available.

Where the purchase of proprietary components/articles is unavoidable Departments will need to check that the price tendered is fair and reasonable and not less favourable to the Department than trade prices for similar products.

In cases where difficulty is likely in establishing the reasonableness of the prices e.g., the trade list price is not known, or the trade price of a comparable product cannot be established, or where adequate guidance is not provided by the experience of previous purchases, Departments should consider including as a supplement to the price schedule for signature by the tenderer a declaration to the effect that the prices quoted to the Department are equal to or more favourable than prices which are available to the trade.
LE 2.7

**FIRM PRICE AND VARIATION OF PRICE**

Firm price and variation of price (VOP) are terms which describe the allocation of the risk of construction cost inflation to one or other of the parties to works or maintenance contracts as follows:

- **Firm price** - means a contract where the contractor has to price for the risk of construction cost inflation in advance of the cost being incurred; effectively this is a contractor's risk item for which the Department pays a premium;
- **VOP** - means a contract where the contractor does not have to price for future inflation and the Department pays the actual additional costs if they materialise.

The standard forms of contract are drafted on the premise that the contractor will tender a firm price, and supplementary conditions must be incorporated if a VOP agreement is required. VOP agreements do not generally apply to the appointment of consultants.

The decision as to whether or not to transfer inflation risk is a matter for early risk management and the formulation of the contract strategy. The decision will depend on:

- current economic conditions;
- duration of contract;
- projected economic conditions;
- value of contract.

One of the advantages of a firm price contract is that the inflation risk is secured under the pressure of competition. In addition it is more expensive to administer a VOP contract.

As a general guide, it is recommended that Departments enter into firm price contracts for contracts of 2 years or less where the work is considered to be sufficiently defined to enable tenderers reasonably to assess cost increases during the contract.

In stable economic conditions in which price rises are reasonably predictable it is appropriate to consider firm price contracts for 3 years, this being the period recommended for term commissions referred to in the Guide.
Note that the GC/Works (1999) measured term contracts are based on a schedule of rates to which a VOP updating percentage is applied. There is no period during which the price is firm.

An imprecise aspect of firm price tendering from the contractor’s viewpoint is the period of time between submission of the offer and the point when the contractor commences work on site. During the part of that period prior to acceptance of the offer, the contractor may withdraw or propose amendments to the offer and, therefore, control, to a certain extent, the extent to which the risk continues. However, after acceptance the contractor is bound by its offer. To assist tendering contractors to assess the period of time between acceptance and commencement of work, invitations to tender for firm price contracts which do not otherwise specify the date when commencement of work is expected should contain a footnote in the following form: “tenderers should note that it is expected that a period of ... weeks will elapse between the date of acceptance and the date when possession of the site or the order to commence will be given”.

Immediately prior to acceptance the date for the possession of site or the order to commence should be checked and confirmed. If confirmation is not available, acceptance should be delayed until the period can be honoured.

It is unwise for a single work service to be divided to enable each part to be dealt with as a firm price contract as the overall cost of the service could well be increased by such action. The possibility of grouping jobs to obtain better prices should, however, always be borne in mind.

**VOP Conditions**

The scope of VOP is not a fixed quantity but depends on the particular words of the VOP condition used. There are various standard methods and formulae available. For JCT forms, for example, three basic methods exist:

- a minimum provision which covers contribution, levy and tax fluctuations;
- a labour, materials and tax fluctuation provision covering fluctuating costs on work terms in full, but ignoring preliminaries;
- a full fluctuation provision based on a monthly index figure but allowing for part of the contract sum to be “non-adjustable” (usually 10%).
VOP provisions, and mechanisms, are complex and are best administered by professional staff or consultants, but a general understanding of how they work is useful for all staff involved in significant contract decisions. The general approach to the valuation of VOP is on a formula basis using indices.

The object of Formula VOP is to compensate the contractor reasonably for cost increases (and the Department for cost decreases) and to reduce delays in payment associated with "actual cost" VOP and the labour in producing and checking an "actual cost" VOP claim. Formula reimbursement results from changes in the indices as from the base index defined in the contract documents, irrespective of the actual cost (or savings) incurred by the contractor or sub-contractor.

Price fluctuations under Formula VOP are assessed by use of the indices as follows:

- The formula for building work uses indices covering labour, materials and plant for similar or associated items of work;
- The formula for specialist M&E Engineering work uses separate indices for labour and materials, the respective weightings of which must be prescribed by the tender documents;
- The formula for civil engineering works uses indices relating to the cost of labour, plant and nine basic materials including fuel, plant and structural steel.

The concept of the "Base Month" is important to the condition. The "Base Month" is the calendar month stated in the tender documents, the index numbers of which are deemed to equate to the price levels represented by the rates and prices contained in the tender. Under normal circumstances the "Base Month" will be the calendar month prior to that in which the tender is due to be returned. For example, a tender returnable in July will quote June as the "Base Month".

Exceptionally, it may be necessary to call for a quotation during the currency of the contract for work which cannot be priced from the tender because it is of different character from work described therein. If the contract still has a long period to run and the work will take some time to complete, it may be unreasonable to insist on a firm price quotation. In this case it may be convenient to set a new "Base Month" for the variation concerned so that any work performed under it can be subject to separate price adjustment calculated from the "agreed" "Base Month".
References

There are a number of publications which are available for Departments or their advisers in securing and valuing VOP contracts:

• Schedules of Rates

There are a number of schedules of rates intended for use by Departments in inviting tenders for small works and maintenance contracts. These can be obtained from HMSO (0171 873 9090) and are as follows:

- ...Mechanical Works (1990)
- ...Electrical Works (1990)
- ...Painting and Decorating (1991)
- ...Landscape Management (1991)

These are extensive schedules of rates used either to estimate the cost of work or to invite tenders from contractors who essentially tender a percentage uplift or discount on these rates.

• VOP Indices for Maintenance Contracts

The VOP indices for adjustment of the above schedules are published in a monthly bulletin called 'Adjustment for Measured Term Contracts - UPDATING PERCENTAGES'. This is available for an annual subscription of £50 or for £5 per copy from:

Construction Research Communications Ltd
151 Rosebury Avenue
London
EC1R 4Q X
Tel: 0171 505 6622

This publication includes:

- maintenance cost indices for building and civil engineering and MQE maintenance;
- daywork indices;
- other indices.
• VO P Indices for Works Contracts

The VO P indices for the adjustment of Government Works contracts (historically known as NEDO indices) are published in a monthly bulletin called “Price Adjustment Formula for Construction Contracts : Monthly Bulletin of Indices”. This is available for an annual subscription of £96 or for £9.75 per copy, and can be obtained from HMSO. This includes both the Series II and Series III indices, the latter having a base year of 1990 with extended work categories.

An extensive Guide on the application of these indices is available for £40 from HMSO. This is called ‘Price Adjustment Formula for Construction Contracts : Users Guide, 1990 Series of Indices’. 
LIQUIDATED AND ASCERTAINED DAMAGES

Damages are said to be 'liquidated' when the amount to which one party is entitled in the event of breach of contract by the other is predetermined and defined in the contract itself.

Liquidated damages are usually, but need not be limited to, damages agreed in respect of culpable delay on the part of the contractor. Liquidated damages must be a genuine pre-estimate of the extra costs likely to be incurred by the Department, generally in the event of delay, e.g. rent and extra running costs that might be incurred whilst occupation of the works is prevented. Provided the damages are a genuine pre-estimate then they will be valid even though the actual loss in the event may be greater or less.

If damages cannot be shown to be a genuine pre-estimate then a contractor may be successful in arguing that the damages are a penalty and therefore unenforceable.

This does not however prevent the Department from claiming unliquidated damages, i.e. the actual loss it incurs as a result of delay. This may involve legal action and its attendant costs, and may negate the whole point of liquidating the damages in the first place.

Historically Government policy was to include a provision for the recovery of liquidated damages for larger works contracts of £150,000 or more. Some cases, however, may arise where it is considered desirable to provide for liquidated damages in a contract which is smaller in value but of sufficient importance to warrant safeguards against delay in completion e.g., where the completion affects the progress of a larger or more important contract.
Key Points

• Liquidated and ascertained damages are a contractual remedy usually for culpable delay by the contractor.

• The level of damages must be a genuine pre-estimate of the loss.

• Keep records of the calculation of the pre-estimate of loss.

• The Department is not legally entitled to deduct liquidated damages if the extension of time provisions have not been properly exercised; in particular if the Department has failed to ensure that further time has been granted to the contractor for causes which are the responsibility of the Department.

• The Department may choose not to deduct liquidated damages immediately the contractor begins the period of culpable delay. In this situation the Department should always reserve its right to do so in the future, since such damages may be used as a bargaining chip to counter a claim from the contractor. Seek advice on this point.
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If damages cannot be shown to be a genuine pre-estimate then a contractor may be successful in arguing that the damages are a penalty (i.e. a sum intended to punish the other party) and therefore unenforceable by the courts.

This does not however prevent the Department from claiming unliquidated damages, i.e. the actual loss it incurs as a result of delay. This may involve legal action and its attendant costs, and may negate the whole point of liquidating the damages in the first place.

On some contracts it may be impossible to estimate the LADs. Note, however, that merely inserting the word “nil” in the contract has the effect of preventing any claim for damages, both liquidated damages under the contract and general damages at common law. If, therefore, liquidated damages are not to be appropriate, the Department should delete that clause or write “not applicable” against it, inserting an alternative clause stating that “the employer reserves the right to claim general damages for delay”.

LE 2.8(SCOT) LIQUIDATED AND ASCERTAINED DAMAGES

GACC EDITION 2 REV 2: JAN 2000 LE 2.8.1(S)
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- The level of damages must be a genuine pre-estimate of the loss.
- Keep records of the calculation of the pre-estimate of loss.
- The Department is not legally entitled to deduct liquidated damages if the extension of time provisions have not been properly exercised; in particular if the Department has failed to ensure that further time has been granted to the contractor for causes which are the responsibility of the Department.
- The Department may choose not to deduct liquidated damages immediately the contractor begins the period of culpable delay. In this situation the Department should always reserve its right to do so in the future, since such damages may be used as a bargaining chip to counter a claim from the contractor. Seek advice on this point.
THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

Part II of the Act lays down a framework for key terms in construction contracts to deal with payment and resolution of disputes and stems from the recommendations of Sir Michael Latham in his 1994 report ‘Constructing the Team’. In the case of the GC/Works suite of contracts, the requirements of the Act have been met by the publication of new documents or amendments circulated by PACE. The guidance note to the GC/Works volumes (published as ‘Commentaries’) contains a full discussion on the practical implications of the adjudication and payment procedures affected by the Act.

Summary of the Act’s Provisions

The essential provisions of Part II of the Act are:

• A ‘construction contract’ is defined as an agreement in writing, or evidenced in writing, for carrying out or arranging for the carrying out of construction operations. It includes, specifically, agreements for architectural, design, surveying, engineering or other professional services in relation to such operations. The Act applies to England, Wales and Scotland (separate action will be needed for Northern Ireland). The Act does not set a minimum project value.

• ‘Construction operations’ are defined to cover most forms of non-domestic construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, civil/mechanical and electrical engineering works, and ancillary or preparatory works. Specific exclusions include oil drilling work, power generation, plant supply contracts (without installation) and artistic works.

• Parties have a right to refer any dispute to adjudication. The timetable must enable referral within 7 days and a decision within a further 28 (which can be extended by agreement). Adjudicators must be impartial and be able to take the initiative in ascertaining facts and the law. The adjudicator will be immune from legal proceedings (other than in cases of fraud or bad faith) and his decision will bind the parties until any further arbitral or legal proceedings are concluded. The parties may however accept the adjudication as final if they wish.
• Payment clauses must contain a clear mechanism for determining the amount and timing of payments, with interim payments a matter of right for contracts over 45 days duration, and a clear ‘final date for payment’ specified for each payment. The payer must give notice, not later than a prescribed period before the final date for payment, of his intention to withhold payment, specifying the amount to be withheld and the grounds for withholding. The parties may agree the period to be prescribed in the contract. The payer must also give notice, not more than 5 days after a sum is due, specifying how much he has paid or intends to pay and the basis of the calculation. Parties may suspend performance of the contract if sums due are not paid without any prior notice of intention to withhold payment having been duly given. Pay-when-paid clauses, by which payment may be withheld down the contractual chain until receipt of payment from a third party, are made ineffective unless the third party is insolvent.

• Any contract that fails to meet the requirements of the Act will be overridden by the **Statutory Scheme For Construction Contracts**, which will automatically imply appropriate provisions into the contract that either party will be entitled to rely on.

**Practical Implications of the Act**

**Relationship to arbitration etc**

• Although adjudication is not a new concept the Act will represent a new approach for most forms of contract. An important point is that the adjudication procedure is laid down in the contract. This contrasts with arbitration which is a separate process with the procedure largely laid down in statute. The Latham Report envisaged adjudication as a quick-fix, allowing the work to proceed without festering disputes. If the adjudicator concludes that either party needs to provide additional money or resources as part of the settlement then this should be done, albeit without necessarily committing either side to accept the decision in the longer term. But subsequent events will have to unfold within the context set by the adjudication, and the contract may, as in the GC forms, expressly bar arbitration, whether directly or following an adjudication until after certified completion of the work. If new evidence or circumstances arose after an adjudication suggesting that the decision was mistaken eg as regards a dispute about quality, then if the parties could not agree a different settlement it would require a new adjudication.
Scope of Adjudication

- This must cover any difference of opinion about any decision taken by either party, or by a representative such as the architect, project manager or engineer. No substantial contractual restraint can now be placed on the referral of any dispute to an independent and impartial adjudicator. However contracts may specify only money remedies for those areas of dispute which cannot realistically be reopened by an adjudicator, such as determination or security decisions.

Adjudication mechanics

- The very tight statutory timescales make it likely that in most cases adjudicators will need to be appointed before a contract is awarded. Fall-back provisions will be needed to settle how a fresh adjudicator might be appointed should this be unavoidable. To allow adjudicators to take independent expert advice the terms of appointment will need to deal expressly with the point, and what steps are expected of the adjudicator if any dispute is so large, complex or unusual that he feels unable to deal with it in the limited time envisaged. The adjudicator must however actually resolve the dispute, and not seek to shelve it by placing a disputed sum with a stakeholder or propose a nominal split-the-difference solution, since these steps would not amount to a genuine decision.

Adjudication cost

- The most appropriate arrangement is likely to be a 50/50 split on fees and for each side to bear their own costs. The adjudicator could be empowered to rule on cost and fee liability as between the parties within his decisions on particular disputes (a possible deterrent to tactical and mischievous calls for adjudication). A standing fee or retainer for the pre-appointed adjudicator is likely to be warranted only in exceptional cases.

Adjudicator commonality

- To enable consolidation of related disputes across the whole project it may be appropriate for the main contract to specify that the subcontract terms should name the main contractor adjudicator as also acting in subcontract disputes.
Payment periods

• Parties will be free to agree the amounts of interim payments and the intervals, if any, that may become due. However the contract terms will need to be precise as to periods both for certification of advances on account and payment following certification.

Set-off from sums due

The Act imposes a broad framework covering all withholding of payment. Set-off will only be effective after notice has been given of the amount and reasons for withholding money. The contract can state what the period of notice should be. The Act will not alter the general law on rights to set-off payments on one contract against monies due on another; this is expressly allowed under the GC forms of contract.

Key Points

• The Act is not retrospective and will therefore not apply before the Statutory Scheme for Construction Contracts comes into effect.

• All construction contracts as defined by the Act are covered by its provisions.

• The Act cannot be ‘contracted-out’; forms of contract which are not amended to take account of the Act will be subject to the requirements of the Scheme for Construction Contracts.
THE SCHEME FOR CONSTRUCTION CONTRACTS (SCOTLAND) REGULATIONS 1998

In Scotland, the characteristics and features of the systems of dispute resolution are different from those in England and Wales. The Scottish tradition has been to rely more on contractual or conventional arrangements than on arrangements regulated by statute. The Act therefore contains provisions enabling a separate Scheme for Construction Contracts to take account of Scottish law, practice and procedure and apply to construction contracts in Scotland. Accordingly, the Scheme for Construction Contracts (Scotland) Regulations 1998 were introduced.

The purpose of the statutory Scheme is to remedy deficiencies in construction contracts relating to adjudication (section 108(5) of the Act) and payment (sections 109(3), 110(3), 111(3) and 113(6)). Where any of the Scheme's provisions apply they shall have effect as implied terms of contract between the parties, thus operating as contractual provisions constituting obligations under the contract:

- for adjudication, unless a construction contract contains adjudication provisions which satisfy all the requirements of section 108(1)-(4), then Part 1 of the Scheme shall apply in its entirety
- for payment the situation is different. Where a construction contract does not meet the individual requirements of the payment provisions in the Act then only the relevant provisions of Part 2 of the Scheme shall apply.

The Scheme's provisions are free-standing and were drafted to operate across a broad range of types of construction contracts. It is felt by many, including some of the Institutes, that it may therefore not meet the detailed requirements of the parties to any particular contract. For example, for adjudication, the Scheme makes adjudication of any dispute available to any party to the contract at any time. The Act, on the other hand, allows parties a considerable degree of discretion and flexibility in their contractual arrangements.

Consequently, where parties to a contract do not wish that the Scheme be imposed on that contract, they must ensure that in drafting the contract they meet the requirements of the Act. Alternatively, some Institutes, such as ICE, have developed their own alternative scheme intended to meet the requirements of the Act but avoid some of the difficulties which they perceive as inherent in the Government Scheme.
Key Point

• If the conditions of any particular construction contract do not comply with the requirements of the Act, then the provisions of the Scheme will apply to that contract.
THE ARBITRATION ACT 1996

The 1996 Arbitration Act is a technical and procedural measure which reflects the recommendations of the Department of Trade and Industry’s Departmental Advisory Committee on Arbitration Law which concluded that the 1950, 1975 and 1979 Arbitration Acts required consolidation and reform so as to:

- incorporate principles established by common law
- give greater party autonomy
- make clearer the supportive role of the courts
- use a more friendly format and language.

The provisions of the new Act are quite separate from the mandatory adjudication procedures introduced into construction contracts by Part II of the Housing Grants, Construction and Regeneration Act 1996. The relationship between adjudication and arbitration for the settlement of disputes must be fixed by individual contracts.

Relevance to Construction Contracts Disputes

Building contract disputes, especially on major projects, tend to involve many different parties and therefore sometimes require consolidation and coordination in a way that is normal within the litigation process. Under the previous law the courts were able to apply discretion when considering applications for a stay of legal proceedings even though a valid arbitration agreement was in existence. Under the new Act the court will no longer have this discretion and must uphold the arbitration agreement unless it is ‘null and void, inoperative or incapable of being performed’.

The 1998 editions of the GC/Works contracts have enhanced arbitration clauses which take account of the requirements of the Act. These ensure that multi-party disputes can, where necessary, be properly coordinated across a range of different contracts applying to a project, without relying on the courts.

Key Points

- The new Act is not retrospective and only applies to arbitrations which commenced on or after 31 January 1997 even if the basic contract and arbitration agreement was entered into before that date.
Unlike England, the rules governing arbitration in Scotland are based almost wholly on the common law (ie case law). The Arbitration (Scotland) Act 1894 did, however, give courts power to appoint arbiters should the parties in certain circumstances fail to agree an arbiter. More recently statute has provided that arbiters may, on the application of one of the parties, and must if directed by the Court of Session, state a case for the opinion of the Court of Session on any question of law (ie not fact) which arises in the arbitration.

Note that the Arbitration Act 1996 only applies to Scotland in so far as consumer arbitration agreements are concerned.
**CONSTRUCTION INDUSTRY TAX SCHEME**

**The Scheme**

The Construction Industry Tax Scheme was introduced in 1971 to counter tax evasion by ‘the lump’. The Scheme was revised in 1999 and from 1 August 1999 Government Departments are deemed to be ‘Contractors’. Inland Revenue requires ‘contractors’ to make a deduction on account of tax from all the labour elements of payments to construction sub-contractors unless an exemption certificate is produced. The ‘contractor’ is also required to make a monthly return to the Inland Revenue of payments to sub-contractors under each contract. These returns also record the certificate number. At the end of each tax year there is a requirement to make a consolidated annual return to the Inland Revenue covering each sub-contractor individually. Payments cannot be made gross to an unregistered sub-contractor in respect of construction work. In these cases not only tax but National Insurance deductions must also be made. These deductions must be remitted to Inland Revenue.

**The requirement on Government Departments**

From 1 August 1999 Government Departments and Agencies are treated as ‘contractors’ under the Scheme. This embraces any role in the direct commissioning of construction works and also where an agent acts on behalf of a Department. The authority is required to make a deduction in respect of tax unless the contractor has an exemption certificate. Also, there is a requirement to make monthly and annual returns to the Inland Revenue of all payments to sub-contractors using the Inland Revenue prescribed forms.

**Contractors’ registration**

A primary requirement before placing any contract is to find out whether contractors hold a current registration card (CIS4) or a tax certificate (CIS5 or CIS6). The Department must ask to see the subcontractor’s certificate or registration documents and then record its number and expiry date on the relevant contract file. If there is any doubt about the validity of the documentation presented the subcontractor initially should be regarded as being a non-certificate holder and the case papers referred to Inland Revenue for evaluation/adjudication.
Any sub-contractor holding a Registration Card is only entitled to payment net (that is, with the Department deducting an element for tax and national insurance contributions). The Department is responsible for passing these deductions direct to Inland Revenue at the same time giving the sub-contractors a copy of the Tax Payment Voucher (CIS25) each month for their records. Sub-contractors who are holders of Tax Certificates (CIS5 and CIS6) are entitled to receive their payments gross. In these cases a Gross Payment Voucher (CIS24) must be completed for each payment made. These are then passed to the sub-contractor to add their taxpayer's reference number. The sub-contractor then returns one part to the Department whilst the other copy is sent direct to Inland Revenue. It is essential that originals of vouchers are retained on the contract file as an annual return has to be made to the Inland Revenue.

**Scope of the Scheme**

Identifying precisely what work is covered by the Scheme is complex. Inland Revenue leaflet IR14/15 (1998) gives detailed guidance. For ease of reference, the following guidelines have been agreed with the Inland Revenue:

- if only part of the contract work falls within the Scheme, the whole value of the contract should be counted for tax purposes;

- small contracts for construction operations, amounting to less than £1,000 (excluding the cost of materials), may be excluded from the Scheme so long as they are not a product of disaggregation and have been duly authorised as 'excluded' by Inland Revenue.

The excluded categories of work are:

- routine servicing and maintenance of heating, lighting, air conditioning, lifts equipment or other related plant;

- routine external cleaning of buildings (other than painting and decorating). This will include annual contracts to clean drains, gutters, changing luminaries and grounds maintenance.

Included categories of work are:

- installation of M&E equipment, including lifts, pumps, boilers, ventilation fans, electrical switchgear;
• all new building or alterations. This will include demolition of partitions/walls, alterations to counters, installation or re-hanging of doors, upgrading accommodation standards to meet fire precaution requirements, installation of general plumbing and general electrical works, major roofing works;

• all painting and decorating, including both initial decoration and re-decoration and wallpapering.

When a job includes both excluded and included categories of work it is regarded as a mixed contract and all work within it should be included under the Scheme. If there is doubt about a particular construction activity, it initially should be included in the tax return. The sub-contractor can subsequently gain a rebate from the Inland Revenue if they agree the item is exempt.

The Inland Revenue deadlines for the completion and return of forms are very strict. All completed forms should be sent promptly at monthly intervals to the Accounts Branch who will collate the Department's annual return.
EPP 1.0  THE SCOPE OF APPLICATION OF THE EC PROCUREMENT RULES

EPP 1.1  General
EPP 1.2  The Directives
EPP 1.3  Deciding which Directive Applies
EPP 1.4  Exclusions
EPP 1.5  Thresholds
EPP 1.6  Estimating the Value of Commissions and Aggregation
EPP 1.7  Publicity and the Types of Notice Required
EPP 1.8  Procedure for Advertising and Awarding Contracts
EPP 1.9  Accelerated Timescales
EPP 1.10  Model Notices and Their Content
EPP 1.11  Number of Tenderers
EPP 1.12  Tenderer Selection
EPP 1.13  Award Criteria
EPP 1.14  Contract Notice, Decline and Debriefing
EPP 1.15  EC/GATT Reporting Requirements

ANNEX

EPP 1.1  Categories of Services
EPP 1.2  Notices Required under EC Public Procurement Rules
EPP 1.3  Procedures and Timescales for Advertising and Awarding Contracts
EPP 1.4  Works Contracts - Model Contract Notices
EPP 1.5  Services Contracts - Model Notices
The term ‘EC procurement rules’ used in the Guide is a reference to the EC public procurement directives and in particular to the relevant UK regulations introduced by way of statutory instruments. This chapter gives guidance on the scope and application of the rules.

There are a number of important general points of guidance which should be kept in mind in cases where the EC procurement rules apply. These are:

- the principles of the EEC Treaty (The Treaty of Rome) apply to all public procurement;

- the four cornerstones of the EEC Treaty are the free movement of goods, persons, services and capital, and Article 7 of the Treaty prohibits discrimination on the grounds of nationality; the establishment of the common market therefore involves the elimination of all obstacles to intra-community trade;

- one of the principal objectives behind the EC public procurement rules is therefore to prevent the use of pre-determined shortlists of tenderers, which in effect represent restrictive or anti-competitive practice;

- the EC procurement rules generally apply only to single contracts above a specified threshold value, however in a number of cases the values of more than one contract must be added together for deciding whether the threshold is met;

- the application of the rules requires special consideration at various stages of the procurement cycle and may place an additional administrative burden on the procuring Department;

- there is a requirement to publish notices in the Official Journal of the European Union (“OJ”);
there are specific minimum time limits which must be observed and which can prolong the procurement process;

there is a high chance of receiving applications from a large number of companies; it is therefore essential that the Department has in place a system which provides a fair and unbiased means of reducing the list to a reasonable number of tenderers, generally on the basis of a paper sift;

there are three procedures which may be adopted, the open procedure, restricted procedure and the negotiated procedure:

- under the open procedure anyone may tender,

- under the restricted procedure anyone may apply to be considered for invitation to tender,

- under the negotiated procedure direct discussions take place between the contracting authority and one or more contractors/suppliers/service providers of its choice.

in order to provide for competition, and for the fair selection of a short list, it will be appropriate to follow the restricted procedure in almost every case;

it should be borne in mind that the Department may receive expressions of interest from firms of which they have had no prior experience; conversely the Department may have to exclude firms, which they may wish to include on a short list, because the firms have failed to respond to the OJ notice either in the prescribed fashion, or at all;

in accordance with the UK Regulations, each Department must send to Treasury not later than 31 July each year for supplies and every alternate year for works and services, a report which sets out information about all contracts which have been let since the last report; all such reports are then collated into a statistical report (which must be provided to the European Commission by each member state);

finally the Department is under an obligation to comply with the Directives and UK Regulations; failure to do so may give rise to court action resulting in an order for the Department to pay damages to a wronged party.
Principles Behind the Regulations

- **Completeness of coverage** - which means that all purchases by public sector bodies, above the thresholds established in the legislation, will be subject to public purchasing procedures under one of the key Directives.

- **Access to information** - means that free and equal access to a pre-defined minimum amount of information should be available to all contractors from the EU. This includes information on planned procurements, specific contracts and tender procedures and the results of those procedures.

- **Equality of treatment** - this means that all tenderers, regardless of origin within the EU should have their offers considered on a fair and equitable basis and that criteria should not be used to evaluate offers that have the effect of unfairly excluding foreign suppliers.

- **Rights of redress** - means that tenderers who believe they have been discriminated against should have access to remedies that can be readily applied that compensate them for their losses, whilst deterring future infractions of the rules. This includes actions in the High Court for suspension of contract award and changes. This in turn requires purchasers to record and document their decisions and to produce statistics that can be used to identify possible bias in contract awards.

Available Rights of Redress

The principal means of enforcement for a breach of the Regulations and other enforceable EC law such as the Treaty are:

- action by suppliers or contractors against individual purchasers in the High Court; and

- action by the Commission against the Member State in the European Court of Justice.

Either way the result might be:

- the suspension of an incomplete contract award procedure; or

- the setting aside of a decision in an incomplete contract award procedure.
The Court of Justice has demonstrated that, in appropriate circumstances, it is prepared to overturn a contract.

The High Court also has powers to award damages. In cases where a contract has been entered into, an award of damages is the only remedy which the High Court can provide. The Regulations set out the procedures to be followed.
The EC rules on public procurement arise from European Community Directives. EC Directives are known as ‘secondary level legislation’, because they are secondary to the Treaty of Rome. The EC Directives on public procurement have been incorporated into UK law by way of a number of Statutory Instruments (SI’s).

The EC Directives and their associated UK SI’s which set out the public procurement rules and their scope are as follows:

• **The Supplies Directive** (UK SI 201/ ‘The Public Supply Contracts Regulations 1995’) - the supply, lease, rental or hire purchase of goods.


Public works concession contracts are the subject of regulations 25 and 26. These are contracts under which the consideration given by the public authority consists of or includes the right to profit from the works to be carried out under the contract, (for example a toll bridge). These regulations are not considered in any detail in this Chapter.

• **The Services Directive** (UK SI 3228/ ‘The Public Services Contracts Regulations 1993’) - the supply of services. A distinction is made between part A services, also known as ‘priority’ services, to which all of the regulations apply, and part B services, also known as ‘residual’ services, to which only selected regulations apply. (See Annex EPP 1.1 (at the end of this chapter) for the services included under each category).

Design contests are the subject of regulation 24 which sets out when the regulations apply and the special procedures which must be followed. This regulation is not considered in any detail in this chapter.

• **The Utilities Directive** (UK SI 3279/1992, amended by SI 3227/1993) - the supply of goods, works and services to the Utilities sector. This concerns nationalised industries and private sector companies within the water, energy, telecommunications and transport industries. Departmental purchases will not normally be affected by this Directive and no further mention of it is made in this section.
• **The Compliance Directive** - to enforce the other four Directives. This Directive has been embodied in the UK SI's for supplies, works and services under the section entitled “Applications to Court”. Under this section the courts are given specific power to ensure compliance with EC procurement rules, including the right to award damages to a wronged supplier.

The Directives apply in the following circumstances:

• Where the procurer is a ‘contracting authority’ as defined by regulation 3 of each of the supplies, works and services regulations. This includes Departments. The regulations also apply to goods, works and services which are being procured by a third party on behalf of a contracting authority.

• Where the nature of the contract is not such as to be excluded by the EC procurement rules.

• Where the value of the contract is above the relevant threshold (see EP 1.5).

**Key Points**

• **Section EPP 1** of this Chapter is intended as a summary of the key points relating to public procurement. Many of the provisions contained in the supplies, works and services regulations are common and use similar or identical wording. Where there are differences, the principal ones have been identified in the sections that follow.

• It is recommended that you read each of the relevant SI's listed in this section.
DECIDING WHICH DIRECTIVE APPLIES

In general it is clear which directive applies for the procurement of a particular type of work.

It will be seen by reference to Annex EPP1.1 that in relation to services contracts, construction design and related professional services are category A - priority services to which all of the services regulations apply.

The choice may be less clear where, as is commonly the case, the scheme involves a combination of works, services and/or supplies. The regulations are not comprehensive in dealing with this issue.

- **Supplies and Services**

  Some assistance may be found under the definition of ‘public supply contract’ in the ‘Public Supply Contracts Regulations 1995’. This states that where a contract involves the supply of goods as well as the provision of services, then the supply regulations apply only if the value of the goods supplied and any siting or installation of the goods is greater than the value of the services element of the work; otherwise the services regulations apply.

- **Works and Services**

  In respect of works and services the EC Commission’s own guidance states that where the value of the works element of a contract exceeds the value of the services element, then it should be categorised as a public works contract.

  The services generally required for construction projects will be categorised as public services contracts.

  However, if these services form part of a single “design and build” or managed construction contract to be awarded to a main or managing contractor, the work will be classified as a public works contract.

  Where the Department decides, for good commercial reasons, to award separate contracts for these services in advance of the main contract (for example where initial design is novated to a ‘design and build contractor), then the services regulations will apply.
• **Supplies and Works**

Contracts for the supply of mechanical plant for example, which are part of a main works contract, will be subject to the works regulations. Contracts for the early procurement of any items where this is appropriate, would be classed as public supply contracts. The items may then be issued free to the contractor. Note that the value of free issue equipment etc. has to be included with the value of the works contract for the purpose of assessing overall value against the works contract threshold.

**Key Points**

• The general rule is that a contract should be classified according to which ever element (supplies, services, works) has the greatest value.

• No attempt should be made to select an unnatural combination or to sub-divide contracts merely to ensure that the likely prices of individual parts fall below the threshold values of their respective directives.

• It costs a lot more to prepare an invitation to tender and place a contract than to insert an advertisement in the OJEC. First costs alone can never justify employing additional contracts to beat the threshold. When in doubt, advertise.
EPP 1.4

EXCLUSIONS

There are a number of types or classes of work which are specifically excluded from the application of the EC public procurement rules.

These may be found at regulation 6 of each of the supplies, works, and services regulations.

A common exclusion from all three sets of regulations is any contract which is classified as secret or where the carrying out of the supply, works or services in connection with it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the UK or when the protection of the basic interests of the security of the UK require it.

• **Supplies**

  The principal exclusion from supplies contracts is those contracts which fall under the utilities regulations.

• **Works**

  The principal exclusions from works contracts are in respect of offers being sought:

  - by a contracting authority which is exercising the functions of a courier by land, air, sea or inland waterway;

  - which concerns the production, transport or distribution of drinking water;

  - by a contracting authority whose principal activity is the production or distribution of energy.
• **Services**

  The principal exclusions from the services regulations are in relation to the following:

  - contracts for the purchase or rental of land or buildings - but not contracts relating to financing for such transactions;
  - contracts for broadcasting material or broadcasting time;
  - contracts for voice or radio telephony, telex, paging or satellite services;
  - arbitration and conciliation services;
  - securities contracts relating to the issue, sale, purchase or transfer of securities or other financial instruments and central bank services
  - contracts for central banking services
  - R&D service contracts (other than those where the benefit accrues exclusively to and is wholly paid for by the contracting authority)

• **Subsidised Contracts**

  In the case of public works contracts (regulation 23) and public services contracts (regulation 25) the regulations need not apply where a contracting authority contributes less than one half of the contract consideration to a subsidised body. If the contribution is greater than one half then the authority must make it a condition of the contribution that the regulations are observed by the subsidised body as if they were a contracting authority.
EPP 1.5

THRESHOLDS

The EC procurement rules do not apply if the estimated value of the contract (net of value added tax) is less than the threshold specified in the regulations.

The intention behind the thresholds is to exclude from the EC requirements contracts which can be assumed to attract only local competition and where the application of the requirements would cause unnecessary bureaucracy. It should be borne in mind that whether or not the threshold applies, the EEC Treaty still prohibits discrimination or national preference.

The thresholds are set by reference to:

- EC public procurement directives
- The General Agreement on Tariffs and Trade (GATT) rules.

The GATT was signed in 1947 and provides an agreed framework of rules for the conduct of trade between member states world-wide. Essentially the rules provide that lower thresholds apply to GATT contracting entities than non-GATT entities. The GATT rules are incorporated into the UK SI’s. Until recently the GATT rules only affected supply contracts, but the rules have now been extended to include services contracts, for which the lower level applies except for R&D services and Part B residual services.

A list of GATT entities (Departments) can be found in Schedule 1 to SI 201 - The Public Supply Contracts Regulations 1995.
The table below sets out the thresholds which apply to the various types of contract.

<table>
<thead>
<tr>
<th>THRESHOLDS - PUBLIC SECTOR: 1 JANUARY 2000 TO 31 DECEMBER 2001</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Supplies</strong></td>
</tr>
<tr>
<td>GATT Entities¹</td>
</tr>
<tr>
<td>Other public sector contracting authorities</td>
</tr>
<tr>
<td>Indicative Notices</td>
</tr>
<tr>
<td>Small Lots</td>
</tr>
</tbody>
</table>

¹ Schedule 1 of the Public Supply Contracts Regulations 1995 lists central government bodies subject to the World Trade Organisation GPA. These thresholds will also apply to any successor bodies.

² With the exception of the following services which have a threshold of £134,800 (ECU200,000):

- Part B (residual) services
- Research & Development Services (Category 8)
- The following Telecommunications services in Category 5:
  - CPC 7524 - Television and Radio Broadcast services
  - CPC 7525 - Interconnection services
  - CPC 7526 - Integrated telecommunications services
- Subsidised services contracts under Regulation 25 of the Public Services Contracts Regulations 1993.

³ With the exception of subsidised works contracts under Regulation 23 of the Public Works Contracts Regulations 1991 which have a threshold of £3,370,000 (ECU5,000,000).
ESTIMATING THE VALUE OF COMMISSIONS AND AGGREGATION

The EC thresholds and the rules that a contracting authority must follow in deciding whether a particular contract exceeds the appropriate advertising threshold are set out in regulation 7 of each of the supplies, works and services regulations.

A fundamental rule within each of the regulations is that the requirement for work or a quantity of supplies or services may not be split up in order to avoid the application of the EC procurement rules, and there must therefore be no deliberate underestimating in order to avoid complying with the regulations.

A contracting authority cannot break the work down into phases, for example, in order deliberately to avoid exceeding the thresholds. Where there is a single requirement for goods, works or services, and the contracting authority intends to let the work in a number of discrete parts, then the consideration calculated for comparison to the threshold must generally be the aggregate value of all of those parts.

In respect of works contracts, the general rule is that where the contract is one of a number of contracts or ‘Lots’ entered into for the purpose of carrying out a ‘work’ then it must be aggregated with all the other associated contracts in deciding whether the threshold applies. It is necessary to look at the result of the operation to see if it serves a single purpose. Hence separate contracts to build or extend different parts of a single construction such as a road project with bridges, should be aggregated.

In general, the total cost of any supplies or services required for a works project, and for which separate contracts are awarded under either the supplies or services directives, should be included in the total cost of the project when calculating its value against the threshold.

The exception here would be where separate service contracts are let well in advance of the main construction contract, for preparation of tenders for example.
Reference is made in the table to EPP 1.5 to thresholds in respect of small lots provisions for public works and public services contracts. This provides for the non-application of the regulations to a contract for part of a project requirement which would normally be aggregated together with other like contracts for evaluation against the advertising threshold. Non-application can only be relied upon if the contract value is less than the small lots provision threshold, and is less than 20% of the aggregate value of all of the contracts to be entered into in order to fulfil the total requirement.

The aggregation rules may also require the aggregation of contracts let by different Departmental units. Generally the rule is that where the contracting authority traditionally purchases centrally, the threshold applies to the aggregated total. But where a discrete unit purchases locally its purchases need not be aggregated with those of another unit and the threshold applies to the value of the local purchase only.

Depending on delegation levels, a Department may be deemed to have discrete operational units (DOU). A DOU is referred to in the supplies and services regulations. A DOU may avoid the aggregation rules referred to above if:

- contracting decisions have been devolved to it; and
- it has the power to make contracting decisions independently of any other part of the contracting authority.

Unless these conditions are met a unit within a contracting authority cannot be regarded as a DOU and would be subject to the aggregation rules.

Contracts for the supply of goods or services over a period of time

There are special valuation rules for public supply and public services contracts where a contracting authority has a requirement over a period of time for either a series of contracts or for a contract which is renewable.
The value of the contracts in respect of such a requirement shall be calculated by either:

- taking the total value of such work carried out in the previous financial year or previous 12 months, and if future requirements are likely to increase, then the value must be adjusted upwards accordingly; or
- taking the expected value of the works to be carried out in a period of 12 months from the first date on which the goods or services will be delivered, or for the term of the contract where the contract is of a definite term in excess of 12 months.

Where goods or services are to be provided over a period in excess of 4 years then the value shall be calculated by multiplying the amount expected to be incurred in respect of each month of the period by 48.

**Key Points**

- There must be no deliberate dis-aggregation of requirements in order to avoid complying with the public procurement regulations.
- It costs more to prepare an invitation to tender and place a contract than it does to place an advert in the OJ. This cost cannot therefore justify the deliberate dis-aggregation of contracts.
- If there is any uncertainty about whether the procurement rules apply or not, it is recommended that they be applied.
PUBLICITY AND THE TYPES OF NOTICE REQUIRED

One of the key elements of the public procurement regime is that apart from the negotiated procedure without prior contract notice, all contracts caught under it must be advertised and contractors invited to tender in the Official Journal of the European Community (the ‘OJ’). This is known as making a “call for competition”. Once the contract has been awarded, details of the award must be published in the OJ.

Various types of notice to cover different circumstances must be published in the OJ, each in standard format. They should also appear in the EC computer-based information system available on a subscription basis, Tenders Electronic Daily or TED. These are described here, for ease of reference:

• **Periodic (or prior) information notice (PIN):** Contracting authorities must publish a notice setting out details of supplies or part A services contracts to be awarded in the next 12 months in each product area or service category where the total value of the contracts exceeds the financial threshold which currently stands at 750,000 ECUs. All major works contracts must be advertised by a PIN as soon as the decision to proceed with them has been made.

• **Notice on the existence of a qualification list:** This notice only applies to contracts regulated under the Utilities Directive.

• **Contract notice:** This is the most important of the procurement notices, advertising individual contracts to be awarded by contracting authorities.

• **Contract award notice:** Once a contract has been awarded the contracting authority must publish the result in the OJ.

The chart in Annex EPP 1.2 at the end of this chapter is a summary of the notices which must be given in accordance with the public procurement rules.
Official Journal of the EC

The notice must not exceed 650 words and should be sent or faxed to:

The Official Journal of the European Community
2 Rue Mercier
L-2985 Luxembourg

Tel: 00 352 2929 1 (switchboard)
Fax: 00 352 2929 42670
00 352 2929 44623
00 352 2929 44619

The OJ has twelve days from receipt of the notice to ensure publication.

Advertisement Elsewhere

Contracts must not be advertised in the UK before contract notices are dispatched to the Official Journal of the EC. Subsequent advertisements in the UK may not contain greater details than those published in the Official Journal.

Key Points

• For each new commission caught by the regulations the appropriate notices must be published in the OJ.

• If commission requirements change, or if time lapses without taking any further procurement action, then the commission should be re-advertised.
The three different procedures which public authorities must choose between when awarding contracts are termed the ‘open’, ‘restricted’ and ‘negotiated’ procedures. Of these, all the Directives other than that for utilities encourage use of either the open or restricted procedure, specifying situations where the negotiated procedure is permitted. The Utilities Directive allows any procedure to be chosen.

- **Open procedure** - all interested suppliers may tender. Anyone interested in tendering who submits a compliant tender to the authority within the appropriate time limit, in response to its call for competition, will be considered for the job.

- **Restricted procedure** - only those suppliers invited to participate by the contracting authority may submit a tender. Where the restricted procedure is used, the tender process has two distinct stages. After a call for competition has been made in the OJ, applicants must submit their requests to be selected to tender within a specified period. The contracting authority then considers these expressions of interest and excludes non-compliant respondents, - those who are unable to fulfill the technical specifications, or who fail to meet the eligibility criteria - before sending the written invitations to tender with contract documentation to short-listed candidates. Generally, a sufficient number of candidates must be selected to tender to ensure adequate competition. The short listed candidates must then submit their tenders before a second deadline. In cases of urgency, the contracting authority may follow an accelerated programme with shorter time limits. Generally, however, the minimum time limits for the restricted procedure are longer than for the open procedure, counter-balancing to some extent the attraction of being able to select tenderers.

The restricted procedure is recommended for use by Departments. It should be noted that in practice the number of expressions of interest can be very high making it impossible to carry out extensive pre-selection procurement procedures, such as pre-selection interviews. Pre-selection will invariably have to be on the basis of a paper sift and therefore the contract notice should specify the grounds on which pre-selection will be made.
**Negotiated procedure** - direct discussions and negotiations will take place between the contracting authority and one or more suppliers of its choice. If the authority makes a call for competition, the first half of the process will be identical to that used in the restricted procedure and the strict time limits will apply. In a few cases the negotiated procedure can be used without a call for competition being made. In these instances no time limits apply.

**Use of the Negotiated Procedure**

The negotiated procedure (see above) may be used, without a call for competition published in the OJ, in the following cases:

- if no (suitable) tenders were received when the same contract was put to tender under the open or restricted procedure;

- if, for technical or artistic reasons, or because of the protection of exclusive rights, only a limited number of service providers can fulfil the contract;

- if the contract follows a design contest and must be awarded to the successful candidate or one of the successful candidates;

- in cases of extreme urgency resulting from unforeseeable events;

- for additional (previously unforeseeable) services which cannot practically be separated from the original contract, or which are strictly necessary for completion, so long as they do not exceed half the amount of the original contract;

- for repeat services within three years of the original contract which conform to a basic project for which the first contract was awarded by open or restricted procedure.

Furthermore, even where there has been a call for competition, the negotiated procedure may still be used in certain prescribed circumstances. For example:

- when the nature of the services such as intellectual or financial services is such that the contract specifications cannot be drawn sufficiently precisely to permit use of the open or restricted procedures.
**Timescales**

Minimum timescales or, if appropriate, maximum timescales are laid down for:

- expressions of interest to be lodged following publication of the contract notice;
- the tender period;
- the publication of a contract award notice.

The timescales depend on the procedure being followed. The procedure and timescales are summarised in the diagrams contained in Annex EPP 1.3 as follows:

- **Diagram 1** Open procedure
- **Diagram 2** Restricted procedure
- **Diagram 3** Negotiated procedure with prior contract notice
- **Diagram 4** Negotiated procedure without prior publication of notice.

[Annex 1.3]
EPP 1.9

**ACCELERATED TIMESCALES**

In respect of supplies, works and services contracts, it is possible to use reduced timescales for the restricted procedure (see Annex EPP 1.3 - Diagram 2) and for the negotiated procedure with prior contract notice (see Annex EPP 1.3 - Diagram 3).

The accelerated timescales may only be used where the normal timescales are rendered impracticable by reason of urgency.

**Key Points**

- Accelerated procedures should not be used to circumvent normal time limits. The proper pre-planning of requirements, taking into account the time needed to implement EC Directives should make cases in which accelerated procedures are used, the exception rather than the rule.
MODEL NOTICES AND THEIR CONTENT

A general description of the notices which must be published in the OJ is given in section EPP 1.7 of the Guide.

The structure and content of these notices differ according to the regulation under which they are issued, and according to the chosen procedure for advertising and awarding the contract.

Model notices are given at the end of each of the sets of regulations. These are repeated with some enhancements in Annex EPP 1.4 for works contracts, and EPP 1.5 for service contracts. The works contract model notices are as follows:

<table>
<thead>
<tr>
<th>Reference</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>4A</td>
<td>Prior Information</td>
</tr>
<tr>
<td>4B</td>
<td>Contract Notice - Open Procedure</td>
</tr>
<tr>
<td>4C</td>
<td>Contract Notice - Restricted Procedure</td>
</tr>
<tr>
<td>4D</td>
<td>Contract Notice - Negotiated Procedure</td>
</tr>
<tr>
<td>4E</td>
<td>Contract Award Notice</td>
</tr>
<tr>
<td>4F</td>
<td>Model Notice of Public Works Concessions</td>
</tr>
<tr>
<td>4G</td>
<td>Model Notice of Works Awarded by the Concessionaire</td>
</tr>
</tbody>
</table>

The service contract model notices are as follow:

<table>
<thead>
<tr>
<th>Reference</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>5A</td>
<td>Indicative Notice</td>
</tr>
<tr>
<td>5B</td>
<td>Contract Notice - Open Procedure</td>
</tr>
<tr>
<td>5C</td>
<td>Contract Notice - Restricted Procedure</td>
</tr>
<tr>
<td>5D</td>
<td>Contract Notice - Negotiated Procedure</td>
</tr>
<tr>
<td>5E</td>
<td>Contract Award Notice</td>
</tr>
<tr>
<td>5F</td>
<td>Design Contest Notice</td>
</tr>
<tr>
<td>5G</td>
<td>Result of Design Contest</td>
</tr>
<tr>
<td>5H</td>
<td>Model Cancellation Notice (All Sectors and All Procedures)</td>
</tr>
</tbody>
</table>
Cancellation

Note that if for any reason, there are significant changes to the contract requirements at any stage then this could invalidate the procedure and necessitate re-commencement of a procedure. If it becomes necessary for any reason to abandon a project in its entirety or to restart a procedure then it will be necessary to publish a cancellation notice in the form given in Annex EPP 1.5H. Firms who have submitted tenders under the open procedure or submitted expressions of interest under the restricted procedure should be informed by letter.

Definition and Use of Official Language

In order to promote the greatest clarity in describing the works, products and services to be purchased specialised vocabularies and the use of technical standards have been defined. These must be used in drafting contract notices and tender specifications.

Standards and Technical Specifications

Technical specifications which define the characteristics of a purchase, including safety, performance, dimensions and quality levels should be included in contract notices and tender specifications. The Directives require contract authorities to use a British Standard implementing European Standards where such a standard exists, or Common Technical Specifications.

Brand or Process Names

References to goods of specific make, source or process which have the effect of favouring specific suppliers or products must be not be used unless the specifications are strictly justified by the subject of the contract. If one cannot otherwise describe the purchases in a sufficiently detailed and tangible way, references to trade marks, patents or brands may only be made provided the words “or equivalent” are added afterwards.

When this is the case one must consider variants to what has been specified in the notice. Offers resulting from such notices cannot be rejected solely on the grounds that they have been drawn up using different technical specifications from those used in the United Kingdom, provided that the tender meets the requirements set out in the contract documents.
Community Procurement Vocabulary (CPV)

In order to establish the greatest accuracy and clarity in the management of public procurement the Commission has developed a Common Procurement Vocabulary. Its main purpose is to ensure speed and consistency in translation of procurement notices. This vocabulary, which is updated from time to time, contains technical descriptions of works, products and services, accompanied by numeric codes which establish their position in the system. These codes and classifications should be used in describing the supplies, works and services to be purchased and should appear in the published notices.

Key Points

• The notices which must be published in the OJ must have information provided in a standard form of language under standard headings.

• It may be advisable to subscribe to the OJ to monitor the publication of the Department’s own notices and to see examples of notices.
EPP 1.11

NUMBER OF TENDERERS

The number of tenderers which will be selected to tender is specified in each of the supplies, works and services regulations. These are as follows:

• **Open procedure**

  An unlimited number, i.e. whoever applies.

• **Restricted procedure**

  The requirements are the same in each of the regulations as follows:

  (6) The contracting authority may pre-determine the range within which the number of persons it intends to invite to tender for the contract shall be fixed but only if:

  (a) the lower number of the range is not less than 5 and the higher number not more than 20,

  (b) the range is determined in the light of the nature of the services to be provided under the contract, and

  (c) the range is specified in the contract notice.

  (7) The number of persons invited to tender shall be sufficient to ensure genuine competition.’

• **Negotiated Procedure**

  Where there is a sufficient number of persons who are suitable to be selected to negotiate the contract, the number selected to negotiate shall not be less than three.
TENDERER SELECTION

After publication of the contract notice, and receipt of responses, the contracting authority may exclude tenderers from the remainder of the process on certain specified grounds.

Respondents to contract notices should be able to demonstrate their commercial, technical and financial ability to meet the requirements of the commission and the contract notice must specify what references are required in this respect.

Note that those placing notices should not prejudge the responses expected.

It is likely that some firms will also respond to indicative (prior information) notices and it is good practice to initiate an appraisal of such firms as soon as the response is received.

When using the restricted procedure, all candidates who respond to the contract notice should be appraised but only those qualified to meet the criteria set out in the notice need be invited to tender.

The selection criteria are set out in similar regulations in respect of each of the supplies, works and services regulations. These are:

- Regulation 14 - Criteria for rejection of supplies, works or services providers
- Regulation 15 - Information as to economic and financial standing
- Regulation 16 - Information as to ability and technical capacity
- Regulation 17 - Supplementary information.

In respect of the open, restricted and negotiated procedures a tenderer or a firm expressing an interest in tendering or negotiating may only be excluded if the firm may be treated as ineligible on the grounds specified in regulation 14 or fails to satisfy minimum standards to be evaluated in accordance with regulations 15, 16 and 17.
The grounds giving rise to ineligibility in regulation 14 include such matters as:

- The company or individual is bankrupt
- An administrator or receiver has been appointed
- A criminal offence has been committed
- Failure to pay social security payment, or taxes
- The firm or person is not licensed in a member state

In accordance with regulation 15, evaluation of economic and financial standing may be made only in connection with the following information.

- Statements from the firm’s bankers. (Including evidence of PI insurance in the case of service providers).
- Statements of accounts or extracts therefrom
- Statement of overall turnover and turnover in the previous 3 financial years in respect of the specific supply, works or services sought.

In accordance with regulation 16, evaluation of ability and technical capacity may be made only in connection with specified criteria. This differs slightly between regulations, but the criteria include such matters as:

- Education and professional qualification.
- Experience.
- Technicians and technical bodies which may be utilised.
- Previous work and track record.
- Tools plant and technical equipment available.
- Technical specifications for products.
- Compliance with BS5750.
AWARD CRITERIA

The contract notice must specify the contract award criteria as either:

• the lowest price only, or
• the most economically advantageous tender.

The latter criteria is the appropriate one for evaluating tenders on the basis of quality and price, particularly when obtaining tenders for services.

Where the latter criteria is to be applied, the criteria to be used for the selection shall be stated, where possible in descending order of importance, in the contract notice or the contract documents.

Only the award criteria specified either in the contract notice or in the tender documents may be applied in the subsequent evaluation of tenders and in the debriefing of unsuccessful tenderers.

Variations

Where a contracting authority decides that it will exclude all tenders which contain variations, it must state this fact in the contract notice.

A contracting authority may otherwise take account of offers containing variations if:

• the offer meets the minimum requirement of the contracting authority; and
• it has stated in the contract documents the minimum requirements and any specific requirements for the presentation of an offer offering variations.
CONTRACT NOTICE, DECLINE AND DEBRIEFING

Once a tenderer has been selected, a contract award notice must be published. See Annex EPP 1.4 for works contracts notices and Annex EPP 1.5 for services contracts notices.

There is no specific obligation to write decline letters to unsuccessful tenderers, but it is recommended that this is done within 7 days of publication of the notice.

Debriefing

In accordance with Regulation 22 of the Works and Services Regulations, and Regulation 23 of the Supply Regulations, there is an obligation to respond within 15 days of receipt of a request from an unsuccessful tenderer for further information. The debriefing letter should set out the following:

• the reasons why the tenderer was unsuccessful;
• the name of the successful tenderer.
EC/GATT REPORTING REQUIREMENTS

By 31 July each year for supplies and every alternate year from 1995 for works and services, each Department is required to provide reports to Treasury which show the following information:

- for each contract awarded under the scope of the Directives:
  - its value,
  - the award procedure used,
  - if the negotiated procedure was used, the reason,
  - the type or category (classification) of goods/works or services,
  - nationality of the party contracted with;
- for contracts awarded outside the scope of the Directives:
  - the aggregate value.

Treasury use this information to collate a statistic report which each member state must compile and submit to the European Commission.

It follows that each discrete purchasing unit and Department must keep a running record of all contracts in order to be in a position to provide reports promptly. The records must also be auditable since the European Commission can at any time ask for information on individual contracts, any such enquiries being passed through Treasury. Reports in response to such enquiries must include the following:

- name and address of contracting authority;
- subject and value of the contract;
- names of candidates or tenderers submitted and the reasons for selection;
- names of candidates or tenderers rejected and the reasons for rejection;
• the name of the successful tenderer and the reasons for the selection of the tender. Also if known, any share of the contract the successful tenderer may sub-contract to a third party;

• for negotiated procedures, the circumstances which justify its use;

• for accelerated procedures, the circumstances which justify its use.

**Key Points**

• Careful records must be kept of all purchasing decisions including those which exclude purchases from the EC procurement rules, such as threshold calculations.
ANNEX EPP 1.1

CATEGORIES OF SERVICES

Referred to in Regulation 5 of the Public Services Contracts Regulations 1993.
(SI 3228/1993)
<table>
<thead>
<tr>
<th>Category Reference</th>
<th>Service</th>
<th>CPC Reference*</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>Maintenance and repair of vehicles and equipment.</td>
<td>6112, 6122, 633, 886</td>
</tr>
<tr>
<td>2</td>
<td>Transport by land, including armoured car services and courier services but not including transport of mail and transport by rail.</td>
<td>712 (except 71235), 7512, 87304</td>
</tr>
<tr>
<td>3</td>
<td>Transport by air but not transport of mail.</td>
<td>73 (except 7321)</td>
</tr>
<tr>
<td>4</td>
<td>Transport of mail by land, other than by rail, and by air.</td>
<td>71235, 7321</td>
</tr>
<tr>
<td>5</td>
<td>Telecommunications services other than voice telephony, telex, radiotelephony paging and satellite services.</td>
<td>752</td>
</tr>
<tr>
<td>6</td>
<td>Financial services</td>
<td>81 (Part), 812, 814</td>
</tr>
<tr>
<td></td>
<td>(a) Insurance services</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) Banking and Investment services other than financial services* in connection with issue, sale, purchase or transfer of securities or other financial instruments, and central bank services</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Computer and related services</td>
<td>84</td>
</tr>
<tr>
<td>8</td>
<td>R&amp;D services where the benefits accrue exclusively to the purchaser for its use in the conduct of its own affairs and the services are to be wholly paid for by the purchaser.</td>
<td>85</td>
</tr>
<tr>
<td>9</td>
<td>Accounting, auditing and book-keeping services</td>
<td>862</td>
</tr>
<tr>
<td>10</td>
<td>Market research and public opinion polling services</td>
<td>864</td>
</tr>
<tr>
<td>Category Reference</td>
<td>Service</td>
<td>CPC Reference</td>
</tr>
<tr>
<td>--------------------</td>
<td>-------------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>11</td>
<td>Management consultancy services and related services, but not arbitration and conciliation services.</td>
<td>865, 866</td>
</tr>
<tr>
<td>12</td>
<td>Architectural services: engineering services and integrated engineering services: urban planning and landscape architectural services: related scientific and technical consulting services: technical testing and analysis services.</td>
<td>867</td>
</tr>
<tr>
<td>13</td>
<td>Advertising services.</td>
<td>871</td>
</tr>
<tr>
<td>14</td>
<td>Building-cleaning services and property management services</td>
<td>874, 82201 to 82206</td>
</tr>
<tr>
<td>15</td>
<td>Publishing and printing services on a fee or contract basis</td>
<td>88442</td>
</tr>
<tr>
<td>16</td>
<td>Sewerage and refuse disposal service: sanitation and similar services</td>
<td>94</td>
</tr>
</tbody>
</table>

*CPC stands for the Central Product Classification of the United Nations
* This exception does not apply in the utilities sector
## PART B

<table>
<thead>
<tr>
<th>Category Reference</th>
<th>Service</th>
<th>CPC Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>17</td>
<td>Hotel and restaurant services</td>
<td>64</td>
</tr>
<tr>
<td>18</td>
<td>Transport by rail</td>
<td>711</td>
</tr>
<tr>
<td>19</td>
<td>Transport by water</td>
<td>72</td>
</tr>
<tr>
<td>20</td>
<td>Supporting and auxiliary transport services</td>
<td>74</td>
</tr>
<tr>
<td>21</td>
<td>Legal services</td>
<td>861</td>
</tr>
<tr>
<td>22</td>
<td>Personnel placement and supply services</td>
<td>872</td>
</tr>
<tr>
<td>23</td>
<td>Investigation and security services, other than armoured car services</td>
<td>873, (except 87304)</td>
</tr>
<tr>
<td>24</td>
<td>Education and vocational education services</td>
<td>92</td>
</tr>
<tr>
<td>25</td>
<td>Health and social services</td>
<td>93</td>
</tr>
<tr>
<td>26</td>
<td>Recreational, cultural and sporting services</td>
<td>96</td>
</tr>
<tr>
<td>27</td>
<td>Other services</td>
<td></td>
</tr>
</tbody>
</table>

*CPC* stands for the Central Product Classification of the United Nations

*This exception does not apply in the utilities sector*
ANNEX EPP 1.2

NOTICES REQUIRED UNDER EC PUBLIC PROCUREMENT RULES
Notices Required Under EC Procurement Rules

- **Voluntary Notices Below Thresholds**
- **Indicative Notices:**
  - Supplies
  - Services
- **Prior Information Notice for Works**

**Contract Notices**
- **Open Procedure:**
  - Works
  - Supplies
  - Priority Services and Design Contests
- **Restricted Procedure:**
  - Works
  - Supplies
  - Priority Services and Design Contests
- **Negotiated Procedure:**
  - Works
  - Supplies
  - Priority Services and Design Contests

**Award Notices:**
- Works
- Supplies
- Services
  - Priority
  - Non-Priority
ANNEX EPP 1.3

PROCEDURES AND TIMESCALES FOR ADVERTISING AND AWARDING CONTRACTS
DIAGRAM 1
Open Procedure

1. Prepare contract Notice and Documents
2. Send Notice to OJEC
3. Notice Issued in OJEC
4. Suppliers Respond to Notice
5. Send Contract Documents to Suppliers
6. Suppliers Return Tender
7. Suppliers Appraisal/Tender Evaluation
8. Award Contract
9. Send Contract Award Notice to OJEC

Note: * Minimum of 36 days if pre-information or indicative notices have been issued under the Works and Services Directives.
ANNEX EPP 1.3

EC PROCUREMENT PROCEDURES

Diagram 2

Restricted Procedure

- Prepare contract notice and documents
- Decide range of tenders sought (between 5 and 20)

Accelerated

Minimum 15 Days

Send Notice to OJEC

Notice issued to OJEC

Suppliers respond to notice

Undertake Supplier Appraisal

Invite Tenders from Qualified Suppliers

Suppliers Return Tender

Award Contract

Send Contract Award Notice to OJEC

Normal

Minimum 37 Days

Minimum 40 Days*

Minimum 1 Day

Maximum 48 Days

Note: * Minimum of 26 days if prior indicative notices have been issued under the Works and Services Directives.
DIAGRAM 3

Negotiated Procedure with Prior Contract Notice

**Accelerated**

1. **Departmental** approval
2. Prepare contract notice/documentation
3. Contract notice to OJEC
4. Contract notice published
5. Suppliers respond to notice
6. Reassess supplier appraisal
7. Negotiate with qualified suppliers (must include at least 3 unless there are insufficient qualified candidates)
8. **Award Contract**
9. Send contract award notice to OJEC

**Normal**

1. Minimum 15 Days
2. Minimum 37 Days
3. Maximum 48 Days
DIAGRAM 4

Negotiated Procedure without Prior Publication of Notice

1. **Departmental Approval** (including draft report for commission)
2. Select Qualified Suppliers
3. Negotiate with Suppliers
4. Award Contract
5. Send Contract Award Notice to OJEC

Maximum 48 Days
### ANNEX EPP 1.4

#### WORKS CONTRACTS

**Model Notices**

<table>
<thead>
<tr>
<th>Reference</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>4A</td>
<td>PRIOR INFORMATION</td>
</tr>
<tr>
<td>4B</td>
<td>CONTRACT NOTICE - OPEN PROCEDURE</td>
</tr>
<tr>
<td>4C</td>
<td>CONTRACT NOTICE - RESTRICTED PROCEDURE</td>
</tr>
<tr>
<td>4D</td>
<td>CONTRACT NOTICE - NEGOTIATED PROCEDURE</td>
</tr>
<tr>
<td>4E</td>
<td>CONTRACT AWARD NOTICE</td>
</tr>
<tr>
<td>4F</td>
<td>MODEL NOTICE OF PUBLIC WORKS CONCESSIONS</td>
</tr>
<tr>
<td>4G</td>
<td>MODEL NOTICE OF WORKS AWARDED BY THE CONCESSIONNAIRE</td>
</tr>
</tbody>
</table>
WORKS CONTRACTS - MODEL CONTRACT NOTICES

4A PRIOR INFORMATION

1 Name, address, telephone number, telegraphic address, telex and facsimile numbers of the contracting authority.

2 (a) Site.

(b) Nature and extent of the services to be provided and, where relevant, main characteristics of any lots by reference to the work.

(c) If available, an estimate of the cost range of the proposed services.

3 (a) Estimated date for initiating the award procedures in respect of the contract or contracts.

(b) If known, estimated date for the start of the work.

(c) If known, estimated timetable for completion of the work.

4 If known, terms of financing of the work and of price revision and/or references of the provision in which these are contained.

5 Other information.

6 Date of dispatch of the notice.

7 Date of receipt of the notice by the Office for Official Publication of the European Communities.
4B CONTRACT NOTICE - OPEN PROCEDURE

1 Name, address, telephone number, telegraphic address, telex and facsimile numbers of the contracting authority.

2 (a) Award procedure chosen.
    (b) Nature of the contract for which tenders are being requested.

3 (a) Site.
    (b) Nature and extent of the services to be provided and general nature of the work.
    (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
    (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

4 Any time limit for completion.

5 (a) Name and address of the service from which the contract documents and additional documents may be requested.
    (b) Where applicable, the amount and terms of payment of the sum to be paid to obtain such documents.

6 (a) Final date for receipt of tenders.
    (b) Address to which tenders must be sent.
    (c) Language in which tenders must be drawn up.

7 (a) Where applicable, the persons authorised to be present at the opening of tenders.
    (b) Date, hour and place of opening of tenders.
8 Any deposit and guarantees required.

9 Main terms concerning financing and payment and/or references to the provisions in which these are contained.

10 Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

11 Minimum standards of economic and technical standing and technical capacity required of the contractor to whom the contract is awarded.

12 Period during which the tenderer is bound to keep open its tender.

13 Criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.

14 Where applicable, prohibition on variants.

15 Other information.

16 Date of publication of the prior information notice in the official journal of the European communities or reference to its non-publication.

17 Date of dispatch of the notice.

18 Date of receipt of the notice by the Office for Official Publication of the European Communities.
4C CONTRACT NOTICE - RESTRICTED PROCEDURE

1 Name, address, telephone number, telegraphic address, telex and facsimile numbers of the contracting authority.

2 (a) Award procedure chosen.

(b) Where applicable, justification for the use of the shorter time limits (accelerated procedure).

(c) Nature of the contract for which tenders are being requested.

3 (a) Site.

(b) Nature and extent of the services to be provided and general nature of the work.

(c) If the work of the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.

(d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of the projects.

4 Any time limit for completion.

5 Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

6 (a) Final date for receipt of requests to participate.

(b) Address to which requests must be sent.

(c) Language or languages in which requests must be drawn up.

7 Final date for despatch of invitations to tender.

8 Any deposit and guarantees required.

9 Main terms concerning financing and payment and/or the provisions in which these are contained.
10 Information concerning the contractor's personal position and minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.

11 Criteria for the award of the contract where they are not mentioned in the invitation to tender.

12 Where applicable, prohibition on variants.

13 Other information.

14 Date of publication of the prior information notice in the Official Journal of the European Communities or reference to its non-publication.

15 Date of dispatch of the notice.

16 Date of receipt of the notice by the Office for Official Publications of the European Communities.
4D  CONTRACT NOTICE - NEGOTIATED PROCEDURE

1  Name, address, telephone number, telegraphic address telex and facsimile numbers of the contracting authority.

2  (a) Award procedure chosen.
    
    (b) Where applicable, justification for the use of the use of the shorter time limits (accelerated procedure).
    
    (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
    
    (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

3  (a) The site.
    
    (b) The nature and extent of the services to be provided and general nature of the work.
    
    (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
    
    (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

4  Any time limit.

5  Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

6  (a) Final date for receipt of tenders.
    
    (b) Address to which tenders must be sent.
    
    (c) Language or languages in which tenders must be drawn up.
Any deposit and guarantees required.

Main terms concerning financing and payment and/or provisions in which these are contained.

Information concerning the contractor's personal position and information and formalities necessary in order to evaluate the minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.

Where applicable, prohibition on variants.

Where applicable, name and address of suppliers already selected by the awarding authority.

Where applicable, date(s) of previous publications in the Official Journal of the European Communities.

Other information.

Date of publication of the prior information notice in the Official Journal of the European Communities.

Date of Dispatch of notice.

Date of receipt of the notice by the Office for Official Publications of the European Communities.
4E CONTRACT AWARDS

1 Name and address of contracting authority.

2 Award procedure chosen.

3 Date of award of contract.

4 Criteria for award of contract.

5 Number of offers received.

6 Name and address of successful contractor(s).

7 Nature and extent of the services provided, general characteristics of the finished structure.

8 Price or range of prices (minimum/maximum) paid.

9 Where appropriate, value and proportion of the contract likely to be subcontracted to third parties.

10 Other information.

11 Date of publication of the tender notice in the Official Journal of the European Communities.

12 Date of dispatch of the notice.

13 Date of receipt of the notice by the Office for Official Publications of the European Communities.
4F MODEL NOTICE OF PUBLIC WORKS CONCESSIONS

1 Name, address, telephone number, telegraphic address, telex and facsimile numbers of the contracting authority.

2 (a) Site.

(b) Subject of the concession, nature and extent of the services to be provided.

3 (a) Final date for receipt of candidatures.

(b) Address to which candidatures must be sent.

(c) Language or languages in which candidatures must be drawn up.

4 Personal, technical and financial conditions to be fulfilled by the candidates.

5 Criteria for award of contract.

6 Where applicable, the minimum percentage of the works contracts awarded to third parties.

7 Other information.

8 Date of dispatch of the notice.

9 Date of receipt of the notice by the office for Official Publications of the European Communities.
4G  MODEL NOTICE OF WORKS AWARDED BY THE CONCESSIONAIRE

1  (a)  Site.
    (b)  The nature and extent of the service to be provided and the general nature of the work.

2  Any time limit for the completion of the works.

3  Name and address of the service from which the contract documents and additional documents may be requested.

4  (a)  The final date for receipt of requests to participate and/or for receipt of tenders.
        (b)  The address to which they must be sent.
        (c)  The language or languages in which they must be drawn up.

5  Any deposit and guarantees required.

6  The minimum standards of economic and financial standing and technical capacity required of the contractor.

7  The criteria for the award of the contract.

8  Other information.

9  Date of despatch of the notice.

10 Date of receipt of the notice by the office for official publications of the European Communities.
ANNEX EPP 1.5

SERVICE CONTRACTS

Model Notices

Standard form responses, where they are relevant, have been included in italics beneath the relevant sections of each notice.

<table>
<thead>
<tr>
<th>Reference</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>5A</td>
<td>INDICATIVE NOTICE</td>
</tr>
<tr>
<td>5B</td>
<td>CONTRACT NOTICE - OPEN PROCEDURE</td>
</tr>
<tr>
<td>5C</td>
<td>CONTRACT NOTICE - RESTRICTED PROCEDURE</td>
</tr>
<tr>
<td>5D</td>
<td>CONTRACT NOTICE - NEGOTIATED PROCEDURE</td>
</tr>
<tr>
<td>5E</td>
<td>CONTRACT AWARD NOTICE</td>
</tr>
<tr>
<td>5F</td>
<td>DESIGN CONTEST NOTICE</td>
</tr>
<tr>
<td>5G</td>
<td>RESULT OF DESIGN CONTEST</td>
</tr>
<tr>
<td>5H</td>
<td>MODEL CANCELLATION NOTICE (ALL SECTORS AND ALL PROCEDURES)</td>
</tr>
</tbody>
</table>
SERVICES CONTRACTS - MODEL NOTICES

5A INDICATIVE NOTICE

1. Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority and of the service from which additional information may be obtained.

2. Intended total procurement in each of the service categories listed in Part A of Schedule 1 of the Services Regulations (see Annex 1).

3. Estimated date for initiating the award procedures, per category.

4. Other information.

5. Date of dispatch of the notice.

6. Date of receipt of the notice by the Office for Official Publications of the European Communities.
5B  **CONTRACT NOTICE - OPEN PROCEDURE**

1  Name, address, telephone, telex and fax numbers of the contracting authority.

2  Category of service and description. CPC reference number.

3  Place of delivery.

4  (a)  Indication of whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession.

        (b)  Reference of the law, regulation or administrative provision.

        (c)  Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service.

5  Indication of whether service providers can tender for some or all of the services required.

6  Where applicable, prohibition on variants.

7  Period of contract or time limit, if any, for completion of the service.

8  (a)  Name and address of the service from which the contract and additional documents may be requested.

        (b)  Final date for making such requests.

        (c)  Where applicable, the amount and terms of payment of any sum payable for such documents.

        **Not applicable**

9  (a)  Persons authorised to be present at the opening of tenders.

        (b)  Date, time and place of the opening.

10  Where applicable, any deposits and guarantees required.
11 Main terms concerning financing and payment and/or references to the relevant provisions.

12 Where applicable, the legal form to be taken by the grouping of service providers to whom the contract is awarded.

‘No special legal form required but each service provider will be required to become jointly and severally responsible for the contract before acceptance’

13 The information and formalities necessary for an appraisal of the minimum standards of economic and financial standing, ability and technical capacity required of the services provider.

14 Period during which the tenderer is bound to keep open its tender.

15 Criteria for the award of the contract (and if possible their order of importance). Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.

16 Other information.

‘Tenders and all supporting documents must be priced in sterling and all payments to be made under the contract shall be in sterling. The contract shall be considered as a contract made in [England/Scotland] and according to [English/Scots] Law and subject to the exclusive jurisdiction of the [English/Scottish] Courts.’

17 Date of dispatch of the notice.

18 Date of receipt of the notice by the Office for Official Publications of the European Communities.
5C CONTRACT NOTICE - RESTRICTED PROCEDURE

1 Name, address, telegraphic address, telephone, telex and fax number of the contracting authority.

2 Category of service and description. CPC reference number.

3 Place of delivery.

4 (a) Indication of whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession.
   (b) Reference of the law, regulation or administrative provision.
   (c) Indication whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the provision of the services.

5 Indication of whether the service provider can tender for a part or all of the services concerned.

6 If known, the number of services providers which will be invited to tender or the range within which that number is expected to fall.

7 Where applicable, prohibition on variants.

8 Duration of contract, or time limit for completion of the service.

9 Where applicable, the legal form to be assumed by the grouping of service providers to whom the contract is awarded.

   'No special legal form required but each service provider will be required to become jointly and severally responsible for the contract before acceptance'
10 (a) Where applicable, justification for the use of shorter time limits (accelerated procedure).

(b) Final date for the receipt of requests to participate.

(c) Address to which they must be sent.

(d) Language(s) in which they must be drawn up.

‘English’

11 Final date for the despatch of invitations to tender.

12 Where applicable, any deposits and guarantees required.

13 The information and formalities necessary for an appraisal of the minimum standards of economic and financial standing, ability and technical standards required of the services provider.

14 Criteria for the award of the contract. Criteria other than that of lowest price shall be mentioned where these do not appear in the contract documents.

15 Other information.

‘Tenders and all supporting documents must be priced in sterling and all payments made under the contract will be in sterling. The contract shall be considered as a contract made in [English/Scots] Law and subject to the exclusive jurisdiction of the [English/Scottish] Courts.’

16 Date of dispatch of the notice.

17 Date of receipt of the notice by the Office for Official Publications of the European Communities.
5D CONTRACT NOTICE - NEGOTIATED PROCEDURE

1. Name, address, telegraphic address, telephone, telex and fax number of the contracting authority.

2. Category of service and description. CPC reference number.

3. Place of delivery.

4. (a) Indication of whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession.

   (b) Reference of the law, regulation or administrative provision.

   (c) Indication of whether legal persons should indicate the names and professional qualifications to the staff to be responsible for the provision of the service.

5. Indication of whether the service providers can tender for some or all of the services required.

6. If known, the number of service providers which will be invited to tender or the range within which that number is expected to fall.

7. Where applicable, non-acceptance of variants.

8. Duration of contracts, or time limit for completion of the service.

9. Where applicable, the legal form to be assumed by the grouping of service providers to whom the contract is awarded.

   ‘No special legal form required but each service provider will be required to become jointly and severally responsible for the contract before acceptance’
10 (a) Where applicable, justification for the use of the shorter time limits (accelerated procedure).

(b) Final date for the receipt of requests to participate.

(c) Address to which they must be sent.

(d) Language(s) in which they must be drawn up.

‘English’

11 Where applicable, any deposits and guarantees required.

12 The information and formalities for an appraisal of the minimum standards of economic and financial standing, ability and technical capacity required of the services provider.

13 Where applicable, the names and addresses of service providers already selected by the contracting authority.

14 Other information.

15 Date of dispatch of the notice.

16 Date of receipt of the notice by the Office for Official Publications of the European Communities.

17 Dates of Previous of publications in the Official Journal of the European Communities.
5E CONTRACT AWARD NOTICE

1  Name and address of the contracting authority.

2  (a)  Award procedure chosen.

   (b)  Where applicable, justification for the use of negotiated procedure without
         prior publication of a tender notice, (Article 11(3)).

3  Category of service and description. CPC reference number.

4  Date of award of the contract.

5  Criteria for award of the contract.

6  Number of tenders received.

7  Name(s) and address(es) of service provider(s).

8  Price or range of prices (minimum/maximum) paid.

9  Where appropriate, value and proportion of the contract which may be
   subcontracted to third parties.

10 Other information.

11 Date of publication of the contract notice in the Official Journal of the European
    Communities.

12 Date of despatch of the notice.

13 Date of receipt of the notice by the Office for Official Publications of the European
    Communities.

14. In the case of contracts for services specified in Part B of Schedule 1, agreement by
    the contracting authority to publication of the notice (Article 16(3)).
5F  DESIGN CONTEST NOTICE

1  Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority and of the service from which additional documents may be obtained.

2  Project description.

3  Nature of the contest: open or restricted.

4  In the case of open contests: final date for receipt of plans and designs.

5  In the case of restricted contests:
   (a)  the number of participants envisaged;
   (b)  where applicable, names of participants already selected;
   (c)  criteria for the selection of participants;
   (d)  final date for receipt of requests to participate.

6  Where applicable, indication of whether participation is reserved to a particular profession.

7  Criteria to be applied in the evaluation of projects.

8  Where applicable, names of the selected member of the jury.

9  Indication of whether the decision of the jury is binding on the contracting authority.

10  Where applicable, number and value of prizes.

11  Where applicable, details of payments to all participants.

12  Indication of whether any follow-up contracts will be awarded to one of the winners.

13  Other information.

14  Date of dispatch of the notice.

15  Date of receipt of the notice by the Office for Official Publications of the European Communities.
5G RESULT OF DESIGN CONTEST

1 Name, address, telegraphic address, telephone, telex and fax numbers of the contracting authority.

2 Project description.

3 Total number of participants.

4 Number of foreign participants.

5 Winner(s) of the contest.

6 Where applicable, the prize(s) awarded.

7 Other information.

8 Reference to publication of the design contest notice in the Official Journal of the European Communities.

9 Date of dispatch of the notice.

10 Date of receipt of the notice by the Office for Official Publications of the European Communities.
5H  MODEL CANCELLATION NOTICE (ALL SECTORS AND ALL PROCEDURES)

By corrigendum to tender notice.

1  Name and address of contracting authority.

2  Nature and brief description of purchase (ie works, supply or services).

3  Date of publication and number of the tender notice in the Official Journal of the European Communities.

4  Other information.

   *This contract has been cancelled.*
CST 1.0  COMMISSIONING STRATEGIES
CST 1.1  Procurement Process and Programme
CST 1.2  Application of EC Public Procurement Rules
CST 1.3  Property Management Type Commissions
CST 1.4  Individual Project Management Type Commissions
CST 1.5  Individual Discipline Commissions
CST 1.6  Term Commissions

CST 2.0  COMMISSION FILE
CST 2.1  Identification
CST 2.2  Sub Files
CST 2.3  Retention Periods
CST 2.3(scot) Retention Periods

CST 3.0  CONSULTANT SELECTION
CST 3.1  Selection of Firms
CST 3.2  DETR New Qualification System (NQS)
CST 3.3  The Long Listing Process
CST 3.4  Identify Pre-Selection Criteria
CST 3.5  Pre-Selection Information
CST 3.6  Compilation of Short Lists
CST 3.7  The Number of Tenderers
CST 3.8  Quality Price Mechanism
CST 3.9  Pre-tender interview Stage
CST 3.10 Single Tender
CST 4.0 TENDER PROCESS
CST 4.1 General
CST 4.2 Forms of Tendering
CST 4.3 Tender Documents
CST 4.4 Tender Periods
CST 4.5 Tender Boxes
CST 4.6 Secure Information
CST 4.7 Documentation Standards
CST 4.8 Dispatch of Tenders
CST 4.9 Queries by Tenderers
CST 4.10 Tender Boards
CST 4.11 Opening the Tender Box
CST 4.12 Opening of Tenders
CST 4.13 The Tender Record Book
CST 4.14 Late Tenders

CST 5.0 TENDER EVALUATION
CST 5.1 Evaluation Criteria
CST 5.2 Fee Schedules
CST 5.3 Incentive Fees
CST 5.4 Evaluation Procedure
CST 5.5 Tender Anomalies
CST 5.6 Qualified Tenders
CST 5.7 Amended Tenders
CST 5.8 Amended Tender Documents
CST 5.9 Re-invitation of Tenders
CST 5.10 Recommendation for Acceptance
CST 6.0 AWARDING COMMISSIONS AND DECLINING TENDERS
   CST 6.1 LEGAL CONTRACT FORMATION
   CST 6.2 ACCEPTANCE OF A TENDER
   CST 6.3 LETTER OF ACCEPTANCE
   CST 6.4 DECLINE OF UNSUCCESSFUL TENDERS
   CST 6.5 EXECUTION OF FORMAL AGREEMENT

CST 7.0 DEBRIEFINING
   CST 7.1 REQUEST FOR DEBRIEFINING
   CST 7.2 DEBRIEFINING INTERVIEWS

CST 8.0 MANAGEMENT COMMISSIONS
   CST 8.1 ROLES AND RESPONSIBILITIES OF THE COMMISSION MANAGER/ THE PROJECT SPONSOR
   CST 8.2 CONSULTANT AND SUB-CONSULTANTS
   CST 8.3 PROFESSIONAL INDEMNITY INSURANCE
   CST 8.4 BILL PAYING AND CHECKING PROCEDURES
   CST 8.5 DETERMINATION/TERMINATION PROCEDURES
   CST 8.6 DETERMINATION/TERMINATION DUE TO DEFAULT

CST 9.0 CLAIMS AND DISPUTES
   CST 9.1 HANDLING OF CLAIMS BY AND AGAINST THE DEPARTMENT
   CST 9.2 CLAIMS ARISING FROM DEFAULT OR NEGLIGENCE BY A DEPARTMENT, CONSULTANT OR CONTRACTOR
   CST 9.3 ALTERNATIVE DISPUTE RESOLUTION PROCEDURES
   CST 9.4 ARBITRATION
   CST 9.5 WRITS AND SUMMONSES
   CST 9.6 EX GRATIA CLAIMS
   CST 9.7 PERSONAL INJURY CLAIMS
<table>
<thead>
<tr>
<th>CST 10.0</th>
<th>PERFORMANCE REPORTING</th>
</tr>
</thead>
<tbody>
<tr>
<td>CST 10.1</td>
<td>Performance Reporting Generally</td>
</tr>
<tr>
<td>CST 10.2</td>
<td>Performance Reporting to the New Qualification System (NQS)</td>
</tr>
<tr>
<td>CST 10.3</td>
<td>Consult Notices within NQS</td>
</tr>
</tbody>
</table>
A guide to the steps involved in the procurement of professional services is as follows:

1. **Determine requirements and develop detailed brief**

2. **Identify capable consultants to form a long list or if EC regulations apply, advertise contract notice to invite expressions of interest**

3. **Undertake pre-selection interviews where appropriate or if EC regulations apply, carry out pre-selection paper sift**

4. **Compile short lists for tendering**

5. **Develop tender documents which clearly define the brief**

6. **Pre-tender interviews as part of quality assessment**

7. **Invite tenders from short listed consultants**

8. **Hold mid-tender interviews where appropriate**

9. **Evaluate tenders**

10. **Make the award and if EC regulations apply publish contract award notice**

11. **De-brief unsuccessful tenders where necessary**

12. **Post tender performance evaluation**
It should be borne in mind that this is only a guide to the steps involved. The more complex or costly the service being procured then the greater the amount of time and care that should be taken in the pre-selection and selection processes.

Where the EC procurement rules apply then the pre-selection process with the restricted procedure will necessarily require a paper sift to reduce what is likely to be an otherwise unmanageable number of expressions of interest.

A similar approach is required where a large number of consultants are invited to tender in order to establish a panel of consultants on the basis of frameworks agreements, this being a strategy that some Department have successfully adopted. A panel is a set of consultants who are selected for a term, without any guarantee of work, and might be established by seeking tenders for all regions at once.

The form and basis of competition will need to be determined early in the procurement process. This will involve deciding upon which procedures it is appropriate to follow, and most importantly the evaluation criteria which will be used to determine the successful tenderer. In particular the basis on which the price will be sought and the way in which quality will be evaluated should be decided at the outset.

**Procurement Programme**

It is recommended that careful consideration is given to the production of a procurement programme immediately following identification of commission or project objectives. Clearly this programme should be developed in the context of the overall objectives and timetable. The procurement programme will to a large extent depend upon the procurement strategy which is to be followed, and should be updated at each stage of the procurement process. The Department should ensure that there is sufficient time allowed in the programme and expertise is available to carry out each of the above steps.
It is recommended that the greater the complexity of the commission, then the greater the time that should be allowed to tenderers to consider, price and submit their tender bids. Tender periods which are too short can lead to an inadequate consideration of the requirements of the commission by tenderers which may lead to under-pricing or over-pricing and possibly to unwanted misunderstandings.

Where the EC procurement directives apply, then specific procedures apply and there are specific minimum or maximum time limits for the various stages of the process depending on which procedure is followed. These will need to be reflected in the procurement programme.
APPLICATION OF EC PUBLIC PROCUREMENT RULES

It is mandatory that EC public procurement rules are complied with where they are applicable. It is also essential that consultants apply the rules on behalf of the Department, where they are dealing with sub-consultants. A clear obligation to do so should be included in the terms of appointment of such consultants (see for example service A1.2.16 for the project manager in the Consultant Commissioning Documentation - GC/Works/5 - General Conditions for the Appointment of Consultants (1998) (ISBN 0-11-7023108)).

The EC procurement rules govern the procurement of most of the services required by Government bodies.

A commission will be subject to the Services Directive if:

• the buyer is a contracting authority subject to the regulations;

• the value of the contract is above the threshold. The construction services generally procured by Departments will fall under Part A of the Public Services Contracts Regulations to which the GATT threshold of 130,000 SDR applies. The pound sterling equivalent is revised every two years, and as of 1 January 2000 this figure is £93,896;

• it is not the subject of one of the exclusions.

It is illegal to split the contract into two or more parts or breakdown what is normally a centrally purchased aggregated contract to avoid the application of the rules. In addition there should be no deliberate underestimating to avoid compliance.

Key Points

• If the value of the commission exceeds £93,896 (as of 1 January 2000) the EC services regulations may apply.

• A more detailed consideration of whether the regulations apply is given in chapter EPP - EC Procurement Procedures, which also sets out the specific timetables and recommended procedures, for inviting and evaluating tenders in accordance with the rules.
CST 1.3  

PROPERTY MANAGEMENT TYPE COMMISSIONS

The Property Management Commission will usually be awarded to a consultant for a three year term.

The property manager will effectively take control of all functions including:

- estates services;
- maintenance;
- works.
INDIVIDUAL PROJECT MANAGEMENT TYPE COMMISSIONS

A project manager (PM) will generally be appointed for major Works Projects and will be appointed to take overall control of the Project. The PM is required at two discrete stages:

• for feasibility studies and development of the Department’s brief;
• for managing the works on site.

It is generally recommended that the two stages are fulfilled by two separate project management organisations.
CST 1.5

INDIVIDUAL DISCIPLINE COMMISSIONS

Where there are specific or one-off requirements for consultant services it is not appropriate to appoint consultants on a term contract.

Terms and conditions in respect of the following services are contained in the Works Commission consultant documentation - GC/Works/5 General Conditions for the Appointment of Consultants (1998) - ISBN 0-11-7023108:

- project manager or lead consultant
- architect/building surveyor
- quantity surveyor
- structural engineer
- building services engineer
TERM COMMISSIONS

A term commission can be used where there is definable and expected repetitive work over a period of time. The recommended duration for term commissions is three years.

The principal advantages of term commissions are:

• three year terms reduce the cost to the Department of the procurement activity;

• consultants will bid competitively if they can be assured of a continuous flow of work for a known period;

• consultants have time to develop a clear understanding of the Department’s needs and should be able to work more effectively to satisfy those needs.

The types of activities which are generally appropriate for term commissions are:

• property management commissions;

• project management and design and cost services where there is an ongoing building programme;

• audit services;

• legal services.

Each Department is likely to have an existing system for numbering identifying and opening new commission files. This section is therefore provided by way of guidance and describes points of general importance and application. When the need for a commission has been identified, consideration should be given to the following important points:

- Each commission should have a reference code assigned to it. It should identify the Department as well as a unique reference number for the commission;

- It is generally common practice to open a registered file which is assigned the commission reference number, and which contains all of the papers relating to the commission;

- It is good practice to use the unique reference number in all correspondence relating to the commission, and to insist that all parties to the commission also use the reference number in their correspondence;

- It is likely that the commission file will comprise a number of files and sub files and all such files should also be assigned the unique reference number;

- An important aspect of the commissioning file is that it provides a record of procurement practice adopted. The file or files are then available to demonstrate that steps have been taken to procure services in a way which aims to achieve best value for money.

The documents in the commission file are likely to include:

- Records of meetings at which matters affecting the setting up of the commission were discussed;

- Minutes requesting and giving financial and contractual approval to further action;

- Records of the pre-selection process for choosing the firms (copies of the corporate brochure or general information about a firm need not be retained on the commission file);
• records of formal interviews and recommendations therefrom;
• records of EC advertisement and replies, if applicable;
• the business case including:
  - a record of the pre-tender estimate;
  - a schedule of potential project risks;
  - a record of the consideration of PFI alternatives, where appropriate;
• a record of the proposed tender evaluation criteria;
• a set of the tender documents as issued to tenderers (other than standard printed documents);
• copies of correspondence during the tender period;
• admissible tenders received, placed in a folder;
• the tender summary sheet;
• any correspondence pertaining to consideration of the tenders;
• the evaluation report and recommendation to accept a tender;
• the appropriate delegated approval to accept a tender;
• a copy of the acceptance letter together with the acknowledgement of acceptance by the successful tenderer;
• a copy of the decline letter sent to unsuccessful tenderers;
• copies of any requests for debriefing by unsuccessful tenderers together with the Department’s response.

Key Points

• Records are required to demonstrate that best value for money has been sought.

• Records may also be essential to demonstrate that tenderers have not been unfairly excluded in the event that EC Procurement procedures have to be followed, and a challenge is raised by an unsuccessful tenderer.
CST 2.2

**SUB FILES**

Each stage of the **commission** process can produce bulky documents (firms’ presentation documents, tender documents, firms’ bids, and evaluation reports etc.). It is therefore recommended that, where such documents may be easily separated from the main file, sub files are created to hold these documents.

Each sub file should carry the unique **commission** reference number, and it is common to give each sub file an alphabetical suffix. Where sub files are created, it is recommended that an index of sub files is held at the front of the main file.
There are four principle reasons for retaining commission files:

1. To provide records for use as an aide memoire for future projects.

2. To provide a record for auditing purposes, especially in respect of commissions procured in accordance with EC public procurement rules.

3. To comply with legal obligations to do so. In accordance with the CDM Regulations the Department is under an obligation to keep available for inspection a health and safety file for what amounts to the entire life of the building.

4. To provide evidence of the agreement and of the conduct of the commission in the event of legal action, which either the Department feels appropriate to take, or against which the Department is required to mount a defence.

In the case of legal action the periods for which the Department may have legal liability are limited by statute, and vary depending on the circumstances.

The minimum period is six years from the date of the breach. If the contract is by deed, however, the period is 12 years. The position is more complex in respect of liability for negligence where the periods of liability may be determined by reference to the Latent Damages Act 1986. Duties of care may be owed by the project manager, the designers and the contractor for periods of up to 15 years, and in some cases beyond. This should therefore be taken into account when assessing the retention period for all documents relating to major works projects.

It is recommended that documents relating to unsuccessful tenders should be retained until completion of the commission.
There are four principle reasons for retaining commission files:

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2. To provide a record for auditing purposes, especially in respect of commissions procured in accordance with EC public procurement rules.

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In the case of legal action the periods for which the Department may have legal liability are limited by statute, and vary depending on the circumstances.

Remember that the vast majority of all contractual obligations will expire under the 'short negative prescription', i.e. after five years from the date when the obligation becomes enforceable, if the necessary conditions are satisfied. Before an obligation prescribes, however, the relevant period of time must have passed without any 'relevant claim' (see LE 1.9) by the creditor, or any 'relevant acknowledgement' (again, see LE 1.9) by the debtor.

It is recommended that documents relating to unsuccessful tenders should be retained until completion of the contract.
CST 3.0  

CONSULTANT SELECTION

CST 3.1  

SELECTION OF FIRMS

The principle aim of the procurement process is to select a consultant which offers the best value for money. This will nearly always involve a process of competitive tendering. Value for money for a particular commission means optimising the balance between best performance or quality of service and lowest price. The aim is always to secure and maintain the quality of service received.

To avoid complacency and therefore secure ongoing competitive performance, as well as avoiding questions of favouritism, it is recommended that the frequent use of the same consultant or the same list of consultants is avoided. Care must also be taken to enforce standard conditions of consultancy contracts if an ex-employee of a Department is contracted with, and this should only be as the result of an open tender. As with using the same consultant frequently, such consultancies can be viewed with suspicion, resulting in accusations of favouritism or nepotism. Finally, it should be kept in mind that consultants are not employees of the Department, and should therefore be maintained at arm’s length contractually.

It may be that in exceptional circumstances the timescale or the type of commission necessitate the appointment of a consultant on the basis of a single tender action. This means that the competitive process is not followed and generally that the contract and in particular price are negotiated with one consultant. Where such a procedure is unavoidable it will normally be necessary to obtain the appropriate delegated authority before proceeding.

Because of the difficulty of assessing and evaluating quality prior to delivery of the service, it is important to have in place procurement procedures which provide as early as possible to the Department, as much information as possible about the likely quality of the service offered by tenderers.

It should also be borne in mind that if any consultant has a role in the direct commissioning of construction works or where he acts on behalf of a Department, he will be covered by the Construction Industry Tax Scheme.
The following steps are therefore recommended in order to obtain a short-list of suitable consultants for tender:

1. Consult DETR Constructionline Register (NQS) for development of the long list
2. Gather market intelligence about consultants including references regarding past performance
3. Keep a list of consultants who serve you well or have served you well in the past

Identify long list

Confirm consultant's interest

Identify pre-selection criteria

For larger commissions eg for project management, request a statement of interest in the form of a questionnaire

W here unfamiliar with consultants arrange pre-selection interviews to assess basic abilities

Evaluate pre-selection data and form short list

Inform consultants of outcome

W here the EC procurement rules apply then the pre-selection process, using the restricted procedure, will be as follows:
O J contract notice and UK advertisements specifying the basis on which the pre-selection will be carried out.

- Initial paper sift
- Appraisal of expressions of interest
- Office visits (optional)
- Financial checks
- Pre-qualification interview (optional)
- Pre-qualification scoring

The next stage of the selection process is the invitation of tenders and choice of consultant. The following steps are recommended in order to select a consultant from the short list:

- Decide on award criteria, in particular weighting of quality and price
- Send out tender documents including detailed brief requesting a submission by consultant of method statement prior to attending a pre-tender interview
- Decide on need for pre-tender interview at which quality of service required and understanding of the brief is considered
- Check consultant tenders for conformity and evaluate price and quality against stated criteria
- Award contract

(continued overleaf)
Advise all consultants

Debrief if requested

The steps involved in obtaining a short list and in selecting the successful consultant set out above need not be rigidly adhered to in every case.

Simple or small standard commissions may not require either pre-selection or pre-tender interviews for example.

The remainder of part CST 3 and parts CST 4-7 of this section give detailed guidance in relation to each of the above steps.

In certain circumstances the negotiated procedure, with advertising, may be used instead of the restricted procedure if one or more of the following derogations apply:

- exceptionally, when the nature of the services to be provided, or the risks attaching thereto, are such as not to permit prior overall pricing;
- when the nature of the services to be provided, in particular in the case of intellectual services or financial services specified in category 6 of Part A of Schedule 1 of the Public Services Contracts Regulations, is such that specifications cannot be drawn up with sufficient precision to permit the award of the contract using the open or restricted procedure.

Under the negotiated procedure the process is the same as the restricted procedure up to pre-qualification scoring. Following this, the contracting authority may negotiate the terms of the contract with those companies it has selected. These negotiations should be consistent with the agreed award criteria. Authorities can choose to invite initial proposals and further sift the candidates, following which they may invite tenders or even, if they so choose, negotiate down from the short list to a single provider and ask him to submit a bid.

**Key Point**

- A consultant is covered by the Construction Industry Tax Scheme if he has a role in the direct commissioning of construction works or where he acts on behalf of a Department in this context.
NEW QUALIFICATION SYSTEM (NQS - FORMERLY CONREG)

Constructionline is the name of the service which utilises the NQS database. Where the EC procurement rules do not apply, then the long list of contractors can normally be obtained from the NQS.

Its purpose is to validate prior to tender, the financial standing, managerial capability, technical competence and resource capacity of bona fide firms wishing to undertake a wide variety of construction and property related services. The NQS is free of charge to clients and is a powerful tool designed to minimise the risk of the user against company failure, poor workmanship and fraud. The data helps to ensure that public bodies only deal with reputable firms and financially sound companies and saves time and valuable resources in the vetting of firms being considered for an invitation to tender.

The NQS includes details of a firm's staffing, specialisms of work a consultant can undertake, current and completed work recorded as 'feedback' by the users, and an assessment of the maximum individual contract value a firm may accommodate (the notation).

Departments can access the NQS on-line, under the auspices of a BT managed telecommunications service. The IT Helpdesk and client liaison responsibility are located in Edinburgh.

Any department, agency or NDPB wishing to access the NQS will need to do so via an on-line computer link. Any requests for Access Packs or additional information/advice can be obtained from the contacts listed overleaf.

Key Point

- More detailed information on the NQS is contained in CAU Information Note 27/98. A copy can be obtained by phoning the CAU Helpdesk on 020 7271 2833.
Organisation Structure of Constructionline

Head Office for Constructionline and the processing responsibility for firms based in England, Wales, Scotland and Northern Ireland is located at:

Constructionline
Great West House
Great West Road
Brentford
Middlesex
TW 8 9DF
Tel: 020 8380 4600

Constructionline Director: Chris Leggett
Development Director: Colin Garton
Operations Manager: Paula Beresford

* Client helpdesk and technical support is currently located at:

Constructionline
The Basement
17 Atholl Crescent
Edinburgh
EH 3 8HA
Tel: 0131 229 9449

*Note: the processing responsibility for firms based in Scotland moved to the Brentford office in October 1998 but the client helpdesk and technical support responsibilities have been retained.

IT Helpdesk
Tel: 0870 607 1602

Client Services Manager
Tel: 0870 607 1602
THE LONG LISTING PROCESS

The production of the long list is the first step towards establishing a viable tender list which will ensure genuine competition among capable suppliers.

The long list will be compiled from the following possible sources:

- NQS;
- market intelligence gathered by the Department;
- list of consultants who have serviced the Department well in the past.

It is recommended that the long list be limited to 10 in number. The key criteria for selection of firms for the long list are:

- experience in the general area of the commission;
- track record on similar commissions.

It may be useful at this stage to ask firms who are not known to the Department to provide brochures and possibly references to confirm experience and track record.

When the long list has been fixed, a preliminary enquiry should be sent to each firm on the list to ask them to confirm without obligation that they are interested, that they have the resources and that they will submit a tender if asked.

It is recommended that replies are requested in writing and by a given date.

Key Points

- An example preliminary enquiry is given in the form of CST/SF1 overleaf.
Dear Sir

PRELIMINARY ENQUIRY RE [TITLE OF PROJECT]

The [Scottish Ministers]/[Secretary of State] acting through [Department] intend(s) to commission [state professional service] in connection with the above project. Brief particulars are [enclosed/as follows:]

The following is the proposed procurement programme in connection with this commission:

- Date of invitation to tender: .............................................................
- Date of contract award: .................................................................
- Commencement of Commission: ....................................................
- Duration of Commission: .............................................................

You are invited to confirm in writing your interest in being included in the tender list by ....................... [Date]. Please also advise us of any special reasons which you consider support the inclusion of your company on the tender list.

You should note that a negative response will not prejudice your company's prospects of being invited to tender in the future.

Please also note that the details given in this preliminary enquiry may change and neither this enquiry nor your positive reply to it in any way guarantee that you will be included on the final tender list or that the commission will proceed at all. In addition the above information is to be treated as strictly confidential.

Yours faithfully
IDENTIFY PRE-SELECTION CRITERIA

In order to form a final short list, it is necessary to establish the criteria to be applied in evaluating those firms on the long list, and to decide which criteria are most important given project requirement. The greater the extent to which the brief has been defined, then the more focused the pre-selection evaluation can be.

The key criteria for pre-selection are as follows:

• track record on similar commissions, in terms of:
  - approach (method of working, management, client liaison),
  - technical ability,
  - performance to quality, time and cost constraints,
  - professional resources and support facilities available;
• qualification of key staff;
• financial standing;
• adoption of a quality management system;
• outline suggestions for approaching the commission, in terms of:
  - experience of the proposed project manager/team leader,
  - how the commission will be organised and managed,
  - technical, managerial or design method;
and any project specific requirements such as:
• location of consultant's offices;
• specific expertise, such as knowledge of language or procedures.

Once these criteria have been established then the pre-selection information must be obtained for evaluation.
Having compiled the long list and decided upon the pre-selection criteria to be used to evaluate those on the list, pre-selection information must be gathered.

Where the Department is unfamiliar with a firm on the long list, or uncertain about the firm’s abilities in a certain field, then the best means of gathering information is by arranging a pre-selection interview.

A brief should have been developed by this stage, and more value can be obtained from the meeting if the project specific brief is provided to the consultant before the meeting. Specific questions can be asked about the firm’s initial views on how they would approach the commission and who might be expected to do the work. If a preliminary enquiry has been sent, and the firm has responded positively, then standard form 2 - Request for preliminary interview may be sent enclosing the brief. (See CST3/SF2).

It is recommended the two members of the Department attend the interview. Neither member should have any conflict of interest with the firm being visited.

The meeting should be arranged with the firm’s key personnel at the consultant’s offices. Much information may be gathered from such a meeting, such as:

- overall expertise;
- the range of work that the firm would be interested in doing;
- any special areas of Consultant expertise;
- resources and support facilities;
- use of IT;
- financial soundness;
- apparent efficiency of staff and the way the office is run;
- nature of staff employed;
- office size and location.
The purpose of the interview is for the Department to assess the suitability of the firm for Government work in the required area. It is also an opportunity for the firm to get to know you and find out more about your specific needs, potential work programme, and way of working.

For larger type commissions it is advisable to prepare a questionnaire which specifically addresses the chosen pre-selection criteria. A response should be requested by a specific date. The consultant should be asked to give information about each of the pre-selection criteria and specifically to indicate likely team size, members and relevant experience.

**Key Points**

- Pre-selection interviews are a useful way of finding out about companies and the market generally.
Dear Sir

[TITLE OF PROJECT]

Thank you for your positive response to our preliminary enquiry dated [date].

A copy of the provisional brief is enclosed. We will shortly be inviting competitive bids for this commission and intend to select a short list of consultants for the competition. We would therefore like to meet you at your offices to discuss the type of work you undertake and to assess your suitability for this commission in terms of the following:

For example:

• overall expertise and experience;
• the range of work that you are interested in doing;
• special areas of consultant expertise;
• expertise and experience relevant to this project;
• resources and support facilities;
• use of IT;
• financial soundness.

Please contact me to arrange a suitable appointment.

Yours faithfully
COMPIlATION OF SHORT LISTS

When all pre-selection information has been gathered, and evaluated, the short-list can be produced. The number of tenderers selected for the short list will depend on the size and complexity of the project.

Those who are not short listed should be advised in writing. Standard Form 3 - exclusion notification, may be sent (see CST 3/SF3). There are two alternative paragraphs depending on whether or not a pre-selection interview was held.
Dear Sirs

[TITLE OF PROJECT]

Thank you for your letter of [date] expressing an interest in being invited to tender for the above contract.

[or, (if attended pre-selection interview): Thank you for the opportunity of meeting you on [date] to discuss your firm and the above project].

After careful consideration I must advise you that on this occasion the Department does not intend to invite you to tender.

Please be assured that this decision in no way affects the prospect of you being invited to tender for suitable work in the future.

Yours faithfully
NUMBER OF TENDERERS

Other than in very unusual circumstances, contractors and consultants are not directly reimbursed for the costs they incur in preparing tenders. This is an overhead to the business in question. One of the ways of contributing to increased industry efficiency encouraged by the Latham Report is to reduce the cost of tendering. Departments may make an important contribution in this respect by keeping to a minimum the number of firms who are invited to tender.

The number of firms selected for the short list would depend on the type and size of commission, but it is generally recommended that 3 or 4 firms are selected.

Where the EC rules apply and the restricted procedure is being used, the contracting authority may specify the range in the Contract Notice from within which the number of tenderers will be invited to bid. The lower number of the range must not be less than 5 and the higher number not more than 20.

If an authority chooses not to specify a range then it is free to invite any number of bidders provided it is sufficient to ensure genuine competition (normally not less than 3).

It is recommended that in any event no more than 6 consultants are invited to tender.

Where the Department is seeking to establish a national panel of say 10 architectural consultants on the basis of framework agreements then it is appropriate to invite tenders from say 30 consultants in one go. Clearly this is the equivalent of 10 separate commissions and so the ratio of three tenderers to one contract is maintained.
CST 3.8

QUALITY PRICE MECHANISM

The final decision as to which consultant offers the best value for money will be determined by:

• the size and scope of the commission;

• the complexity of the commission;

• quality considerations of tenderers, such as qualifications, experience and track record etc.;

• the prices offered by tenderers.

In coming to a final decision it is worth bearing in mind that the labourer is worthy of his or her hire. Best practice private sector clients and Departments have all learnt to their cost that the cheapest bid does not necessarily result in overall long term best value for money. Cut price tenders usually result in cut price inputs, where more work is carried out by less experienced professionals or technicians, and the Department suffers as a result of a less attentive service provider.

It is therefore important to consider both quality and price during the evaluation. The term best value for money means selecting a consultant who offers the optimum combination of quality and price. Hence, these factors should be considered in the final choice of consultant.

A very useful approach to tender evaluation is to use a quality/price mechanism which is based on a numerical scoring and weighting system. The advantages of this are that:

• it formalises what can be a very subjective evaluation process;

• it requires forethought as to what are the most important criteria for selection;

• it can be transparent;

• it can be audited.
The quality/price mechanism should be decided upon at the outset of consultant procurement. The Tender Board should be appointed at this stage for this purpose. If the brief continues to be developed it may be necessary to change some of the evaluation criteria and or their weightings, but the mechanism should be finalised before pre-tender interviews commence.

The finalisation of the quality/price mechanism involves deciding upon the following:

- the quality criteria which will be used; standard form CST3/SF7 is an example of quality marking sheet;
- the weighting which should be attached to each of the chosen criteria;
- the quality price ratio; in other words the relative importance of quality and price.

The weighting of quality against price will be influenced by the complexity of the project and the degree of creativity or flexibility that is required in its execution. For example the more complex the project, the harder the project will be to manage and control; the more unusual the project the harder it will be to make predictions about resource levels and the more skill that will be required of the consultant. Experience, technical competence, management skill and management systems will take on a far more significant level of importance for complex projects. For the quality/price mechanisms to reflect this shift in balance, more weight should be given to quality criteria than to price.

Indicative quality/price ratios for consultant services are as follows:

<table>
<thead>
<tr>
<th>Type of project</th>
<th>Indicative quality/price ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feasibility studies</td>
<td>80/20 to 90/10</td>
</tr>
<tr>
<td>Innovative projects</td>
<td>70/30 to 85/15</td>
</tr>
<tr>
<td>Complex projects</td>
<td>60/40 to 80/20</td>
</tr>
<tr>
<td>Straightforward projects</td>
<td>30/70 to 60/40</td>
</tr>
<tr>
<td>Repeat projects</td>
<td>10/90 to 30/70</td>
</tr>
</tbody>
</table>
Key Points

• The final selection should be based both on quality and price.

• The numerical/price mechanism is a useful decision support tool but there may be good reasons why the final choice may nevertheless require some subjective judgement.

• Any decision as to the final choice of consultant must be justifiable on the basis that the consultant offers overall long-term best value for money.
PRE-TENDER INTERVIEW STAGE

Purpose

The pre-tender interview stage is the first of a two part tender evaluation process. The purpose behind the pre-tender interview is to provide for the separate initial evaluation of quality. The short list may be further reduced as a result of this quality evaluation, and only those who satisfy the quality requirements/quality threshold of the commission will be invited to submit a price.

Enquiry

A date and time should be arranged for pre-selection interviews with each of the short listed consultants. Each consultant should be contacted to confirm their availability to attend a meeting at the required time.

It is essential that the consultant, or principal consultants, who will be expected by the consultant firm to carry out the commission is/are actually available to attend the interview. If the consultant already has the brief then this should be stipulated at the time of arranging the meeting. If not then this should be confirmed after the consultant has received the full tender documents referred to below.

Send out Tender Documents

Having determined availability to attend the pre-tender interview, an invitation letter is sent (see CST3/SF4). The consultant is not actually invited to tender at this stage, but is provided with the brief and conditions of engagement so that the consultant may give detailed consideration to the project requirements and determine which resources are appropriate to carry out the commission. If any of the consultants have not already done so then they should be provided with a questionnaire to be completed and returned prior to the interview. (An example questionnaire is provided in the form of CST3/SF5).
Reasonable time should be allowed for the following:

• consultant’s preparation of their submission;

• consultant’s response to the questionnaire;

• consideration of submissions and any questionnaire by the proposed members of the interview panel (usually three members of the Department);

• confirming attendance of each consultant’s proposed team.

When submissions are received they should be circulated to all members of the panel for their scrutiny. The panel should focus on any areas of weaknesses, and highlight the need for specific questions in the interview.

Although optional, a Department may choose to carry out a preliminary scoring of each of the consultants submissions prior to interview, on a score sheet (See CST/SF7). These scores can then be re-visited post-interview.

The Interview

The pre-tender interviews should be held at the Department’s offices. It is recommended that consultants are kept from meeting one-another, otherwise this may affect prices subsequently submitted.

It is also recommended that the pre-tender interview is attended by a panel of three members of the Department, one of whom is nominated chairman to lead the meeting, and that the meeting is limited to a duration of one hour. For an example of an agenda see CST 3/SF6.

It is advisable to allow sufficient time between interviews to allow for an overrun in interview time and to allow for the quality scoring of the consultant by each panel member.

Each consultant should be treated fairly and equally and each interviewer should be objective. Prior to the interviews, the panel should set aside time to discuss and agree the nature of questions and specific questions to be asked of each consultant.
Within the framework of the example agenda (see CST3/SF6), the principal areas which should be covered in the interview are:

- the consultant’s understanding of the commission;
- the way in which the consultant might expect to handle the commission;
- the clarification of ambiguities by either side;
- the clarification of any particular areas of concern amongst panel members;
- the development of a clearer understanding of each other’s requirements.

Questions should be directed to ensure that each panel member has sufficient information to score each consultant. An example score sheet is given at CST3/SF7, and this will be completed by each panel member at the conclusion of each interview. Note that this sheet has examples of weightings for each criteria, but that each one is scored out of 100. The weightings are subsequently applied to determine the overall weighted average quality score.

It is also essential that one of the panel members keeps notes of who attended, answers to questions, and in particular any undertakings given by a consultant.

At the completion of all interviews, the chairman leads a review of the comparative findings of the panel, and produces a summary sheet for each consultant which consolidates the marks of individual panels. An example summary sheet is given at CST3/SF8. Formal recommendation will than be prepared which identifies those which should be included on the final tender list.

It is not the intention of this process to result in the selection of a final short list of consultants who all have an equal quality score, but merely to exclude those who are considered unsuitable or fall short of a predetermined quality threshold.

If it is decided to exclude any firms from the short list at this stage then they should be sent a decline letter in the form suggested by CST3/SF9.
Key Points

• The purpose of the pre-tender interview is to assess quality not price.

• Each consultant should be treated equally and fairly.

• It is essential to keep records of all questions, scoring and decisions so that an audit trail is available.
STANDARD FORM 4 - LETTER

INVITING CONSULTANT TO ATTEND FORMAL INTERVIEW

Dear Sirs

[TITLE OF PROJECT]

The [Scottish Ministers]/[Secretary of State] acting through [Department] intend(s) to commission ....................... [state professional service] in connection with the above .

The provisional brief and Conditions of Engagement for the commission is enclosed, and it is anticipated that the following services, as defined in the conditions of appointment described above, will be required:

It must not be assumed that conditions are unchanged from previous editions.

It is expected that the fee competition for this commission will be on the basis of a ..................................... [specify either lump sum, or time charges or percentage of the project value].

You are invited to attend a selection interview which will last an hour with representatives of [Department] on .................. [date] at .................. [time] in .................. [address] to discuss how you would propose to carry out the services required, your experience of similar projects the structure and available resources of your practice, workloads, facilities, special expertise and the details of the principal and senior staff whom you propose would be responsible for the project. The [Department] will detail its requirements and method of working and will answer questions you may have during the interview. [A questionnaire is enclosed which I would be grateful if you would complete and return to me by ................].

Following the interviews, [selected] consultants will be invited to submit their fee proposals which will be taken into account when deciding which consultants should be awarded the commission.

Will you please confirm as soon as possible that the proposed date and time for the interview is convenient to you and let me know who will be attending. It is of course, for you to decide who should attend the interview but we would expect to meet the proposed account manager and senior consultant who will be responsible for the day to day operation of this commission.

Please note the [Department] is not bound to accept your proposal.

Yours faithfully
Please give details of the following:

(1) Outline how the brief would be tackled.

(2) The structure, resources, organisation, and location of the office which would undertake the commission.

(3) Name, qualifications and summary of relevant experience of Partner/Principal/Director proposed as responsible for the commission and any other Partners/Principals/Directors who may be involved and the anticipated extent of their involvement.

(4) Names and qualifications of senior staff likely to have involvement with the commission and the input they are likely to have over the life of the commission.

(5) Experience of commissions of comparable size, complexity and nature in UK and overseas.

(6) Previous experience in working for Departments and other public authorities.

(7) Confirmation of whether all the specialist experience or expertise necessary for this commission is available from within the practice. If this specialist experience or expertise is not so available how and from whom it would be obtained.

(8) Computer facilities and experience which are available, highlighting any specialist techniques.

(9) Insurances, indemnities, securities which are held; or would be taken out for this commission. The level of insurance must meet the Department’s requirements.

(10) What Quality Assurance schemes/systems operate.
AGENDA

(Allow maximum of 1 hour to complete)

a) Chairman welcomes Firms’ representatives and introduces interviewing panel members.

b) Chairman outlines purpose and structure of interview and time to be allowed.

c) Firms’ presentation (approx. 20 mins)

d) Interview panel questions (approx. 30 mins)

e) Questions from Firm/Clarification of any point.

f) Chairman to close
# INTERVIEW ASSESSMENT FORM

**Commission Title:**

.........................................................................................................................................................................
..........................................................................................

**Firm:**

......................................................................................................................................................................
............................................................................................................................... .......................

**Represented by:**

.......................................................................................................................................................................
..........................................................................................

**Panel Member:**

.......................................................................................................................................................................
..........................................................................................

<table>
<thead>
<tr>
<th>Comments</th>
<th>(A) Weight in g</th>
<th>(B) Marks (out of 100)</th>
<th>(A) x (B) weighted marks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Appreciation of the commission</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Calibre of relevant professional staff. Accounting and management skills and depth of experience</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Quality of account manager (for the whole commission)</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Approach to undertaking the commission, including resources allocated and ability to cope with peak workloads</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Experience of similar commissions</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comments</td>
<td>(A) Max</td>
<td>(B) Marks (out of 100)</td>
<td>(A) x (B) weighted marks</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>---------</td>
<td>------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>6. Experience of public sector work</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Quality Assurance/Checking systems</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. Specialist advice to be bought in</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Mark awarded</td>
<td>100</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

SIGNATURE: ________________________________    DATE: __________________

PRE-TENDER INTERVIEW STAGE
CONSULTANTS SECTION
CONSULTANT SELECTION

CST 3.9.9
# INTERVIEW SUMMARY SHEET

1. Name of Company:...................................................................................................................................................

2. Represented By:...........................................................................................................................................................

3. Name of Commission: .............................................................................................................................................

4. Commission Ref No: ................................................................................................................................................

5. Date of Interview: ......................................................................................................................................................

6. Time of Interview: ......................................................................................................................................................

7. Summary of Overall Assessment Markings: ..............................................................................................................

<table>
<thead>
<tr>
<th>PANEL MEMBERS</th>
<th>MARKING TOTALS (WEIGHTED SCORE)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>PANEL MARKING TOTAL</td>
<td></td>
</tr>
</tbody>
</table>

CST 3.9.10
8. Comments: ..........................................................

..........................................................

..........................................................

..........................................................

9. Chairman's Signature: ..........................................................
Dear Sir

[TITLE OF PROJECT]

Thank you for attending at these offices for interviews on

After careful evaluation of your proposal I must advise you that yours was unsuccessful and you will not be invited to provide a fee bid on this occasion.

Please be assured that this decision in no way affects the prospect of you being invited to tender for suitable work in the future.

Yours faithfully
CST 3.10

SINGLE TENDER

In the case of some specialist works or work of an experimental nature, competition may not always be possible or practicable. In such situations single tender action may be unavoidable.

Before single tender action is sanctioned, special care should be taken to ensure that other consultants are not capable of providing the required service.

It should be remembered that single tender action may not lead to the best possible value for money.

Single tender action must be sanctioned by the appropriate authority in accordance with the laid down delegations.

The submission for authority to proceed with single tender action should give clear and convincing reasons for taking such action and a copy of that submission and subsequent approval must be kept on the commission file for future reference.

The EC Services Directive sets restrictions on negotiated commissions which exceed the EC thresholds and these must be considered prior to approving single tender action.

Key Points

• It may be acceptable in exceptional circumstances to pursue a single tender action procurement route, but this will usually require obtaining the appropriate delegated authority.
CST 4.0  

TENDER PROCESS

CST 4.1  

GENERAL

The tender process involves the invitation by the Department to tenderers to submit their price in respect of the proposed commission. Where the consultant procurement procedures recommended by the guide are being followed, then the quality assessment will already have been carried out. If this is the case, then during the tender period the consultant will have only to review the level of resources required and submit the price. However, the price itself may have implications regarding resourcing. Since resourcing is a quality issue this aspect in particular may necessitate a re-appraisal of the quality score arrived at after completion of pre-tender interview.

The principal stages in the tender process are as follows:

1. Prepare clear, consistent and comprehensive tender documents
2. Determine sufficient time for tender period
3. Issue tender invitation and tender documents to tenderers enclosing label and specific date time and address for return
4. Facilitate any site visits required by tenderers
5. Deal with tenderers queries promptly - and advise all other tenderers of information given
6. Place all tenders received in the tender box
7. Sort tenderers by name or preferably by price and assign a unique tender number to each
8. List tenders received, not received, on tender summary sheet
9. List tender number, opening date, name and price in tender record book
By way of introduction, the following are the key points which relate to the tender invitation and operating process:

- the guidance given here applies not only to the Department but to any consultants procuring consultant commissions on behalf of the Department;

- it may be appropriate to check tenderers against NQs to ensure that there has been no change of status since the longlist was prepared;

- in order to ensure consistency of information provided to tenderers it is recommended that only one person in the Department acts as a contact; this helps to ensure the fair treatment of all tenderers;

- it is recommended that tenders are always returned to the Department's offices, where they should be kept securely (in a tender box) until they are opened;

- from the time of opening to award of contract, tenders should be kept securely and all tender information treated as strictly confidential;

- a clear audit trail should be established.

The procedures for tender receipt, opening and evaluation which follow may seem onerous, but it is essential to have procedures in place which protect the individuals involved from claims of corruption or impropriety, and which ensure that the tenderers are participating in a fair competition.

**Key Points**

- Tenders should be kept secure from the time of receipt until the final award of contract.

- Clear records must be kept of each step.
FORMS OF TENDERING

The intention behind the pre-tender interview stage is to evaluate quality separately from and ahead of price, before a final decision which combines the two.

Although not the preferred approach, there is an alternative method of keeping tenderer's submissions on quality and price separate. This is known as the double-envelope method. Where the quality and price elements of the tender are submitted in separate envelopes. This may take two different forms:

• the common approach is for all consultants technical envelopes to be opened and evaluated; all consultant's price envelopes are then opened and evaluated separately; the consultant with the most favourable combination is then selected;

• the alternative approach is that selection is on quality only; i.e. only one price envelope is opened, that of the best quality tenderer; the price envelopes of the unsuccessful tenderers are returned.

The problem with the latter option is that there is no way of ranking all consultants by combination of quality and price and therefore no way of knowing whether the selected tender offers the best value for money option.
TENDER DOCUMENTS

The tender documents should specify the Department's requirements as well as the consultant's obligations, particularly since this information is the basis of the contract price.

The tender documentation will therefore consist of the following main elements:

- the conditions of engagement;
- the specific duties required of the consultant;
- the brief related to the commission.

The conditions of engagement or contract will define the allocation of risks, obligations of the parties, the basis on which the price is to be tendered (e.g. hourly rates, lump sum, ad valorem (percentage of overall capital cost) remedies in the event of failure by a party to perform its obligations etc.

The specific duties are normally a schedule of duties, in the form of a 'shopping list' which the consultant will be expected to carry out. These will obviously vary according to the scope of the commission and the type of consultant being engaged.

The brief can be considered as a specification of the Department's needs in respect of the work required. In the case of a major works commission this will normally be a fairly detailed specification of premises needs, service requirements etc. In the case of estates services commissions the brief would commonly set out a schedule of premises, lease terms, anticipated rent review periods and property management requirements.

Lack of clarity or ambiguity in documents, create weaknesses or opportunities which the consultant may exploit in order to increase the final cost and/or delay the time for delivery.
It is important therefore that the tender documents satisfy the following essential requirements:

• the documents should be specific about what is required;

• the documents should be without ambiguity; these and any documents which are a record of negotiations that are subsequently incorporated as contract documents, should all be consistent with one another;

• the conditions must clearly allocate risks as between consultant and Department and specify who must pay what in the event of variations or delay.

Documentation for inviting tenders whether compiled by the consultant or the Department, should ideally comprise the following:

• invitation letter;

• the brief;

• list of tender documents;

• conditions of engagement;

• notes for tenderers;

• standard acknowledgement slip (See CST4/SF1);

• instructions for submitting tenders;

• tender offer form;

• tender return Label (See CST4/SF2).

Note that the instructions to tenderers should include information about a point of contract (the premises manager for example) with whom tenderers can make arrangements to visit a site or building, where this is the subject of a commission.
To minimise the risk and impact of individual consultants, or members of a consultant’s team, switching employers during a construction related negotiation and re-appearing as an adviser to the opposing side, precautionary measures should be put in place. This might be especially pertinent, for example in the case of a claims negotiation on a building contract or during lease or rent negotiations.

Therefore Departments should ensure that conditions of engagement for property or works consultants include a requirement for each individual member of the consultant’s team to sign a confidentiality undertaking before commencing work in connection with the commission.

A model clause is shown at CST4/SF3 whilst a model undertaking is shown at CST/SF4.
STANDARD FORM 1

STANDARD FORM 1

ACKNOWLEDGEMENT SLIP

Tenderers are requested to complete this slip and return it to

....................................................................................................................................................................................................

[Departmental address] immediately upon receipt of the tender documents.

PROJECT/COMMISSION TITLE: ..........................................................................................................................
DEPARTMENT REFERENCE NO: .......................................................................................................................
DEPARTMENT LIAISON OFFICER: ...................................................................................................................
(as stated in the invitation letter)

1. I acknowledge receipt of tender documents for the above project/commission.

(either)*

2. I will submit my tender by the due date.

(or)*

2. I do not wish to tender on this occasion and return the documents herewith.

Signed: .............................................................................................................................................
For and on behalf of .............................................................................................................................
.............................................................................................................................................................
.............................................................................................................................................................
Date: .....................................................................................................................................................*

*Delete as appropriate
3. Tenders to be delivered by hand are to be handed in at the Tender Box.

2. It is the Tenderers responsibility to ensure that the tender is delivered by the due time. Tenderers must bear any indication of the Tenderer's name.

1. The envelope to which this tender is attached must not be openedamera than 11:00 hrs on the day of opening.

---

FOR CONTRACT NO:

Tender

STANDARD FORM 2

TENDER RETURN SUP.

DEPARTMENTAL ADDRESS

ART

STAMPS

ONE"
STANDARD FORM 3

CONFIDENTIALITY

Each party:

a) shall treat as confidential all information obtained from the other Party under or in connection with the Contract;

b) shall not disclose any of that information to any third party without the prior written consent of the other Party except to such persons and to such extent as may be necessary for the performance of the Contract; and

c) shall not use any of that information otherwise than for the purposes of the Contract.

The Contractor shall take all necessary precautions to ensure that all information obtained from the Authority under or in connection with the Contract:

a) is given only to the minimum number of Staff and then only to the extent necessary for each member of Staff's activities in the provision of the Services; and

b) is treated as confidential and not disclosed (without prior Approval) or used by any Staff otherwise than for the purposes of the Contract.

Where it is considered necessary in the opinion of the Authority's Representative, the Contractor shall ensure that Staff sign a confidentiality undertaking before commencing work in connection with the provision of the Services.

The provisions of this Condition shall not apply to any information:

a) which is or becomes public knowledge (otherwise than by breach of this Condition); or

b) which is in the possession of the Party concerned, without restriction as to its disclosure, before receiving it from the disclosing Party; or

c) which is receiving from a third party who lawfully acquired it and who is under no obligation restricting its disclosure.
Nothing in this Condition shall prevent the Authority:

a) disclosing such information relating to the outcome of the procurement process for the Contract as may be required to be published in the Supplement to the Official Journal of the European Communities in accordance with EC directives or elsewhere in accordance with requirements of Scottish Government and/or United Kingdom government policy on the disclosure of information relating to government contracts;

b) disclosing any information obtained from the Contractor:

i) to any Scottish Minister, Minister of the Crown, government agency or department (including the Comptroller and Auditor General, National Audit Office, the Auditor General for Scotland and Audit Scotland), regulatory or fiscal body, or the Scottish Parliament or the United Kingdom Parliament (including, in both cases, its committees), each of whom may disclose the information in their reports. For the avoidance of doubt, the Authority shall have no responsibility for Confidential Information which appears in reports of the activities or proceedings of any of the foregoing; or

ii) to any Person engaged in providing any services to the Authority for any purpose relating to or ancillary to the Contract, provided that in disclosing information under sub-paragraph (i) or (ii) the Authority discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

Nothing in this Condition shall prevent either Party from using any techniques, ideas or know-how gained during the performance of the Contract in the course of its normal business, to the extent that this does not result in a disclosure of confidential information or an infringement of any Intellectual Property Rights.

The Contractor shall not use any confidential information obtained from the Authority for the solicitation of business from the Authority or any other part of the Crown in right of Her Majesty's Government in the United Kingdom or in right of the Scottish Administration.

The obligations imposed by this Condition shall continue to apply after the expiry or termination of the Contract.
STANDARD FORM 4

CONFIDENTIALITY UNDERTAKING

In connection with a contract between [...............................] and [...............................] for the provision of [...............................] services. To be signed by persons employed in providing the services before being given access to Government information.

I am employed by [name of Consultant]. I have been informed that I may be required to work for my employer in providing services to the [full name of Authority].

I understand that information in the possession of the [...............................] or obtained from the [...............................] must be treated as confidential.

I hereby give my formal undertaking, as a solemn promise to the [...............................], that:

1. I will not communicate any of that information, or any other knowledge I acquire about the [...............................] in the course of my work, to anyone who is not authorised to receive it in connection with that work.

2. I will not make use of any of that information or knowledge for any purpose apart from that work.

I acknowledge that this applies to all information that is not already a matter of public acknowledge and that it applies to both written and oral information.

I also acknowledge that this undertaking will continue to apply at all times in the future, even when the work has finished and when I have left my employment.
I have also been informed that I will be bound by the provisions of the Official Secrets Acts 1911 to 1989. I am aware that under those provisions it is a criminal offence to disclose information which has been provided by [Department] in connection with the above contract. I am aware that serious consequences may follow any breach of those provisions.*

SIGN ED: .................................................................
Surname: .................................................................
Forenames: ..............................................................
Date: ..........................................................
Consultant's Name ..............................................................
Contract Reference No. ..............................................................

*This optional paragraph may be deleted if the consultant is unlikely to come into contact with material which carries a security classification.
MODEL SIGNATURE FORMAT FOR USE UNDER SCOTTISH REGIME

1 I acknowledge and agree that this Undertaking shall be governed by, and construed in accordance with, the law of Scotland and the parties prorogate the jurisdiction of the Scottish courts so far as not already subject thereto: IN WITNESS WHEREOF these presents consisting of this and the [insert no] preceding page(s) are executed as follows:

for and on behalf of [insert name of consultant] (Consultant)

at ................................. on .................................. 200[ ] by:

....................................... (Director's signature)  .................................. (Director/Co Sec's signature)

....................................... (full name)  .................................... (full name)

(use style above if company) / (use style below if individual or firm)

by the Consultant:

At ................................. on .................................. 200[ ]

................................................................. (signature)

................................................................. (full name)

................................................................. (title)

in the presence of:

................................................................. (signature of witness)

................................................................. (full name)

................................................................. (address)

.................................................................
CST 4.4  TENDER PERIODS

The time allowed from issue of tender documents to the date by which the tenderers offer must be returned is known as the tender period.

The tender period allowed to tenderers to submit their bid will depend on the nature and complexity of the project. A minimum of 2 weeks and a maximum of 6 weeks should be allowed for tendering depending on the size and complexity of the services. Allowance should be made for the need for site visits or for gathering information or quotations necessary to prepare the offer, as well as for public holidays.

If pre-tender interviews have been held then consultants will already have given consideration to the requirements of the commission and the resources they anticipated will be required to carry out the commission. If this is so then, subject to the need for information gathering, the lower end of the range i.e. 2-3 weeks ought to be adequate time for consultants to submit their price.

Where the EC procurement rules apply, minimum tender periods are stipulated.

Key Points

- It is suggested that the tender period should be a minimum of 2 weeks and a maximum of 6 weeks.
- It may be advisable to contact tenderers beforehand to ensure that tender periods are feasible.
**TENDER BOXES**

Arrangements should be made for a suitably-sized tender box to be provided marked “[Department] TENDER BOX”. The box should be designed so that it is secure and all tenders received can be placed in the box and remain there until the date and time for opening.

Tenders received should be stamped with the date and time received before being placed in the tender box.

The box should be solidly built and be large enough to hold all the tenders likely to be received during the period between tender boards, bearing in mind that tenderers often include large or bulky documents as part of their submission.

The box should be fitted with two separate locks and the keys should be held by two different individuals nominated by the commission manager/project sponsor. The box should have a letter-box type opening so that tenders can be inserted but cannot be taken out without opening the locks.
CST 4.6

SECURE INFORMATION

No classified information should be disclosed in tender documents or drawings unless the disclosure is absolutely necessary for the preparation of tenders. In such cases the tender documents should be drawn up so that documents containing classified information may easily be identified and isolated.

Classified documents should be transmitted in accordance with the instructions in the Departmental Security Handbook and consultants should be acquainted with these procedures where applicable.
CST 4.7

**DOCUMENTATION STANDARDS**

All tender documentation must be type-written and documents that are required to be completed and returned with the tender SHOULD BE ISSUED IN DUPLICATE with an instruction to the tenderer to retain a copy for its records.

An adhesive tender return label showing the tender reference number together with the time, address and date of return should be issued with the invitation documents. An example of a tender label is shown at CST4/SF2.

In the case of single tenders there should be nothing either in the tender documents or on the return label to indicate to the tenderer that it is a single tender.
DISPATCH OF TENDERS

The current addresses of all tenderers should be established before sending out tenders. It is also important that the tender is marked for the attention of the correct person within each organisation, otherwise the tenderer may lose valuable time in preparing the tender.

The sender's name and address (either the Department's or the Consultant's address) should be entered on the back of each dispatched tender envelope to ensure the quick return of any tender in the event of non-delivery. A locally produced rubber stamp could be used for this purpose.

If a tenderer's documentation is returned by the Post Office marked "GONE AWAY", enquiries should be made to try and ascertain the correct address.

Once this has been established, the NQS should be notified so that the relevant database can be updated.

Dependant on the speed with which the tender has been returned, consideration should be given to dispatching the tender again to the correct address, and perhaps consideration given to extending the tender period.
QUERIES BY TENDERERS

All firms should be dealt with in exactly the same way. They should be given the same documentation and the same access to further information.

Ideally there should be a clarification period following the issue of the tender documents during which the Department may provide further information in response to queries by tenderers. The answer to a query from a tenderer should be confirmed in writing and any supplementary information which has to be issued as a result, should be copied simultaneously to all other tenderers, without making reference to the questions.

Although it is intended that questions pertaining to the commission should be dealt with during the pre-tender interview, it may be appropriate to hold mid-tender interviews. Mid-tender interviews can be very useful for exchanging information. The Department can frequently benefit from the questions posed by tenderers and any constructive comment from them. Mid-tender interviews should be held separately with each tenderer. Avoid allowing tenderers to attend the offices at the same time or to see other names in a signing-in book.

Where queries result in a significant change then an extension of the tender period should be considered.

Viewing of Properties

If tenderers ask to view properties during the tender period, this may be arranged by the Department through the premises manager for the building in question.

Standard form CST4/SF5 is an example letter that may be sent to a premises manager instructing him or her to co-ordinate appointments to view the property. Any queries should be referred back to the departmental representative responsible for inviting tenders.

Key Points

- All tenderers should be dealt with equally and fairly.
- Additional information should be provided in writing to all tenderers.
COMMERCIAL-IN-CONFIDENCE

Dear ............................................................................................................................
[Premises Manager]

[Title of Project/Commission]

1. You may be aware that it is the intention of [Department] to appoint a consultant to undertake the above mentioned project/commission.

2. Following recent selection interviews ...... companies, namely .............................................. ............................................................

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.................................................. [list tenders names] will be invited to tender. During the tender period [state tender period included dates] the selected firms may wish to view the following properties:

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TENDER BOARDS

A tender board, typically comprising three people should be appointed to open and record bids. It is recommended that the following conventions be followed:

- one member should be a senior chairperson;

- one member should be completely independent from the commission; this helps to establish the credibility of the board, as impartial;

- total impartiality is achieved through choosing different tender board members from those on the tender evaluation panel.

To promote propriety, it helps if a member of the board appoints no more than one other member, i.e. chairman appoints the secretary, the secretary appoints the third person.

It is the responsibility of the senior board member to ensure that all members are conversant with tender board and tender opening procedures and the tender documents.
CST 4.11  OPENING THE TENDER BOX

Tenders should be opened on the same day as the date for return and shortly after the hour specified for return.

If, as is recommended, a tender box is being used, then the joint key holders will have to first open the tender box. Only those tenders relevant to the commission in question should be removed.

Late Tenders

The tender box should be checked daily after the required tender return date to check for late tenders. Late tenders should be dealt with in accordance with section CST 4.14.
OPENING OF TENDERS

Prior to the opening of tenders, the commission manager/project sponsor should provide the tender board with a list of all those invited to tender. This enables the tender board to identify those who have not submitted tenders or subsequently those whose tenders are received late.

When the tender box is opened, the unopened tenders should be passed directly to the tender board, and to no-one else.

The following steps should then be followed by the tender board:

• tenderers should ideally be opened in a locked room with no working telephone;

• if the tender board is dealing with tenders for a number of commissions then it will need to sort tenders by their unique tender number and deal separately with the tenders for each commission;

• opened tenders for a commission should be sorted according to price or in the alphabetical order of the tenderers' name;

• any unpriced tenders are not complete tenders and should therefore be rejected and returned stating the reason for rejection;

• where a tender document has a tenderer's signature at the end of it, each page of that document should be signed by the senior member of the tender board; this may be speeded up by the use of a personal facsimile signature stamp;

• each tender should then be given a sequential number to prevent later insertion of other tenders.

• a tender summary sheet should then be completed (CST4/SF6); on the sheet should be listed the sequential tender numbers names of tenderers from whom tenders were received and their price; names of those who did not submit tenders, should also be given together with the reason if known;

• the tender summary sheet relates to the tenders for a particular commission and should be completed and signed by the senior tender board officer;

• the tender summary sheet and opened tenders should be delivered by hand or, if necessary sent by registered post to a member of the tender evaluation panel.
STANDARD FORM 6

TENDER SUMMARY SHEET

[Department]
TENDERS - SUMMARY SHEET
Commission/Contract File No:

LOCATION
NAME OF CONTRACT/COMMISSION
ESTIMATED COST £
DATE

Tenders as listed below, have today been opened and authenticated by the Tender Opening Board. Also listed are the names of those firms that did not wish to tender, together with those that did not respond to the tender invitation.

To:

Will you please examine the enclosed tenders and provide your recommendation as soon as possible.

Signed: Senior Tender Board Officer
CST 4.13

THE TENDER RECORD BOOK

A Tender Record Book is a proforma book used for recording all tenders for all commissions opened on a given day. It is therefore a running record of all tenders opened. An example format is given at CST4/SF7.

The Tender Record Book is invaluable for senior officers and auditors, as the first step in any review of tendering activity since it provides a complete reference record of allocated tender numbers.

It is important that the sequence of numbers should remain unbroken. Tender board members should sign the tender record book once tender opening has been completed, confirming the next number in the sequence.

This prevents any irregularities such as the addition of a late tenderer to the tender list without prior approval of the tender board and without clear reasons for so doing.
### COMMERCIAL-IN-CONFIDENCE
#### TENDER RECORD BOOK

[DEPARTMENT]

<table>
<thead>
<tr>
<th>SERIAL NO OF TENDERS (SEE NOTE 2)</th>
<th>CONTRACT/COMMISSION NO</th>
<th>TITLE OF CONTRACT/COMMISSION</th>
<th>NAME OF FIRM TENDERING</th>
<th>TENDER PRICE</th>
<th>DATE AND TIME TENDERS OPENED</th>
<th>NOTES ON COMPLETENESS OF TENDER/IRREGULARITIES</th>
<th>SIGNATURE OF TENDER BOARD MEMBERS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**

1. Details of all Contractors/Consultants who were invited to tender must be included. Tender prices should be entered where it is clear from the tender documents, otherwise “see tender” should be entered.

2. Below the last tender number enter “Next Tender Number To Be Used” and insert Tender No.
LATE TENDERS

Late tenders are not acceptable and should be rejected. However, it may be unfair to reject a posted tender if it has been held up in the post. The tender board should be re-commenced on receipt of late tenders. Late tenders might be accepted in the following circumstances:

- **first class posted tenders** - the date stamp should be at least one day before tenders were due to return;

- **second class posted tenders** - the date stamp should be at least two days before tenders were due to return.

If the date stamp or class of postage are difficult to ascertain - treat as second class postage. If the date stamp and class are made with the tenderer's franking machine, the tender should be rejected.

Tenders should not be accepted by facsimile under any circumstances.

A record of all rejected tenders should be kept at the back of the tender record book, and the price should not be recorded or disclosed. (See CST4/SF8)

Should the tender opening board decide to admit a late tender into competition it should be inserted in sequence into the list of tenders and given a suffix to the preceding number i.e.:

<table>
<thead>
<tr>
<th>Tender numbers</th>
<th>Tenderer's Name</th>
<th>Tenderer's Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>248</td>
<td>J Bloggs</td>
<td>£265,498</td>
</tr>
<tr>
<td>249</td>
<td>J Smith</td>
<td>£265,501</td>
</tr>
<tr>
<td>249A*</td>
<td>T Jones</td>
<td>£270,995</td>
</tr>
<tr>
<td>250</td>
<td>F Black</td>
<td>£276,222</td>
</tr>
<tr>
<td>251</td>
<td>B W hite</td>
<td>£292,543</td>
</tr>
<tr>
<td>*</td>
<td>admitted late tender</td>
<td></td>
</tr>
</tbody>
</table>

The envelope of any rejected tenderer should be retained and should be endorsed with the tenderers name together with the reasons for rejection and signed by a senior member of the tender evaluation board. The contents should then be returned to the tenderer with a short explanation for rejection (see CST4/SF9).

The envelopes for admitted and rejected late tenderers should be filed and used if the decision is challenged.
STANDARD FORM 8

Record of Rejected Tenders

COMMERCIAL-IN-CONFIDENCE
RECORD OF REJECTED TENDERS

[DEPARTMENT]

<table>
<thead>
<tr>
<th>CONTRACT/COMMISSION NO</th>
<th>TITLE OF CONTRACT/COMMISSION</th>
<th>NAME OF FIRM</th>
<th>DATE TENDERS DUE</th>
<th>DATE AND TIME TENDERS RECEIVED</th>
<th>REASON FOR REJECTION OF TENDER</th>
<th>SIGNATURE OF TENDER BOARD MEMBERS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
</tr>
</tbody>
</table>
Dear Sirs

Location: ................................................................................................................................................................................

Commission: ................................................................................................................................................................................

Thank you for your tender for the above contract. It is very much regretted that it was received after the time appointed for delivery and therefore cannot be considered. It is returned herewith.

Should further opportunities arise for you to tender, it would be appreciated if you would ensure that your offers arrive in time to be admitted.

Yours faithfully
CST 5.0  
TENDER EVALUATION

CST 5.1  
EVALUATION CRITERIA

The chosen quality/price mechanism will have established the relative weighting that is to be given to quality and price.

Although quality will already have been evaluated at the pre-tender interview, receipt of the full tender from each consultant may necessitate a rescoring of quality using a form similar to CST5/SF1. This is an example of a tender assessment sheet which takes account of the quality/price ratio and provides for the calculation of a score which combines quality and price.

Quality Scoring

The score for each quality attribute should be an absolute score out of 100 and is multiplied by the weighting. It may be that failure to achieve a minimum level in key criterion will result in rejection, as will a failure to satisfy the quality threshold.

Price Scoring

The price score is calculated for each tender by reference to the lowest tenderer, which is given a score of 100. One point is deducted from the other tenderers for each percentage point above the lowest. The formula for the score is therefore:

\[ 100 \times (1 - ((a - b)/b)) \]

\[ a = \text{price of tenderer being evaluated} \]
\[ b = \text{lowest tender price.} \]
When scoring price it is recommended that the following factors be considered:

- price should only be considered after the tenderer has satisfied the quality threshold;

- very low tenders should be carefully scrutinised to ensure that this is not as a result of failure to understand the commission; note that this should have been resolved at the pre-tender stage;

- compare resourcing levels and cost as low tenders may be under-resourced;

- tenders must be comparable; an essential aspect of tender evaluation is to confirm that tenders are on a par, i.e. that deliberate amendments to the conditions, or qualification have not created anomalies between tenders.

**Final Choice**

Once each tender has been scored, they should be ranked by score, the tenderer with the highest overall score chosen.

**Key Point**

The price scoring and quality scoring systems should be compatible with each other. There are a number of options and the formula outlined earlier in this section would be suitable for evaluating consultants in many circumstances.

A further option would be to use the mean price (rather than the lowest price). A point would be deducted from the score of each tenderer for each percentage point above the mean. Conversely a point would be added for each percentage point below the mean. This option would be even less likely to be subject to distortion if it utilised the average of the three lowest tenders.
**TENDER ASSESSMENT SHEET**  
Confidential- not for public distribution

<table>
<thead>
<tr>
<th>Quality Criteria</th>
<th>Project Weighting (A)</th>
<th>Marks Awarded (B out of 100)</th>
<th>Weighted Marks (A x B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Appreciation of the commission.</td>
<td>20</td>
<td></td>
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<tr>
<td>2. Calibre of relevant professional staff. Accounting and management skills and depth of experience.</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Quality of account manager (for the whole commission).</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Approach to undertaking the commission, including resources allocated and ability to cope with peak workloads.</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quality Criteria</td>
<td>Project Weighting (A)</td>
<td>Marks Awarded (B out of 100)</td>
<td>Weighted Marks (A x B)</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>-----------------------</td>
<td>-----------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>5. Experience of similar commissions</td>
<td></td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>6. Experience of public sector work</td>
<td></td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>7. Quality Assurance/checking systems</td>
<td></td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>8. Specialist advice to be bought in.</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

Total Quality Score (Q)

**Price Criterion**

Tender Price ........................................................

Price Score ........................................................ (P) .................................................

**Overall Assessment**

Quality Weighting x Quality Score 65% x ...................... (Q) = ......................

Price Weighting x Price Score 35% x ...................... (P) = ......................

Overall Score = ..........

SIGNATURE: ___________________________ DATE: ___________________________
CST 5.2

**FEES SCHEDULES**

The use of fee schedules in commission contract documents is highly recommended. These provide for structured headings and price categories. They make pricing and subsequent evaluation and comparison of prices considerably easier.

The tender documents should make it clear on what basis the price is sought:

- hourly rates;
- lump sum;
- ad valorem (percentage of works contract price).

The tender should be priced by the tenderer on the basis required.
CST 5.3  INCENTIVE FEES

It should be noted that the documentation for PMCs, EMCs and estate surveying term and individual commissions often invite the tenderer to submit proposals for alternative incentive fee proposals for lease renewals and rent reviews together with their compliant bid.

These will necessitate careful evaluation to ascertain the bid that offers the most economically advantageous deal, bearing in mind the likely incidence of such negotiations and transactions during the life of the commission.
EVALUATION PROCEDURE

The sequence of activity for the evaluation of bids is usually as follows:

- check all bids for completeness and arithmetic accuracy;
- compare the proposal document with that originally received; check and reconcile significant differences;
- undertake a section by section analysis of the bids including cost evaluation of alternative incentive fee proposals and sensitivity analysis;
- compare most satisfactory bid with initial estimate and funding available;
- make recommendation for acceptance, non-acceptance or re-tender.

Circumstances may arise where consideration must be given to either requesting further information from tenderers or recommending re-invitation.
TENDER ANOMALIES

Anomalies within a tender bid may be taken up with the tenderer concerned in writing provided that such clarification does not put other tenders at a disadvantage or distort the competition element of the tender. Any written enquiry should always include the expression “This letter does not imply, expressly or otherwise, acceptance of your tender.”
QUALIFIED TENDERS

Qualified tenders are difficult if not impossible to compare with others, and for this reason they should be actively discouraged. It may be decided for example to state in the invitation to tender that qualified bids will be automatically disqualified, (except where alternatives are sought). Where the EC procurement rules apply, the procurer has the option of stating in the contract notice that qualified tenders will not be considered.

If a qualified tender is received, the tenderer should be given the opportunity to withdraw the qualification without amendment to its tender price. This should be done through correspondence, copies of the Department's letter and the tenderer's reply being kept on the commission file.

Should a tenderer refuse to withdraw its qualification, then the importance of the qualification and the effect on the tender price will need to be assessed as precisely as possible.

The file should show a fully reasoned explanation if an otherwise good offer is passed over due to a qualification, and likewise if an offer is recommended for acceptance despite a qualification.
AMENDED TENDERS

Legally, a tender can be withdrawn or amended at any time before acceptance (i.e. the posting of the letter of acceptance). The Department is not obliged however, to accept such an amendment for consideration if received outside the tender period.

Tenders must, as far as possible, be evaluated on the same basis and to allow amendments to a bid after the tender period could call into question the propriety of both the Department and the tenderer.

If an amendment flows from a genuine error or unforeseeable circumstance that implies no advantage to the tenderer, such amendments may be considered. It is recommended that the reason for amendment should be considered credible, beyond doubt and the full history recorded on the commission file.

Key Points

• Different Departments have different policies on the treatment of post-tender negotiations. Commission managers should refer to their Departmental handbooks.

• Post tender negotiations are only likely to be permissible on the grounds that the selected tenderers’ offer still represents best value for money.
AMENDED TENDER DOCUMENTS

It is recommended that deliberate amendments to tender documents are not accepted without good reason. These are not always easily detectable e.g. firms typing out their own fee offer in order to distort certain bandings, and accordingly, amendments to tenders should always be made clearly in writing, adjacent to the amended item, and signed by the tenderer.

If tenders are rejected on these grounds, then the tenderer should be reminded that only tenders based on the documents issued will be considered in future.
RE-INVITATION OF TENDERS

If no tender is considered acceptable, then all tenders should be declined and formal re-tendering undertaken (including EC/O ficial Journal advertising if applicable).

If malpractice is suspected amongst those invited to tender then, subject to departmental procedure, a report should be made to the officer with the appropriate delegation to deal with irregularities and re-invitation. If re-invitation is recommended due to sharp practice amongst tenderers, then all the tenderers involved may be dropped from the new tender list.

Tenderers who are re-invited to bid should be advised as to why the original offer was not acceptable as not to do so may lead tenderers to question the value of submitting further bids.
CST 5.10

RECOMMENDATION FOR ACCEPTANCE

Once the Tender Board has completed its evaluation, it should report
its recommendations to the Budget Holder for approval and
subsequent acceptance.

The evaluation report should include:

• an explanation of the background to and scope of the commission;
• a summary of the recommendation;
• a description of the pre-qualification criteria;
• a description of the tender evaluation criteria;
• a description of the sensitivity analysis undertaken or reasons why
  not;
• the reasons for rejection of unsuccessful bids;
• an indication of the cost implications of the recommended bid;
• a comparison with pre-tender estimate and confirmation that funds
  are available;
• a confirmation that the tenderer satisfied the quality threshold at
  interview stage.

The objective of competitive tendering is to achieve value for money.
AWARDING COMMISSIONS AND DECLINING TENDERS

LEGAL CONTRACT FORMATION

The legal process of contract formation is set out at Section LE 1.2 - Simple Contracts. Provided that all of the other elements of formation exist, then an unqualified acceptance of an offer gives rise to a legally binding contract.

It should be noted that unless an offer is open for acceptance for a specified period it may be withdrawn at any time up until acceptance. To ensure proper formation of contract it is recommended that the following conventions be observed:

• all qualifications to the tender should have been removed (negotiated out);

• the offer must be capable of acceptance (an unqualified yes);

• the offer must not have lapsed; the offer may be stated as being open for acceptance within a specified period; if this has elapsed then confirmation must be sought from the tenderer that the offer remains open for acceptance;

• all subsequent undertaking by the tenderer and amendments to the tender must be confirmed in writing; it is recommended that at the very least all such amendments be aggregated into a schedule of amendments which can be referred to in the acceptance; with time permitting it is better to incorporate amendments directly into the contract and initial them;

• the tender must represent best value for money;

• it is recommended that a departmental procedure is in place which requires approval by an officer with the appropriate delegation prior to accepting an offer.
Once the requirements relating to the tender have been satisfied then the offer may be accepted. To ensure proper acceptance of the tender the following conventions should be followed:

- acceptance must be unqualified; purported acceptance with qualifications represents a counter-offer which may be accepted by the consultant; this may lead to unnecessary argument about how and when acceptance occurred and what is or is not part of the contract; this should always be avoided;

- acceptance should be communicated in writing; in law, the ‘postal rule’ is that acceptance is communicated when the letter is posted not when it is received; proof of posting can be ensured by sending the acceptance by Registered Post;

- acceptance should be notified with the minimum delay following receipt of tenders.

**Key Points**

- Acceptance should be unqualified.

- Acceptance should be in writing.
A suggested letter of acceptance is given at CST6/SF1.

It is best practice in the letter to list by reference all documents which are to be incorporated into the agreement and which form the basis of the acceptance. An alternative is to attach a schedule, but it is essential that this is given a recognisable and unique reference number.

It is essential that any correspondence or references to negotiations on fees or alteration to the services which have been agreed with the tenderer are referred to in the letter of acceptance.

For the avoidance of doubt it is recommended that the successful tenderer is asked to complete and return a ‘confirmation of receipt slip’ on receipt of the letter of acceptance.

Note that it is usual for the tenderer, in the form of tender, to give an undertaking to execute the formal conditions of contract, when they are provided for signing.

Contract documents should be prepared and provided to the tenderer with the letter of acceptance or as soon as possible thereafter.
Dear Sirs

[TITLE OF PROJECT]
[CONTRACT/TENDER NUMBER]

Further to our invitation to tender dated ............................................................... and your tender submission provided under cover of your letter of ..........................................................., I accept on behalf of the [.................................], your offer to carry out [.................................] in connection with the above project.

The [following documents or the documents referred to in Schedule [Contract No]/1] attached are the basis of this acceptance; and together with this letter of acceptance form a binding contract between us.

[List Documents such as:]

• Invitation to tender
• Instructions to tenderers
• Schedule of duties
• Brief
• Tender submission from tenderer
• Schedule of amendments or price schedule and basis of payment
• Correspondence/minutes confirming undertakings by tenderer
• Relevant correspondence from Department.]

Will you please contact ........................................................................................................ [Project Sponsor/Commissions Manager] as soon as possible to make arrangements for the formal execution of contract documents, and subsequently for commencing work. Will you please complete and return the attached acknowledgement slip.

Yours faithfully
LETTER OF ACCEPTANCE

Confirmation of Receipt Slip

[TITLE OF PROJECT]
[CONTRACT/TENDER NUMBER]

I acknowledge receipt of your letter of acceptance dated ...................... .

Name: ............................................................................ (name in block capitals)

Signed: ............................................................................

in the capacity of ...................... authorised to sign for and on behalf of .......................................................

Date: ............................................................................ Telephone No.: ............................................................

Address: ..........................................................................

..........................................................................

..........................................................................
It is advisable to notify the successful tenderer of the intention to accept their offer before sending decline letters to unsuccessful tenderers. Following confirmation from the successful tenderer, decline letters should be sent immediately to all unsuccessful tenderers.

Standard Form CST6/SF2 is an example decline letter. To an extent the wording of the letter will be determined by the type of procurement effected and what issues were subsumed within the evaluation.

There are two principal reasons for responding as fully as possible:

- it gives consultants confidence in the process;
- it gives consultants market information which helps to encourage competitive market performance.
Decline Letter

Dear Sirs

[TITLE OF PROJECT/COMMISSION] ..........................................................................................................................................................................................

Your tender for the above mentioned project/commission has been evaluated but I must inform you that you were not successful on this occasion. The successful tenderer was........................................................................................................................................................................................................

This was the successful tenderer because..........................................................................................................................................................................................

I would like to take this opportunity to thank you for your considerable efforts in submitting a tender and for your interest.

Yours faithfully
EXECUTION OF FORMAL AGREEMENT

Although the posting of the letter of acceptance should result in the formation of a legally binding contract, it is essential that for the avoidance of doubt a set of contract documents is properly executed by both parties.

There ought to be no reason why this cannot be done at the time of acceptance, such contract documents should be prepared in anticipation of this event. It is however essential that the contract documents are signed before commencement of any work by the consultant. The scope for negotiation, if any is still required, is significantly reduced after this time.
Debriefing is the only way in which unsuccessful tenderers are able to find out why they were not selected, and therefore to obtain information about areas where they need to improve their future performance. This positive feedback encourages competitive performance and is therefore recognised as best practice.

CUP Guidance Note No.45 provides useful guidance on debriefing.

On receipt of a decline letter either at interview stage or tender stage a consultant may request more information regarding their performance, so that they may:

- address particular problems;
- improve competitiveness of future bids.

A letter requesting further information should be answered with a letter offering the tenderer the opportunity for a formal debriefing interview.

Where the EC procurement rules apply then a request for debriefing must be responded to within 15 days of receipt of the request.

Dealing with a Telephone Call

A consultant who has received a decline letter is likely to make a telephone call to the Department.

This should be handled with care. It is recommended that the following conventions be observed:

- do not discuss the performance of other tenderers; bear in mind that the solutions and price offered by other contractors are confidential;
- offer a confirmation of the points made in the decline letter;
- confine the information given to matters that would be covered in a debriefing interview;
- keep a record of the conversation.
DEBRIEFING INTERVIEWS

If unsuccessful tenderers request a debriefing interview, this should be agreed to if possible. Any such interview should be undertaken as soon after the contract/commission award date as practicable, generally between three to six weeks.

Debriefing interviews for commissions are conducted by the commission manager/project sponsor but debriefing interviews for contracts may be conducted by the consultant who invited and subsequently evaluated the tenders.

Valuable time and money is spent in debriefing, but should always be considered worthwhile on large contracts/commissions as there are certain long term benefits. These are:

• to establish a reputation in the market place as a strictly fair, honest and ethical Department, which will encourage the best firms to submit their best offer first time around;

• to offer unsuccessful tenderers some return for the time and money expended in preparing their tenders;

• to assist firms to improve their performance.

Interview Format

The agenda for the interview will be dependent upon the individual commission/contract but generally the person conducting the interview should be accompanied by at least one other person and an agenda agreed between them prior to the meeting. If possible the agenda should follow the evaluation criteria set out prior to receipt of tenders and where applicable, listed in the EC/Official Journal advertisement.

The meeting should allow sufficient time for the unsuccessful tenderer to be told the reasons for failure in this instance and for the firm to ask any questions that they feel are relevant.

The interviewers should be aware that the reason for the interview is diplomatically to convey to the tenderer weaknesses and strengths within cost, schedule, design, delivery, experience etc. It must be made clear that only the unsuccessful tender will be discussed and not a comparison with the other tenderers or competitors.
Formal minutes are not distributed following the meeting but it is recommended that a copy of notes taken at the meeting should be kept on the commission file for future reference by the Department.
The primary role of the commission manager is to ensure that the requirements of the commission are delivered.

It is strongly recommended therefore that consultants/service providers are actively managed and monitored. It may be unwise to leave consultants to their own devices. It is suggested that the best results can be achieved by doing the following:

- ensuring that Department expectations and timescales are properly defined and communicated;
- monitor performance in terms of time and cost against the agreed programme;
- holding regular review meetings with the consultant and review progress of interim activities; this can include the requirement for the consultant to produce reports before progress meetings; this is especially important in the case of projects such as major works where the activities of others are reliant on timely performance by the consultant;
- keep the consultant's performance up to the required standards;
- ensure that the terms of the commission are followed;
- provide clear and documented evidence when necessary to invoke the default provisions in the commission;
- provide a clear assessment that value for money is being obtained;
- anticipate problems and assess proposed solutions.

The commission manager is the representative of the Department. The Department will have specific obligations in accordance with the terms of the commission agreement. The roles and responsibilities of the commission manager will therefore depend to some extent upon the consultant's terms of appointment. This section makes reference to commissions let under GC/Works/5 General Conditions for the Appointment of Consultants (1998) - available from TSO.
The commission manager role is often set out in the terms and conditions of Property Management Commissions as follows:

‘The commission manager is authorised to receive and conduct all communications between the Managing Agent or the Account Manager and the Department, and has authority to act on behalf of the Department for all purposes connected with the Commission.’

Within the Consultant Commissioning Documentation the project sponsor is usually designated as the Department representative with the following role:

‘The Department representative ..... shall act on behalf of the Department in issuing instructions to the consultants and for receiving reports, notices, requests, statements or in dealing with any other matter concerning the Consultant’s commission.’

In principle, a project sponsor fulfils the same functions as a commission manager and the general principles put forward in this section are therefore applicable to both posts unless otherwise stated.

**Key Points**

- Effective management means setting clear specific, measurable and achievable objectives, and motivating and monitoring consultants to deliver the service to the best of their ability.
CST 8.2

CONSULTANT AND SUB-CONSULTANTS

For any type of commission, the consultant is required to name one or more (as specified in the terms and conditions of the commission) members of their staff to act as their representative for the purposes of the particular commission (for Property Management commissions this person is known as the account manager).

Since this person is likely to have been one of the factors considered in the quality evaluation of the tender bid, any change in such personnel must only be effected with the prior approval of the commission manager/project sponsor.

The commission manager/project sponsor must arrange to be provided with regular progress reports from the consultant as specified in the commission documentation. These reports should cover the areas of financial management, works management and, in the case of property/estate management commissions, estate management.

Face-to-face meetings with the consultant should be arranged as often, but not more often than necessary. Within the property management documentation it is stated that meetings will be monthly. No such specification is given in project documentation but it must be remembered that meetings demand a cost in both time and money from all participants and should not be held if they are unnecessary or have no identifiable purpose. (The purpose should be determined and communicated in advance).

At the time of submitting the tender, the consultant should also list those companies whom they propose to employ as sub-consultants and obtain the commission manager/project sponsor's approval of those companies.

At all times the consultant is deemed responsible for the actions of any nominated sub-consultants and for the payment of monies to the sub-consultant.
Key Points

- The Department is entitled to expect continuity of consultant staff. Since the quality of such staff is likely to have been important in winning the tender, any change of staff, especially after time has been spent on complex commissions, should be strongly resisted.
PROFESSIONAL INDEMNITY INSURANCE

Professional Indemnity Insurance (PII) is a form of specialised cover directed at damage or loss arising from negligence in the provision of professional services. Liability is not limited to the Department but is also extended to third parties.

PII works on a “claims-made” basis in that insurance must be held when the claim is made not when the culpable act took place. PII is mandatory for all building-works consultants commissioned by Departments and insurance to the level prescribed in the commission documentation must be maintained for the period of the commission and six years beyond.

The consultant must be able to produce a certificate of their professional indemnity insurance, and any further particulars as may be required by the Department.

If the consultant fails to maintain indemnity insurance in accordance with the terms of the commission, the Department may, in its own or in the consultant’s name, take out and maintain a policy of indemnity insurance in reasonably equivalent terms and shall be entitled to recover all costs thereby incurred from the consultant. (There should be a clause in the conditions which provides for this right.)

If a situation arises where a consultant is unable to obtain or maintain sufficient cover in the commercial market a report should immediately be sent to the Department.

Key Points

- If the consultant fails to maintain cover, the Department may obtain such cover and charge the consultant.
BILL PAYING AND CHECKING PROCEDURES

It is essential that the Department has in place effective systems for checking bills and for paying them promptly.

In general it is suggested that the following principles apply:

• the bill should be checked; depending on the number of bills, either all bills should be checked or at least a representative but random sample; there must be a contract which gives rise to departmental liability; the bill, e.g., rates, must be in accordance with the terms of the contract; and the work said to have been done, must have been done to the satisfaction of the Department;

• cash flow is the life-blood of the industry; late payment or failure to pay may affect the health of the business being employed, which could seriously affect the commission being undertaken;

• where the contract specifies periods for payment, these should be honoured;

• the Late Payments of Commercial Debts (Interest) Act 1998 introduces a statutory right to interest on late payment of a debt. Additionally there may be a contractual right to interest (e.g., on late payment of a certificate for Government works contracts); late payment in this situation clearly affects the project cost and approved budget;

• the Government is committed to ensuring that where there is no contractual provision or other understanding or accepted practice governing the timing of payment, payment should be made within 30 days of receipt of a valid invoice or similar demand for payment.

Key Point

A consultant is covered by the Construction Industry Tax Scheme if he has a role in the direct commissioning of construction works or where he acts on behalf of a Department in this context.
DETERMINATION/TERMINATION PROCEDURES

Determination/termination of a commission will generally arise by reason of one of the following:

- bankruptcy or liquidation of consultant firm;
- the committing of an act of bribery or corruption by the consultant in connection with Government contracts;
- default on the part of the consultant in respect of one or more of its contractual obligations;
- in exceptional circumstances where for example because of budgetary considerations it becomes necessary not only for the Department to suspend work but also to cease it.

In standard forms of contract there are usually contractual provisions which set out circumstances in which either one or both parties may determine/terminate the contract.

It is important to note that there is also the common law doctrine of material breach of a contract condition (see LE 1.4 and LE 1.5 for other grounds for termination).

It is therefore essential that contractual procedures for determination/termination are followed and that the specified grounds for determination/termination are properly established. Wrongful determination/termination may in itself amount to a material breach giving rise to an entitlement on the part of the consultant to claim damages such as lost profit etc.

The determination/termination provisions commonly provide for the following:

- notice to be served on the defaulting party stating the nature of the default and specifying a period within which the default should be rectified;
- if the default persists beyond the specified duration, notice may be sent by registered post to the defaulting party confirming determination/termination of the contract;
- any costs arising from obtaining a new consultant to complete the commission may be set off against any outstanding monies owed or become payable as a debt to the Department.
It is common for term commissions to contain a break clause which may or may not allow a notice period and which enables the Department to determine/terminate the contract without cause or default on the part of the consultant.

**Key Points**

- Seek advice before proceeding.
- Where there are contractual provisions which entitle the Department to determine/terminate the contract, and there is occasion to operate them, the provisions in question should be followed to the letter.
CST 8.6

DETERMINATION/TERMINATION DUE TO DEFAULT

In cases of default due to breach of the terms of a commission, an official notice should be served on the consultant advising that should the instructions given in the notice fail to be carried out within a specified period then the commission will be determined.

Great care must be taken in drafting notices of default to ensure that the Department's rights are not unwittingly prejudiced by the terms of the notice. It is important that the wording of the condition under which the notice is issued should be reflected exactly in the notice and it is suggested therefore that legal advice be sought.

If the giving of a notice of default is actually followed by determination/termination of the commission, arrangements should be made to complete the commission without delay as the amount of any additional costs which may be claimed from the original consultant may be reduced if it can be shown that unreasonable delay has increased these costs.

Commission managers/project sponsors should ensure that for each commission within their control, they are aware of the timescales for giving notice to consultants, the procedures for determining/terminating the commission and the method of calculating fees due to a consultant whose commission has been determined/terminated since these may vary from commission to commission.

When a commission is determined/terminated due to default, it is recommended that a full report should be sent to the appropriate senior departmental officer. An adverse performance report should be sent to NQS as soon as possible.

Key Points

• Seek legal advice before issuing a notice of default.

• The Department should be sure of its grounds before serving a notice and clearly communicate them in the notice.
CST 9.0  CLAIMS & DISPUTES

CST 9.1  HANDLING OF CLAIMS BY AND AGAINST THE DEPARTMENT

Types of Claim

Claims include all matters from a routine request for additional time to complete, to a major allegation of breach of contract. In fact a claim is simply a demand by one party on the other that a particular entitlement is due. Not all claims signify a dispute. But where a claim is not met in full and there is disagreement by one party as to the entitlement of the other then unless agreement can be reached through negotiation, it can be said that a dispute or difference has arisen between the parties.

The majority of claims arise from a failure or an alleged failure of one party fully to comply with the requirements of the contract or in some instances conditions implied by the common law. The remedy sought to an alleged breach is usually damages.

Claims generally fall into the categories listed below (examples are given of each):

**Contractual Claims** (specific entitlement in accordance with the terms of the contract):

- for delay/additional time for specified reasons such as:
  - issue of variations expanding the scope of the contract,
  - late issue of information and/or variations,
- for the additional cost of variations;
- for disruption or lost productivity due to interference by the Department;
Common Law Claims (ex-contractual claims):

- damages for breach of contract;
- damages in tort/delict (e.g. negligence - breach of a duty of care);
- damages for breach of copyright;

Third Party Claims:

- personal injury claims;
- employee claims;
- estates claims;

Quantum Meruit Claims:

Ex Gratia Claims (‘out of kindness’).

From the Department’s viewpoint claims should be avoided if only because financial control becomes extremely difficult, especially for claims produced long after the event.

In practice it is difficult to avoid claims, but it is possible to deal with them intelligently and expeditiously so as to avoid disputes.

Steps to minimise the likelihood of a dispute are as follows:

- ensure that the brief is well defined and contractual requirements are consistent;
- ensure that the consultant has the information required, preferably before he or she requires it;
- avoid variations;
- where variations are required, agree time and cost increases prior to instruction or as soon as possible thereafter;
- keep good records of all events which may lead to a claim;
- insist on compliance with the contract where contractual claims are being made and evaluate them as quickly as possible;
- negotiate with the consultant.
If a dispute does arise or the Department is contemplating making a claim against a consultant then the following principles should be noted:

• there must be a basis for the claim in law, either under the contract or otherwise;

• there must be some loss which arises by reason of the legal right to claim;

• the connection between the legal right and the damages sought must as far as possible be proven by the party claiming the damages;

• the matters in dispute should be set down on paper as soon as possible and communicated in a cogent and persuasive manner;

• if in receipt of a claim, evaluate it, determine the value of any counter-claim the Department may wish to make and make a realistic offer as soon as possible.

Key Points

• A claim is more often than not an expression of the additional entitlement of a party specifically provided for under the terms of the contract for specified matters.

• The better the Department’s records, the better its ability to make and defend claims and to negotiate them.

• The legal principles involved in making or defending claims can be complex and the preparation of a good claim document is an art. If in any doubt seek professional advice.
Claims arising from default or negligence by a department, consultant or contractor

Claims generally represent an unbudgeted increase in cost to the Department. In addition, unless they are based on good grounds they can represent a fruitless exercise, and a substantial cost risk. It is important that the effort and cost of resolving a dispute is kept in proportion with the amount in dispute.

A substantial cost risk may arise where:

- the Department unreasonably objects to a claim from a consultant where the claim has some merit;
- the Department pursues a claim where the claim has little merit, or more particularly represents difficulties in proving the case on the ‘balance of probabilities’.

For these reasons it is recommended that the following procedures be followed:

- contractual claims should be dealt with quickly and expeditiously and negotiated by the commission manager; the appropriate senior officer should be kept advised, and budgetary provision made for the claim;
- claims relating to professional negligence should be referred to the appropriate senior officer, and legal advice sought;
- any claim that appears to be sensitive novel or to have political implications should be referred to the appropriate senior officer;
- any undisputed contractual claims which do not require consideration of matters of law should be evaluated and paid immediately.
**ALTERNATIVE DISPUTE RESOLUTION PROCEDURES (ADR)**

ADR is a method of dispute resolution which has been imported from the United States. ADR is a generic term to describe methods of dispute resolution in which the aim is that a third party is instrumental in bringing about a quick and effective resolution to a dispute. ADR can be an effective means of dispute resolution as a pre-cursor to arbitration or litigation. An ADR clause can be included in the contract, or ADR may be used by subsequent agreement between the parties.

The various ADR procedures are:

- **Mediation/Conciliation** - a private voluntary dispute resolution procedure in which a mediator facilitates dialogue between the parties; helps each party to see the strengths and weaknesses of its case and encourages settlement. Mediations are ‘without prejudice’ to further negotiations. The parties may ask the mediator to provide a written evaluation or recommendation. If settlement is reached then it is advisable for the parties to draw up a settlement agreement.

- **Mini Trial** - a more formalised mediation involving a panel comprising the mediator and a senior executive from each party. Representations are made to the panel by each party and the panel retires to mediate the dispute. The procedure is also private and voluntary with no formal rules. Again the dispute is only resolved by agreement between the parties.

- **Judicial Appraisal** - whereby the parties agree in advance to submit their respective cases, including oral submissions if preferred, to a senior legal figure such as a QC for him to carry out a review and prepare a written appraisal of the case before him. The parties can agree to be bound by the appraisal or it may simply ease the way for further negotiations. This can be very effective in helping to resolve any points of law which are central to the dispute.

- **Early Neutral Evaluation** - this is similar in nature to the judicial appraisal, but is carried out by an independent expert where technical issues are at the centre of the dispute.
• **Adjudication** - involves the appointment of an adjudicator who is commonly a valuer or expert and who receives written and/or oral submissions before coming to a decision. The adjudicator's decisions are binding on the parties.

• Part II of the Housing Grants, Construction and Regeneration Act 1996 requires that a party to any construction contract has a right to refer any dispute for impartial adjudication. Any such adjudication must be effected within a certain timescale during the contract.

• **Dispute Review Board** - a panel of experts who are appointed by the parties at the outset of the works to monitor and resolve claims. They are there to foster good relations between the parties. This is most appropriate on large complex projects.

**Key Points**

• For ADR to be effective, the parties must be willing to submit to and be influenced by the process.
If a resolution to a claim cannot be reached following negotiations and/or Alternative Dispute Resolution, it may be appropriate to refer the dispute to a third party for determination. In fact where the form of contract has provided for arbitration this may be a necessary precondition to litigation.

For arbitration to be an option there must be a written agreement in the contract to arbitrate (an arbitration clause); or there may be subsequent written agreement to arbitrate.

The advantages of arbitration are as follows:

- the parties may choose the arbitrator/arbiter;
- confidentiality - arbitration is private;
- should be faster;
- flexibility - parties may agree to relax procedural rules or rules of evidence;
- the parties do not have to be represented by counsel;
- limited appeals (on points of law);
- no reliance on Rules of Court.

The conditions of contract usually set out the procedure to be adopted for the arbitration however, the parties are free to agree on their own procedures.

Once an arbitration notice has been issued by either party, failure to respond may be a breach of contract.

**Key Points**

- Arbitration is a means of dispute resolution by the decision of a third party.
- The service of a notice of arbitration may be a very effective means of encouraging settlement, however, it is not a step that should be taken lightly. There must be a case to argue, and there must be a reasonable prospect of success.
• It is often cheaper and less time consuming to try to settle disputes through a settlement or ADR.

• Seek professional advice before issuing a notice of arbitration or upon receipt of one.
WRITS AND SUMMONSES

The receipt of an initial writ or summons generally attaches with it a strict timetable for response or action and must be complied with.

The appropriate senior officer within the Department should be advised immediately by the solicitors representing the Department as to the receipt of an initial writ or summons, and appropriate legal advice as to actions and strategy given.

If the Department is considering the service of a writ in contemplation of litigation, then this is likely only to follow the failure of other means of dispute resolution and should only be done in the context of clear legal advice on the matter in dispute.

Key Point

- A Minister of the Crown may not sue another Minister of the Crown. However, since 1 July 1999, rights and liabilities may arise between the Crown in right of Her Majesty's Government in the United Kingdom and the Crown in right of the Scottish Administration by virtue of a contract, by operation of law or by virtue of an enactment as they may arise between subjects. The Scottish Ministers may therefore sue, and be sued by, Ministers of the Crown. Notwithstanding this, every attempt should be made by Departments to resolve disputes without recourse to court proceedings. This would in any case only arise where the Scottish Ministers contract with a Minister of the Crown, if perhaps using an English Department as consultants, or vice versa.
EX GRATIA CLAIMS

These claims usually arise where the claimant has no grounds (other than possibly moral) for additional costs.

Ex-gratia payments are generally made in exceptional circumstances and with the agreement of the finance section of the Department.
CST 9.7

PERSONAL INJURY CLAIMS

Departments should have their own procedures in place for dealing with personal injury claims (usually dealt with by the finance division). A full report should be prepared by the Department or consultants representing them on all circumstances surrounding the claim.

Claims for personal injury which arise by reason of negligence on the part of a consultant or contractor acting for the Department, may also give rise to contractual claims and copy papers should be provided to the commission manager.
CST 10.0 PERFORMANCE REPORTING

CST 10.1 PERFORMANCE REPORTING GENERALLY

Performance reporting is the last stage in the procurement process and closes the procurement cycle by providing feedback into the long-listing process for future work.

The advantages of performance evaluation and reporting are:

- feedback for future procurement;
- feedback to NQS;
- a sharing of knowledge with other Departments;
- it represents additional pressure on consultants to perform well.

The performance evaluation should also involve a separate critique of the Department’s own performance in respect of the consultant commission so that lessons learnt may be used as a resource for future projects.
PERFORMANCE REPORTING TO THE NEW QUALIFICATION SYSTEM (NQS)

NQS is a computerised database of information on consultants approved as being eligible for the provision of services to Departments.

Applications to the Consultant’s Register for a list of suitable consultants for long-listing is briefly described at Section CST 3.2.

Commissions feedback is a crucial part of the NQS system. It is therefore important to ensure that all tendering and performance information is passed to NQS for entry onto the database. Standard feedback forms should be completed promptly and forwarded through Heads of Division to provide information on:

- all offers received, in addition to the commission award details;
- the performance of the consultants at the appropriate stage (interim/final).

It is recommended that these forms should be used on all new commissions and on all existing commissions where reports have not already been submitted. They also represent a useful internal appraisal record and resource for the tendering of subsequent commissions.

The NQS Performance Report provides separate assessment tables for either building services or estates commissions; only one table should be completed for each commission. This will enable future enquirers of NQS to obtain more relevant performance details according to the type of commission.

When completing the report for a Property Management Commission, the commission manager should assess whether the commission has included a predominance of works management or estate management services and complete the relevant table.

In the longer term, NQS are looking into the possibility of including the detailed performance breakdown on the computerised system but in the meantime, such details can be requested from NQS’s manual records for particular consultants.
‘CONSULT’ NOTICES WITHIN NQS

A ‘CONSULT’ notice shown against a firm on the database indicates that NQS need to be consulted before tender invitations are sent out. There may be several reasons why a firm has such a notice against it. It could be for financial reasons where the firm’s audited accounts show the firm to be financially unstable; the firm could be reorganising itself; it could be under investigation, or it could be overloaded with work.

A ‘CONSULT’ notice may simply ensure a referral to NQS because there may be additional information that the Budget Holder should consider before inviting the consultant to tender.

A ‘CONSULT’ notice against a firm should not be regarded as a prohibition on dealing with the firm and in some cases the firm may still be invited to tender. ‘CONSULT’ notices against consultants on NQS should be treated confidentially and should not be disclosed to any consultant without the authority of NQS.
### CRS 1.0 CONTRACTING STRATEGIES

| CRS 1.1  | Procurement Process and Programme                      |
| CRS 1.2  | Application of EC Public Procurement Rules             |
| CRS 1.3  | Introduction to the Choice of Contract                 |
| CRS 1.4  | Contracts using Bills of Quantities                    |
| CRS 1.5  | Contracts using Schedules of Rates                     |
| CRS 1.6  | Simple Lump Sum Contracts                              |
| CRS 1.7  | Traditional Lump Sum Contracts                         |
| CRS 1.8  | Design and Build Contracts                             |
| CRS 1.9  | Prime Cost Contracts                                   |
| CRS 1.10 | Management Contracts                                   |
| CRS 1.11 | Construction Management Contracts                      |
| CRS 1.12 | Design and Manage Contracts                            |
| CRS 1.13 | Extension Contracts and Variations                     |
| CRS 1.14 | Term Contracts                                         |
| CRS 1.15 | Standard Government Contracts                          |
| CRS 1.15.1 | GC/Works/1 (1998) - Lump Sum with Quantities          |
| CRS 1.15.2 | GC/Works/1 (1998) - Lump Sum without Quantities       |
| CRS 1.15.3 | GC/Works/1 (1998) - Single Stage Design and Build Version |
| CRS 1.15.4 | GC/Works/1 (1999) - Two Stage Design and Build Version |
| CRS 1.15.5 | GC/Works/1 (1999) - With Quantities Construction Management Trade Contract - Without Quantities Construction Management Trade Contract |
| CRS 1.15.6 | GC/Works/2 (1998) - Building and Civil Engineering Minor Works |
| CRS 1.15.7 | GC/Works/3 (1998) - Mechanical and Electrical Engineering Works |
| CRS 1.15.8 | GC/Works/4 (1998) - Building, Civil Engineering, Mechanical and Electrical Works |
| CRS 1.15.9 | GC/Works/6 (1999) - Daywork Term Contract              |
| CRS 1.15.10 | GC/Works/7 (1999) - Measured Term Contract            |
CRS 1.15.11 GC/W orks/8 (1999) - Specialist Term Contract for Maintenance of Equipment


CRS 1.15.13 C1303 - Window Cleaning and C1304 - Chimney Sweeping


CRS 1.15.15 C1804 - Repair of Plant

CRS 2.0 CONTRACTS FILE

CRS 2.1 Identification
CRS 2.2 Sub-Files
CRS 2.3 Retention Periods
CRS 2.3(SCOT) Retention Periods

CRS 3.0 CONTRACTOR SELECTION

CRS 3.1 Selection of Firms
CRS 3.2 New Qualification System (NQS - formerly CMIS)
CRS 3.3 The Long Listing Process
CRS 3.4 Pre-Selection Procedures
CRS 3.5 Compilation of Short Lists
CRS 3.6 The Number of Tenderers

CRS 4.0 TENDERING PROCESS

CRS 4.1 Documentation
CRS 4.2 Instructions/Notices To Tenderers/Tender Periods
CRS 4.3 Mid Tender Interviews
CRS 4.4 Tender Boards
CRS 4.5 Opening of Tenders
CRS 4.6 The Tender Record Book
CRS 4.7 Late Tenders
<table>
<thead>
<tr>
<th>CRS 9.0</th>
<th>MANAGEMENT OF CONTRACTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRS 9.1</td>
<td>Role of the Project Manager</td>
</tr>
<tr>
<td>CRS 9.2</td>
<td>Role of the Project Sponsor</td>
</tr>
<tr>
<td>CRS 9.3</td>
<td>Bill Paying</td>
</tr>
<tr>
<td>CRS 9.4</td>
<td>Checking Procedures</td>
</tr>
<tr>
<td>CRS 9.5</td>
<td>Determination/Termination Procedures</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CRS 10.0</th>
<th>CLAIMS &amp; DISPUTES</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRS 10.1</td>
<td>General</td>
</tr>
<tr>
<td>CRS 10.2</td>
<td>Contract Claims Against the Department</td>
</tr>
<tr>
<td>CRS 10.3</td>
<td>Avoidance of Claims</td>
</tr>
<tr>
<td>CRS 10.4</td>
<td>Managing Claims</td>
</tr>
<tr>
<td>CRS 10.5</td>
<td>Presentation of Claims</td>
</tr>
<tr>
<td>CRS 10.6</td>
<td>Claims Against Contractors</td>
</tr>
<tr>
<td>CRS 10.7</td>
<td>Arbitration</td>
</tr>
<tr>
<td>CRS 10.8</td>
<td>Ex Gratia Claims</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CRS 11.0</th>
<th>MATTERS ARISING ON COMPLETION</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRS 11.1</td>
<td>Liquidated and Ascertained Damages</td>
</tr>
<tr>
<td>CRS 11.2</td>
<td>Maintenance Periods</td>
</tr>
<tr>
<td>CRS 11.3</td>
<td>Payments</td>
</tr>
<tr>
<td>CRS 11.4</td>
<td>Overpayments</td>
</tr>
<tr>
<td>CRS 11.5</td>
<td>Handover</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CRS 12.0</th>
<th>PERFORMANCE REPORTING</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRS 12.1</td>
<td>General</td>
</tr>
<tr>
<td>CRS 12.2</td>
<td>Performance Reporting to NQS</td>
</tr>
</tbody>
</table>
A guide to the steps involved in the procurement of works contractors is as follows:

1. Determine requirement, develop detailed brief and decide on contract strategy
2. Identify capable contractors to form a long list or if EC regulations apply, advertise contract notice to invite expressions of interest
3. Undertake pre-selection interviews where appropriate or if EC regulations apply, carry out pre-selection paper sift
4. Compile short lists for tendering
5. Develop tender documents which define the brief
6. Invite tenders from short-listed consultants
7. Hold mid-tender interviews where appropriate
8. Evaluate tenders
9. Make the award and if EC regulations apply publish contract award notice
10. De-brief unsuccessful tenders where necessary
11. Post tender performance evaluation
It should be borne in mind that this is only a guide to the steps involved. The more complex or costly the work being procured then the greater the amount of time and care that should be taken in the pre-selection and selection processes.

When the EC procurement rules apply then the pre-selection process with the restricted procedure will necessarily require a paper sift to reduce what is likely to be an otherwise unmanageable number of expressions of interest.

A similar approach is required where a large number of contractors are invited to tender in order to establish a panel of contractors on the basis of framework agreements, this being a strategy that some Department have successfully adopted. A panel is a set of contractors who are selected for a term, without any guarantee of work, and might be established by seeking tenders for all regions at once.

The form and basis of competition will need to be determined early in the procurement process. This will involve deciding upon which procedures it is appropriate to follow, and most importantly the evaluation criteria which will be used to determine the successful tenderer. In particular the basis on which the price will be sought and the way in which quality will be evaluated should be decided at the outset.

**Procurement Programme**

It is recommended that careful consideration is given to the production of a procurement programme immediately following identification of the objectives of the project or works contract. Clearly this programme should be developed in the context of the overall objectives and timetable. The procurement programme will depend upon the contract procurement strategy which is to be followed, and should be updated at each stage of the procurement process. The Department should ensure that there is sufficient time allowed in the programme and expertise is available to carry out each of the above steps.

It is recommended that the greater the complexity of the contract, then the greater the time that should be allowed to tenderers to consider, price and submit their tender bids. Tender periods which are too short can lead to an inadequate consideration of the requirements of the contract by tenderers which may lead to under-pricing or over-pricing and possibly to unwanted misunderstandings.
Where the EC procurement directives apply, then specific procedures apply and there are specific minimum or maximum time limits for the various stages of the process depending on which procedure is followed. These will need to be reflected in the procurement programme.
APPLICATION OF EC PUBLIC PROCUREMENT RULES

It is mandatory that EC public procurement rules are complied with where they are applicable. It is also essential that consultants apply the rules on behalf of the Department, where they are dealing with contractors. A clear obligation to do so should be included in the terms of appointment of such consultants (see for example service A1.2.16 for the project manager in GC/Works/5 - General Conditions for the Appointment of Consultants (1998), ISBN 0-11-7023108).

The Works Directive and UK Regulations govern the procurement of works contracts required by Government bodies.

A commission will be subject to the Works Regulations if:

- the buyer is a contracting authority subject to the regulations;
- the aggregated value of the contract together with any other contracts associated with a single ‘work’ is above the threshold, which for works contracts is 5,358,153 ECU. The pound sterling equivalent is revised every two years, and as of 1 January 2000 this figure is £3,611,395;
- it is not the subject of one of the exclusions.

It is illegal to split the contract into two or more parts or breakdown what is normally a centrally purchased aggregated contract to avoid the application of the rules. In addition there should be no deliberate underestimating to avoid compliance.

Key Points

- If the value of the commission exceeds £3,611,395 (as of 1 January 2000) the EC Works Regulations may apply.
- A more detailed consideration of whether the regulations apply is given in chapter EPP - EC Procurement Procedures, which also sets out the specific timetables and recommended procedures, for inviting and evaluating tenders in accordance with the rules.
INTRODUCTION TO THE CHOICE OF CONTRACT

Guidance on the choice of contract strategy is given in the *Procurement Strategies* chapter of the Guide.

The remainder of CRS 1 is devoted to explaining in more detail each of the principal types of *works* contract, when it might be appropriate to use them and their advantages and disadvantages. Guidance is also given in the *Procurement Guidance Note* No. 5, available from HM Treasury (tel. 020 7270 4558).

There are two aspects to the type of contract which may be adopted for a particular *works* contract or *project* strategy:

- the basis on which the price is to be sought; using:
  - bills of quantities,
  - schedules of rates, or
  - simple lump sum contracts;
- the type of contract including:
  - traditional lump sum contracts,
  - design and build contracts,
  - prime cost contracts,
  - management contracts,
  - construction management contracts,
  - design and manage contracts,
  - extension contracts and variations,
  - term contracts.
There are a number of bodies who produce families of standard forms of contract which include to a greater or lesser extent those listed above. These bodies include:

- The Government’s ‘GC’ Contracts (excluding management, construction management and design and manage);
- Joint Contracts Tribunal (JCT) Contracts (excluding construction management and design and manage);
- Institute of Civil Engineers (ICE) 5th and 6th Edition Contracts (bill of approximate quantities forms for civil engineering work);
- The ICE Engineering and Construction Contract (2nd Edition) Series (formerly the New Engineering Contract);
- The Institute of Chemical Engineers (IChemE) Contracts;
- The Association of Consultant Architects (ACA) Contracts;
- The British Property Federation (BPF) Contracts;
- The Scottish Building Contract Committee (SBCC) Contracts; and
- others.

Having decided on which type of contract is most appropriate, it must then be decided which standard form is most appropriate.

Many of the above bodies provide similar types of contract, for example, traditional lump sum contracts based on firm bills of quantities; but they have their differences in terms of:

- risk allocation;
- payment mechanisms;
- variation instruction and valuation mechanisms;
- loss and expense or costs provisions; and
- others.
It is not the place of the Guide to attempt to analyse all the relative advantages and disadvantages of each form, but the following recommendations are given:

• each standard form is produced by different bodies whose interests are reflected in their form;

• provided the form satisfies the required scheme of risk allocation and the project objectives, it is better to use a form with which the Department and professional team are familiar than one with which they are not;

• the Government’s ‘GC’ contracts are recommended for use by Departments because they:
  - were drafted by Government for Government and generally represent the best interests of Departments,
  - are relatively simple to understand and administer,
  - are less prone to litigation than other more complex forms,
  - contractors once familiar with the forms generally know where they stand.

It should be noted that the 1998 and 1999 editions of the GC/W orks contracts have been amended to take account of the CDM regulations. Users of the earlier editions should refer to Information Note (No.6/95) which advises Departments of the amendments necessary to enable these forms to take account of the CDM regulations.

**Key Points**

• The choice of contract form depends on the basis on which the price is to be sought, (whether by bill of quantities or otherwise), and upon the contract strategy which best meets the project objectives.

• The Government’s ‘GC’ contracts are generally recommended for use by Departments.
• Some standard conditions (eg ICE) contain clauses providing for application of Scots law to the contract where the works are situated in Scotland. If the standard conditions to be used do not contain such a provision, then a suitable clause must be inserted in the supplementary or special conditions which form part of the contract. Even if such a condition does appear in the standard conditions, there is no harm in a ‘belt and braces’ approach by also providing for this in the supplementary conditions. If in doubt as to wording, seek legal advice.
CONTRACTS USING BILLS OF QUANTITIES (BQ)

General

The use of a BQ in support of a contract is the traditional and proven means of securing a lump sum price for undertaking the works. BQs may be:

- firm;
- approximate;
- provisional.

The firmer the quantities, in other words the more precisely the work is measured and itemised, the more reliable is the tender price. In theory, were there no design development or departmental changes, then a firm BQ would provide a price at the tender stage which would equal the final cost. In practice there are changes, and the BQ provides a good basis for cost control since the direct cost of changes to the contract can be assessed with reference to the BQ rates. Such changes from the tender drawings to the final construction detail are known as variations. The firmer the BQ the better it is as a means of post-contract financial control. BQs also provide one of the best resources for estimating the value of future work.

A BQ is an itemised list of all the work required to carry out the contract works. The BQ generally comprises the following sections:

- **Preliminaries** - which describe the project particulars, the drawings upon which the BQ is based, the site, the work in general, the form of contract and any supplementary conditions, the Department's requirements, and all of the contractor's general cost items including management and staff, site accommodation, services and facilities, mechanical plant, and temporary works items.

- **Preambles** - contain the descriptions of materials and workmanship applicable to the measured items, and generally more fully describe what work is included in abbreviated descriptions, including any special methods of measurement. The preambles have to be read in conjunction with the measured items and significantly reduce the need for long and full descriptions of materials and standard of work.
• **Measured Work** - is the main part of the BQ which lists all of the items of work to be undertaken under separate sections for each element or trade such as brickwork or joinery etc. Each item comprises a description of labour and/or materials with a quantity measured as finished work taken from the completed design drawings and specification.

• **Provisional Sums** - are included for any items of work which might be anticipated but for which no firm design has been developed.

• **Prime Cost Sums** - are sums allowed for specialist work such as mechanical and electric work which is carried out by nominated sub-contractors, provided for under some standard forms of contract such as JCT80.

• **Contingency Sum** - it is often tempting for a quantity surveyor to include in the BQ a specific sum for contingencies (say 5%) in respect of unexpected expenditure. It is recommended that contingency sums are allowed for, but that they be kept within the knowledge of the Department.

**Recommended Value**

A firm BQ will normally be prepared when full design information is available. The firmer the BQ the longer and more costly the preparation time. BQs can be produced for work of any value, but the time and cost of doing so must be looked at in light of the level of post-contract cost control that is required.

It will normally be appropriate to use BQs for work in excess of £500,000 in value.

**Approximate BQs**

Approximate or provisional BQs are used when there is insufficient detail to prepare firm BQs or where it is decided that the time or cost of a firm BQ is not warranted. Such contracts do not provide a lump sum price, but rather tender totals, since the quantities are subject to re-measurement on completion by the quantity surveyor. These contracts are usually subject to greater variation than lump sum contracts and therefore should only be used where time is a limiting factor or where there is great uncertainty in respect of certain elements such as major excavation and earthworks.

The initial resource cost of approximate BQs is likely to be lower than for a firm BQ, but the need for re-measurement invariably results in a higher overall resource cost.
CONTRACTS USING SCHEDULES OF RATES

Schedules of rates are generally used in one of two ways:

• they are prepared by a contractor in support of its price, based on specification and drawings, when tendering for lump sum contracts without quantities; and

• published standard schedules or bespoke schedules are provided to the contractor who tenders a percentage adjustment to the schedule; this approach being used for measured term contracts covering such work as repair and maintenance.

In the former case the contractor provides the schedule, which is then used as a basis for valuing post-contract variations. This effectively transfers the work and cost of quantifying the works onto the contractor and usually requires a longer tender period which is sufficient to reflect the extra effort required of the contractor to prepare the tender.

Schedules of Rates with Measured Term Contracts

Schedules of rates for measured term contracts are available for a variety of types of work and are generally extensive to cover most work items.

The precise quantity of work is unknown at tender stage. Neither the Department’s quantity surveyor nor the contractor produce a bill of quantities or otherwise quantify the work, resulting in a shorter procurement programme than otherwise.

The value of any work carried out in accordance with such contracts is ascertained on completion of the work by measurement and valuation in accordance with the rates in the schedule, any percentage adjustment tendered by the contractor and the updating percentages to cover inflation.
SIMPLE LUMP SUM CONTRACTS

With a simple lump sum contract the contractor commits itself to a price on the basis of the work shown on the drawings and in the specification. A quantity surveyor is not usually employed and BQs are not used; this means that preliminary cost forecasting, budgeting, and valuing of changes in the scheme may be unsatisfactory. However, where the Department's requirements are firm, and the drawings and specification are fully developed, this is a very simple and effective contractual basis.

It is generally only appropriate to use this type of arrangement for small schemes, otherwise it may be difficult to obtain prices in competition.
TRADITIONAL LUMP SUM CONTRACTS

With this type of contract the design team are engaged directly by the Department to fully develop the design prior to going out to tender. A firm BQ is generally prepared which is priced by the contractor to give a fixed price at the outset of the contract. This BQ also forms the basis of post contract cost control. The contract is with a main contractor who has responsibility only for the construction works.

This is a medium risk strategy for the Department, since the Department takes the responsibility and risk for design team performance and the contractor takes responsibility and financial risk for the building works which it prices in advance of carrying them out. The contractor is responsible for workmanship as well as for meeting the programme.

If the design has been fully developed and sufficient time has been devoted to the production of a firm BQ, then in theory this type of contract should lead to a high level of cost certainty at tender stage. In addition, if the design has been fully co-ordinated and there are no clashes or other variations due to design development, then it might be possible to avoid delays and thus construct the works more quickly.

The development of a full design pre-tender is time consuming and often an ideal which is not consistent with meeting frequently very tight timescales for works contracts. Often the extra time is not warranted and other types of contract can be cost effective whilst meeting shorter timescales.

It is possible to have an accelerated traditional contract strategy by overlapping some design with construction. This is often done with the early appointment of enabling contractors to carry out such work as:

- demolition;
- site levelling;
- piling;
- infrastructure works including service mains and roads, etc.
Such work is let and carried out whilst the design for the rest of the work is carried out. This approach, whilst shortening the overall programme, can create two principal problems:

- **Departments** may be unwilling to commit to such work prior to overall project cost being clearly defined; and

- the main contractor is very unlikely to be prepared to assume the risk of works carried out by others, especially foundations.

Examples of this traditional type of contract are:

- GC/Works/1 (1998) (with quantities)
- JCT80 Local Authorities Edition (with quantities)

**Advantages of Traditional Lump Sum Contracts:**

- the **Department** maintains control over the design team and cost consultant through direct contractual relationships with them;

- the **Department** has a direct contract with the contractor and is able to some extent to influence the contractor’s performance;

- it is possible to achieve high levels of design and construction quality;

- **liquidated damages** provisions provide for the recovery of funds due to culpable delay by the contractor;

- the BQ provides one of the best bases for post-contract cost control.
Disadvantages:

- the Department must have the appropriate expertise to ensure effective management of the design risk, the timely provision of accurate design information being essential to avoid claims;
- the contractor is separated from the design phase, which means that there is:
  - no design input from the contractor, which can otherwise lead to design solutions which are more buildable and possibly cheaper,
  - the possibility of the traditional barriers between consultants and the contractor giving rise to poor co-operation;
- the overall programme may be longer than for other contract strategies because of the time taken for full design development and preparation of BQs.
DESIGN AND BUILD CONTRACTS (D&B)

General

With this procurement strategy, the contractor takes responsibility and risk for both the design and the construction of the works for a fixed price lump sum.

The D&B strategy generally represents the lowest risk strategy for Departments, and the D&B contractor offers a single point of responsibility. For certain types of work such as piling, it may be more appropriate to engage specialist contractors on a D&B basis since they may be better able to provide the required design expertise.

This procurement strategy has variants depending on the status of the design, such as:

• **Direct** - where a designer/contractor is appointed without competition on account of prior knowledge or commercial expediency. This is generally not the recommended approach, and would only be used in exceptional circumstances.

• **Competitive** - where a limited number of contractors are invited to submit designs and prices in competition on the basis of documents defining the project. These may be prepared by in-house professional advisors or by consultants.

• **Develop and Construct** - where consultants (or in-house designers as appropriate) are appointed to design the project to a certain stage including securing any planning permission. Tenders are then invited from contractors to develop and complete the design and construction of the building. This may be undertaken by the contractor's own design team, or if design continuity is important, it may be stipulated that the design team originally appointed be transferred (in the case of external design consultants) to the contractor, for completion of the design under the responsibility of the contractor. This process is commonly known as 'novation'.
The project brief and the requirements of the Department are set out in a document called the ‘Employer’s Requirements’ or ‘Authority’s Requirements’. This is a key tender document and is the basis on which the D&B contractor provides the contractor’s proposals and its tender price and develops and completes the detailed design.

If the requirements are not properly developed and defined with clarity then this can be very costly, since any requirements which are not specified or are changed will be variations to the contract. This strategy works best when there are few variations or changes to the Department’s requirements, since such changes tend to be more expensive than other strategies.

Because the design risk is transferred to the contractor, the Department loses some control over the project. It should be borne in mind that D&B contracts secured under competition lead to the contractor adopting the simplest and cheapest specifications required to meet the Department’s requirements. There is generally a trade-off between the time saving and risk transfer, and quality control. The Department’s requirements should therefore include performance specifications and clearly state the minimum acceptable standards of design and specification.

For the reasons stated above, the use of the D&B strategy is generally not recommended for complex buildings or for work where the Department wish to have a high level of involvement in design development.

**Design Liability**

There are two alternative standards of design liability which are implied by law or expressly required by the contract:

- reasonable skill and care; and
- fitness for purpose.

Fitness for purpose is a greater obligation than the use of reasonable skill and care. Generally the professional designer is under an implied obligation to exercise reasonable skill and care in carrying out its design duties. On the other hand a builder who undertakes both the design and the construction of work will be under an implied duty to ensure that the work is fit for the purpose for which it was intended (unless stated otherwise in the contract).
If things go wrong, a professional designer may be able to show that it used reasonable skill and care, i.e. the ‘ordinary skill of an ordinary competent man exercising that particular art’. In other words the test is by reference to the level of skill and care which would reasonably by expected of other professionals of that discipline. In addition, consultants may rely upon the ‘state of the art’ defence - that specified materials which are subsequently found to be inadequate were at the time of being specified untried and untested but that their specification was nevertheless reasonable.

A contractor, whose standard of design liability is ‘fitness for purpose’ cannot rely on such defences, and for example a contract for the design, supply and installation of a radio mast must result in a radio mast which stands up as well as operates as a radio mast. In the event of a failure of the mast the contractor will be responsible for providing or paying for a replacement which is fit for its purpose. The contractor cannot rely, as it would under the traditional contract strategy, on the fact that the Department’s designer specified the mast and that it may have been the specification which led to the failure rather than the method of installation.

Because contractors are generally unwilling to accept design liability on the basis of fitness for purpose, the commonly used standard forms of D&B contract specify a duty of reasonable skill and care.

**Single Stage D&B Contracts**

These contracts are widely used for standardised relatively simple buildings such as houses and individual units.

On the basis of the Department’s requirements, it is necessary for tenderers to undertake a certain amount of design in order to submit a tender for this approach. It is common practice to invite no more than 3 tenderers following an interview with 6 or more firms. The purpose of restricting the tender list to 3 is to avoid, as much as possible, the abortive tendering cost arising from design production by unsuccessful tenderers.
Two Stage D&B Contracts

These contracts are recommended for projects of a more complex nature where the Department may require a higher standard of quality and prestigious finishes. This process requires a clearly defined brief from the outset to achieve the requisite level of quality.

- Stage 1 - the Department should invite tenders requesting the following submissions:
  - outline design
  - price for completion of design
  - estimated price for construction
  - outline programme showing estimated start and finish dates.

The tenderers whose proposals are judged to be the most economically advantageous are awarded the first stage contract.

- Stage 2 - If at the end of Stage 1 the contractor has produced an acceptable design and offers an acceptable price for construction they are awarded Stage 2. In Stage 2 the contractor is required to complete the contract within the agreed programme and cost.

The contractor may attempt to price the construction work above their estimated price after they have won Stage 1. In order to combat this it is recommended that the Department should:

- specify in the Stage 1 conditions of contract that the Department is entitled to use the design for tendering the works contract;
- employ a QS to control the cost of transition from Stage 1 to Stage 2;
- ensure that the Stage 1 design is readily capable of being built by another contractor.

The Department should also guard against any undue interference with the contractor's design which may lead to an unwanted transfer of design liability.
Examples of D&B contracts are:

- **GC/Works/1(1998)** - Single Stage Design and Build Version;
- **JCT81** - with Contractor’s Design.

**Advantages of D&B contracts:**

- the risk of design, cost and time are transferred to the contractor who represents a single point of responsibility in the event of problems;
- completion may be achieved earlier because there is scope for overlapping design and construction;
- price certainty is obtained at tender stage, provided the **Department’s** requirements are adequately drafted and there are no changes;
- it is possible to require of the contractor a greater duty of care than would normally be required of a design consultant.

**Disadvantages:**

- the **Department** loses control over design development and quality;
- contractors are likely to opt for minimum cost design solutions;
- variations can be more costly;
- price certainty may not be as attractive as it seems if, for example, the contractor fails properly to understand and manage the design process, and/or exploits uncertainties in the client’s requirements;
- the strategy is not recommended for complex buildings.
PRIME COST CONTRACTS

General

With prime cost, or cost plus contracts the Department pays the prime cost of the work carried out, plus a fee to the contractor. The contractor does not tender a contract price but instead tenders a percentage fee, and possibly plant rates. The final cost is therefore whatever it costs 'plus' the contractor's fee.

Prime cost contracting represents a high risk strategy for a Department, since the final cost is open-ended and post contract cost-control is difficult. Because of the uncertainty of the final cost, it is generally recommended that the use of prime cost contracts is avoided unless absolutely necessary.

Exceptionally it may be necessary to use prime cost contracts where the requirements of the work are not known in detail either because of:

• the nature of the work, such as emergency maintenance or damage repair, e.g. fire damage; and/or

• an acute shortage of time.

Prime cost contracts will generally only be used where it is necessary to procure a contractor very quickly. Normal procurement procedures are not normally possible and it is recommended that the selected contractor is one which has a proven track record with the Department for reliability and integrity.

Prime cost contracts often have the following characteristics:

• since the scope of work is ill-defined the specification and quantity of work is often vague;

• resource limits and time limits are agreed, although they are often revised when more information is available;

• the contractor undertakes work through instructions from the supervising officer or the project manager;

• they are expensive to administer because of the amount of checking of invoices and supporting paperwork.
It is essential to clearly define what is included in the prime cost and what is included in the fee. Typically the split will be as follows:

• prime cost items:
  - material costs supported by invoices,
  - labour costs supported by labour returns, salary slips etc.,
  - services and charges such as insurances,
  - sub-contracted work,
  - plant costs (time or usage rates possibly tendered by contractor);

• contractors tendered fee to include such things as:
  - management costs,
  - temporary site accommodation and office equipment etc.,
  - small tools,
  - consumables,
  - overheads and profit.

With a simple percentage ‘plus’ fee, it is very much in the contractor’s interest to expend as much prime costs as possible. Other than the contractor’s goodwill, there is no incentive for the contractor to use resources effectively or to keep costs to a minimum. Better cost control should be achieved by changing the basis of the fee. The following are examples:

• fixed lump sum fee - the contractor gains nothing by increasing the cost, (see for example the JCT Prime Cost Plus Fixed Fee Contract); a problem with this approach is that the contractor may be unfairly penalised if the scope of the work increases;

• sliding scale fee - the percentage addition for the fee reduces as the prime cost increases;

• target cost plus contractor’s percentage fee.
Target Cost

Target cost contracting requires the agreement of target costs for each of the elements of the work to be carried out. This therefore necessitates a reasonable knowledge of the work required and estimates of the likely cost. The target cost comprises the estimated prime cost plus the contractor's fee. The incentive for reducing costs comes by allowing the contractor a percentage share of any saving to the target cost. If the actual cost exceeds the target then the contractor may receive full payment for the excess or have to pay a percentage contribution to the excess depending on the basis of the contact. An example of a target cost contract is the Engineering and Construction Contract (2nd Edition)- Target Contract with Activity Schedule.

Advantages of Prime Cost Contracts:

- they enable a very quick mobilisation of the contractor before the workscope is defined or designed.

Disadvantages:

- the final cost is not known until the work is complete;
- costs are difficult to control;
- it costs more for the Department to administer, since all invoices etc. have to be checked;
- timescales may be difficult to define.
A management contract is where a management contractor is appointed by the Department to manage the overall contract works in return for a management fee (usually a percentage of the cost of the works). The idea behind management contracting is that the management contractor is appointed early, before the design is complete, to advise on buildability, programme, sequencing and procurement of works packages, and is intended to have a closer relationship with the Department.

This is a 'fast track' procurement strategy whereby the early packages are let before the rest of the design is complete. Works packages are commonly secured on a lump sum basis with a bill of quantities or schedule of rates. This means that cost certainty is not achieved until the last package is let.

The Department engages the design team, and therefore retains the risk of design development and it also engages the management contractor. The management contractor procures and contracts with each of the works contractors whose packages are designed and let in order of construction and in accordance with a detailed package procurement programme. The management contractor might provide site offices and other common services, such as welfare and site cleaning, etc., but does not otherwise carry out any of the work. The management contractor will normally have joint responsibility with the quantity surveyor for developing and managing the budget and for post-contract cost control.

Whilst it may appear that the management contractor takes the financial risk of construction, it is common for management contracts to contain a provision to the effect that in the event of a default by a works package contractor, the Department will be liable for the cost of that default to the extent that the management contractor is unable to recover such costs from the defaulting works contractor itself. In this way the management contractor has to manage failures and do all it can to resolve them, but the Department may foot the bill if the management contractor would otherwise be out of pocket. This is the trade-off for securing the management contractor's expertise as part of the professional team.
Because of the sequenced way of letting packages, procurement and therefore works package costs can be adversely affected by design delays, design development, and changing market conditions. Good management and in particular design and cost management is therefore essential to reap the maximum advantage of the time saving that this procurement method can provide. This strategy requires more effort and involvement from the quantity surveyor in preparing tender documents of works packages and in monitoring and managing costs. Therefore where this strategy is opted for, it is recommended that consultants should be so advised at the time they are procured.

By way of general guidance, this strategy is generally appropriate for major works schemes in excess of say £5 million in value.

Management contractors’ fees vary around 2½%-3% of total works package costs. Site facilities etc. are usually reimbursed at cost. The quality of the management contractor’s team is therefore probably the single most important factor in choosing a firm in a competition. Selecting a firm who offers the lowest price could be a very poor decision and provide poor value for money in the long term.

If the management contracting strategy is chosen it is important to note that there is no standard set of Government conditions. Examples of standard forms are:

- the JCT87 Standard Form of Management Contract;
- the Engineering and Construction Contract (2nd Edition) - Management Contract;
- many contractors provide their own forms.

Advice should be sought on the choice of form to be adopted since standard forms may not provide the Department with the safeguards and risk transfer it requires.
Advantages of Management Contracting:

- the overlapping of design and construction provides fast track development;
- the management contractor brings its construction expertise to the design team earlier, when design, buildability and programming and management can be of most value;
- it can be used for complex buildings;
- the Department retains control of design development and design quality;
- changes can be accommodated in later packages;
- the management contractor takes some of the risk for the performance of works contractors.

Disadvantages:

- the cost is not known with any certainty until the last package is let;
- careful and effective management of the design team is required, design development in particular has to be closely controlled;
- higher standards of cost management are required;
- there is no direct contractual relationship between works contractors and the Department, possibly requiring the use of warranties;
- the Department must have the expertise and/or resources to administer the management contractor as well as the design team.
Construction management is generally applicable for use with complex major works projects where the Department has the need and the expertise and resources to have a high level of involvement in both the design development and the construction of the work.

A construction manager is appointed for a fee to provide buildability and design input advice, and to programme and co-ordinate the design and construction activities, as well as managing key dates when input from the Department is required. Trade contractors have a direct contract with the Department and the construction manager carries out only planning, site management and co-ordination of the trade contractors.

The construction manager effectively has the role of managing the construction work with no financial risk.

This is also a ‘fast track’ procurement method since packages are let, on a lump sum basis, before the design for subsequent packages has been let. For the Department this is a high risk strategy, but one which enables a high level of Departmental influence. For social contracts such as Housing Action Trust work, this level of involvement may ideally suit a Trust’s objectives.

The construction manager should be selected for his or her skills in programming, management and control and for an ability clearly to understand and align with the objectives of the Department.

Effectively this strategy enables shorter programmes, and secures high quality buildings with high levels of input from the Department, but at the expense of cost certainty.

There are no standard forms of construction management contract, although many construction management companies have developed their own forms.
Advantages of Construction Management Contracts:

• ‘fast track’ development is possible because design and construction can be overlapped;

• it can be used for complex buildings - London’s Broadgate development was constructed using this strategy for example;

• the Department retains high levels of involvement and influence;

• the Department retains direct control over the design team and over output quality;

• advantage can be gained from procuring the expertise of specialist contractors in providing early design input advice;

• the project manager and construction manager can better develop relationships with the trade contractors, rather than a main contractor, in order to create close co-operation and direct resolution of problems and claims;

• information flow can be quicker and therefore more effective;

• this is a flexible strategy where, for example, elements of design can be included in some packages and not others;

• changes can be accommodated in later packages;

• the construction manager is effectively a member of the professional team and more closely aligned to the Department.

Disadvantages:

• the construction manager takes no financial risk in the construction project;

• the level of risk transfer to the construction manager and trade contractors is lower than traditional contract strategies, because the Department is responsible for delays by one trade contractor which may affect others, (although the Department can claim against a trade contractor who causes delay to others);

• price certainty is not achieved until the last package is let;

• the Department must have the resources and expertise to administer the design team and each of the trade contractors.
A design and manage strategy is similar to management contracting. The difference is that the management contractor’s fee also covers the responsibility for design as well as for managing the works contract packages.

This is also a ‘fast track’ method but one which provides for design risk transfer. Where the work is not overly complex and where quality is not a major issue, then it may be more appropriate to consider the use of a design and build contract. Some of the differences between the design and manage approach and the design and build strategy are:

- design and manage can be used for complex buildings whereas design and build is not recommended for such buildings;
- the design and manage contractor is unlikely to take full financial risk in the way that a design and build contractor does;
- with design and manage, quality is more controllable and design development is more flexible than design and build but at the expense of losing cost certainty until much later in the project.

There are no standard forms of design and manage contract.

Advantages of Design and Manage Contracts:

- the contractor takes responsibility for integrating design and construction, thus overcoming the traditional design team/contractor barriers;
- the contractor offers a single point of responsibility;
- completion can be achieved earlier because of the scope for overlapping design with construction;
- it can be used for complex buildings.

Disadvantages:

- price certainty is not achieved until the last package is let;
- the Department loses direct control over design quality;
- there is no direct contractual relationship between works contractors and the Department, possibly requiring the use of warranties.
EXTENSION CONTRACTS AND VARIATIONS

General

These contracts are also referred to as continuity contracts, whereby a contractor already present on site is instructed to undertake modification or additional work under a variation instruction. In order for a variation to be valid under the contract, the work should not be beyond the scope of the original contract, such that it would represent a substantial departure from the original contract in terms of character, extent and time. If the additional works are beyond the scope of the original contract then they should be let under a separate contract.

Provided that the work can be agreed satisfactorily between the Department and the contractor, the work will be subject to the original conditions of contract and valued in accordance with the rules for valuation of variations appropriate to that contract.

Claims and Cost Control

Instructing additional work will present the contractor with scope to claim extra time and additional cost due to increased preliminaries (prolongation) and disruption to the contract works. Quite often the contractor can successfully sustain its argument since there is a limit to the amount variations which can be absorbed without affecting the completion date. Perhaps the best method for controlling the cost of variations is to agree the time and cost implication as a lump sum quotation ahead of the work being carried out, which for example may be instructed under Condition 40(5) GC/Works/1 (1998). This approach has been further endorsed in the Engineering and Construction Contract (2nd Edition), (formerly the New Engineering Contract) as a way of reducing conflict under contracts.

It is recommended that Departments have in place effective ‘change control’ procedures which ensure that the Department has the final say over the issue of significant variations (by setting a value threshold for example) and that time, cost and quality issues are properly evaluated and balanced against the benefit of instructing the variations.
Forms of Contract

This process can be initiated on all contracts containing variation provisions. The ascertainment of the value of the variation is generally easier where the contract is based on a firm BQ, and potentially more difficult with specification and drawings contracts.
TERM CONTRACTS

General

Term contracts are often referred to as call-off contracts and they are usually suitable where a continuous programme of work is required of a particular type for which the scope can be approximately defined in a schedule of rates. The term or duration of these contracts tend to run for 3 to 5 years but can often be terminated by notice by either party.

These type of contracts are often favoured by Departments which have a continuous requirement for maintenance or minor work at either regular or irregular intervals.

It is recommended that a ‘break clause’ is included which enables the Department to bring the contract to an end in the event of a change of requirements or because of budgetary constraints.

Term contracts generally exhibit the following characteristics:

- the contract is usually for a particular type of work i.e. general repairs, stating the maximum and minimum order value;
- the contract states specific response times to various categories of order e.g. urgent repairs;
- the contract is usually confined to a geographic area;
- the value of the work is ascertained in accordance with agreed rates and prices usually on the basis of a schedule of rates;
- the cost of setting up and administering these contracts tend to be comparatively lower than the cost of a series of one-off contracts.
Advantages of Term Contracts:

- the procurement cycle is short and the costs of preparing tender documents is low;
- the cost of work is fixed in advance, with some allowance for fluctuations;
- procurement costs are cheap because only one contractor is secured for the term;
- one contractor is in place to carry out the work whenever required;
- a continuity of labour reduces the burden on security clearance.

Disadvantages:

- since no guarantee of work is given, the contractor’s performance can deteriorate if the contract is not much used by the Department;
- it is difficult to estimate resource costs and therefore to accurately predict the rate to undertake a particular element of work where future quantities and costs are unknown;
- schedules of rates/prices tend to encompass a wide range of items. When the contractor’s profit is spread over these items, especially where many of the items are never required, the contractor may find these prices uneconomical over the term and may issue notice of termination;
- on a long running term contract, the convenience and expediency may take precedence over commercial considerations i.e. the cost of undertaking the work may be cheaper on an ad hoc basis due to changes in the market conditions;
- all works must be inspected by the supervising officer and the value of each order re-measured on completion.

It is recommended that the market should be regularly tested to monitor fluctuations in market conditions and therefore the continuing competitiveness of any rates or prices.
Types of Term Contracts

- **Measured Term Contracts** - these contracts are often based on a schedule of rates or prices;

- **Specialist Term Contracts** - these contracts are often based on lump sum quotations for works of a specialist nature e.g. lift maintenance, window cleaning etc.;

- **Daywork Term Contracts** - this arrangement is often used for small works where the work is paid for on a ‘prime cost’ basis.

**Measured Term Contract (MTC)**

The features of an MTC are as follows:

- They are usually based on a schedule of rates, which are often published on standard forms. Tenders are obtained by firms quoting percentage adjustments i.e. addition to or deductions from the schedule of rates.

- The percentage adjustment applies to all orders issued pursuant to the MTC. However, Government contracts for electrical services, mechanical services and grounds maintenance allow differing percentage adjustments to different categories of item in the schedule of rates.

- In order to provide the contractor with some basis for pricing and in order not to over stretch the contractor, it is usual to specify in the contract minimum and maximum order values. Under the Government’s standard form GC/Works/7(1999) any order is priced at the net value of measured work which comprises the contractor’s tendered adjustment applied to the rates in the schedule.

- To allow for labour and material cost inflation, the rates are adjusted each month by the appropriate Updating Percentages for MTC’s. The resulting value is then identified as the Net Updated Value of measured work. It should be noted that the Schedule of Rates and Updated Percentages only reflect national price levels not regional levels.

- The Department’s position is protected as far as possible by provisions which provide for each order to specify a completion date and an obligation on the contractor to proceed regularly and diligently with the work so as to complete by the completion date on the order. The work is required to be carried out to the satisfaction of the supervising officer.
• An MTC can accommodate a Lump Sum Maintenance Element (LSME) i.e. where the contractor operates, maintains and repairs plant, usually for an annual sum. The lump sum is adjusted annually on the anniversary of the commencement date in accordance with the variation of price (VOP) formula set out in the conditions of contract. Payment of the annual lump sum is usually paid in 12 equal monthly instalments. LSME is often used for the following works:

- heating and air-conditioning in a crown court etc.;
- domestic boilers on a married quarters site;
- specialist equipment in a hangar etc.

As with any lump sum contract, there is a danger that the contractor will carry out minimal repairs which may result in the plant deteriorating more rapidly than otherwise. Consequently continual performance monitoring and supervision is required to reduce this risk.

Specialist Term Contracts

These contracts are particularly useful for the servicing and inspection of M&E plant and the like. The contractor has the primary responsibility to maintain the plant through routine servicing and in the event of breakdown or failure the contractor carries out the necessary repairs without reference to the Department.

The contractor quotes annual lump sums for the tasks and is paid 12 equal monthly payments. The Department must ensure that the work is carried out in accordance with the contract, by monitoring and checking the plant and site records etc.
Daywork Term Contracts

This contracting strategy is recommended only where order values are likely to be low and where security and familiarity with the site is necessary. The two major reservations with this approach are:

- contractors tend to complete tasks more slowly than they would for a lump sum contract due to the lack of incentive;
- supervision of the works is necessary to verify accounts.

This type of contract can be a license to print money for a contractor and should be used with great care.

In order for contracts to operate successfully the Department should carry out all necessary checks and audits to the contractor’s daywork sheets and records. These include:

- checking that there is no double counting i.e. same person on 2 separate sites at the same time;
- verifying the hours charged against office pay records;
- checking the reasonableness of the hours and materials used;
- ensuring that the rates are correct;
- making sure that travel time is chargeable.
CRS 1.15

STANDARD GOVERNMENT CONTRACTS

All GC/Works forms of contract are essentially developed from the GC/Works/1 Edition 3 version (Revised 1990) which was first published in 1989. Edition 3 was a more management-orientated contract than its predecessor (Edition 2) and makes specific provision for administration of the contract by a Project Manager on behalf of the Employer.

GC/Works/1 contract forms can be used to procure major building and civil engineering works and are suitable for use on either major refurbishment or new works projects. Six versions are available together with a comprehensive Model Forms and Commentary volume, as follows:

- GC/Works/1 (1998) Lump Sum with Quantities;
- GC/Works/1 (1998) Lump Sum without quantities;
- GC/Works/1 (1999) Two Stage Design & Build;
- GC/Works/1 (1998) Model Forms and Commentary;

Each of the individual versions is suitable for use in conjunction with a particular procurement strategy selected by a Department.

Other standard ‘property-related’ Government forms of contract are:

- GC/Works/3 (1998) For use with Mechanical and Electrical Engineering Works
- GC/Works/4 (1998) For use with Building, Civil Engineering, Mechanical and Electrical Small Works
• GC/Works/5 (1998) For Appointment of Consultants (Single Project) (see CST 1.5)

• GC/Works/5 (1999) For Appointment of Consultants: Framework Agreement (see CST 1.6)

• GC/Works/6 (1999) Daywork Term Contract

• GC/Works/7 (1999) Measured Term Contract

• GC/Works/8 (1999) Specialist Term Contract for Maintenance of Equipment

• GC/Works/9 (1999) Operation, Repair and Maintenance Contract for M & E Plant, Equipment and Installations etc

• C1303 Window Cleaning

• C1304 Chimney Sweeping

• C1306 Maintenance of Gardens, Grounds, etc

• C1312 Supply and Application of Herbicides etc

• C1804 Repair of Plant.

A brief commentary on the major features of each of these standard Government forms is outlined in sections 1.15.1 to 1.15.15 with the exception of GC/Works/5 (which relates to the appointment of consultants, CST 1.5 and 1.6 refer).

**Note:** An 'approximate quantities' version of GC/Works/1 is currently being tested on a number of trial.

A new GC/Works/Subcontract form, suitable for use between the Main Contractor and his Subcontractor, is in the process of being developed. It is due to be published by March 2000.
CRS 1.15.1


Recommended Value

Value thresholds will be a matter of policy for each Department and will depend on the scale of work normally carried out by the Department.

By way of general guidance, it is recommended that where the chosen strategy is the traditional lump sum contract strategy, then it is appropriate to use the 'with quantities' version of this contract where the works element of major alterations refurbishment or new work exceeds £250,000.

Major Features

The major features of this contract are as follows:

• the contract is administered by a Project Manager (PM) on behalf of the Employer;

• Condition 1A imposes a duty on all of the parties to the contract to deal fairly with each other and as a team;

• in line with 'Constructing the Team' recommendation that there be flexibility in payment methods, Condition 48 (Advances on account) has been amended to offer three alternative payment methods. The alternatives are stage payments based on the contractor's progress measured against his latest accepted programme, payments based on the achievement of Milestones by the contractor which have been agreed pre-contract and recorded in the Milestone Payment Chart and payment based on the measurement and validation of work executed and materials on site;

• the contractor is paid 95% of the total sum payable in each month;

• a 5% reserve is withheld from each interim payment as security in respect of defects (see Condition 21);

• a new optional condition has been introduced which enables the Employer to make payments to the contractor to cover high mobilisation costs (see Condition 48B);
• a new optional condition has been introduced allowing payment to be made for things off site (see Condition 48C (not applicable in Scotland));

• there is a heavy focus on valuing variations at the time they arise and preferably before the works are carried out;

• in order to reduce the scope for claims after the majority of the works have been completed, in accordance with Condition 41(2) the value of variations is to include any disruption to or prolongation of both varied and unvaried work;

• in accordance with Condition 42(6) if in the opinion of the Q S a variation has a disruptive effect on other work then the Q S may adjust the rates for such work to make due allowance for the disruptive effect;

• the recovery of expenses incurred because of prolongation and disruption caused by such matters as late issue of information is dealt with by Condition 46;

• the obligations imposed by the Construction (Design and Management) Regulations (1994) have been incorporated in the contract (see Condition 11);

• finance charges are excluded from the contractor's loss or disruption costs, but are paid instead (at a rate decided by the Employer) on any sums outstanding only if the Employer or Project Manager have failed to comply with any time limits in the contract or if the Q S revalues work, provided such failure is not consequent on further particulars presented by the contractor;

• Condition 33 now requires the contractor to submit his programme with his tender. The little used Edition 3 provision for submission of the programme post award has been dropped. The programme must show the sequence of work and must be in sufficient detail to enable effective monitoring of the progress. It must allow reasonable periods for the provision of information and identify any events which are critical to completion of the work. The programme cannot include any float time, and it can only be varied by agreement;

• the contractor is given possession of the site by specific notice in accordance with Condition 34;

• the contractor is entitled to an extension of time in accordance with Condition 36;
provision is made in Condition 55 for the Employer to deduct or seek the payment of liquidated damages for culpable delay;

a measure of design liability is imposed on the contractor by Condition 10, in recognition of the fact that contractors are often involved in the design;

time limits and notice requirements have been placed throughout the contract which fully comply with the requirements of Part II of the Housing Grants, Construction and Regeneration Act 1996 (for example see Condition 50A);

Condition 51 provides that defects notified to the contractor which the Employer believes to be the responsibility of the contractor must be remedied; if the contractor can show that any defect was not due to his default then he will be entitled to payment for the remedy;

Condition 52 allows the contractor to suspend work on the contract due to non-payment by the Employer;

the adjudication procedures introduced in Edition 3 have been amended to bring them into line with the requirements of Part II of the Housing Grants, Construction and Regeneration Act 1996 (see Condition 59);

acceleration is provided for should it be required;

Condition 56(8) allows the Employer to determine the contract at any time without reason. This might be useful if, for example, policy is changed or funds are withdrawn with little or no notice;

optional Condition 66 enables the Employer to require the contractor to maintain a performance bond;

optional Condition 67 enables the Employer to require the contractor to provide a Parent Company Guarantee.
Model Forms

The following contract specific model forms are included in the document:

• abstract of contract particulars;
• Invitation to Tender and Schedule of Drawings;
• Tender and Tender Price Form;
• Contract Agreement.

This is the traditional lump sum contract for large value refurbishment and new works projects based on a lump sum without quantities.

**Recommended Value**

Value thresholds will be a matter of policy for each Department.

By way of general guidance it is recommended that where the chosen strategy is the traditional lump sum contract strategy, then it is appropriate to use the without quantities version of this contract where the value of the works element of major alterations, refurbishment or new work exceeds £250,000.

**Major Features**

The principal differences between this and the with quantities version are:

- the without quantities version is supported by a schedule of rates provided by the contractor with the tender and which is used for valuing variations in accordance with Clause 41;

- all reference to bills of quantities is removed including Clause 3 in the with quantities version which deals with errors and omissions etc. in bills of quantities.

Otherwise the other conditions of contract are essentially the same as the with quantities version.
Model Forms

These conditions include the following model forms;

• abstract of contract particulars;
• Invitation to Tender and Schedule of Drawings;
• Tender and Tender Price Form;
• Contract Agreement.

Other forms required by this and the other versions of the GC/Works/1 (1998) are included in the Model Forms and commentary.
This is a lump sum design and build contract which envisages a single stage tender procedure. Single stage means that a separate design stage is not anticipated.

This standard form is based on the with quantities version of GC/Works/1 (1998). The main changes from the with quantities version are described in the Model forms and Commentary Volume. Some of the principal differences are as follows:

**Condition 1 - New Definitions:**

- The Authority's Requirements - this document (which may include drawings) replaces specification and drawings. It is this document that must describe the requirements and objectives of the authority in sufficient detail to enable the contractor to submit the tender. It should also define the site boundary.

- The Contractor's Proposals - this is the response to the authority's requirements which must include drawings and specification and describe how the contractor proposes to satisfy the authority's requirements.

- The Design - this is defined as being the sum total of the accepted contractor's proposals and subsequent design documents.

- Design Document - any document prepared by the contractor as a result of the design process and subject to a procedural process detailed within Condition 10a.

- Pricing Document - this document gives details of the build up of the contractor's lump sum offer.

Note that the pricing document replaces the bills of quantities and is the basis for valuing variations in accordance with Clause 42.
Condition 2 - Contract Documents

- This condition deals with mismatch within and between contract documents. It is made clear that should there be a discrepancy between the authority's requirements and the contractor's proposals, it is the Employer's requirements which will prevail. Discrepancies in or between the Employer's requirements and any statutory requirement, building regulation or planning permission are resolved by the Project Manager.

Condition 3 - Pricing Document

- Under this condition, any errors found in the bills of quantities after the contract has been awarded cannot be amended.

Condition 8A - Insurance for Design Indemnity

- A contractor's normal insurance cover does not extend to design liability. This form therefore includes a condition requiring the contractor to hold professional indemnity insurance in respect of its design.

Condition 10 - Design of the Works

- This condition imposes a duty upon the contractor to use all reasonable skill and care when carrying out design work.

Condition 10a - Design Documents

- This condition deals with the procedure for issuing design documents by the contractor to the project manager. It is important that contractors are aware that they cannot start any work for which a design document has been prepared until the manager has had an opportunity to be satisfied that the authority's requirements will be met, to raise queries and receive satisfactory explanations. The liability in respect of any design document remains firmly with the contractor. The contractor must submit two copies of each design document to the project manager and a basic quality control procedure for queries and changes is built-in to the condition.
Condition 33 - Programme

• The authority's requirements should specify that the contractor must submit a programme with the tender. As well as forming part of the tender evaluation, the programme is required in order to review (or negotiate) the actions which involve the authority/project manager (e.g. sequence of delivery and periods for examination of design documents) prior to tender acceptance. There is therefore no provision in this contract for the contractor to submit the programme within 21 days after acceptance of its tender.

• The programme must incorporate the design activity and identify when possession of the site is required. Periods of time for the project manager to examine design documents must also be shown.

Condition 36 - Extensions of Time

• The entitlement for an extension for any delay caused by the execution of modified or additional work, has been replaced by an entitlement only where there is a change in the authority's requirements.

Condition 40 - Project Manager's Instructions

• The project manager may issue variations in the form of a change in the authority's requirements.

Condition 63 - Nomination

• This condition has been omitted from this version of the GC/Works/1 (1998) contract.

Condition 63A - Insolvency of Nominated Sub-contractors or Suppliers

• This condition from the with quantities version of GC/Works/1 (1998) has been omitted as a natural consequence of the omission of Condition 63 - Nomination.

Condition 64 - Provisional Sums

• This condition omitted from the Edition 3 Design and Build version of the contract has been reinstated into the 1998 edition as a means of incorporating sums into the contract for the work of statutory undertakers undertaking their statutory duties.
Amendments to the Conditions of Contract

- Any amendments or additions to the standard form of contract to suit particular circumstances must, to comply with Condition 2(1), be incorporated by the use of supplementary conditions. They are incorporated into the conditions by listing in the abstract of particulars. Copies should be included with the tender documents.

Stage Payment Chart - General Note

- A stage payment chart will need to be compiled to suit each particular project and included with the invitation to tender. Ready prepared charts may be commercially available but it may be appropriate to require the contractor to prepare and present a stage payment chart as part of their tender submission. This should be supported by a resourced draft programme together with calculations.

Model Forms

These conditions include the following model forms;

- abstract of contract particulars;
- Invitation to Tender and Schedule of Drawings;
- Tender and Tender Price Form.
The GC/Works/1 Design and Build (1998) contract is a lump sum form described in CRS 1.15.3 and is intended to support a single stage tendering procedure, without a separate design stage. It is sufficiently flexible to allow for varying amounts of design input from the Contractor. The Employer provides Employer's Requirements, to which the Contractor responds with Contractor's Proposals, and the Contractor develops the detailed design on the basis outlined in those documents.

This ‘Two Stage’ Design and Build form supports a separate design stage. It is also a lump sum form of contract but the lump sum is arrived at in two stages, as explained below.

Naturally, the two documents are very similar. The new features of GC/Works/1 ‘Two Stage’ Design and Build (1999) are as follows:

• at the time the Contract is entered, the Contract Sum is not ascertained, owing to the lack at that time of design and other information upon which to base the Contract Sum. However, a separate Design Fee is ascertained at that time and the Contractor will have submitted a Pricing Document as an aid to the subsequent ascertainment of the Contract Sum

• a Design Process Event is identified. This consists of two distinct elements:
  - determination of the Contract Sum during the design stage either by agreement of the parties or, in the absence of agreement, by the QS (subject to later adjudication and arbitration at the instance of the Contractor)
  - achievement of a certain design progress milestone. This may be completion of the Design, or some earlier design stage, which must be identified in the entry in the Abstract of Particulars relating to the new Condition 10B (Design process and Contract Sum)

• the Contractor proceeds with site and/or soil investigations and the Design, but generally with no other work until given notice of possession of the Site
• the Contractor is paid the Design Fee monthly, without retention

• under Condition 10B(10) (Design process and Contract Sum), the PM certifies when the Design Process Event has been achieved

• the Employer elects at his absolute discretion whether or not to proceed with the Contract and give the Contractor notice of possession of the Site. If he does not do so within a limited time, the Contract is deemed determined, and the Contractor is entitled to be paid for work done to that time

• if the Employer elects to let the Contract determine, but later decides to proceed with the Works, he may use the initial Contractor’s design, whether or not he further employs that Contractor in connection with the Works

• if the Employer elects to give notice of possession of the Site, the time for the Contractor to provide the performance bond, retention payment bond and mobilisation payment bond (if any) runs from the giving of that notice.
These two forms adapt the respective GC/Works/1 ‘With’ and ‘Without’ Quantities forms for use in ‘construction management’, a contractual structure under which:

• there is no single main contractor

• the Employer enters into a number of direct contracts (usually called Trade Contracts) with several separate contractors (usually called Trade Contractors) for separate works packages together comprising a larger

• the Employer instructs a construction manager to run the .

These ‘Construction Management’ Contracts differ from the GC/Works/1 (1998) ‘With’ and ‘Without’ Quantities contracts in the following areas:

**Condition 1 (Definitions)**

• The definition of ‘Principal Contractor’ has been amended to reflect that the Contractor may not be the Principal Contractor for the Purposes of the Construction (Design and Management) Regulations 1994 and their Northern Ireland equivalent;

• A new definition has been added - ‘the Project’. This relates to the project which are described in the Abstract of Particulars of which the Works under the particular Trade Contract form a part.

**Condition 8 (Insurance)**

• This condition has effectively been edited to adopt the provisions of Alternative C under Condition 8 (Insurance) of GC/Works/1 With Quantities (1998). Under that alternative, the Employer assumes responsibility for construction ‘all risks’ and public liability insurance; and, while the Crown is the Employer, the Employer does not have to insure, but may assume the relevant risks - the Crown as a matter of policy, generally does not effect insurance.
Condition 13 (Protection of Works)

- This Condition has been amended to reflect that the Contractor under Construction Management can only be responsible for his own Work and Things (as defined under the Contract). If the Contractor is to have wider responsibilities in respect of the whole Site, these must be ‘specified by the contract’.

Condition 21 (Defects in Maintenance Periods)

- Whilst this Condition is unamended various changes have been introduced into the Abstract of Particulars relating to it which enable the Employer to set specific maintenance periods in relation to the Works.

Condition 22 (Occupier's and Employer's rules and regulations)

- The title of this Condition has been amended to refer to the Employer's, as well as the occupier's rules and regulations, and the Condition assumes very great importance under CM. It is not an optional Condition as under the GC/Works/1 With and Without Quantities (1998) contracts.

Condition 26 (Site admittance)

- This Condition has been amended to reflect that each Contractor under Construction Management cannot be responsible for the admittance of persons to the Site. Therefore, the Contractor is required to take ‘the steps specified by the Contract, or Instructed by the PM’ to prevent unauthorized persons being admitted to the Site.

Condition 34 (Commencement and completion)

- This Condition has been amended to reflect that under Construction Management the Contractor is only given access to the Site rather than possession. The Condition also places a responsibility on the Contractor to keep his area of the works clear of debris and rubbish.

Condition 46 (Prolongation and disruption)

- This Condition has been amended in recognition that under Construction Management there is a greater risk of the activities of other Works adversely affecting the Contractor’s work.
**Condition 55 (Damages for delay)**

- This Condition has been amended to enable the Employer to claim either liquidated damages or damages at large in respect of the Contractor's failure to complete the Works on time.

**Condition 65 (Other works)**

- This Condition assumes great importance under Construction Management as all the other Trade Contractors will be working in accordance with it.

GC/Works/2 (1998) is for use where lump sum tenders are to be invited on the basis of the specification and drawings only, with an Employer's option to require the contractor to provide a schedule of rates in order to value variations ordered.

**Recommended Value**

Value thresholds will be a matter of policy for each Department.

By way of general guidance it is suggested that this type of contract is suitable for building and civil engineering works with a value between £25,000 and £200,000 and demolition contracts of any value.

**Major Features**

- the contract is administered by the person designated as the Project Manager (PM) by the Employer;

- in accordance with Condition 1A, the parties to the contract are required to deal fairly, in good faith and in mutual cooperation with each other;

- in accordance with Condition 30, the contractor is entitled to apply for monthly payments, provided the application is supported by a valuation which is to be agreed by the PM; the contractor is paid 97 percent of the value of the work executed on site to the satisfaction of the PM and of things (materials) brought to site for incorporation into the works;

- the 3 per cent ‘reserve’ is held as security in respect of any defects which may arise in the maintenance period (see Condition 19);
• the PM may issue instructions to vary or further explain the terms of the works in accordance with Condition 25. All instructions are to be confirmed in writing;

• variations are valued in accordance with Condition 26 and on the basis of either fair rates to be agreed between the Department and the contractor or on the basis of the contractor’s schedule of rates if one was requested;

• Condition 6 incorporates into the contract the obligations imposed by the Construction (Design and Management) Regulations 1994;

• Condition 23 provides for extensions of time to the contractor for any matters which are wholly beyond the control of the contractor; for example unforeseen ground conditions (only if certified as such by the PM under Condition 4);

• Condition 28 allows the contractor to receive additional funds for delay provided he can satisfy the requirements imposed by 28(1) and (3);

• under Condition 29 the contractor has a right to interest payments at the rate specified in the Abstract of Particulars due to the circumstances listed in Condition 29(1);

• Condition 37 introduces the employers right to claim liquidated damages in the event of loss being incurred due to delay by the contractor;

• optional Condition 47 enables the Employer to require the contractor to maintain a performance bond;

• optional Condition 48 enables the Employer to require the contractor to provide a Parent Company Guarantee.

Model Forms and Commentary

A separate volume is available, entitled “GC/Works/2 (1998) Contract for Building and Civil Engineering Minor Works - Model Forms and Commentary” (TSO ISBN 0-11-702153-9), which includes model forms such as:

• Invitation to Tender and Schedule of Drawings;

• Adjudicator’s Appointment;

• Certificate of Completion; and

• detailed guidance on each of the conditions.

GC/Works/3 (1998) is a new standard form of contract for UK mechanical and electrical engineering works replacing General Conditions of Contract for Minor Mechanical & Electrical Services and Plant: Form C1020 (September 1990) and General Conditions of Contract for Mechanical & Electrical Services and Plant: Form C1030 (September 1990). Because C1020 was almost as long and complex as C1030, it was considered unnecessary to continue publication of separate forms of contract respectively for minor and major mechanical and electrical engineering work.

GC/Works/3 General Conditions are based upon GC/Works/1 With Quantities (1998). GC/Works/3 is for use on lump sum contracts for UK mechanical and electrical engineering works of any value based upon a Specification and Drawings, with the optional use of Bills of Quantities or a Schedule of Rates. Options are also given for liquidated damages at large in respect of delay in completion of the works.

Recommended Value

Value thresholds will be a matter of policy for each Department.

By way of general guidance, it is suggested that this type of contract is suitable for works contracts of any value.

GC/Works/3 (1998) differs from GC/Works/1 With Quantities (1998) in the following areas:

Condition 1 Definitions

- ‘Bills of quantities’ definition expanded to reflect their optional use;
- in the definition of ‘Contract’ the words ‘(if used)’ after ‘Specification’ have been deleted as the specification is an essential item for mechanical and electrical engineering works;
- definition of ‘Programme’ expanded to reflect that its use is optional in GC/Works/3;
- definition of ‘Schedule of rates’ added;
- definition of tests on and after completion have been added.
Condition 9 Setting Out and ‘as built’ drawings

- New paragraph (3) has been added to this condition which requires the contractor to supply ‘as built’ drawings to the Employer within 14 days of a section of, or all of the works being signed off as complete. Failure to comply with this condition allows the Employer to withhold further payments.

Condition 10 Design

- Paragraph (1) refers to ‘the design of the whole or any part of the Works’.

Condition 33 Programme

- This condition is optional.

Condition 39 Tests on Completion and certifying work

- Paragraphs 1-5 are new and deal with the Making of Tests on completion and the issue by the Project Manager of certificates of satisfactory completion in respect of all or any part of the works. Repeated failure of Tests on Completion is a ground for determination of the contract by the Employer under Condition 56.

Condition 39A Tests after Completion

- This new optional condition sets out the procedures for testing the works after completion, with liquidated damages for shortfall in performance.

Condition 55 Damages for Delay

- This condition provides alternatives respectively for liquidated damages and damages at large.

Condition 56 Determination by Employer

- Paragraph (6)(i) is new to reflect Condition 39 and enables the Employer to determine the contract due to repeated test failures on completion.
Model Forms and Commentary

A separate volume entitled “GC/Works/3 (1997) Contract for Mechanical and Electrical Engineering Works: Model Forms and Commentary” (TSO ISBN 0-11-702153-9) is also available. This includes all of the model forms required to successfully utilise the GC/Works/3 contract and includes:

- Tender and Tender Price Form;
- Contract Agreement;
- Retention Payment Bond; together with detailed guidance on each of the conditions.
GC/WORKS/4 (1998) CONTRACT FOR BUILDING, CIVIL ENGINEERING, MECHANICAL AND ELECTRICAL SMALL WORKS
(TSO - ISBN 0-11-702154-7)


Recommended Value

Value thresholds will be a matter of policy for each Department.

By way of general guidance it is recommended that this type of contract is suitable for contracts with a maximum value of £75,000.

Although GC/Works/4 (1998) is intended for use on low value projects, Departments may occasionally need to consider using GC/Works/2 (1998) as this incorporates a number of conditions which do not feature in GC/Works/4 (1998). For example, under GC/Works/4 neither the contractor or the Employer is required to maintain insurance. The contractor is also unable to claim additional funds or time due to delay caused by unforeseen ground conditions.

Major Features

The major features are as follows:

• the contract is administered by the person designated as the Project Manager (PM);

• variation instructions may be issued by the PM in accordance with Condition 17(2);

• in accordance with Condition 1A, the parties to the contract are required to deal fairly, in good faith and in mutual cooperation with each other. Variations are valued in accordance with Condition 18;

• Condition 20 gives the Employer the option of paying advances on account based on progress;

• under Condition 28, both parties have the right to refer disputes to an adjudicator. In all cases, the adjudicators decision is final and cannot be subjected to arbitration post completion.
Model Forms and Commentary

A separate model forms and commentary volume is also available for GC/Works/4 1998 entitled “Contract for Building, Civil Engineering, Mechanical and Electrical Small Works: Model Forms and Commentary” (TSO ISBN 0-11-702154-7)).
This is the standard form of daywork term contract. The competition is in the percentage on-cost quoted by the tenderers. Payment is based on hourly rates for labour which include the contractor's overheads etc. Materials are paid for at cost plus a percentage addition.

It is intended that this form be used for work of a jobbing nature.

**Major Features**

- the contract is administered by a Project Manager (PM);
- in accordance with Condition 7, the contractor is required to carry out work described in the tender as ordered by the PM;
- in accordance with Condition 7, the contract may be determined by either party following three months notice;
- payment for labour is made in accordance with Condition 23, which specifies what is deemed to be included in the contractor's hourly rates; in accordance with Condition 17 the contractor must keep all relevant time sheets;
- Condition 24 states that the contractor is entitled to payment of the prime cost of materials;
- payment for plant is in accordance with Condition 24.

**Model Forms**

These conditions include the following model forms:

- invitation to tender (specifying works and payments etc.);
- form of tender.
This is the standard form of measured term contract, based on a schedule of rates provided by the Department. The contractor's tendered price is a percentage addition or deduction from the rates in the schedule for orders in three price ranges:

- £0 - £5,000;
- £5,000, and £50,000;
- greater than £50,000.

The contract can be applied to multiple sites.

**Major Features**

- the contract is administered by a Project Manager (PM);
- the contract includes duties to be carried out by a quantity surveyor who is appointed by the Employer;
- each order issued in accordance with Condition 8 is effectively a separate contract for a specified task and states the date of commencement and completion;
- in accordance with Condition 7, the whole contract may be terminated by either party provided three months prior notice has been given;
- under Condition 29, stage or interim payments can be made if the total estimated value of an order exceeds the sum stated in the abstract of particulars or the duration of the works exceeds 45 calendar days;
- there is no provision for a reserve as security in respect of defects;
- orders are valued in accordance with Condition 27, on the basis of the net rates in the schedule of rates, adjusted by the relevant 'Updating Percentage' and then adjusted by the contractor's tendered percentage adjustment;
- Condition 26 sets out the procedure for measurement of the work on site and submission by the contractor of its account for work carried out in connection with an order.
Model Forms

These conditions include the following model forms:

• form of invitation;
• form of tender;
• abstract of particulars.
CRS 1.15.11 GC/WORKS/8 (1999) - SPECIALIST TERM CONTRACT FOR MAINTENANCE OF EQUIPMENT (REPLACES C1301, PUBLISHED 1990)

This form of contract is a specialist term contract for use where specified maintenance of equipment is required and can be costed per task. One of the principal differences between this form and form GC/Works/9 (1999) is that under this form a schedule of work is priced by the contractor and interim payments are based on the measured work actually carried out. The price is not based on single annual cost.

Main Features

• the contract covers the periodic servicing and inspection of equipment (including specialist plant), repair of equipment due to faults discovered during inspection, and repairs ordered by the Project Manager (PM);

• the contract is administered by the PM;

• Condition 23 provides for the valuation of work at the rates and prices in the schedules;

• Condition 24 provides for the separate payment of travelling time;

• the form of tender allows for price limits to be set by the Department for each repair in respect of routine minor repairs and any repairs separately ordered;

• the prices in the schedule will be subject to VOP adjustment in accordance with the formula in Condition 25 and using the indices in the DETR publication "Price Adjustment Formula for Building Contracts (Series 2)";

• in accordance with Condition 27, separate monthly accounts are submitted by the contractor for period servicing/inspection and for minor repairs; accounts for repairs separately ordered are to be submitted within 14 days after completion of each order;

• Condition 22 provides for emergency call-outs.
Model Forms

These conditions include the following model forms:

• invitation letter;
• form of tender;
• Schedule A: items of periodic servicing and inspection.
This form of contract is a lump sum maintenance term contract for the operation, maintenance and repair of fixed M&E plant, equipment and installations, for a single establishment or complex of buildings close enough to be conveniently covered by a single contract. The term of the contract is for a period of one to five years and the price includes one-off repairs up to a specified maximum cost per repair. The price is based on a performance based specification which sets out operational requirements and plant operating criteria.

**Major Features**

- the contract is administered by the Project Manager (PM);

- the contractor must appoint an agent in accordance with Condition 5 who will supervise the work and to whom directions may be given by the PM;

- the contract sum is a lump sum for the service to be provided in the first year, to be paid in 12 equal monthly payments commencing one month after the commencement date, in accordance with Condition 26;

- on the anniversary of the commencement date in each subsequent year of the term, the annual lump sum is adjusted for inflation using the VOP formula set out in Condition 25 and using the indices published in the DETR publication “Price Adjustment Formula for Building Contracts (Series 2)”;

- in accordance with Condition 1, the contractor will not be entitled to any additional payment for any repairs which do not exceed the cost threshold set for individual repairs.
Model Forms

These conditions include the following model forms:

• invitation letter;
• form of tender;
• list of sites and summary of tender;
• abstract of contract particulars;
• schedule of information to be supplied by the tenderer.
These specialist term contracts are very similar and are both for use where work is required at specified intervals. The contractor prices a schedule of work which sets out what has to be cleaned and how regularly.

**Main Features**

- there is no Superintending Officer; the Department takes responsibility for contract management;
- prices remain fixed for the first year and are then negotiated at twelve month intervals thereafter;
- the period of the contract may be from one to three years;
- the contract may be determined by either party provided three month’s notice is given and the contract is not determined before the expiry of the first year;
- the work shall be carried out at the times stated in the schedule or at such times as the Department may direct.

**Model Forms**

These conditions include the following model forms:

- invitation letter;
- form of tender;
- schedule of work.
These specialist term contracts are very similar to C1303 and C1304, but they differ in the way in which prices are updated. Both of these contracts are for use where work is required at specified intervals. The contractor prices a schedule of work which specifies what has to be done at what locations, and how frequently.

**Main Features**

- there is no Superintending Officer; the Department takes responsibility for contract management;
- prices remain fixed for the first year, and are adjusted at 12 monthly intervals thereafter;
  - in the case of C1306, the price is adjusted in accordance with a formula given at Condition 5,
  - in the case of C1312, the price is adjusted in accordance with the formula given at Condition 8 and the updating percentages specified at Condition 5;
- the contract period may be from one to three years;
- the contract may be determined by either party provided three month's notice is given and the contract is not determined before the expiry of the first year;
- the work shall be carried out at the times stated in the schedule or at such times as the Department may direct.

**Model Forms**

These conditions include the following model forms:

- form of tender;
- schedule of work.
CRS 1.15.15  

**C/804 - REPAIR OF PLANT**

This is a standard form of contract for repair of plant. It is a non-competitive two stage contract. The contractor strips the plant and reports on the degree of repairs required. If the contractor's quotation for repair is considered fair and reasonable the contractor can be instructed to proceed. If it is not considered reasonable the contractor is merely paid for the work carried out i.e. the stripping and report. The repair work can then be carried out by alternative means e.g. GC/Works/4 (1998), using the report as a basis for the specification. Alternatively it may be considered uneconomic to repair the plant and it can be replaced by new.

**Model Forms**

These conditions include the following model forms:

- instructions to proceed;

- form for quotations, report, and details of replacement parts and tests.
Each Department is likely to have an existing system for numbering identifying and opening new contract files. This section is therefore provided by way of guidance and describes points of general importance and application. When the need for a contract has been identified, consideration should be given to the following important points:

- each contract should have a reference code assigned to it; it should identify the Department as well as a unique reference number for the contract;
- it is generally common practice to open a registered file which is assigned the contract reference number, and which contains all of the papers relating to the contract;
- it is good practice to use the unique reference number in all correspondence relating to the contract, and to insist that all parties to the contract also use the reference number in their correspondence;
- it is likely that the contract file will comprise a number of files and sub files and all such files should also be assigned the unique reference number;
- an important aspect of the contract file is that it provides a record of procurement practice adopted; the file or files are then available to demonstrate that steps have been taken to procure services in a way which aims to achieve best value for money.

The documents in the contract file are likely to include:

- records of meetings at which matters affecting the setting up of the contract were discussed;
- minutes requesting and giving financial and contractual approval to further action;
- records of the pre-selection process for choosing the companies (copies of the corporate brochure or general information about a company need not be retained on the contract file);
• records of formal interviews and recommendations therefrom;
• records of EC advertisement and replies, if applicable;
• the business case including:
  - a record of the pre-tender estimate;
  - a schedule of potential project risks;
  - a record of the consideration of PFI alternatives, where appropriate;
• a record of the proposed tender evaluation criteria;
• a set of the tender documents as issued to tenderers (other than standard printed documents);
• copies of correspondence during the tender period;
• admissible tenders received, placed in a folder;
• the tender summary sheet;
• any correspondence pertaining to consideration of the tenders;
• the evaluation report and recommendation to accept a tender;
• the appropriate delegated approval to accept a tender;
• a copy of the acceptance letter together with the acknowledgement of acceptance by the successful tenderer;
• a copy of the decline letter sent to unsuccessful tenderers;
• copies of any requests for debriefing by unsuccessful tenderers together with the Department's response.

Key Points

• Records are required to demonstrate that best value for money has been sought.
• Records may also be essential to demonstrate that tenderers have not been unfairly excluded in the event that EC Procurement procedures have to be followed, and a challenge is raised by an unsuccessful tenderer.
Each stage of the contract process can produce bulky documents (companies’ presentation documents, tender documents, companies’ bids, and evaluation reports etc.). It is therefore recommended that, where such documents may be easily separated from the main file, sub files are created to hold these documents.

Each sub file should carry the unique contract reference number, and it is common to give each sub file an alphabetical suffix. Where sub files are created, it is recommended that an index of sub files is held at the front of the main file.
RETENTION PERIODS (THIS SECTION DUPLICATES CST 2.3)

There are four principle reasons for retaining contract files:

1. To provide records for use as an aide memoire for future projects.
2. To provide a record for auditing purposes, especially in respect of contracts procured in accordance with EC public procurement rules.
3. To comply with legal obligations to do so. In accordance with the CDM Regulations the Department is under an obligation to keep available for inspection a health and safety file for what amounts to the entire life of the building.
4. To provide evidence of the agreement and of the conduct of the contract in the event of legal action, which either the Department feels appropriate to take, or against which a Department is required to mount a defence.

In the case of legal action the periods for which the Department may have legal liability are limited by statute, and vary depending on the circumstances.

The periods of liability are determined by reference to the Latent Damages Act 1986. The minimum period is six years from the date of the breach. If the contract is by deed, however, the period is 12 years. The position is more complex in respect of liability for negligence. Duties of care may be owed by the project manager, the designers and the contractor for periods of up to 15 years, and in some cases beyond. This should therefore be taken into account when assessing the retention period for all documents relating to major works projects.

It is recommended that documents relating to unsuccessful tenders should be retained until completion of the contract.
RETENTION PERIODS

There are four principle reasons for retaining commission files:

1. To provide records for use as an aide-memoire for future.

2. To provide a record for auditing purposes, especially in respect of commissions procured in accordance with EC public procurement rules.

3. To comply with legal obligations to do so. In accordance with the CDM Regulations the Department is under an obligation to keep available for inspection a health and safety file for what amounts to the entire life of the building.

4. To provide evidence of the agreement and of the conduct of the commission in the event of legal action, which either the Department feels appropriate to take, or against which the Department is required to mount a defence.

In the case of legal action the periods for which the Department may have legal liability are limited by statute, and vary depending on the circumstances.

Remember that the vast majority of all contractual obligations will expire under the ‘short negative prescription’, ie after five years from the date when the obligation becomes enforceable, if the necessary conditions are satisfied. Before an obligation prescribes, however, the relevant period of time must have passed without any ‘relevant claim’ (see LE 1.9) by the creditor, or any ‘relevant acknowledgement’ (again, see LE 1.9) by the debtor.
CRS 3.0  CONTRACTOR SELECTION

CRS 3.1  SELECTION OF FIRMS

The principle aim of the procurement process is to select a contractor which offers the best value for money. This will nearly always involve a process of competitive tendering. Value for money means the "most economically advantageous to the contracting authority" and not lowest cost alone (see PPD Guidance Note No. 3).

Much of the work let in accordance with this chapter is likely to be of a specialist service or maintenance type contract for a term of say 3 years. It is recommended that the frequent use of the same contractor or the same list of contractors is avoided.

It may be that in exceptional circumstances the timescale or the type of work necessitate the appointment of a contractor on the basis of a single tender action. This means that the competitive process is not followed and generally that the contract and in particular price are negotiated with one contractor. Where such a procedure is unavoidable it will normally be necessary to obtain the appropriate delegated authority before proceeding.

It will be appreciated that the precise steps involved in procuring a contractor or a number of contractors depend very much on the selected contract strategy and whether or not the public procurement rules apply. The steps which are followed in this chapter assume a single stage selective tendering process.

For the selection of contractors, the weight attached to quality is likely to be less than it is for consultants. The extent of quality evaluation will vary from one contract strategy to another. It is suggested that with the traditional strategy, pre-selection and short listing are when the principal quality evaluation will be done. For certain strategies, in particular construction management and to some extent management contracting, it is recommended that quality is further evaluated by holding pre-tender interviews.

It should also be borne in mind that under the Construction Industry Tax Scheme all firms must be in possession of a valid registration card or tax certificate and produce it for inspection whenever requested to do so.
The adopted procedure should be transparent and auditable and should operate fairly between each tenderer.

The following steps are therefore recommended in order to obtain a short-list of suitable contractors for tender:

- Consult New Qualification System (NQS) for development of the longlist
- Gather market intelligence about contractors including references regarding past performance
- Keep a list of contractors who serve you well or have served you well in the past

Identify long list

Confirm contractor’s interest

Identify pre-selection criteria

Where unfamiliar with contractors arrange pre-selection interviews to assess basic abilities

Evaluate pre-selection data and form short list

Inform contractors of outcome

Where the EC procurement rules apply then the pre-selection process, using the restricted procedure, will be as follows:
OJ contract notice and UK advertisements specifying the basis on which the pre-selection will be carried out

Initial paper sift

Appraisal of expressions of interest

Office Visits (optional)

Financial checks

Pre-qualification interview (optional)

Pre-qualification scoring

A paper sift will also be required if a large number of tenders are sought in order to establish a panel of contractors.

The next stage of the selection process is the invitation of tenders and choice of contractor. The following steps are recommended in order to select a contractor from the short list:
The steps involved in obtaining a short list and in selecting the successful contractor set out above need not be rigidly adhered to in every case. Simple or small standard contracts may not require pre-tender interviews for example.

**Key Point**

The Construction Industry Tax Scheme requires that any firm must be in possession of a valid registration card or tax certificate.
NEW QUALIFICATION SYSTEM (NQS - formerly CMIS)

Constructionline is the name of the service which utilises the NQS database. Where the EC procurement rules do not apply, then the long list of contractors can normally be obtained from the NQS.

Its purpose is to validate prior to tender, the financial standing, managerial capability, technical competence and resource capacity of bona fide firms wishing to undertake a wide variety of construction and property related services. The NQS is free of charge to clients and is a powerful tool designed to minimise the risk of the user against company failure, poor workmanship and fraud. The data helps to ensure that public bodies only deal with reputable firms and financially sound companies and saves time and valuable resources in the vetting of firms being considered for an invitation to tender.

The NQS includes details of a firm’s staffing, categories of work a contractor can undertake, current and completed work recorded as ‘feedback’ by the users, and an assessment of the maximum individual contract value a firm may accommodate (the notation).

Departments can access the NQS on-line, under the auspices of a BT managed telecommunications service. The IT Helpdesk and client liaison responsibility are located in Edinburgh.

Any department, agency or NDPB wishing to access the NQS will need to do so via an on-line computer link. Any requests for Access Packs or additional information/advice can be obtained from the contacts listed overleaf.

Key Point

More detailed information on the NQS is contained in CAU Information Note 27/98. A copy can be obtained by phoning the CAU Helpdesk on 020 7271 2833.
Organisation Structure of Constructionline

Head Office for Constructionline and the processing responsibility for firms based in England, Wales, Scotland and Northern Ireland:

Constructionline
Great West House
Great West Road
Brentford
Middlesex
TW8 9DF Tel: 020 8380 4600

Constructionline Director: Chris Leggett
Development Director: Colin Garton
Operations Manager: Paula Beresford

* Client helpdesk and technical support is currently located at:

Constructionline
The Basement
17 Atholl Crescent
Edinburgh
EH3 8HA Tel: 0131 229 9449

*Note: the processing responsibility for firms based in Scotland moved to the Brentford office in October 1998 but the client helpdesk and technical support responsibilities have been retained.

IT Helpdesk Tel: 0870 607 1602
Client Services Manager Tel: 0870 607 1602
CRS 3.3

THE LONG LISTING PROCESS

The production of the long list is the first step towards establishing a viable tender list which will ensure genuine competition among capable suppliers.

Where the EC public procurement rules apply, the long list will generally be established through inviting expressions of interest by advertising in the Official Journal of the European Community. It is recommended that such expressions of interest are checked with NQS in respect of their financial position. Otherwise, the long list will be compiled from the following possible sources:

- NQS;
- market intelligence gathered by the Department;
- list of contractors who have serviced the Department well in the past.

It is recommended that the long list be limited to 10 in number. The key criteria for selection of firms for the long list are:

- experience in the general area of construction work;
- track record on similar work;
- experience with the size of works contract envisaged.

It may be useful at this stage to ask firms who are not known to the Department to provide brochures and possibly references to confirm experience and track record.

When the long list has been fixed, a preliminary enquiry should be sent to each firm on the list to ask them to confirm without obligation that they are interested, that they have the resources and that they will submit a tender if asked.

It is recommended that replies are requested in writing and by a given date.

Key Points

- An example preliminary enquiry is given in the form of CRS3/SF1 overleaf.
Dear Sir

PRELIMINARY ENQUIRY RE [TITLE OF PROJECT]

The [Secretary of State] acting through [Department] intends to tender the construction of the works described below. Particulars of the works are [enclosed/as follows:]

Include details such as:

- project;
- nature of work;
- location;
- estimated value;
- contract period;
- contract strategy;
- proposed number of tenderers.

The following is the proposed procurement programme in connection with this commission:

- Date of invitation to tender: ____________________________
- Date of contract award: ________________________________
- Commencement of works: ______________________________
- Duration of works: ____________________________________

You are invited to confirm in writing your interest in being included in the tender list by ______________ [Date]. Please also advise us of any special reasons which you consider to support the inclusion of your company on the tender list.
You should note that a negative response will not prejudice your company’s prospects of being invited to tender in the future.

Please also note that the details given in this preliminary enquiry may change and neither this enquiry nor your positive reply to it in any way guarantee that you will be included on the final tender list or that the work will proceed at all. In addition the above information is to be treated as strictly confidential.

Yours faithfully
CRS 3.4

PRE-SELECTION PROCEDURES

Once the long list has been formed, then pre-selection information is gathered in order to produce the final short list of contractors. The object of contractor pre-selection is to determine a short list of firms, any one of which could be entrusted with the work. The final choice of contractor on this basis is therefore simpler. The following criteria (and any other criteria considered appropriate to the contract) are among the points which should be considered in formulating the short list:

- contractor staff: availability and track record of key personnel; note that contractors will tend to field their best team to win the job;
- availability and ownership of plant;
- ratio of contracted to permanent staff;
- turnover of company in relation to project size and expenditure profile;
- company status: relationship to parent company, joint ventures etc.; is it a shell company or dormant;
- contractor’s policy with regard to sub-contract work;
- safety policy and record;
- attitude of contractor to “claims”: check references and other experience;
- capability, experience and standard procedures in such areas as project management, cost control, procurement, design services etc.

A full evaluation of these factors should generate a short list of contractors suitable for the works.

Where the EC public procurement rules apply, and the restricted procedure is being followed, then each of the expressions of interest will be evaluated on the basis of a paper sift in order to arrive at a short list.
**Pre-Selection Interview**

In certain circumstances depending on the size and importance of the contract it may be necessary to carry out an interview of all the potential bidders as part of the pre-selection procedure. This allows firms to highlight their strengths and for Departments to expose any weaknesses and also to meet the firms staff.

It is recommended that the following issues are considered in respect of pre-selection interviews:

- plan the interview;
- ensure each interviewer has an agreed area on which to concentrate and standard check lists are prepared covering these areas;
- have a standard agenda and a priority marking system;
- analyse capability against a series of key areas for the specific project;
- take up other private or Department references;
- determine resource strength in depth;
- look for real experience and track record rather than impressive presentational skills;
- for contracts subject to the EC Works Directive, make sure to stay within the bounds of the evidence that is required; and
- treat all contractors identically to avoid any hint of discrimination.

The interview provides an opportunity for the Department to learn about the industry and market conditions first hand. Other issues may be discussed such as payment terms, insurance, pre-ordering materials, subcontracting etc.

**Key Points**

- The idea behind contractor pre-selection is to result in a short list of contractors which can all be entrusted with the works.
When all pre-selection information has been gathered, and evaluated, the short list can be produced. The number of tenderers selected for the short list will depend on the size and complexity of the works contract.

Those who are not short listed should be advised in writing. Standard Form 2 - Exclusion Notification, may be sent (see CRS 3/SF2). There are two alternative paragraphs depending on whether or not a pre-selection interview was held.
Exclusion Notification

Dear Sirs

[TITLE OF PROJECT]

Thank you for your letter of [date] expressing an interest in being invited to tender for the above contract.

[or, (if attended pre-selection interview): Thank you for the opportunity of meeting you on [date] to discuss your firm and the above project].

After careful consideration I must advise you that on this occasion the Department does not intend to invite you to tender.

Please be assured that this decision in no way affects the prospect of you being invited to tender for suitable work in the future.

Yours faithfully
THE NUMBER OF TENDERERS

A balance must be struck between encouraging competition and providing each tenderer with a reasonable chance of success. In respect of major works contracts it is recommended that tenderers are invited from six tenderers, however, it should generally be not less than three and no more than ten for selective (restricted) tendering. Each contract should be decided on its individual merits, but the following is an indicative guide for deciding on the number of tenderers.

- **B&C**
  - up to £1 million estimated value: 5 or 6 firms
  - £1 million and over: 6 to 10 firms

- **M&E**
  - up to £250,000 estimated value: 4 to 6 firms
  - £250,000 and over: 6 to 8 firms

In respect of design and build contracts where the contractor can be involved in expensive design work as part of the tender, it is recommended that tenders are sought from no more than three contractors unless the EC public procurement rules apply.

Where the EC rules apply and the restricted procedure is being used, the contracting authority may specify the range in the Contract Notice from within which the number of tenderers will be invited to bid. The lower number of the range must not be less than 5 and the higher number not more than 20.

If an authority chooses not to specify a range, then it is free to invite any number of bidders provided it is sufficient to ensure genuine competition (normally not less than 3).
The information must be as comprehensive as possible and it must be clear which elements are meant to be contractual and which parts are for information or guidance.

This documentation is the basis of the contractor's price. Lack of clarity or ambiguity in documents, create weaknesses or opportunities which the contractor may exploit in order to increase the final cost and/or delay the time for delivery.

It is important therefore that the tender documents satisfy the following essential requirements:

- the documents should be specific about what is required;
- the documents should be without ambiguity; these and any documents which are a record of negotiations that are subsequently incorporated as contract documents, should all be consistent with one another;
- the conditions must clearly allocate risks as between contractor and Department and specify who must pay what in the event of variations or delay.

The content of tender documentation for a works contract will typically comprise:

- instruction to tenderers;
- general conditions of contract;
- special conditions of contract;
- scope of work;
- standards and specifications;
- schedules and drawings;
- pricing schedules as required by the form of contract (e.g. BQs);
• schedule of rates; and
• administration procedures
• standard acknowledgement slip (see CRS4/SF1)
• tender return label (see CRS4/SF2)

Invitations to Tenderers

It is suggested that these should include, inter alia, the following information (when not included within the instructions to tenderers):

• the point of contact to which queries should be sent by tenderers;
• the address to which tenders should be returned;
• the time and date of the return of tenderers;
• the address where additional documents and information may be inspected;
• any expected delays to possession of site or commencement of the works;
• timings for the appointment of nominated sub-contractors;
• any key design phases and timings;
• qualification or amendments to standard conditions of contract;
• brief details of the Department's insurances;
• rates for liquidated damage (where applicable);
• length of maintenance period e.g. B&CE 6 months, M&E 12 months.

The Government forms of contract include standard forms of invitation to tender and forms of tender which are recommended for use with these forms.
Instructions to Tenderers

These will usually not form part of the contract documentation since their purpose is for guidance to tenderers in submitting a compliant bid.

Typical guidance within the instructions include:

• advice on how to respond to the invitation to tender;
• complete schedule of all tender documents;
• a possible checklist for tender returns.

It is suggested that the instructions make it clear that the Department is not bound to accept the lowest price, in other words the selection criteria should be value for money. Additional information may include:

• arrangements for the acceptance of telephoned, faxed or telexed tenders - stating whether they are acceptable or not;
• the criteria for accepting late tenders;
• procedure for dealing with qualified tenders;
• policy on alternative tenders which are non-compliant bids;
• arrangements for receipt, opening and recording of bids;
• procedure for dealing with arithmetical errors;
• policy for debriefing unsuccessful tenderers;
• instructions with regards to confidentiality of tenders i.e. to mark clearly “In confidence”;
• the requirement to be registered with Inland Revenue under the Construction Industry Tax Scheme.
**Tender Periods**

The time allowed to prepare the bid must be adequate in order to submit a comprehensive bid. For lump sum contracts (i.e. BQs) it is time consuming to estimate the cost of all the resources required to provide the works and where a design is sought this is even more onerous.

Approximately six weeks is recommended for traditional procurement, however, the requirements of each contract must be considered separately. Minimum periods are specified when the contract is subject to the EC public procurement rules.

**Extensions of Time**

Tenderers, from time to time, may request an extension to time for preparing their tender. In principle there is no justification for extending the tender period. However, Departments may wish to consider such requests where, for example, there have been a change in the circumstances, usually by way of a tender amendment.

**Key Points**

- It is suggested that a tender period around six weeks is appropriate for traditional procurement. Appropriate periods vary according to project value and complexity.

- It may be advisable to contact tenderers beforehand to ensure that tender periods are feasible.
STANDARD FORM 1

ACKNOWLEDGEMENT SLIP

Tenderers are requested to complete this slip and return it to:
..................................................................................................................................................................................................
[Departmental address] immediately upon receipt of the tender documents.

PROJECT/COMMISSION TITLE: ....................................................................................................................

DEPARTMENT REFERENCE NO: ..................................................................................................................

DEPARTMENT LIAISON OFFICER: ..................................................................................................................

(as stated in the invitation letter)

1. I acknowledge receipt of tender documents for the above project/commission.

   (either)*

2. I will submit my tender by the due date.

   (or)*

2. I do not wish to tender on this occasion and return the documents herewith.

   Signed: .................................................................................................

   For and on behalf of ..........................................................................

   ..................................................................................................

   ..................................................................................................

   Date: ............................................................................................

* Delete as appropriate
STANDARD FORM 2

Tender Return Slip

Notes:
1. The envelope to which this label is attached must not bear any indication of the tenderer’s name.
2. It is the tenderer’s responsibility to ensure that the tender is delivered by the due time. Tenders received after this time will not be considered.
3. Tenders to be delivered by hand are to be handed in at the reception desk and/or placed in the [DEPARTMENT’S] TENDER BOX.

CRS 4.2.4
**MID-TENDER INTERVIEWS**

Mid-tender interviews are held with tenderers after the tenders have been invited. The interview should be timed such that tenderers have had sufficient time to give detailed consideration to the requirements of the tender.

The requirement for mid-tender interviews is optional. However, the more complex the work the more likely it is that a mid-tender interview will be of value.

Mid-tender interviews should be held separately with each tenderer. Avoid allowing tenderers to attend the offices at the same time or to see other names in a signing-in book.

The principle functions of a mid-tender interview are that it provides:

- a further opportunity for the Department and its advisers to meet the tenderers;
- an opportunity for contractors to raise any specific queries they may have concerning incomplete tender information or ambiguities in the information;
- an opportunity for contractors to raise questions about potential qualifications or alternative tenders;
- a chance for the Department to issue any further information, the need for which may already have been flagged up by the design team or tenderers.

The Department may gain very useful information about design problems and an insight into some of the risks it may not have fully considered at the pre-tender stage. All requests for information should be consolidated and all answers provided to all tenderers to ensure consistent and fair dealing.

Where queries result in a significant change then an extension of the tender period should be considered.

**Key Points**

- All tenderers should be dealt with equally and fairly.
- Additional information should be provided in writing to all tenderers.
TENDER BOARDS

A tender board, typically comprising three people should be appointed to open and record bids. It is recommended that the following conventions be followed:

• one member should be a senior chairperson;

• one member should be completely independent from the commission; this helps to establish the credibility of the board, as impartial;

• total impartiality is achieved through choosing different tender board members from those on the tender evaluation panel.

To promote propriety, it helps if a member of the board appoints no more than one other member, i.e. chairperson appoints the secretary, the secretary appoints the third person.

It is the responsibility of the senior board member to ensure that all members are conversant with tender board and tender opening procedures and the tender documents.
**OPENING OF TENDERS**

Once the tenders have been received they should be securely locked away in a cabinet or tender box until they are due to be opened (i.e. the advertised time).

Prior to the opening of tenders, the commission manager/project sponsor should provide the tender board with a list of all those invited to tender. This enables the tender board to identify those who have not submitted tenders or subsequently those whose tenders are received late.

When the tender box is opened, the unopened tenders should be passed directly to the tender board, and to no-one else.

The following steps should then be followed by the tender board:

- tenders should ideally be opened in a locked room with no working telephone;
- if the tender board is dealing with tenders for a number of contracts or commissions then it will need to sort tenders by their unique tender number and deal separately with the tenders for each contract;
- opened tenders for a contract should be sorted according to price or in the alphabetical order of the tenderers’ name;
- any unpriced tenders are not complete tenders and should therefore be rejected and returned stating the reason for rejection;
- where a tender document has a tenderer’s signature at the end of it, each page of that document should be signed by the senior member of the tender board; this may be speeded up by the use of a personal facsimile signature stamp;
- each tender should then be given a sequential number to prevent later insertion of other tenders;
- a tender summary sheet should then be completed (CRS4/SF3); on the sheet should be listed the sequential tender numbers names of tenderers from whom tenders were received and their price; names of those who did not submit tenders, should also be given together with the reason if known;
• the tender summary sheet relates to the tenders for a particular contract and should be completed and signed by the senior tender board officer;

• the tender summary sheet and opened tenders should be delivered by hand or, if necessary sent by registered post to a member of the tender evaluation panel.
STANDARD FORM 3

Tender Summary Sheet

[Department]

TENDERS - SUMMARY SHEET

Commission/Contract File No: ..................................................................................................................................................

LOCATION

NAME OF CONTRACT/COMMISSION

ESTIMATED COST £

DATE

Tenders as listed below, have today been opened and authenticated by the Tender Opening Board. Also listed are the names of those firms that did not wish to tender, together with those that did not respond to the tender invitation.

To:

........................................................................................................................................................................................................

Will you please examine the enclosed tenders and provide your recommendation as soon as possible?

Signed: .......................................................................................................................................................................................

Senior Tender Board Officer
THE TENDER RECORD BOOK

A tender record book is a proforma book used for recording all tenders for all contracts opened on a given day. It is therefore a running record of all tenders opened. An example format is given at CRS4/SF4.

The tender record book is invaluable for senior officers and auditors, as the first step in any review of tendering activity since it provides a complete reference record of allocated tender numbers.

It is important that the sequence of numbers should remain unbroken. Tender board members should sign the tender record book once tender opening has been completed, confirming the next number in the sequence.

This prevents any irregularities such as the addition of a late tenderer to the tender list without prior approval of the tender board and without clear reasons for so doing.
# Tender Record Book

## Commercial in Confidence

**[Department]**

<table>
<thead>
<tr>
<th>Serial No of Tenders (See Note 2)</th>
<th>Contract/Commission No</th>
<th>Title of Contract/Commission</th>
<th>Name of Firm Tendering</th>
<th>Tender Price</th>
<th>Date and Time Tenders Opened</th>
<th>Notes on Completeness of Tender/ Irregularities</th>
<th>Signature of Tender Board Members</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Notes:

1. Details of all Contractors/Consultants who were invited to tender must be included. Tender prices should be entered where it is clear from the tender documents, otherwise ‘see tender’ should be entered.

2. Below the last tender number enter ‘Next Tender Number To Be Used’ and insert Tender No.
LATE TENDERS

Late tenders are not acceptable and should be rejected. However, it may be unfair to reject a posted tender if it has been held up in the post. The tender board should be re-commenced on receipt of late tenders. Late tenders might be accepted in the following circumstances:

• **first class posted tenders** - the date stamp should be at least one day before tenders were due to return;

• **second class posted tenders** - the date stamp should be at least two days before tenders were due to return.

If the date stamp or class of postage are difficult to ascertain - treat as second class postage. If the date stamp and class are made with the tenderer’s franking machine, the tender should be rejected.

Tenders should not be accepted by facsimile under any circumstances.

A record of all rejected tenders should be kept at the back of the tender record book, and the price should not be recorded or disclosed. (See CRS4/SF5)

Should the tender opening board decide to admit a late tender into competition it should be inserted in sequence into the list of tenders and given a suffix to the preceding number i.e.:

<table>
<thead>
<tr>
<th>Tender numbers</th>
<th>Tenderer’s Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>248</td>
<td>J Bloggs £265,498</td>
</tr>
<tr>
<td>249</td>
<td>J Smith £265,501</td>
</tr>
<tr>
<td>249A*</td>
<td>T Jones £270,995</td>
</tr>
<tr>
<td>250</td>
<td>F Black £276,222</td>
</tr>
<tr>
<td>251</td>
<td>B White £292,543</td>
</tr>
</tbody>
</table>

* admitted late tender

The envelope of any rejected tenderer should be retained and should be endorsed with the tenderers name together with the reasons for rejection and signed by a senior member of the tender evaluation board. The contents should then be returned to the tenderer with a short explanation for rejection (see CRS4/SF6).

The envelopes for admitted and rejected late tenderers should be filed and used if the decision is challenged.
### STANDARD FORM 6

**RECORD OF REJECTED TENDERS**

<table>
<thead>
<tr>
<th>CONTRACT/COMMISSION NO</th>
<th>TITLE OF CONTRACT/COMMISSION</th>
<th>NAME OF FIRM</th>
<th>DATE TENDERS DUE</th>
<th>DATE AND TIME TENDERS RECEIVED</th>
<th>REASON FOR REJECTION OF TENDER</th>
<th>SIGNATURE OF TENDER BOARD MEMBERS</th>
</tr>
</thead>
</table>

**COMMERCIAL IN CONFIDENCE**

CRS 4.7.2
Dear Sirs

Location: ................................................................................................................................................................................

Commission: .............................................................................................................................................................................

Thank you for your tender for the above contract. It is very much regretted that it was received after the time appointed for delivery and therefore cannot be considered. It is returned herewith.

Should further opportunities arise for you to tender, it would be appreciated if you would ensure that your offers arrive in time to be admitted.

Yours faithfully
CRS 5.0  TENDER EVALUATION

CRS 5.1  GENERAL

The most important principle with this process is that it must be open, clear, systematic, fair, thorough and seen to be so.

The following are some of the key issues to be considered:

• the purpose of the evaluation is to identify the best value for money by comparing the price against the assessed benefits (under EC procurement this is known as the most ‘economically advantageous’ tender);

• parity of tendering must be observed, in other words, tender documents should not generate tenders based on unequal criteria;

• correspondence should be channelled through a single officer to ensure that a fair and consistent approach is adopted with all tenderers; such correspondence should be allocated a unique reference or job number since all amendments must be clearly referenced at contract award stage.

Procedure Prior to Evaluation

Prior to evaluation consideration should be given to the following points:

• ensure that the tender returns have been signed;

• the lowest tenderers should be asked to provide their BQ as soon as possible;

• incomplete tender returns must be taken up with the tenderer (this may be classed as a non-compliant bid and therefore unacceptable). It is recommended that the invitation to tender should state that the Department is under no obligation to check the completeness of a tender and that incomplete tenders may be rejected;

• arithmetical check on tender prices;

• where bids are not exactly comparable because, for example, of different proposals from contractors, then the tender board must choose either to reject non-compliant bids or to ‘condition’ bids as far as possible such that they are comparable.
• identification of qualified tenders and additional terms inserted;

• is the tender exceptionally low (abnormally low in EC procurement vocabulary).

**Key Points**

• The tendering process should be fair and scrupulous.

• Any contacts with tenderers should be consistent and information should be distributed to all tenderers.
CRS 5.2

CRITERIA FOR EVALUATION

It is important that the tender evaluation panel decide on the criteria which are most important to the contract before tender opening and preferably before invitation to tender. Each criterion should be weighted and agreed before bids are opened and if the contract is subject to the EC Works Directive the criteria must be stated in the tender notice or bid documents.

The appropriate criteria will heavily depend on the chosen contract strategy. The following are commonly used but there are others:

Lump Sum Tender

• Technical
  - checking for compliance with specification;
  - resolving any stated deviations from specification;
  - evaluating benefits of alternative proposals;
  - if the bidders are to do any design, evaluating their design capability and any design proposals for ease of construction and operability.

• Execution proposal
  - evaluating proposed programme;
  - evaluating execution proposals: e.g. management organisation and support, resources of plant and labour proposed;
  - plant and labour availability (which may be very different);
  - reviewing key personnel.

• Commercial
  - reviewing sensitivity to changes imposed by Department;
  - if the price includes a BQ do the rates reflect the true costs of the items concerned, or are they unbalanced?
  - evaluating any exceptions to conditions of contract.
Cost Reimbursable Tenders

- **Technical**
  - quality and completeness of proposals;
  - cost evaluation of benefits of one proposal compared with another;
  - design office productivity particularly the use of modern technology such as computer aided design (CAD) and derivatives;
  - construction/supervision track record: labour management, subcontractor management, claims settlement, construction techniques and experience on other jobs etc.;
  - potential programme differences;
  - personnel quality - this is really the key issue for reimbursable cost or management contracts. The cost of management personnel will typically represent some 5 to 15 percent of the contract value but their level of competence will have an enormous effect on the end costs;
  - reviewing all key posts and in particular looking at strength in depth;
  - taking up other private or Department references;
  - procurement procedures;
  - cost management procedures;
  - evaluation of operating costs and overheads;
  - comparing quoted fee with estimated man-hours;
  - reviewing cost audit, reporting, and control mechanisms.

The evaluation exercise can then proceed following a similar method and taking account of the principles espoused in CST 5.1.
Key Points

Useful further guidance can be found in HM Treasury Procurement Guidance (No. 3), available from:

HM Treasury
Public Enquiry Unit
Room 89/2
Parliament Street
London SW 1P 3AG

Tel. 020 7270 4558

Within the document is an illustrative example of an award mechanism which could be adopted. It would of course need to be amended to suit the individual circumstances of each project.
QUALIFIED TENDERS

Qualified tenders are difficult if not impossible to compare with others, and for this reason they should be actively discouraged. It may be decided for example to state in the invitation to tender that qualified bids will be automatically disqualified, unless alternatives are sought. Where the EC procurement rules apply, the procurer has the option of stating in the contract notice that qualified tenders will not be considered.

Although qualified tenders will generally not be accepted, in certain circumstances it is advisable that they are given consideration. If a qualified tender is received, the tenderer should be given the opportunity to withdraw the qualification without amendment to its tender price. This should be done through correspondence, copies of the Department's letter and the tenderer's reply being kept on the commission file.

Should a tenderer refuse to withdraw its qualification, then the importance of the qualification and the effect on the tender price will need to be assessed as precisely as possible.

If the tenderer is otherwise in the running and the qualification is a technical one imposed by a specialist company and offers the possibility of innovation and best value for money, professional advice will need to be sought on the importance of the qualification. It may be possible to give a fully reasoned explanation not to pass over an otherwise good offer containing an acceptable qualification, e.g. shorter completion date. Sometimes a price reduction will be offered if such qualifications are accepted.

The file should show a fully reasoned explanation if an otherwise good offer is passed over due to a qualification, and likewise if an offer is recommended for acceptance despite a qualification.

Key Points

- It may be appropriate to consider qualifications to tenders if they provide best value for money.
ALTERNATIVE OFFERS

Tenderers will sometimes propose an alternative offer, e.g. an alternative material, method or specification, which they think could meet the requirements in a better, cheaper or faster way. Innovation by tenderers should not be discouraged.

Generally an alternative offer should be a separate, second offer, to the main (or compliant) bid. The alternative offer should not be qualified in any way and will be fully priced to show clearly how and where costs would differ from the price based on the original specification.

If the alternative offer demonstrates savings and added value this will have a bearing on its acceptability.

The alternative offer may be exposed to competition especially if the alternative offer is not the lowest. This may however, discourage tenderers from introducing further innovative ideas. In cases where the alternative is subject to a patent this is not an issue. It is important to consider whether the alternative fundamentally undermines the original pricing assumptions, in this case further competition may be regarded as essential.

Key Points

• It may be appropriate to consider alternative offers if they provide best value for money.
AMENDED TENDERS

Departments should decide before evaluation of tenders begins, the extent to which they will permit tenderers to change bids following the closing date for receipt. It is usual practice not to accept such amendments and to ask the contractor either to:

- absorb the effect of any errors in pricing found post-tender; or
- withdraw the offer.

Alternatively, Departments may opt to admit amendments if they are satisfied that the errors are genuine and thereby maintain competition, especially if the errors relate to what would otherwise be the preferred tender.

If the amendment is due to an alleged clerical error or misinterpretation of specification or drawings and is considered not to be credible reasoning, then the tenderer should be told that its original offer must stand, or be withdrawn.

Key Points

- It is usual to refuse to accept amendments due to errors unless it is clearly a genuine error and/or that might seriously prejudice the contractor.
- The lowest tenderer should not be so advised at this stage.
- Provided the contractor is unaware of the other bids, then it will be at its risk whether or not the contractor wants to request an amendment that may result in it not being the lowest.
CRS 5.6

ERRORS IN PRICED BILLS

General

It is recommended that Departments are clear on their policy for handling obvious errors in BQs or schedules of rates found during evaluation.

The object of examining prices is to detect errors in computation and to avoid BQs that undermine the reliability of the tender rankings. Errors in pricing due to poor estimating would be absorbed by contractors if discovered after contract award, however it is sensible and professional practice to identify errors in pricing. It is recommended that misplaced decimal points etc., or patent errors in arithmetic, should be notified to tenderers during evaluation so they can either:

• confirm their tender;
• withdraw their tender;
• amend their tender.

The Department should ensure that the chosen alternative is clearly expressed in the Form of Tender.

Deliberate Errors

If the Department suspects that the “error” was deliberate to allow an amended price or if it seems to be so abnormally high or low, it is recommended that they reject it and insist on the original bid being confirmed or withdrawn.

Abnormally Low Tenders

In contracts without BQs, errors resulting in abnormally low or uneconomic bids should incorporate similar procedures as above, i.e. challenge the price and allow amendment (if the error is satisfactorily explained) or the bid to be confirmed or withdrawn.

The rejection of ‘abnormally low’ tenders is not only highly questionable in terms of best value for money, but also a contravention to the EC Works/Services Directives. The Directives require that tenderers be provided with the opportunity to justify apparently uneconomic bids.
POST TENDER NEGOTIATION

Post tender negotiation (PTN) may exceptionally be appropriate or necessary. It involves the negotiation of the leading tenderer’s bid with the tenderer, and is carried out after bid conditioning and bid evaluation are complete.

Procedure

The purpose is to obtain an improvement in content and circumstances which do not put the other tenderers at a disadvantage or distort competition, and results in best value for money. If it is to be done then it is recommended that PTN is carried out after receiving tenders and before the letting of the contract.

PTN may be necessary where part of a specification needs clarification or because there are insufficient funds available to cover the price submitted by the lowest acceptable tender. The aim of PTN, is to secure value for money and definitely not to start a ‘dutch auction’.

All negotiations should be fully recorded or minuted so as to provide an audit trail. PTN can be undertaken by revising drawings or BQ’s etc., should negotiations founder, attempts can be made to negotiate with the next lowest tenderer and so on in ascending order of tendered sums. It is recommended that only the three lowest tenderers should be approached for negotiation.

EC Implication

Where PTN is being considered for projects that are subject to the EC Directive, negotiations are only permissible to clarify points; this process would be more correctly termed post tender clarification.

Key Points

• Different Departments have different policies on the treatment of post-tender negotiations. Project sponsors should refer to their Departmental handbooks.

• Post-tender negotiations are only likely to be permissible on the grounds that the selected tenderer’s offer still represents best value for money.

• If negotiations are required to reduce the scope of the work to secure a price within budget, then it may be appropriate to re-tender the works, if the scope has to be changed significantly.
RE-INVITATION OF TENDERS

Circumstances

On the assumption that none of the tenders are acceptable then all tenders will need to be declined and formal re-tendering undertaken. Some potential reasons for such an action are where:

- a high number of short listed tenderers drop out or fail to submit bids;
- the bids are all substantially higher than expected in light of current market conditions;
- where significant changes in scope of the work are required in order to obtain a price which might conform to budget;
- collusive tendering.

It should be noted that the decision to re-tender should not be taken lightly. The Department should be very certain of its grounds for doing so. Tenders can cost contractors a lot of money to prepare. A re-tender situation causes much unhappiness amongst contractors, and may prejudice a contractor’s desire to tender in the future, especially when market conditions are good.

Re-invitation of Original Tenderers

If the original tender list foundered largely because it was not feasible to negotiate-in substantial changes to the Department’s requirements, then the original tender list could stand. If re-invitation is the result of high tenders and unsuccessful post-tender negotiation, then new firms should replace the highest original bidders e.g., top 3 out of 6. Where re-invitation is due to sharp or corrupt practice amongst tenderers e.g., the detection of collusive bidding or cover-pricing, then all the firms involved in the malpractice should be dropped from the new tender list.

It is recommended that re-invited firms to tender should be provided reasons as to why the original offer was not acceptable so as to allow tenderers to decide on the value of submitting further tenders.
Key Points

• Re-invitation of tenders may exceptionally be appropriate.

• The Department should keep clear and auditable records of its reasons for such an action.

• It is recommended that tenderers in the rejected round of tenders should be advised of the reasons for re-tendering.
TENDER REPORTING

For all contracts, the tender evaluation team must formalise their recommendation for the award of the contract. This process is called tender reporting and it sets out the background and basis for the decision to provide an audit trail and opportunity for department managers to ratify the recommendation. The tender report should include:

- an explanation of the background to the scope of the contract;
- a summary of the recommendation;
- a description of the pre-qualification criteria;
- a description of the bid opening and initial position;
- a description of the bid conditioning process;
- a description of the tender evaluation criteria;
- a description of any post-tender negotiation actions;
- the reasons for rejection of unsuccessful bids;
- summarise reasons for recommendation;
- a comparison with the pre-tender estimate and confirmation that funds are available;
- indicate cost and time implications for the project.
CRS 6.0  AWARDING CONTRACTS & DECLINING TENDERS

CRS 6.1  LEGAL CONTRACT FORMATION
(THIS SECTION DUPLICATES CST 6.1)

The legal process of contract formation is set out at Section LE1.2 - Simple Contracts. Provided that all of the other elements of formation exist, then an unqualified acceptance of an offer gives rise to a legally binding contract.

It should be noted that an offer may be withdrawn at any time up until acceptance. To ensure proper formation of contract it is recommended that the following conventions be observed:

- all qualifications to the tender should have been removed (negotiated out);
- the offer must be capable of acceptance (an unqualified yes);
- the offer must not have lapsed; the offer may be stated as being open for acceptance within a specified period; if this has elapsed then confirmation must be sought from the tenderer that the offer remains open for acceptance;
- all subsequent undertaking by the tenderer and amendments to the tender must be confirmed in writing; it is recommended that at the very least all such amendments be aggregated into a schedule of amendments which can be referred to in the acceptance; with time permitting it is better to incorporate amendments directly into the contract and initial them;
- the tender must represent best value for money;
- it is recommended that a departmental procedure is in place which requires approval by an officer with the appropriate delegation prior to accepting an offer.
When contracts are awarded following competitive tendering they are usually placed with the lowest satisfactory tenderer who is considered to provide the best value for money. Reasons should be given if the lowest tender is not accepted so as to defend any potential challenge.

Once the requirements relating to the tender have been satisfied, the offer may be accepted. To ensure proper acceptance of the tender the following conventions should be followed:

- acceptance must be unqualified; purported acceptance with qualifications represents a counter-offer which may be accepted by the contractor; this may lead to unnecessary argument about how and when acceptance occurred and what is or is not part of the contract; this should always be avoided;

- acceptance should be communicated in writing; in law, the ‘postal rule’ is that acceptance is communicated when the letter is posted not when it is received; proof of posting can be ensured by sending the acceptance by registered post;

- acceptance should be notified with the minimum delay following receipt of tenders.

**Key Points**

- Acceptance should be unqualified.

- Acceptance should be in writing.
A suggested letter of acceptance is given at CRS6/SF1.

It is best practice in the letter to list by reference all documents which are to be incorporated into the agreement and which form the basis of the acceptance, e.g. exchanges of correspondence prior to award. An alternative is to attach a schedule, but it is essential that this is given a recognisable and unique reference number.

It is essential that any correspondence or references to negotiations on fees or alteration to the services which have been agreed with the tenderer are referred to in the letter of acceptance.

For the avoidance of doubt it is recommended that the successful tenderer is asked to complete and return a ‘confirmation of receipt slip’ on receipt of the letter of acceptance.

Note that it is usual for the tenderer, in the form of tender, to give an undertaking to execute the formal conditions of contract, when they are provided for signing.

Contract documents should be prepared and provided to the tenderer with the letter of acceptance.
Dear Sirs

[Title of Project]
[Contract/Tender Number]

Further to our invitation to tender dated .............. and your tender submission provided under cover of your letter of .............., I accept on behalf of the [Secretary of State], your offer to carry out [contract works] in connection with the above project.

The [following documents or the documents referred to in Schedule [Contract No]/1] attached are the basis of this acceptance; and together with this letter of acceptance form a binding contract between us.

List Documents Such As:

- invitation to tender
- instructions to tenderers
- form of tender
- bills of quantities
- specification
- drawings
- schedule of Work
- abstract of contract particulars
- tender submission from tenderer
- schedule of amendments or price schedule and basis of payment
- correspondence/minutes confirming undertakings by tenderer
- relevant correspondence from Department.

Will you please contact .............. [project sponsor/commissions manager] as soon as possible to make arrangements for the formal execution of contract documents, and subsequently for commencing work. Will you please complete and return the attached acknowledgement slip.

Yours faithfully
LETTER OF ACCEPTANCE

Confirmation of Receipt Slip

[TITLE OF PROJECT]
[CONTRACT/TENDER NUMBER]

I acknowledge receipt of your letter of acceptance dated .......................... .

Name: ........................................................................ (name in block capitals)

Signed: ...........................................................................

in the capacity of ................................................ authorised to sign for and on behalf of ..............................................

Date: ........................................................................... Telephone No.: ...........................................

Address: .......................................................................................................................................................
CRS 6.4

DECLINE OF UNSUCCESSFUL TENDERS (This section duplicates CST 6.4)

It is advisable to notify the successful tenderer of the intention to accept their offer before sending decline letters to unsuccessful tenderers. Following confirmation from the successful tenderer, decline letters should be sent immediately to all unsuccessful tenderers.

Standard Form CRS6/SF2 is an example decline letter. To an extent the wording of the letter will be determined by the type of procurement affected and what issues were subsumed within the evaluation.

There are two principal reasons for responding as fully as possible:

• it gives contractors confidence in the process;
• it gives contractors market information which helps to encourage competitive market performance.
Model Letter of Decline

Dear Sirs

[TITLE OF PROJECT/COMMISSION]

Your tender for the above mentioned project/commission has been evaluated but I must inform you that you were not successful on this occasion. The successful tenderer was

This was the successful tenderer because

I would like to take this opportunity to thank you for your considerable efforts in submitting a tender and for your interest.

Yours faithfully
EXECUTION OF FORMAL AGREEMENT (THIS SECTION Duplicates CST 6.5)

Although the posting of the letter of acceptance should result in the formation of a legally binding contract, it is essential that for the avoidance of doubt two sets of contract documents are properly executed by both parties.

There ought to be no reason why this cannot be done at the time of acceptance, such contract documents should be prepared in anticipation of this event. It is however essential that the contract documents are signed before commencement of any work by the contractor. The scope for negotiation, if any is still required, is significantly reduced after this time.
Debriefing is the only way in which unsuccessful tenderers are able to find out why they were not selected, and therefore to obtain information about areas where they need to improve their future performance. This positive feedback encourages competitive performance and is therefore recognised as best practice.

CUP Guidance Note No. 45 provides useful guidance on debriefing.

On receipt of a decline letter either at interview stage or tender stage a contractor may request more information regarding their performance, so that they may:

- address particular problems;
- improve competitiveness of future bids.

A letter requesting further information should be answered with a letter offering the tenderer the opportunity for a formal debriefing interview.

Where the EC procurement rules apply then a request for debriefing must be responded to within 15 days of receipt of the request.

**Dealing with a Telephone Call**

A contractor who has received a decline letter is likely to make a telephone call to the Department.

This should be handled with care. It is recommended that the following conventions be observed:

- do not discuss the performance of other tenderers; bear in mind that the solutions and price offered by other contractors are confidential;
- offer a confirmation of the points made in the decline letter;
- confine the information given to matters that would be covered in a debriefing interview;
- keep a record of the conversation.
CRS 7.2

**DEBRIEFING INTERVIEWS** (This section duplicates CST 7.2)

If unsuccessful tenderers request a debriefing interview, this should be agreed to if possible. Any such interview should be undertaken as soon after the contract/commission award date as practicable, generally between three to six weeks.

Debriefing interviews for commissions are conducted by the commission manager/project sponsor but debriefing interviews for contracts may be conducted by the consultant who invited and subsequently evaluated the tenders.

Valuable time and money is spent in debriefing, but should always be considered worthwhile on large contracts/commissions as there are certain long term benefits. These are:

- to establish a reputation in the market place as a strictly fair, honest and ethical client, which will encourage the best firms to submit their best offer first time around;
- to offer unsuccessful tenderers some return for the time and money expended in preparing their tenders;
- to assist firms to improve their performance.

**Interview Format**

The agenda for the interview will be dependent upon the individual commission/contract but generally the person conducting the interview should be accompanied by at least one other person and an agenda agreed between them prior to the meeting. If possible the agenda should follow the evaluation criteria set out prior to receipt of tenders and where applicable, listed in the EC/Official Journal advertisement.

The meeting should allow sufficient time for the unsuccessful tenderer to be told the reasons for failure in this instance and for the firm to ask any questions that they feel are relevant.

The interviewers should be aware that the reason for the interview is diplomatically to convey to the tenderer weaknesses and strengths within cost, schedule, design, delivery, experience etc. It must be made clear that only the unsuccessful tender will be discussed and not a comparison with the other tenderers or competitors.

Formal minutes are not distributed following the meeting but it is recommended that a copy of notes taken at the meeting should be kept on the commission file for future reference by the Department.
NOMINATION OF SUB-CONTRACTORS

NOMINATION PROCEDURES

General

Nomination is widely used in the construction industry for the appointment on major works contracts, of specialist contractors, such as piling, earthworks and mechanical and electrical services. Departments who wish to secure the work of a particular specialist as part of the overall works contract can do so by nominating such a contractor. It can be used for both the provision of services (sub-contractors) and for plant and materials. It generally requires the inclusion of specific sums (Prime Cost or Provisional Sums) in contracts to be expended only on the nomination of a sub-contractor or supplier. GC/Works/1 (1998) makes provision for nomination at Clause 63 for example.

The problem with nomination, particularly under JCT contracts, is that it creates a transfer of risk back to the Department particularly for delay on the part of the nominated sub-contractor. Thus depending on the choice of contract strategy, experienced Departments operate on the basis that wherever possible, works should be as fully pre-planned and designed as possible. A fully pre-planned and designed project will obviate the need to:

- include Prime Cost (PC) items in respect of work to be executed or materials supplied by specialists or others;
- include Provisional Sums (both defined and undefined) for work which may or may not be required to be carried out by the main contractor;
- enter into direct contracts for services or materials which may interfere with the main contractor's control of the contract.
Nominated Sub-Contractors

If a contractor has not got the resources to undertake such works or services within its own organisation, the main contractor should be permitted, wherever possible, to enter into sub-contracts, subject to Departmental approval, with firms of its own choice. On the other hand, should the Department require a sub-contractor to undertake works, outside the expertise of the main contractor, it is recommended that they appoint such a sub-contractor through the nomination process. This means that the main contractor takes on the sub-contractor, making the main contractor fully responsible for its performance and default.

Key Points

• PC sums are included in a contract to cover the nomination of specialist contractors.

• Ideally, the need for PC and provisional sums should be avoided through the development of full design, although this will clearly depend on other objectives and the chosen contract strategy.
PRIME COSTS

General

For specialist work which cannot be described in the specification or BQ as a priceable item, the estimated value may be included as a PC sum and the work and/or supply involved is undertaken by a nominated or named sub-contractor/supplier. The agreed sum for the contract is then subject to appropriate adjustment on nomination. The main contractor is entitled to payment for attendance on the sub-contract and for its profit in accordance with the rates included in the BQs or Schedule of Rates.

Inclusion of PC Items in Contract Documentation

PC sums are not appropriate for non-lump sum contracts since their purpose is to achieve a fully inclusive fixed price for the Works at tender stage by allowing the main contractor to quote a price or percentage addition for profit and providing attendance. PC sums are used in the following documentation:

- Bills of Quantities - billed following the last work section in each measured bill and forming a separate section to each measured bill;

- Lump Sum Contracts Without BQs - detailed as a Summary of Prime Cost and Provisional Sums which can be associated with the tender form and make clear that the tender figure is intended to include all prime cost sums (including profit thereon) and provisional sums.

Removal of PC Sums

Departments should be careful over the decision to include PC sums since their removal once the contract has been let may cause nugatory expenditure.
ARRANGING A NOMINATED SUB-CONTRACT

When a PC Sum is Included

In general, specialist work should be invited concurrently with the tenders for the main contract, so that nomination of the preferred sub-contractor may be made as soon as the main contract is let.

Late nomination is a major contributor to delay and disruption to project completion and consequent claims, it should therefore be avoided.

If the specialist work is not required until later in the contract period it may be easier for the main contractor to appoint the sub-contractor provided this is agreed prior to the formation of the main contract. This will prevent the main contractor seeking additional costs for delay and disruption due to programming difficulties. It may also be prudent to delay inviting main contract tender until tender nominations for nominated sub-contract are ready. This allows co-ordination between both and reduces the risk of delay and disruption which may otherwise occur.

Invitation of Nominated Sub-Contracts Well in Advance of a Main Contract

On occasion nomination and appointment of sub-contracts well in advance of the invitation of the main contract tenders may be required. This may be necessary because the design of the main project cannot be completed until:

- a sub-contractor is known;
- because an item like a special boiler will take many months to manufacture;
- because the sub-contract includes preliminary work such as design and/or fabrication of materials (e.g., structural steel).

In exceptional circumstances it is necessary to invite tenders well in advance of the main contract, where it should be made clear in the invitation that the work is to be the subject of a sub-contract to a main contractor not yet appointed.
The tender documents in this case should state:

- the responsibilities of the main contractor;

- the anticipated form of main contract e.g. GC/W orks/1 (1998);

- contract particulars such as contract period, start date and level of liquidated damages etc.

**Main Contractor's Responsibilities for Sub-Contractor's Design**

The Department should ensure that the specification for the main contract contains an appropriate description of the scope and nature of the work to which the PC sum relates. Equally the sub-contract specification should be clear and consistent with the above, in order that the main contractor will be able to seek redress from the sub-contractor in the event of failure of the sub-contractor's design (not through the Department).

**Specialist Design**

Exceptionally, the design element may be such that neither the main contractor nor the design team leader has the expertise to undertake the specialist design proposals (e.g., novel or innovative proposals). In such cases a separate design contract can be arranged directly with the specialist (wherever possible in competition) with an understanding that, subject to a satisfactory lump sum, the successful specialist will be nominated as a sub-contractor to the main contractor.

**Warranties**

It is recommended that where nomination is envisaged that the main contractor becomes liable for the design liability of the nominated sub-contractors. Accordingly, any direct design warranties suggested by the main contractor between the sub-contractor and the Department would only serve to obscure the main-contractor's design liability.

It is to be noted that this is not the approach adopted in the JCT forms of contract, where liability for the design of nominated sub-contract works will bypass the main contractor, unless alternative arrangements are made.
Where the design responsibility of the specialist sub-contractor forms a major part of the total cost of the project, consideration can be given to appointing the specialist contractor as the main contractor.

**Key Points**

- Depending on circumstances it is recommended that the specification and requirements of any nominated sub-contractors are developed concurrently with the main contract specification and drawings such that conditions imposed on nominated sub-contractors and the main contractors are consistent.

- Late nomination can cause serious delays to a works project.
ESTABLISHING A CONTRACT

General

It is recommended that where the Department chooses to nominate, the main contractor should enter into a sub-contract with the nominated sub-contractor without delay.

Problems with Establishing a Contract

In certain circumstances the main contractor and the proposed nominated sub-contractor may not reach agreement. The most common causes of failure to agree between main and sub-contractor are:

- disagreement over the programme;
- the sub-contractor’s reluctance to accept conditions imposed by the main contractor;
- the main contractor’s doubts about the financial stability of the nominated sub-contractor;
- the main contractor’s dislike of the nominated firm.

Resolution to Problems

Most problems may be resolved by the Department mediating between both parties. Most conditions of contract provide that, if the main contractor has valid objections regarding a particular nominee that another firm should be nominated or that the main contractor is permitted to execute the work or appoint its own sub-contractor, as appropriate. The Department may be liable for any increase in price but this will depend on the terms of the main contract.
LIQUIDATION OF A NOMINATED SUB-CONTRACTOR

Once the contract is made between the main and sub-contractor, it should be clear in the main contract conditions that the main contractor is fully responsible for the work including all design. Employer/sub-contractor agreements provided for under JCT 80 forms give the employers direct redress against the sub-contractor in certain circumstances, e.g. design liability. These agreements are not used in GC forms since they may affect the contractual relationship between the main contractor and sub-contractor.

Under the GC forms, the contractor assumes responsibility for any nominated sub-contractors and if the sub-contract is terminated due to the liquidation or bankruptcy of the sub-contractor then the main contractor may be required to find other means of completing the work. The Department carries the risk of any extra cost of securing a replacement.
SELECTED OR APPROVED SUB-CONTRACTORS

Nomination and Naming

For a sub-contractor to be contractually "nominated" its selection must be the subject of a PC sum. Sub-contractors who may be approved by the architect or engineer, under other provisions of the contract (e.g. listing or naming) are effectively domestic sub-contractors.

It is recommended that listing is not used unless the specialist firm is willing to take on the work as a domestic sub-contractor. The reason is that if difficulties occur in establishing the sub-contract many of the problems and delays associated with formal nomination can arise.

Once the Department has accepted the domestic arrangements of the main contract they cannot later choose to nominate formally.

The practice should be to use selected or approved sub-contractor lists carefully and not to treat them as an easy way of nominating by the back-door.
CRS 9.0  MANAGEMENT OF CONTRACTS

CRS 9.1  ROLE OF THE PROJECT MANAGER

General

The project manager is usually appointed on major works contracts to manage the contract from design and construction through to completion. The appointment of a project manager should not be an automatic decision, for instance it is unlikely that a project manager is required for maintenance works.

The Department will normally appoint a project manager at the feasibility stages of a Project. The project manager’s duties include acting on behalf of the Department and advising them on the procurement of design resources, on estimates of costs and time, on the merits of alternative schemes and on choosing the most appropriate contract strategy.

Project Manager Appointed for the Duration of the Project

As contracts are placed for construction work, it is preferable to appoint the person or organisation already appointed for the whole project to act as the project manager on a particular contract. However, it is essential that the project manager for a particular contract is sufficiently close to the work and has the time to carry out his or her duties effectively. On very large projects, especially where there are several contracts to be placed, it may be necessary to appoint a different project manager for each contract or for the project manager to delegate responsibilities for some of the contracts.

On certain contracts e.g. GC/Works/1 (1998) the project manager may take on the role of the lead consultant.
**Project Manager's Responsibilities**

Clearly the project manager will have important obligations under the contract entered into between the Department and the contractor. Where other duties are considered to exist they must be stated clearly and without ambiguity to avoid disputes.

Throughout each of the stages it should be stated that it is the project manager who is responsible for the overall success of the project including responsibility for the Department's team and ensuring each consultant performs in a manner which will bring about the success required.

**Design Co-ordination**

The project manager’s role includes the important one of design co-ordination, and to keep the Department properly and fully informed throughout each stage.

**Employer's Agent**

At the construction stage it must be remembered that the project manager will have obligations under the contract as the Employer’s Agent, i.e. issue of certificates, instructions etc.

**Claims and Disputes**

With respect to contractual claims the project manager must be seen to be impartial and act independently.

If the Department finds itself locked in a dispute going all the way to a formal hearing, the project manager is likely to be a key witness but he or she will of course be a witness as to fact and not opinion, which would indeed be the role of an independent expert if required.
ROLE OF THE PROJECT SPONSOR (PS)

Where a major works project is being procured then it is recommended that a project sponsor is appointed, and the appropriate management structure is in place to ensure the sponsor can be an effective representative of the Department.

The sponsor will commonly have a number of key duties including:

- monitoring the performance of the project manager, and indirectly that of the design team and contractor;
- acting as the channel for Departmental changes or information flow;
- monitoring the budget and obtaining necessary financial authorisation;
- other duties.

Key Points

- The project sponsor should be sufficiently empowered to make quick and effective decisions covering project execution; however it should be kept in mind that the project manager is engaged to manage and advise not to delegate responsibility back to the Department.
Function of the Quantity Surveyor (QS)

Only under some of the Government contracts forms is there a specific role for a QS but it will be usual to appoint a QS where the work requires regular measurement and/or valuation. It will ordinarily be the function of the QS to prepare interim valuations in accordance with the contract and such valuations will be submitted to the project manager for approval.

Gross Valuation

.Once the project manager is satisfied as to the valuation of the sums due he or she should inform the main contractor of the amount to be certified for payment. The gross valuation is calculated as the sum of work executed, the value of materials on site, the value of any variations and the gross amount of VAT. Where nominated sub-contractors are present the gross valuation shall normally include the value of work undertaken by the sub-contractor, exclusive of VAT.

Advanced Payment

In certain circumstances the Department may consider it appropriate to pay advances on account for goods and materials to be incorporated into the works. This may be reasonable when the goods and materials have been brought on site and are adequately stored and protected. In exceptional circumstances advance payment for materials held off-site may be appropriate, e.g. where materials cannot be brought on site as programmed possibly due to a failing on the part of the Department. The purpose of such advance payment is to protect the Department against claims for loss and/or expense due to delay and disruption. The payment for materials off-site raises questions of ownership and may expose the Department to further financial risk. It is therefore recommended that clear professional advice is sought regarding such action.

Key Point

The Construction Industry Tax Scheme requires that any firm must be in possession of a valid registration card or tax certificate before any payments are made.
CHECKING PROCEDURES

Cost Control

The project manager will usually be responsible for maintaining control of the costs for the contract within his delegated limits, and should report regularly to the project sponsor, using a suitable commitment and forecasting record system.

The system should show a running record of expenditure through variation orders which can be readily checked against the project manager's financial delegation. It should also record the letting of nominated sub-contracts and the expenditure of provisional sums.

These records should be brought together to show, month by month, funds committed and those yet uncommitted. This can be readily compared with the physical progress of the project.

Limits on the Project Manager's Authority

It is recommended that the project manager's authority to commit money beyond the contract sum is limited as follows:

• to the limit of contingencies and daywork provision; and
• to a maximum limit on individual variations.

Financial Reporting

The QS should be required to submit to the project manager a monthly financial report showing current and future commitment. From this information the project manager will update and summarise the financial position.

Each month the project manager should send to the project sponsor a statement of the financial position of the work.
DETERMINATION PROCEDURES

General

Failure by the contractor to carry out his or her obligations under the contract, is grounds under most contracts for the Department to determine the contract. Furthermore some Government forms of contract often give the Department discretionary powers to determine the contract at any time by notice to the contractor.

Default Notices

Great care should be taken in producing notices of default, warning letters and notices of determination to ensure that the Department's rights under the contract are not prejudiced in any way by the terms of the letter. It is recommended that the wording of the condition under which any letter or notice is issued should be reflected exactly in the letter of notice.

Default Procedure

The following is a recommended procedure for dealing with default, but any specific requirements of the contract must be adhered to:

• as soon as the project manager is convinced that normal day to day communications with the contractor is not achieving the desired improvement/remedial action the project manager should issue a Notice of Default. The notice should specify not only the defective work, or work which is being improperly performed but also any remedial measures required;

• if the project manager considers the contractor is still in default seven days after the receipt of the Notice of Default, he or she should discuss with the Department and, if instructed, initiate action to determine the contract;

• in the event that the contractor has suspended the works, or, in the project manager's opinion, the contractor's progress is such that the contract will not be completed by the date for completion of the contract, or the project manager experiences difficulty in obtaining the contractor's full compliance with the requirements of the contract, he or she should report the position to the Department and recommend the issue of a Formal Final Warning Letter or Notice of Determination;
• if a satisfactory response has not been received from the contractor within seven days of the receipt of the warning, the project manager should immediately take action to determine the contract;

• once the decision is taken to determine the contract the quantity surveyor should be advised of the effective date of determination in order that a certificate may be prepared on the status and valuation of the works on the day of determination and for instructions to be issued to cover the security of the site on and after the day of determination.

Completion of the Works in Case of Default

The following procedure is recommended on determination:

• upon determination of a contract due to default, arrangements should be made for the work to be completed by another contractor, any additional cost being claimed from the original contractor, or deducted from sums due to him;

• the project manager should recommend as soon as possible to the Department his or her proposals for completing outstanding work on the contract; whatever the course recommended, it is essential that excess costs over the balance of the contract price should be avoided or, if unavoidable, kept to an absolute minimum consistent with obtaining a satisfactory completion of the works;

• any contract to complete the works must be placed without delay and be based, as far as possible, on the same specification and conditions as the original contract;

• any additional cost incurred as a result of determination may not be recoverable from the original contractor if they could reasonably have been mitigated by prompt or decisive action, on the part of the department.

Key Points

• Seek advice before proceeding.

• Where there are contractual provisions which entitle the Department to determine the contract, and there is occasion to operate them, the provisions in question should be followed to the letter.
Claims include all matters from a routine request for additional time to complete, to a major allegation of breach of contract. In fact a claim is simply a demand by one party on the other that a particular entitlement is due. Not all claims signify a dispute. But where a claim is not met in full and there is disagreement by one party as to the entitlement of the other then unless agreement can be reached through negotiation, it can be said that a dispute or difference has arisen between the parties.

The majority of claims arise from a failure or an alleged failure of one party to fully comply with the requirements of the contract or in some instances conditions implied by the common law. The remedy sought for an alleged breach is usually damages.

Claims generally fall into the categories listed below (examples are given of each):

**Contractual Claims** (specific entitlement in accordance with the terms of the contract):

- for delay/additional time for specified reasons such as:
  - issue of variations expanding the scope of the contract,
  - late issue of information and/or variations;
- for the additional cost of variations;
- for disruption or lost productivity due to interference by the Department;

**Common Law Claims** (ex-contractual claims):

- damages for breach of contract;
- damages in tort/delict (e.g. negligence - breach of a duty of care);
- damages for breach of copyright;
Third Party Claims:
• personal injury claims;
• employee claims;
• land compensation claims;

Quantum Meruit Claims:

Ex Gratia Claims ('out of kindness').

From the Department's viewpoint claims should be avoided if only because financial control becomes extremely difficult, especially for claims produced long after the event.

In practice it is difficult to avoid claims, but it is possible to deal with them intelligently and expeditiously so as to avoid disputes.

Key Points
• A claim is more often than not an expression of the additional entitlement of a party specifically provided for under the terms of the contract for specified matters.
• The better the Department's records, the better its ability to make and defend claims and to negotiate them.
• The legal principles involved in making or defending claims can be complex and the preparation of a good claim document is an art. If in any doubt seek professional advice.
Claims often involve dealing with parties perceptions, which although often held very strongly are not always supportable. The manner and the speed in which claims are dealt with can, and in most cases do, have a major bearing on the eventual outcome of the claim.

**Damages**

The remedy for a breach of contract which has not been excused is damages. Damages are awarded to put the innocent party, as nearly as possible, into the position that party would have been in had the contract been performed. There are well established criteria for the determination of the amount of damages at common law, but these must be considered in light of what the express terms of the contract have to say about recovery.

**Problems with Quantification and Evaluation of Claims**

The difficulty with many claims arising out of construction contracts are that they are often very difficult to evaluate, and are seldom clear cut. These difficulties are as follows:

- construction projects are frequently very complex involving the interaction of many trades thereby often making it very difficult to determine the connection between an alleged breach of contract (cause) and the loss suffered by the injured party as a result (effect); claims in construction projects often arise out of claims for extensions of time; without the use of up to date computerised planning/network packages, the determination of the Critical Path through a particular project, itself a dynamic entity, can be near impossible;

- the area of construction law is extremely specialised; further, statute and case law is constantly being updated and the boundaries redefined; it is recommended professional advice is sought when considering how the terms of the contract should be interpreted in the event of a dispute, and in considering the Department’s liability;
even with professional advice there can and often are ‘grey’ or indefinable areas within a particular claim, but clearly it is in the Department’s interests to narrow down the issues and determine the validity or otherwise of a particular claim as quickly as possible so that it can properly consider/advise on:

- budgets: their accuracy/likely overspend,
- estimated time of completion of the project,
- legal action it needs to take or prepare for,
- negotiation of claims leading to settlement; it is the party who is armed as fully as possible with the facts who is likely to bring about or induce a negotiated settlement.

**Key Points**

- Construction works contract claims tend to be complex and may include heads of claim which are difficult to prove or evaluate.

- Seek professional advice.
AVOIDANCE OF CLAIMS

The main source of claims under the contract are:

- discrepancies between drawings, schedules and bills of quantities;
- late submission of information;
- variations and their valuation;
- poor communication or attitude on the part of members of the construction team;
- the contractor discovering, towards the end of the job, that it has lost money through mis-management or otherwise.

Throughout the duration of the project it is constantly necessary to hold meetings, monitor progress and budgets etc. so that as soon as a problem or potential problem arises it can be dealt with in the most expedient manner. Of course it depends on the nature and size of the project being worked upon, but in the vast majority of cases the same holds true for dealing with contractual claims. Resources expended ‘up front’ in ensuring the brief is properly delivered, contractual roles and obligations clearly set out, the contractual arrangements entered into properly reflect the agreement required, including the contract strategy adopted, etc., can only help to ensure that the risk of contractual claims is reduced and/or minimised.

Key Points

- In practice it is difficult to avoid claims but the early identification and prompt resolution of problems through good management will do much to prevent or control the risk of claims.
MANAGING CLAIMS

The main steps to be followed in order to manage claims are:

• ensure that the brief is well defined and contractual requirements are consistent;

• ensure that the contractor has the information required, preferably before it is required;

• avoid variations;

• where variations are required, agree time and cost increases prior to instruction or as soon as possible thereafter;

• keep good records of all events which may lead to a claim;

• insist on compliance with the contract where contractual claims are being made and evaluate them as quickly as possible;

• negotiate with the contractor.

Once a claim has been received a report (with privilege status) should be drafted to include the following:

• details of the claim and why there is a dispute;

• an assessment of the extent of liability;

• include negotiating proposals;

• give an assessment of the likely outcome in financial terms.
PRESENTATION OF CLAIMS

The degree and type of evidence required to establish monetary claims arising under a building contract will generally be a matter safely left in the hands of the professional advisers acting for a Department. But some important general principals are as follows:

• there must be a basis for the claim in law, either under the contract or otherwise;

• there must be some loss which arises by reason of the legal right to claim;

• the connection between the legal right and the damages sought must as far as possible be proven by the party claiming the damages;

• the matters in dispute should be set down on paper as soon as possible and communicated in a cogent and persuasive manner;

• if in receipt of a claim, evaluate it, determine the value of any counter-claim the Department may wish to make and make a realistic offer as soon as possible.

Key Points

• Claims once established by the contractor should be promptly settled or at least paid to the extent of the Department’s liability that can be evaluated.

• Officers will not normally have any authority to deal with ex-contractual claims, and should consult their Departmental handbooks in this respect.
CLAIMS AGAINST CONTRACTORS

General

The principal claim which a Department is likely to make is one for the costs of delay by the contractor. Where liquidated damages provisions exist in the contract, then the recovery of such costs is covered by the deduction of LADs. Where there are no LAD provisions and the contractor is in breach of contract, for example because of delay or defective workmanship, then the Department may wish to make a claim provided it can show that it has suffered loss as a result of the breach or breaches. Claims are best dealt with by the architect, superintending officer or project manager on behalf of the Department since they should be familiar with the background to the claims. If the claim is a complex one then it may pay dividends to seek legal advice to prepare a high quality claim at the outset.

Loss and Damages

Once the alleged breach has been confirmed by the Department it is prudent to issue a notice of default to the contractor explaining that a claim is being considered. It is recommended that as soon as a breach of contract has been confirmed, the Department should calculate the additional cost and loss suffered as a result of the contractor's breach. Potential losses or damages may occur at a later date in which case these losses would be considered speculative since the contractor may be able to limit its liability by mitigating the extent of any future loss. It is recommended that any such future loss is periodically notified to the contractor as it occurs.

Insurance

If the breach alleged is the kind of liability which should be covered by the contractor's standard policy of insurance, then the insurer may become involved.
Procedure

As soon as it becomes reasonably apparent that a claim against the contractor is likely, the Department should put in place adequate procedures to compile evidence which can be used to support the claim. The following are recommended procedures for dealing with damaged or defective work:

- inspect the damage, take any necessary photographs and record the details in the site diary;

- arrange a meeting on the site with the contractor to establish what is agreed or disagreed as to fact and press for a written acceptance of liability to either indemnify, reinstate, make good or compensate with regard to the damage;

- if the contractor asserts that the damage was not due to its neglect or default then request its case in writing;

- in the event that the contractor admits liability the PM or superintending officer must ensure that the remedial works are put in hand; any resultant delay in the programme may give rise to the Department's right to deduct liquidated damages (where appropriate);

- if a contractor has acknowledged liability or where there is a strong case against them (but they deny liability), should they delay in carrying out remedial work, the department should consider having the work undertaken by an alternative contractor at the original contractor's cost.

Dispute Resolution

Where the contractor formally disputes its responsibility to make good or compensate damage the aim must be to resolve the argument by negotiation, rather than resorting to arbitration or litigation. But a legal opinion is generally necessary at an early stage, and protracted negotiation should be avoided.

In the event that the contractor is causing problems on a contract, a full report should be sent to NQS so that other possible users of the contractor are alerted.
For arbitration to be an option there must be a written agreement in the contract to arbitrate (an arbitration clause); or there may be subsequent written agreement to arbitrate.

The Government works contracts generally include contractual provisions for resolution of disputes by arbitration after completion, abandonment of the works, or determination (for example see Condition 60 of GC/Works/1 (1998)). This amounts to a written agreement to arbitrate. Where there is such an agreement, arbitration is a pre-condition to litigation.

The advantages of arbitration are as follows:

- the parties may choose the arbitrator (tribunal);
- confidentiality - arbitration is private;
- should be faster;
- flexibility - parties may agree to relax procedural rules or rules of evidence;
- the parties do not have to be represented by counsel;
- limited appeals;
- no reliance on Rules of Court.

The conditions of contract usually set out the procedure to be adopted for the arbitration however, the parties are free to agree on their own procedures.

Once an arbitration notice has been issued by either party, failure to respond may be a breach of contract.

As an alternative to arbitration, it may be possible to agree with the contractor to attempt a method of alternative dispute resolution. If successful this can be a cheaper and quicker method of resolution.

All the GC/Works/1 contracts include an adjudication clause which provides for an independent adjudicator to find on disputes which occur during the progress of the works. The adjudicator's decision is binding until the completion, abandonment of the works or determination.
Key Points

• Part II of the Housing Grants, Construction and Regeneration Act 1996 requires that a party to any construction contract has a right to refer any dispute for impartial adjudication. Any such adjudication must be effected within a certain timescale.

• Arbitration is a means of dispute resolution by the decision of a third party.

• The service of a notice of arbitration may be a very effective means of encouraging settlement, however, it is not a step that should be taken lightly. There must be a case to argue, and there must be a reasonable prospect of success.

• Seek professional advice before issuing a notice of arbitration or upon receipt of one.

• It should be cheaper and less time consuming to attempt to settle the dispute either through settlement negotiations or ADR.
EX GRATIA CLAIMS (THIS SECTION DUPLICATES CST 9.6)

These claims usually arise where the claimant has no grounds (other than possibly moral grounds) for additional costs.

Ex-gratia payments are generally made in exceptional circumstances and with the agreement of the finance section of the department.
MATTERS ARISING ON COMPLETION

LIQUIDATED AND ASCERTAINED DAMAGES

General

Liquidated and Ascertain damages (LADs) are contractual damages which do not have to be proved and they are independent of the actual loss suffered by the Department due to the contractor's failure to complete the works by the contract completion date.

Quantum of Damages

Damages are levied at the rate set out in the contract by the period of the delay (i.e. the period between certified completion and the extended date for completion). The damages may be deducted from any amounts due to the contractor, or the sum may be claimed from him as a debt.

Calculation of the amount due as LADs is straightforward, requiring merely that the rate per day or week be multiplied by the number of days or weeks the work overran. Under some forms of contract e.g., GC/Works/1 (1998), this calculation will be essentially a confirming one if the employer has elected to deduct damages from interim payments after expiry of the contract period but before certifying completion.

Extensions of Time

For the Department to be entitled to deduct LADs, the superintending officer or project manager must have properly applied the extension of time provisions. For this reason, the deduction of LADs often gives rise to disputes over extensions of time to the contract period. Some claims may be rejected in whole or in part by the superintending officer or project manager, as not falling within the conditions of contract. Some forms of contract e.g., JCT 80, GC/Works/1 (1998), provide for the review by the architect or project manager of extension of time decisions already made. Review is not about whether the Department should waive LADs, but whether the grounds for extra time have been properly and reasonably evaluated.
It is solely a matter for the Department (i.e. Authority) whether LADs will be deducted or waived, not that of the superintending officer or project manager.

Key Points

- In the event that a contractor is in culpable delay, then under many forms of contract the Department has a contractual right to deduct LADs.

- Contractors are likely to respond either by claiming that an extension of time is due or that matters for which extensions were previously requested have not been fairly or properly considered.

- Contractors may offer to trade off a loss and expense claim against an LAD deduction. It is recommended that professional advice is sought if faced with this type of situation.
M A I N T E N A N C E  P E R I O D S

G e n e r a l

Certain contracts provide for a maintenance period, where the contractor is required to rectify any defects in work resulting from improper workmanship and materials which may arise during the maintenance period. The period usually commences from the day after the certified date for completion. When the contract envisages sectional completion each maintenance period is calculated from the day after the certified completion date of the relevant section of the works. The length of the period varies according to the work. Typical periods are:

- building and civil engineering work - 6 months;
- mechanical and electrical work - 12 months (to allow for operation in one complete cycle of seasons).

M a i n  C o n t r a c t o r s  R e s p o n s i b i l i t y  f o r  S p e c i a l i s t  S u b - C o n t r a c t o r s

Where a specialist sub-contract is involved in a main building contract and it carries a maintenance period that extends beyond that of the main building contract, the main contractor's responsibility for maintenance of the specialist works continues until the end of the appropriate period stated in the Abstract of Particulars for the specialist works.

P a y m e n t

If on expiry of the maintenance period of the main building contract the Architect/SO etc., is satisfied about the state of the works, he or she certifies this. Each section will have its certificate issued at the expiry of the appropriate maintenance period. These certificates allow the final payments under the contract to include any retention made subject to any outstanding claims.
CRS 11.3

PAYMENTS

General

It is recommended that payments are made promptly at all stages in accordance with the terms of that contract. The timely payment of sums which become due on contracts can be significant in reducing the cost to companies through financing their operations. When disputes arise over single items of payment, the undisputed items should be paid immediately, leaving the disputed items for later settlement.

Late Payment and Interest

Where payment is due in respect of work it is not reasonable to withhold payments due to a contractor on the grounds that internal procedure has not been complied with or completed. Provided that the arrangements made with the contractor for valuation of the unauthorised work are satisfactory, the contractor may receive the money due to him. Internal procedures should be such as to ensure that the Department’s obligations under the contract are complied with.

Where a Department has failed to make payment due to the contractor by the agreed date, or has otherwise unreasonably withheld a sum due to a contractor, certain Government forms provide for the payment of contractual interest to the contractor.

Key Points

• It is Government policy to make prompt payment in respect of bona fide liabilities especially to small companies.

• Late payment may result in the need to increase the overall budget because of the contractor’s entitlement to interest.

• Departments should ensure that they comply with the principles of prompt payment as contained in Government Accounting and the various Charter initiatives.
OVERPAYMENTS

Potential debts can arise under the contract for overpayments to contractors by reason of excess advances.

Overpayments - Recovery by Way of “Set-off”

Certain Government forms of contract provide for the recovery of sums due under the contract by reason of overpayment as a “set-off”, see GC/Works/1 (1998), Condition 51. Condition 51 also provides for the recovery of sums due under one contract from payments due to the contractor under any other contract with any other Department. The Department should be certain of its right to deduct such monies before it proceeds with such a course of action. If in doubt seek professional advice.

Interest on Overpayments

Where overpayments have been made to contractors and the debts arising are to be discharged within a short period, interest may be charged only where provision for the charging of interest is expressly included in the terms of the contract. Since there is no provision in the ‘GC’ and ‘C’ series of contracts to claim interest for overpayments it would be improper to seek to deduct such monies, under these forms.
Once the works (or any section) have been satisfactorily completed, the project manager or supervising officer will issue a certificate after the maintenance period to that effect.

It is recommended that copies of the certificate are distributed by the project manager to the:

- contractor;
- quantity surveyor;
- project sponsor or works contract manager.

**Effect of Certificate of Completion**

As a result of case law in 1994, the final certificate issued by the architect under JCT80, which was issued on the basis that the works were complete to the satisfaction of the architect, was found to have the effect of relieving the contractor of liability for any defects in the work thereafter.

It was not the intention of the drafters of the JCT forms that a final certificate should have this effect, and as a result amendment 15 was issued in July 1995 which redrafted Clause 30.9.1.1 to limit the effects of the final certificate. It is now only conclusive evidence of the fact that only matters expressed in the contract documents or instructions, as being for the approval of the architect, were to the reasonable satisfaction of the architect. The contractor retains liability for all other matters.
The 1998 editions of the GC/Works contracts have overcome this problem as illustrated by clause 39 (Certifying Works) which states:

“The PM shall certify the date when the Works, or any Section, or any completed part within the meaning of Condition 37 (Early Possession) are completed in accordance with the contract. Such completion shall include sufficient compliance by the contractor with Condition 11(7) (Statutory Notices and CDM Regulations). After the end of the last Maintenance Period to expire, he shall issue a certificate when the contractor has complied with Condition 21 (Defects in Maintenance Periods).

Key Points

• Care should be taken over the issue of a final certificate or certificate of completion.

• Seek legal advice where in doubt about the effect of such certificates.
Performance reporting is the last stage in the procurement process and closes the procurement cycle by providing feedback into the long listing process for future work.

On completion of the works contract the project manager or supervising officer should prepare a report for the Department on the performance of the contractor, at least one year from completion of the construction period. In respect of a major works contract, the appraisal may include the following:

- whether the premises meet the original brief satisfactorily;
- whether the premises are operationally satisfactory or need modification, either because of unforeseen problems or changes in departmental requirements;
- whether the engineering services are operating satisfactorily or require any alteration;
- whether there are any signs of premature wear or failure in the building fabric or engineering services;
- whether there are any features of the design or brief that should not be repeated in a future similar project;
- the cost of operation and maintenance of the premises in comparison with anticipated running costs;
- any recommended economies in running costs;
- any recommended alterations to the premises or installations to provide a better service to the department.

**Key Points**

- Performance reporting provides invaluable intelligence for the Department and assists with future procurement decisions.
- Performance reporting provides feedback to NQS.
- Performance reporting provides the Department with an opportunity to learn.
PERFORMANCE REPORTING TO NQS

Performance Report

As soon as the contract is complete it is recommended that the project manager prepares a performance report on behalf of or together with the Department and forwards it to the designated NQS section for the benefit of future users.

It is recommended that the Department uses its discretion and judgement in making its assessment. The box for “Contract Period” should state the time allowed under the contract including extensions of time awarded. This can then be compared with the entry for “Time Taken” and the actual duration of construction work. The assessment for “Speed” should be consistent with the other information.

Markings

Where classifications of performance indicate problems, NQS requires that supporting correspondence and other information should be attached to the report indicating that problems have been brought to the contractor’s attention together with any replies received.
INDEX

Abbreviations Used in this Document .................................................................................................................. INT 1.7
Acceptance of a Tender ........................................................................................................................................ CST 6.2, CRS 6.2
Adjudication .......................................................................................................................................................... LE 2.9
Alternative Dispute Resolution Procedures ..................................................................................................... CST 9.3.1
Alternative Offers ............................................................................................................................................. CRS 5.4
Amended Tender Documents .......................................................................................................................... CST 5.8
Amended Tenders .............................................................................................................................................. CST 5.7, CRS 5.5
Appointment Through Competition .................................................................................................................. PS 3.3
Arbitration .......................................................................................................................................................... LE 2.9, CST 9.4, CRS 10.7.1
Assignment ........................................................................................................................................................ LE 1.11
Avoidance of Claims ....................................................................................................................................... CRS 10.3
Award Criteria .................................................................................................................................................... EPP 1.13
Background ......................................................................................................................................................... INT 1.1
‘Best Practice Client’, Principles of .................................................................................................................. PS 1.3
Bill Paying ........................................................................................................................................................ CRS 9.3
Bill Paying and Checking Procedures ........................................................................................................... CST 8.4
Breach of Contract .......................................................................................................................................... LE 1.7
C1303 - Window Cleaning and C1304 · Chimney Sweeping ....................................................................... CRS 1.15.13
C1306 · Maintenance of Gardens, Grounds, Etc. and C1312 · Supply and Application of Herbicides, Etc. .... CRS 1.15.14
C1804 · Repair of Plant ..................................................................................................................................... CRS 1.15.15
Checking Procedures ........................................................................................................................................ CRS 9.4
Choice of Contract, Introduction to the ............................................................................................................ CRS 1.3.1
Claims Against Contractors ............................................................................................................................. CRS 10.6.1
Claims and Disputes, General ......................................................................................................................... CRS 10.1.1
Claims Arising from Default or Negligence by a Department Consultant or Contractor ......................... CST 9.2
Claims by and Against the Department, Handling of ...................................................................................... CST 9.1.1
Claims, Presentation of .................................................................................................................................... CRS 10.5
Commission Manager/the Project Sponsor, Roles and Responsibilities of the ........................................ CST 8.1.1
Conduct of Staff,The ......................................................................................................................................... PS 1.4
Construction Industry Tax Scheme ................................................................................................................ LE 2.11
Construction Management Contracts ........................................................................................................... CRS 1.11.1
Consult Notices with NQS .............................................................................................................................. CST 10.3
Consultant’s Section, General ........................................................................................................................ CST 4.1.1
Consultant and Sub-Consultants ....................................................................................................................... CST 8.2.1
Contract Claims Against the Department ....................................................................................................... CRS 10.2.1
Contract Notice, Decline and Debriefing ........................................................................................................ EPP 1.14
Contract Strategy ............................................................................................................................................. PS 2.4.1.1
General .............................................................................................................................................................. PS 2.4.1.1
Property Management Functions .................................................................................................................... PS 2.4.2.1
Facilities Management Strategies .................................................................................................................. PS 2.4.3.1
Works Contract Strategies ............................................................................................................................. PS 2.4.4.1
Contractor's Section, General ........................................................................................................ CRS 5.1.1
Contracts by Deed .......................................................................................................................... LE 1.3
Contracts File, Retention Periods .................................................................................................. CST 2.3, CRS 2.3
Contracts using Bills of Quantities .............................................................................................. CRS 1.4.1
Contracts using Schedules of Rates ............................................................................................. CRS 1.5
Criteria for Evaluation .................................................................................................................. CRS 5.2.1
Damages for Breach of Contract ................................................................................................. LE 1.8
Debriefing Interviews .................................................................................................................... CST 7.2.1
Decline Of Unsuccessful Tenderers .............................................................................................. CRS 6.4.1, CST 6.4.1
Departmental Management Roles ................................................................................................ PS 1.5.1
Design and Build Contracts .......................................................................................................... CRS 1.8.1
Design and Manage Contracts ...................................................................................................... CRS 1.12
Determination Due to Default ........................................................................................................ CST 8.6
Determination Procedures .............................................................................................................. CST 8.5.1, CRS 9.5.1
Discharge of a Contract ................................................................................................................ LE 1.5
Dispatch of Tenders ........................................................................................................................ CST 4.8
Documentation .............................................................................................................................. CRS 4.1.1
Documentation Standards ............................................................................................................. CST 4.7
EC Procurement Procedures, Accelerated Timescales ................................................................ EPP 1.9
EC Procurement Procedures, Directives, The .............................................................................. EPP 1.2.1
EC Procurement Procedures, General .......................................................................................... EPP 1.1.1
EC Procurement Procedures, Procedures and Timescales for Advertising and Awarding Contracts ............................................................................................................................................................................. Annex EPP 1.3.1
EC Procurement Procedures, Application of .............................................................................. CST 1.2, CRS 1.2
EC Procurement Procedures, Categories of Services ................................................................ Annex EPP 1.1.1
EC Procurement Procedures, Deciding which Directive Applies ................................................ EPP 1.3.1
EC Procurement Procedures, Estimating the Value of Commissions and Aggregation .............. EPP 1.6.1
EC Procurement Procedures, Notices Required under ................................................................ Annex EPP 1.2.1
EC Procurement Procedures, Number of Tenderers ................................................................... EPP 1.1.1
EC Procurement Procedures, Procedure for Advertising and Awarding Contracts .................... EPP 1.8.1
EC Procurement Procedures, Services Contract - Model Notices .............................................. Annex EPP 1.5.1
EC Procurement Procedures, Works Contracts - Model Contract Notices .................................. Annex EPP 1.4.1
EC/GATT Reporting Requirements ............................................................................................. EPP 1.15.1
Effective Decision-Making ............................................................................................................. PS 1.6
Errors in Priced Bills ........................................................................................................................ CRS 5.6
Establishing A Contract ................................................................................................................ CRS 8.4
Evaluating Performance .................................................................................................................. PS 4.1
Evaluation Criteria ........................................................................................................................ CST 5.1.1
Evaluation Procedure ..................................................................................................................... CST 5.4
Evidence of Contract ..................................................................................................................... LE 1.10
Ex Gratia Claims .......................................................................................................................... CST 9.6, CRS 10.8
Exclusions ..................................................................................................................................... EPP 1.4.1
Execution of Formal Agreement ..................................................................................................... CST 6.5, CRS 6.5
Extension Contracts and Variations ............................................................................................... CRS 1.13.1
Facilities Management Strategies .......................................................................................................... PS 2.4.3.1
Fair Employment (Northern Ireland) Acts ................................................................................................ LE 2.4.1
Fee Schedules ........................................................................................................................................ CST 5.2
Firm Price and Variation of Price .............................................................................................................. LE 2.7.1
Focus on Output Value .............................................................................................................................. PS 1.7.1
Forms of Tendering ................................................................................................................................ CST 4.2
Fostering Teamwork ................................................................................................................................. PS 3.4
GC/Works1 (1998) - Lump Sum with Quantities ...................................................................................... CRS 1.15.1.1
GC/Works1 (1998) - Lump Sum without Quantities .................................................................................. CRS 1.15.2.1
GC/Works1 (1998) - Single Stage Design and Build Version ..................................................................... CRS 1.15.3.1
GC/Works1 (1999) - Two Stage Design and Build Version ........................................................................ CRS 1.15.4.1
GC/Works1 (1999) - With Quantities Construction Management Trade Contract ......................................... CRS 1.15.5.1
GC/Works2 (1998) - Building and Civil Engineering Minor Works ............................................................. CRS 1.15.4.1
GC/Works3 (1998) - Mechanical and Electrical Engineering Works .......................................................... CRS 1.15.5.1
GC/Works4 (1998) - Building, Civil Engineering, Mechanical and Electrical Works .................................. CRS 1.15.6.1
GC/Works5 (1999) - Works Commission Consultant Document (Framework/Term) ..................................... CST 1.6
GC/Works6 (1999) - Daywork Term Contract ............................................................................................ CRS 1.15.9.1
GC/Works7 (1999) - Measured Term Contract ............................................................................................ CRS 1.15.10.1
GC/Works8 (1999) - Specialist Term Contract for Maintenance of Equipment ............................................. CRS 1.15.11.1
GC/Works9 (1999) - Operation, Repairs and Maintenance of Equipment for Mechanical and Electrical Plant, Equipment and Installations etc .................................................................................................................. CRS 1.15.12.1
Guide to the Appointment of Consultants and Contractors - Edition 2 ...................................................... INT 1.2
Handover .................................................................................................................................................. CRS 11.5.1
Health & Safety (CDM) ............................................................................................................................ LE 2.1.1
Identification ............................................................................................................................................. CST 2.1.1, CRS 2.1.1
Incentive Fees ........................................................................................................................................... CST 5.3
Individual Discipline Commissions ............................................................................................................ CST 1.5
Individual Project Management Type Commission .................................................................................... CST 1.4
Insolvency and Bankruptcy ........................................................................................................................ LE 1.18.1
Instructions/Notices To Tenderers/Tender Periods .................................................................................... CRS 4.2.1
Intellectual Property, Copyright, and Royalties Etc. .................................................................................... LE 2.5.1
Intelligent Customer Role and the Role of CAU/PACE, The ......................................................................... PS 1.2.1.1
Intelligent Customer Role .......................................................................................................................... PS 1.2.1.1
The Role of CAU/PACE ............................................................................................................................ PS 1.2.2.1
Late Tenders ............................................................................................................................................. CST 4.14.1, CRS 4.7.1
Law of Contract in England & Wales, Principles Covering the ................................................................ LE 1.1.1
Legal Advice ............................................................................................................................................. LE 1.2.1
Legal Contract Formation ............................................................................................................................ CST 6.1, CRS 6.1
Letter of Acceptance ................................................................................................................................... CST 6.3.1, CRS 6.3.1
Limitation .................................................................................................................................................. LE 1.9
Liquidated and Ascertained Damages ........................................................................................................... LE 2.8.1, CRS 11.1.1
Liquidation of a Nominated Sub-Contractor ............................................................................................... CRS 8.5