

Conciliation Procedure 2013

For use with the PWC Suite of Contracts

Approved by the Dispute Resolution Board of Engineers Ireland, 8 November 2013



Preamble

Conciliation has been the most widely used form of dispute resolution in the Irish construction industry since the early 1990s; it has been a very successful process and has led to the resolution of countless disputes. That earlier form of conciliation featured a non-binding recommendation and Engineers Ireland published a procedure for the process in 1994 which was subsequently revised and reissued as Conciliation Procedure 2000.

In 2007, the introduction of the PWC suite of contracts, provided for conciliation with a binding recommendation and at that time Engineers Ireland produced Conciliation Procedure 2007 for use with such contracts. The Dispute Resolution Board at Engineers Ireland recently decided to review that procedure in the light of current practice and also a number of changes in the PWC. The document has been extensively rewritten and thus it has been decided to issue the revised document as Conciliation Procedure 2013 and to withdraw the earlier 2007 version. The 2000 procedure is retained for disputes where parties have agreed on conciliation.

This document is being made freely available electronically on the Engineers Ireland website and parties to the PWC suite of contracts are encouraged to use it.

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November 2013

1. CONCILIATION PROCEDURE

- 1.1 This Conciliation Procedure 2013 shall apply where the Parties have agreed to its use under one of the forms of Public Works Contracts (as published by the Department of Public Expenditure and Reform).
- 1.2 This Procedure is to be interpreted and applied in the manner most conducive to the efficient conduct of the conciliation proceedings, with the primary objective of facilitating a timely and cost effective settlement of the dispute, ideally by agreement between the Parties.
- 1.3 The Conciliator shall be appointed by agreement of the Parties, or failing agreement, and unless otherwise provided for in the Contract, shall be appointed by the President or Vice President of Engineers Ireland. The Conciliator shall, as soon as possible, send to the Parties the proposed terms of the Conciliator's appointment and shall confirm in writing to the Parties the date of the Conciliator's appointment ("the date of appointment"). The Conciliator shall start the Conciliation as soon as possible after the date of appointment and shall use best endeavours to conclude the Conciliation as soon as possible and in any event within 42 days from the date of appointment, or within such other time as may be set out in the Contract or otherwise agreed between the Parties.
- 1.4 As soon as possible after the date of appointment, the Conciliator shall establish the timetable for the conduct of the conciliation, which will include the date and place for any conciliation meeting with the Parties. The timetable shall take account of any time periods set out in the Contract or otherwise agreed by the Parties. Subject to any other provisions contained in the Contract, the Conciliator may, entirely at the Conciliator's discretion, notify the parties of any further steps considered appropriate for the fair and efficient conduct of the conciliation. The Conciliator may meet and question the Parties and their representatives, together or separately; investigate the facts and circumstances of the dispute; visit the site; and request the

production of documents or the attendance of people whom the Conciliator considers could assist in any way. The Conciliator may conduct the proceedings in any way that the Conciliator wishes and may obtain legal or technical advice, the cost of which shall be met by the Parties in accordance with Paragraph 1.15 or as may be agreed by the Parties and the Conciliator.

- 1.5 Each Party shall, following the appointment of the Conciliator, and within the time agreed by the parties or set by the Conciliator, taking account of the periods set out in the Contract, send to the Conciliator and to the other Party brief details of the dispute, setting out the facts and its submissions as to the respective rights, obligations and liabilities of the Parties arising under the Contract in relation to the dispute, together with the financial consequences of the same, and the remedy(ies) which are sought. The Parties shall also provide the Conciliator and the other Party with details of the point(s) of contact to whom communications relating to the Conciliation are to be sent. The Parties and the Conciliator shall agree the method of delivery of documents required under this Procedure, including delivery of the Recommendation. If agreement cannot be reached, delivery of documents shall be in accordance with the Contract.
- 1.6 The Parties shall co-operate in good faith with the Conciliator and, in particular, shall comply promptly with requests by the Conciliator to submit written materials, provide documents and other information, provide access to site and attend meetings.
- 1.7 At least three working days before any conciliation meeting, each Party shall inform the Conciliator and the other Party in writing of the name of its representative(s) for the Conciliation and the names of any other persons who will attend the Conciliation Meeting. Each Party shall ensure that their attendees at the Conciliation Meeting include the person or persons with authority to settle the dispute.
- 1.8 The Conciliator may consider and discuss such solutions to the dispute as the

Conciliator thinks appropriate or as may be suggested by any Party. The Conciliator shall observe and maintain the confidentiality of particular information which the Conciliator is given by either Party privately, and may disclose it only with the express permission of that Party. The Conciliator shall try to assist the Parties to resolve the dispute in any way acceptable to them.

- 1.9 The Parties may agree that additional claims or disputes be joined in the Conciliation.
- 1.10 If, in the opinion of the Conciliator, the resolution of the dispute would be assisted by further investigation by any Party or by the Conciliator, or by an interim agreement, including some action by any Party, then the Conciliator shall, with the agreement of the Parties, so notify the Parties and/or adjourn the proceedings as may be appropriate.
- 1.11 If settlement is achieved of the whole or of any part of the matters in dispute, the Conciliator may, if so requested by the Parties, assist the Parties to prepare an agreement incorporating the terms of the settlement. Once signed by the Parties, this agreement shall be final and binding upon them with respect to the matters covered by the agreement.
- 1.12 If, in the opinion of the Parties or the Conciliator, it is unlikely that the Parties will reach an agreed settlement of their disputes, the Conciliator shall advise the Parties accordingly and shall prepare the Recommendation, provided always that the Recommendation will be issued within 42 days from the date of appointment or such other period as the Contract shall provide or as the Parties have agreed. The Recommendation shall not be deemed issued until it has been delivered to the Parties.
- 1.13 The Conciliator shall issue the Recommendation to the Parties simultaneously. The Recommendation shall have the status set out in the Contract and the Parties shall

comply with the Recommendation in accordance with the requirements of the Contract, save where otherwise agreed by the Parties.

- 1.14 The Recommendation shall state the Conciliator's opinion as to the resolution of the dispute, based on the Parties' rights and obligations under the Contract. The Conciliator shall not be required to provide an explanation for the Recommendation, unless requested to do so by both Parties and agreed by the Conciliator. If an explanation of the Recommendation is requested and agreed by the Conciliator, this explanation shall be issued as a separate document, within 7 days of date of issue of the Recommendation. The Parties agree that any separate document setting out the explanation for the Recommendation shall remain confidential.
- 1.15 When a settlement has been reached or when the Conciliator has prepared the Recommendation or at any earlier date at the discretion of the Conciliator, the Conciliator shall notify the Parties in writing and send them an account of the fees and disbursements incurred by the Conciliator in the conduct of the Conciliation. Unless otherwise agreed between them, the Parties shall be jointly and severally liable for the Conciliator's fees and all costs and expenses that may be incurred by the Conciliator in the conduct of the conciliation.
- 1.16 Each Party shall be responsible for its own costs and expenses incurred in the conciliation.
- 1.17 The Conciliator shall not be appointed arbitrator nor be retained or act as advocate or as representative in any subsequent arbitration or litigation between the Parties whether arising out of the dispute, difference, or otherwise arising out of the same Contract unless the Parties otherwise agree in writing. No Party shall be entitled to call the Conciliator as a witness in any subsequent arbitration or litigation concerning the subject matter of the Conciliation.
- 1.18 The Parties and the Conciliator shall at all times maintain the confidentiality of the

process and shall endeavor to ensure that anyone acting on their behalf or through them shall do likewise. Unless otherwise agreed by the Parties, all documents prepared for or produced in the Conciliation shall be confidential and privileged and shall not be admissible in evidence in any subsequent dispute resolution process or litigation, save where such documents are otherwise admissible or are required by law to be produced in any court or arbitration proceedings. Notwithstanding this clause 1.18, the Parties shall be entitled to disclose any settlement agreement entered into insofar as is necessary to give effect to or otherwise enforce the same.

- 1.19 The Parties shall jointly and severally and on behalf of their heirs and successors and any other person claiming through them save harmless and indemnify the Conciliator against any claims, demands, proceedings, damages, costs, charges and expenses whatsoever which may arise in connection with or arising out of the Conciliation or the way in which it is or has been conducted and shall not themselves bring any such claims against the Conciliator. The Conciliator shall not be liable to the Parties or any person claiming through them for any matter arising out of or in connection with the Conciliation or the way in which it was conducted and the Parties shall not bring any such claims against the Conciliator. Engineers Ireland, together with the President, its servants and agents, shall not be liable for any act or omission in connection with any appointment made or any Conciliation conducted under this Procedure.

GUIDE TO CONCILIATION PROCEDURE 2013

- 2.1 *This Guide does not form part of the Procedure but is included to assist the parties and the Conciliator by giving some background to the Procedure and by making some suggestions on how it should be used.*
- 2.2 *This document, originally published as Conciliation Procedure 2007, has been revised in the light of its use in the interim and also a number of changes to the PWC Suite of Contracts as published by the Department of Expenditure and Public Reform. In doing so every effort has been made to avoid any conflict between the Procedure and clause 13.1 so that the Procedure serves to amplify and clarify certain aspects of the process.*
- 2.3 *Conciliation as provided for in clause 13.1 is a hybrid process comprised of a facilitative element, similar to mediation, together with an adjudicative element, similar to adjudication. In the first instance, the Conciliator will seek to assist the parties in resolving the issues in dispute by agreement; this is essentially assisted negotiation and may lead to partial or full resolution of the dispute. The parties are not bound until any such agreement is set out in writing and signed by them.*
- 2.4 *If it is not possible for the parties to reach agreement, the conciliator is obliged to make a Recommendation concerning the matters at issue and that Recommendation must be based on the rights and obligations of the parties under the Contract.*
- 2.5 *The Recommendation is provided to the parties for their consideration and may be rejected by means of a Notice of Dissatisfaction at any time during a period of 42 days after receipt of the Recommendation. If the Recommendation is accepted by the parties, in other words, there is no Notice of Dissatisfaction, the Recommendation becomes final and binding on the parties. Even if the Recommendation is rejected, in other words a Notice of Dissatisfaction is issued by one or both of the parties within the 42 days, the Recommendation is binding in the interim, subject to final resolution in*

Arbitration.

- 2.6 *The Recommendation should set out the background to the dispute, how the Conciliator was appointed, the date of appointment, what steps were taken in the Conciliation, what issues were dealt with and finally, what the Conciliator recommends in relation to the issues. It is of the utmost importance that the Recommendation is clear, unambiguous and ultimately capable of enforcement.*
- 2.7 *It is considered preferable that the Recommendation does not include any explanation for what the Conciliator has recommended. If, however, such an explanation is to be provided, it should be set out in a separate document. "Reasons" should not, generally, be provided within the Recommendation.*
- 2.8 *The Procedure provides that the parties and the Conciliator must agree if an explanation for the Recommendation is to be provided and the Conciliator is advised to consider carefully before agreeing to this. This is because in certain circumstances the explanation or basis for the Recommendation may cause difficulties for a party, even where the provisions of the Recommendation on its own would not. The Conciliator should approach this issue on the basis of doing what is felt most likely to lead to acceptance of the Recommendation by both parties.*
- 2.9 *This form of Conciliation is time constrained, in other words the matter must be resolved by agreement or alternatively the Conciliator must have issued a Recommendation within 42 days of the Conciliator's appointment. The Conciliator is bound by this time period unless the parties agree to extend it and the Procedure seeks to clarify the date of the Conciliator's appointment and when the clock starts to run.*
- 2.10 *The Procedure expands on clause 13.1 to provide details on the Conciliation Meeting and how the Conciliator relates to the parties during the facilitative element. While attempting to assist the parties in reaching agreement, the Conciliator's job is to*

explore the parties' interests as well as their strengths, weaknesses and needs, and the Conciliator should seek to identify possible areas of accommodation or compromise. In doing so, the parties and the Conciliator enjoy considerable flexibility and are free to explore options which might not be available to the Employer's Representative or indeed in the Recommendation or in any subsequent process.

2.11 The Conciliation Meeting is intended to be informal with the parties encouraged to exchange information, rather than engage in cross examination or other procedures adopted in Arbitration or litigation. The Conciliator is permitted to communicate privately and separately with each party but does so on the basis that any information provided to the Conciliator in such circumstances may only be revealed to the other party with the express agreement of the first party.

2.12 The entire process is carried out on a confidential and without prejudice basis. Thus, anything disclosed by a party during the process, or stated or written by the Conciliator to the parties in the course of the Conciliation is the subject of without prejudice privilege, and may not be used or referred to by the other party in any subsequent proceedings, arbitration or litigation, unless the document would otherwise be subject to disclosure in those proceedings or both parties agree. This is intended to facilitate a more open exchange between the parties and allow fuller exploration of settlement possibilities.