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# The Public Works Contract (PWC) The role of Employers Representative

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Peter O'Malley

**Peter O'Malley Dispute Resolution**

# Who am I?

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## **Presentation content:**

- Commenced studies in Dublin, qualified as an architect and urban designer
- Ex-founding and senior partner of 'LOM architecture and design', an AJ top 100 practice based in London and previously short-listed for AJ Practice of the Year.
- Projects in Europe, Middle-East, West-Africa, Australia and the Caribbean
- Worked in Common law, Civil law and Shariah law jurisdictions
- Various qualifications in Construction Law from Ireland and the UK
- Now primarily involved in dispute avoidance and resolution in Ireland and the UK
- Member of the Ministerial Panel of Adjudicators under the Construction Contracts Act 2013
- Various peer-reviewed papers and articles published on construction law
- Immediate past-chair of the Chartered Institute of Arbitrators (Ciarb) Ireland Branch
- Will take up position as a Trustee for Ciarb worldwide in 2025

# The Public Works Contract – The role of Employers Representative (ER)

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## **Presentation content:**

- Consider the nature of the client
- The Public Works Contract (PWC)
- Approach to the role
- Overview of the ER role
- The powers and duties of the ER as set out in the PWC
- The Tender and Schedule – limitations on authority
- Conditions of Engagement - COE1
- A role with two hats - Administrative
- A role with two hats - Determinative
- Common issues
- Key takeaways

## Consider the nature of the client

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- Will often be formed by a committee within a state or semi-state organisation, agency or public authority with accountability to a Government Department.
- Will have a high aversion to risk or taking immediate decisions often with limited or no autonomy to make commercial decisions.
- Decisions will usually necessitate consultation with a range of stakeholders and will often be protracted.
- The committee, which can be organisationally complex, may only be in place for the project.
- Committee members often lack experience in the construction process and will rarely have an extensive knowledge of the PWC Contract.
- The project will not be a career priority and there will be discomfort with adversarial situations.



# The Public Works Contract (PWC)

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The guiding principles which underpin the Public Works Contract are:

- To ensure as far as practicable that the accepted tender prices and the final outturn costs are the same; and
- To allocate risk so that there is optimal transfer of risk to the Contractor – There is a considerable body of opinion that believes there is an excessive transfer of risk away from the Employer.
- The PWC is an evolving contract with numerous past amendments.
- Check the version – current issue is PW-CF1 v.2.8 1 May 2024.
- Conditions extend to 61 pages and the Schedule to 29 pages, compared to the RIAI Blue form which is 50 pages.
- It is prescriptive and complex in several sections, clause 9.4.3 Programme Contingency and clause 15 Price Variation as examples.
- Although the ER is not a party to the contract, the role is considered to be a ‘creature of the contract’ where the intention is that the parties are bound by the orders and decisions of the ER.

PUBLIC WORKS CONTRACT FOR BUILDING WORKS DESIGNED BY THE EMPLOYER

**Public Works Contract**  
**for**  
**BUILDING WORKS**  
**designed by**  
**THE EMPLOYER**

Office of Government Procurement



## Approach to the role

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- The role of the Employers Representative in the Public Works Contract (PWC) requires a change of 'mind set' from that of the Design Architect.
- The Public Works Contract requires an organised approach to management and record keeping to fulfil the obligations of administering of the contract.
- The role requires that you treat both parties even-handedly, in a fair minded and unbiased manner.
- The role also requires an anticipatory approach to identifying issues that could escalate to become disputes – remember that as the ER you have the opportunity to resolve issues before they get out of control.
- There are often conflicting pressures between the Employer and Contractor, you should not yield to pressure from either.





# Overview of the ER role

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The Employer's Representative (ER) is a person appointed to administer the Contract on behalf of the Employer to:

- Represent the Employer's interests.
- In most cases this is the same person who acts as Design Team Leader / Lead Consultant during the Design Stage.
- The ER can be appointed from within the Employer's organisation; or the role may be filled by a consultant architect, engineer, surveyor or other person capable of carrying out the required responsibilities.
- The ER is the person primarily responsible for liaison with the Contractor. Client requested changes are not permitted (whether within the ER's authority or not) without prior Department authorisation.
- The limits of the ER's authority are stated in Part 1A of the schedule to the PWC Contract CF-1.

Source: Capital Works Management Framework Guidance Note GN 31.





# The powers and duties of the ER as set out in the PWC

Clause	Powers	Duties
1.1	Issue Change Order including imposition or removal of constraints on how the Works are to be executed.	
1.1	Determine that the Contactor has reasonable grounds for not rectifying minor defects.	
4.1.3	Request clarifications, consultations, workshops, exchange of information or expertise.	
4.2.3	Request removal of the Contractor's Representative or Supervisor for misconduct, negligence or incompetence.	
4.3.2	Issue instructions outside of limitations stated in Schedule Part I	
4.3.3	Delegate authority to named representatives.	Notify the Contractor of such delegation and any changes to the delegation.
4.4.1	Give the Contractor instructions, directions, change orders or make objections.	
4.4.2	Give the Contractor and Employer opinions, assessments, determinations, certificates and other communications the Employer's Representative considers appropriate.	
4.5.2 & Clause 10		Determine whether or not an instruction is a change order.
4.5.3		Not give a change order to do work after Substantial Completion except in the case of defects or work that was to be done after Substantial Completion.

Clause	Powers	Duties
4.5.4	Give an instruction necessary for completion of Works	Give a change order where physically impossible or contrary to Legal Requirements to complete Works in accordance with Works Requirements.
4.5.5		Issue instructions in writing. Confirm verbal instructions in writing as soon as practicable.
4.6.2		Consider any changes to the Works Proposals.
4.7	Object to a submission of the Contractor giving reasons; request additional information; alter or withdraw an objection	
4.8.3	Determine reduction in Contract Sum and adjustment to the Date of Substantial Completion arising from a VE proposal.	Communicate the Employer's position on any VE proposal.
4.9.1	Waive content of a programme.	
4.9.3	Request a revised programme	
4.10.1	Dictate format of progress reports	
4.10.2	Waive Content of progress reports.	
4.12	Access to Contract Documents	
4.13.6	Request information from Contractor	
4.15.1	Schedule meetings with the Contractor and others;	Consult with the Contractor and act reasonably in the timing and location of meetings.
4.15.2		Issue minutes of meetings within 5 working days

Clause	Powers	Duties
4.16	Notify the Contractor of secret or confidential matters.	
5.4.5	Request details on the termination or repudiation of a contract between the Contractor and a Specialist.	
5.4.6	Object to the proposed replacement of a Specialist.	
5.6	Direct removal of workpersons.	
7.5.1(1)	Authorise personnel to be on Site.	
7.5.2		Comply with reasonable safety rules notified by the Contractor.
7.8	Issue instruction regarding archaeological objects and human remains.	
7.11(2)	Waive working times requirements set out in the Works Requirements.	
8.2	Monitor, audit or spot check the contractors QA procedures.	
8.3	Gain access, inspect, observe the Works or anywhere that Works Items are manufactured, stores, extracted, tested, etc.	
8.3.2	Request test certificates or other information on the mode, place, time of manufacture, or performance capabilities or source of supply of a Works Item	
8.3.3	Inspect Works or Works Items	
8.4.1	Agree the location and timing of tests; attend tests; request test results.	

Source: Department of Finance, Training Manual TM-CC, 2008



# The powers and duties of the ER as set out in the PWC

Clause	Powers	Duties
8.4.2	Request repeat tests where they have failed.	
8.4.3	Request the carrying out of further tests.	
8.5	Direct the Contractor to search for defects; give direction on defects; accept a defect with the Employer's consent and determine the reduction in value of the Works; notify the Contractor that the Employer will not accept defect.  Reject the Works and/or a part thereof.	
8.6	Instruct the Contractor to rectify defects; extend defects period and issue an interim certificate to part release retention monies.	
8.7		Issue Defects Certificate
9.1	Reduce the notice period of the Starting Date	
9.2	Suspend the Works; instruct the Contractor to resume the Works	Examine Works and Works Items affected by a suspension; determine the extension of time and the adjustment to the Contract Sum for unavoidable deterioration of the Works or Works Items arising from the suspension.
9.3 and 10.5	Revise any determination of extension of time previously given.	Determine the Contractor's entitlement to extensions of time, if any.
9.4.6		Notify the Employer and Contractor of the amount of programme contingency used.
9.5	Agree reductions in the contract period for omissions.	

Clause	Powers	Duties
9.6.2		Issue Certificate of Substantial Completion or reasons for not issuing same.
9.7	Issue notice of taking over of part of the Works.	Certify contract value of works to be taken over.
10.3	Request further information on Contractor's claims; direct the Contractor to maintain records.	
10.4	Request proposals on Proposed Instructions.	
10.5		Respond within 20 days of receiving claim or proposals in respect of a proposed instruction.  In respect of claims or proposed instructions  (1) Direct the Contractor to provide additional information or revised proposals (1 shot only at this) or (2) Notify the Employer and Contractor that the proposals are agreed or (3) Determine the adjustment to the Contract Sum and the extent of any delay or extension of time or (4) Notify the Contractor that the proposed instruction will not be given.
10.6	Direct that additional work be valued on a time and materials basis	
10.7		Determine which rate for delay shall be used where a number of rates are provided.
10.9		Give notice of Employer's Claims. Determine Employer's claims.
11.1	Value unfixed Work Items for interim certificates	Issue payment certificates

Clause	Powers	Duties
11.3	Agree date for provision of retention bond by the Contractor.	
11.5		Issue penultimate payment certificate within 3 months of receipt of the Contractors statement.  Issue final payment certificate within 3 months after Defects Certificate
12.2	Direct the Contractor to assign benefit of any sub-contract.	Determine termination value in the event of default termination;  Issue certificate setting out the termination amount
12.6.4		Determine amount due to Contractor within 10 working days

But there are further duties and obligations...

# The Tender and Schedule – limitations on authority

- Maximum adjustment to the Contract Sum for a single Change Order: €  unless approved by the Employer.
- Maximum cumulative value of adjustments to the Contract Sum for Change Orders in any 3-month period: €  unless approved by the Employer.
- The Employer's Representative *shall not* make a Change Order causing or contributing to a reduction in safety, scope, quality or usefulness of the Works without the Employer's approval.
- The Employer *will decide* whether to accept or reject a value engineering proposal.
- The Employer *must agree* to reduce retention if the Defects Period is extended.
- The Employer's Representative *is to consult* with the Employer in relation to any adjustment to the Contract Sum before determining the adjustment.
- Where the Employer has appointed a quantity surveyor, the Employer's Representative *is to consult* with the quantity surveyor in relation to any adjustments to the Contract Sum before determining the adjustment.
- The Employer's Representative *must not* waive any of the Employer's rights or the Contractor's obligations under the Contract including without limitation sub-clause 10.3.

**Tender and Schedule**  
for  
The Project   
using the  
Public Works Contract for **BUILDING WORKS** Designed by the EMPLOYER

# Conditions of Engagement – COE1

- The Conditions of Engagement is a standard form, current version is COE-1 v-2i.
- Consider your obligations in the COE carefully, e.g. Clause 5, Prolongation:  
*“Neither party is liable to the other for delay due to Special circumstances not due to its own breach of this Contract. Special circumstances are –  
war, hostilities, civil commotion;  
industrial disputes;  
delay to the Project construction contract.”*
- Also be aware of additional provisions:  
*“The **Design Team** (individually and collectively) **are responsible for any change orders** arising from incomplete design and/or inadequate detailing (the standard required is that of reasonable skill and care) **which either generate a compensation event and/or cause delays.***  
  
*For design where the standard of reasonable skill and care was not applied, the **Client reserves the right to recoup such costs (including consequential costs arising from such delays)** from the Design Team and/or their Professional Indemnity insurance.”*

Standard Conditions of Engagement  
for Consultancy Services (Technical)

between

[Click or tap here to enter text.]  
Client

and

[Click or tap here to enter text.]  
Consultant

in respect of

[Click or tap here to enter text.]  
Project

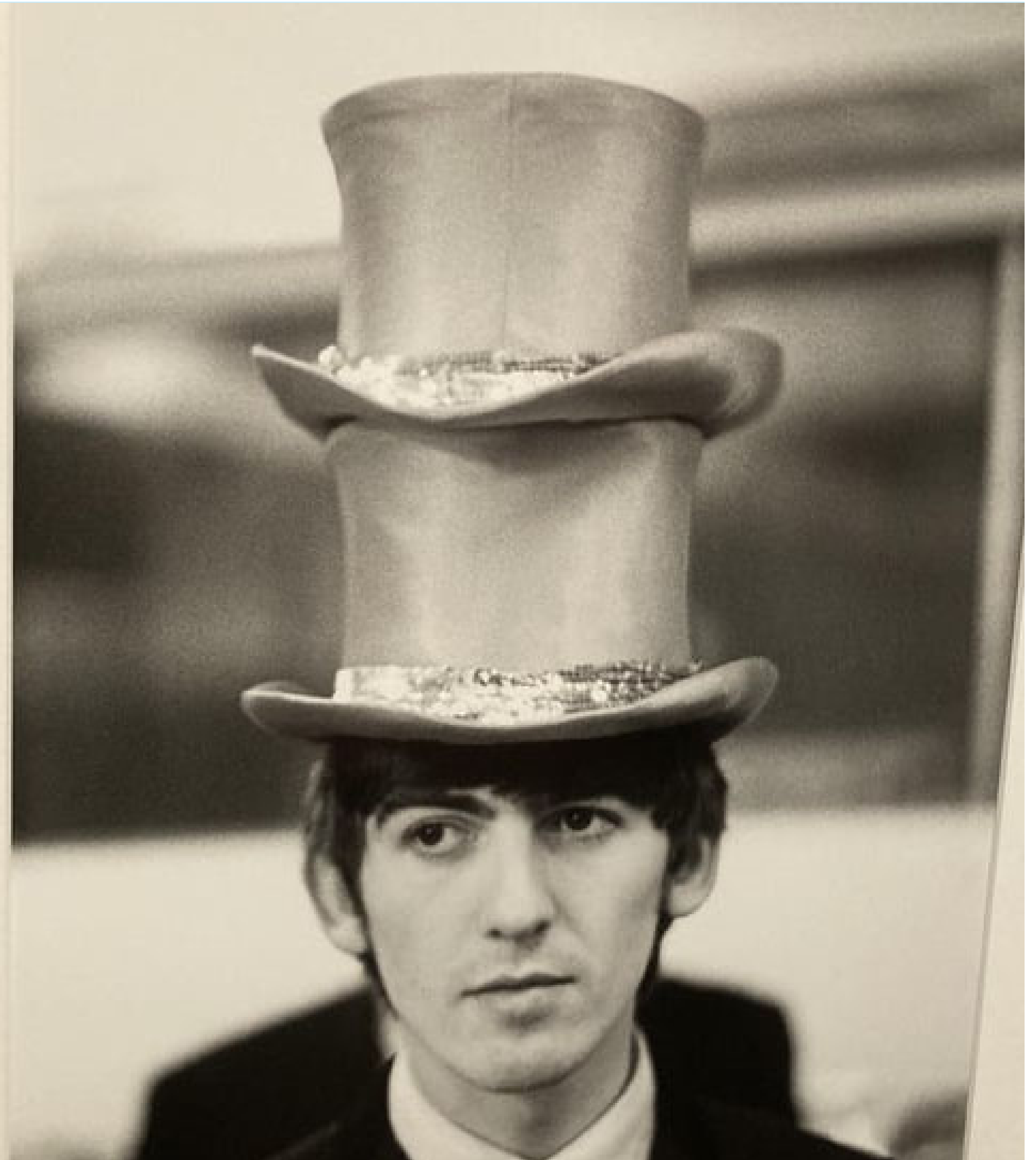


## A role with two hats - Administrative

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The Employer's Representative (ER) has a dual responsibility - acting for the employer and making decisions between the Employer and the Contractor, administration includes:

- Monitoring the progress of the works in respect of:
  - Construction programme.
  - Quality matters.
  - Compliance with Works Requirements.
  - Compliance with Statutory Consents.
- Notifying of changes to delegation, clause 4.3.3
- Issuing instructions in the form of Directions or Change Orders, clauses 4.5.2 and 10.
- Confirming verbal instructions in writing, clause 4.5.5.
- Scheduling and chairing meetings, clause 4.15.1.
- Issuing meeting minutes within 5 working days, clause 5.15.2.
- Notifying amount of programme contingency, clause 9.4.6.



## A role with two hats - Determinative

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On various important matters the ER is required to 'exercise judgment in a fair and unbiased manner,' despite being in the employ of the Employer.

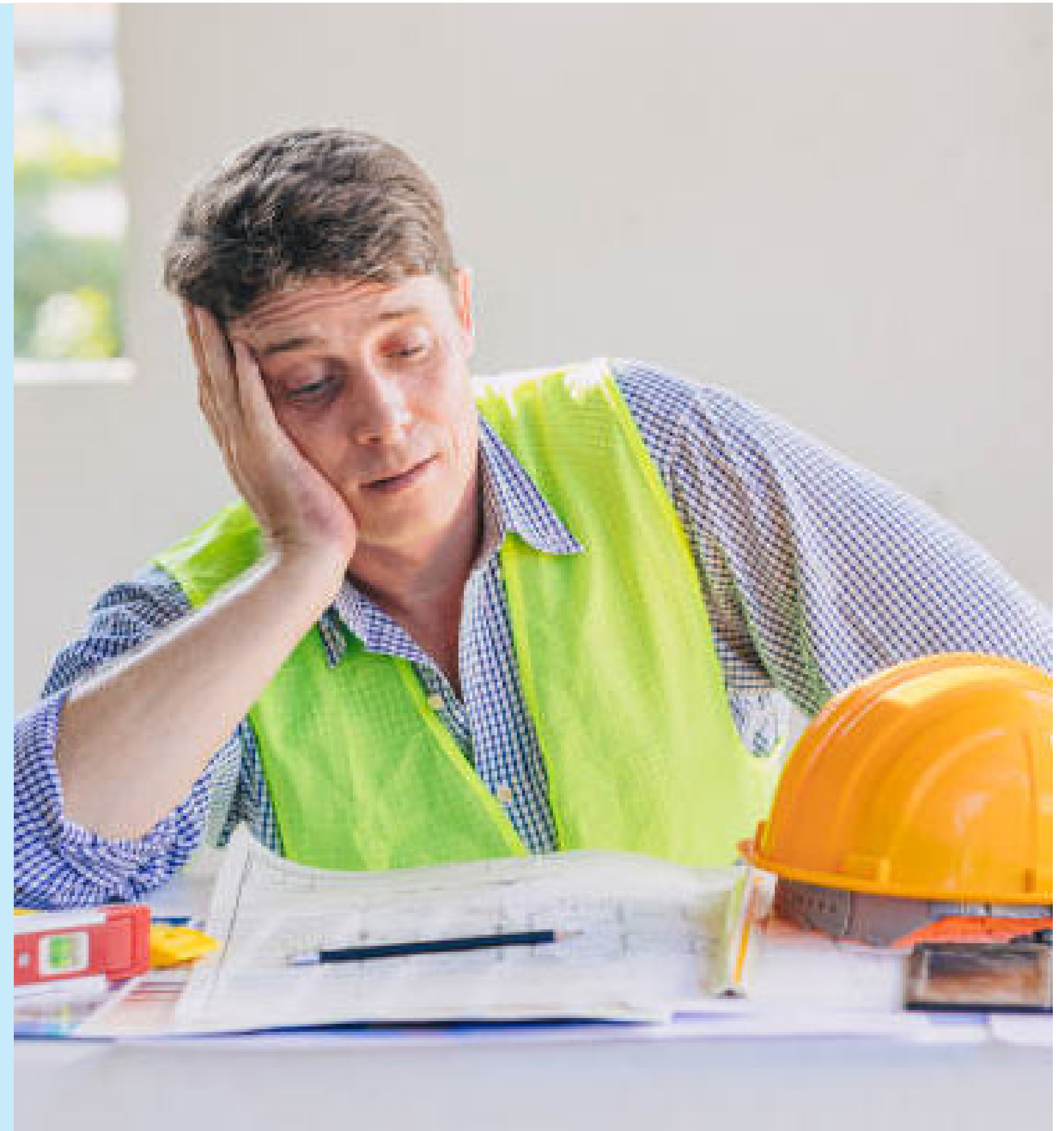
- Considering changes to works proposals, clause 4.6.2.
- Issuing of Certificates.
  - Interim payments.
  - Defects, clause 8.7.
  - Substantial Completion, clause 9.6.2.
  - Notice of taking over part of the works, clause 9.7.
  - Penultimate interim payment, clause 11.5.
  - Final payment, clause 11.5.
  - Determining termination amount, clause 12.2.
- Determining any extension of time for a Delay event, clauses 9.3, 10.5 and Schedule Part 1K.
- Determining adjustment to the Contract sum for a Compensation event, clause 10.5, Schedule Part 1K.
- Determining Employers claims, clause 10.9.



## Common issues

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- Lack of appreciation of the management time required to correctly administer the Public Works Contract.
- Insufficient familiarity with some of the most important clauses.
  - Clause 4, Management
  - Clause 8, Quality, Testing and Defects
  - Clause 9, Time and Completion
  - Clause 10, Claims and Adjustments
  - Clause 11, Payment
- Inadequate record keeping.
- Remaining design work not being timely developed.
- Lack of understanding of wider obligations.
- Being overwhelmed, don't put your head in the sand.
- Lack of early addressing of problems, not reporting.
- Diminished fee resource, can only get worse.
- Office pressure to move on to other projects.





## Key Takeaways

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- 1:** The Public Works Contract, and its associated documents, give rise to extensive obligations.
- 2:** The Public Works Contract is demanding to correctly administer.
- 3:** Take the necessary time at the start to fully review and understand the contract documents.
- 4:** The client body is likely to demand and approach of involved and proactive management.
- 5:** You need to start as you mean to continue, it needs a change of 'mind set' as an architect.
- 6:** Always be vigilant to any early signs of difficulty and be proactive in reporting and resolving.

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Thank you

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