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## Commercial

# Contract Administration Manual Works (CAM)

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8.0	See below:	
Section number	Revised Y/N	Status / Description of Changes
Various	Y	Amended templates to reflect change of address (now 5 Endeavour Square) and email addresses
0	Y	Change of Supervisor (now Head of Engineering Management)
2	Y	Supply chain team
3(1)	Y	Further guidance on Takeover – This includes a mandatory requirement for the PM to consult CRL Commercial and CRL Legal (General Counsel) on the wording of the Takeover certificate.
Various	Y	CCSC replaced by STAR and Investment Committee
Various	Y	Standardisation of terms <i>Employer, CEC</i>
0	Y	Reference to Supplemental Agreements
8	Y	Insurance contacts (now TfL Group Claims Manager)
5	Y	Update to financial information (accounts payable)
Various	Y	Title changes to reflect organisation changes – September 2020
W	Y	Update to Disputes and relationship with governance committees

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Please note:- The Reference Documents and Standards/Forms and Templates tables can be found at the end of each Section of the CAM rather than the end.

## **0 Introduction**

This section of the Manual explains the overarching purpose of the Manual and includes key information for commencing and governing the contract.

This section contains Crossrail's Contract Administration Policy that is intended to guide this Manual and those responsible for managing contracts on Crossrail.

This introduction is split into the following sections:

- Scope and purpose of the Manual (0.1)
- The CRL organisational arrangements (0.2)
- Crossrail's Contract Administration Policy (0.3)
- Governance Overlay (0.4)

### **0.1 Scope and purpose of the Manual**

This Manual is intended to be applied to all Crossrail NEC3 based main works contracts.

It has been written around the CRL NEC3 Main Civils Contract Target contract with activity schedule. Where works contracts have been based upon other NEC3 forms or main options (for example Short Form, or novated Subcontracts), this Manual applies in its intent although some interpretation may be required for its application.

Similarly, where contracts have been amended by Supplemental Agreement, the principles in this manual shall continue to apply. Specific guidance documents may be issued from time to time.

Sections are included for all key processes under the contract however this Manual is in no way intended to supersede or take precedence over the conditions of the contracts. Contracts should be read alongside this Manual and where ambiguity arises clarification should be sought from the relevant functional lead within Crossrail.

This Manual primarily instructs the *Project Manager*, his delegates and those involved in supporting them in the administration of the contract **how to** close out their actions under the contract. It includes processes, forms and templates that shall be used to administer contracts.

The Manual helps to ensure that:

- All contracts are administered in accordance with Crossrail's Contract Administration Policy;
- All contracts are administered in a systematic, controlled and consistent manner across the Project;
- Each contract is administered in accordance with its *conditions of contract*;
- The contracting parties behave in a way which is aligned to the success of the Project, and
- Risks associated with administering the contracts are as low as is practically possible.
- Contract Administration activities are integrated with other departmental processes.

It would be of benefit for readers of this Manual that they also refer to other NEC reference material including:

- the NEC guidance notes and flow charts,
- the NEC managing reality, and,

- the NEC User Group material.

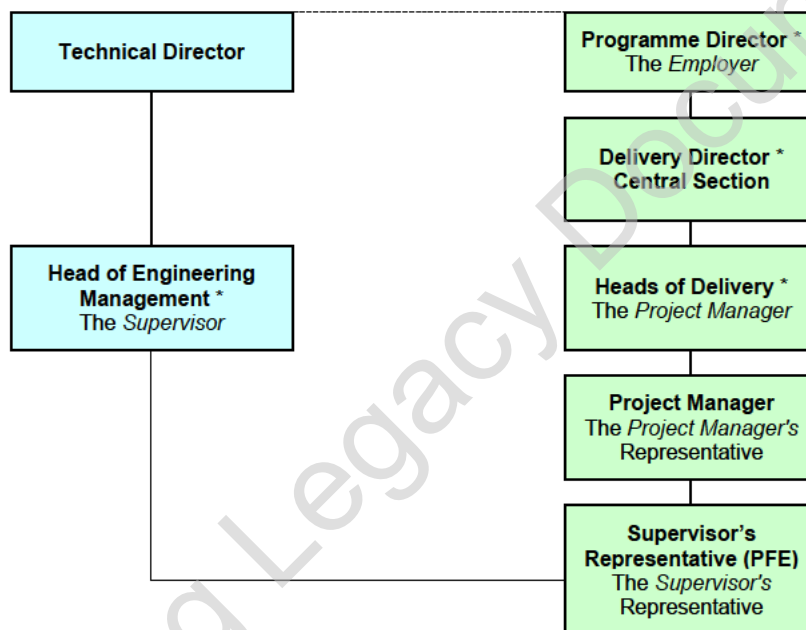
CRL will seek to make such publication available to the project delivery teams. It must however be taken in consideration that any such publications are for guidance only.

**This Manual is for INTERNAL USE ONLY within the Crossrail Team.**

It should not be disclosed voluntarily to *Contractors* or External Parties. Contractors do not need to be aware of the internal governance processes relating to the actions of the *Employer*, the *Project Manager*, the *Project Manager's Representative*, *Supervisor* and the *Supervisor's Representative* or be concerned about the authorisation of any action or decision of the above.

## 0.2 The CRL Organisational Arrangements

CRL have consistently applied the contractual roles of individuals to organisational posts as follows:



- Position titles are subject to change

The respective Head of Delivery is the named *Project Manager* under the Contracts who will delegate his actions to the *Project Manager's Representative* to manage his actions under the Contracts.

Likewise, the Head of Engineering Management is the named *Supervisor* under the Contracts who will delegate his actions to the *Supervisor's Representative* to manage his actions under the Contract.

The Supervisor's Representative may at their discretion delegate day to day duties such as watching a test; or carrying out inspections. However, they cannot delegate their authority to issue Supervisor's Instructions, Notices or Certificates to the Contractor.

In this manual, all references to the *Project Manager* include the *Project Manager's Representative* and references to the *Supervisor* include the *Supervisor's Representative*; where the context permits.

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### **0.3 The Contract Administration Policy**

This document sets out Crossrail's Contract Administration Policy (CAP) for key aspects that are essential for the successful operation of the main civils contracts.

Crossrail have adopted the NEC3 contract with minimal Crossrail specific amendments; references to the CRL NEC3 contract in this policy refer to CRL's NEC3 Main Civils Contract (Target contract with activity schedule).

Crossrail has based the main contract conditions upon a number of policies that have been endorsed by the Crossrail Executive. It is important that these policies are carried through into the implementation phase of the project. In some instances, these policies require a further level of explanation to allow practical application.

This Contract Administration Policy therefore explains and expands upon the key contracting policies with the expectation that these will guide the contract administration procedures and those involved in the management of the contracts. It should be read alongside Crossrail's Procurement Policy document.

This policy does not set out how the CRL NEC3 contract operates in detail nor serve as a guide to the interpretation of the Contracts.

#### **CAP1 Crossrail promotes collaborative working with *Contractors* supported by co-location wherever possible**

*Contract Context:*

The CRL NEC3 contract supports Crossrail's approach to delivering contracts based on collaborative working supported by fair allocation of risk.

*Policy Detail:*

CRL anticipates that the administration and management of the contracts will be based upon practical collaborative arrangements with *Contractors* that continue to recognise the contractual responsibilities of the parties. For this purpose, CRL will promote both the office co-location of the *Project Managers* and their team with the *Contractor's* team wherever possible and where appropriate integrated seating arrangements for some disciplines.

#### **CAP2 Crossrail will provide efficient electronic communication tools that will be used by the *Project Manager* and the *Contractor* for all contract communications<sup>1</sup>**

*Contract Context:*

All instructions, certificates, submissions, proposals records, acceptances, notifications, replies and other communications must be in a form that can be read, copied and recorded or be available on a hosted web server. Unless otherwise stated in the contract, all communications must be replied to within 14 days. Refer to Communications – CRL NEC3 Contract Clause 13.

*Policy Detail:*

<sup>1</sup> Note that the only exception is for the notification of a dispute that must be notified in hard copy only.

Effective communication methods are essential for the correct operation of the CRL NEC3 Contracts. CRL have mandated the use of eB for use by the *Employer*, *Project Manager*, *Supervisor* and *Contractors* as the electronic communication tool for all documents. CRL will establish suitable standard “work flows” in eB to manage the common NEC3 processes e.g. compensation events.

**CAP3** Crossrail encourage the appropriate use of Early Warnings by the *Contractor* and *Project Manager* as a tool to manage project risk

*Contract Context:*

The CRL NEC3 contract requires the *Contractor* and the *Project Manager* to give an early warning notice as soon as either becomes aware of any matter which could increase the total of the Prices<sup>2</sup> or delay Completion or a Key Date (amongst other items). In addition, the *Contractor* or *Project Manager* may give an early warning of any other matter which could increase the total cost. The *Project Manager* is required to maintain a Risk Register; the contract also has a process that includes holding risk reduction meetings, seeking solutions and deciding on actions. Refer to Contract clause 16.

*Policy Detail:*

A collaborative approach to delivering the contract is significantly assisted by the early warning process and the joint management of risk provided these processes are operated correctly. It should be noted that an early warning notice does not give any entitlement to a change in the Prices, the Completion Date or a Key Date. The raising of early warning notices by the *Project Manager* or the *Contractor* and risk reduction meetings are to be positively encouraged and should be seen as an important process in the overall success of the contract. Early warnings should be used to promote a “no surprises” approach for all parties.

**CAP4** The *Project Manager* should do all that is reasonably possible to ensure that that there is an Accepted Programme at all times

*Contract Context:*

If a programme is not submitted as part of the tender and included within the initial contract, then the *Contractor* must submit a first programme for acceptance within 4 weeks of the Contract Date. Following this the *Contractor* submits a revised programme to the *Project Manager* for acceptance every 4 weeks. The conditions of contract lay out the information required to be included within programmes (refer to CRL NEC3 Contract clause 31.2), this is added to within the Works Information (Volume 2B Part 14).

The emphasis of having an Accepted Programme is reflected within the payment provisions where one quarter of the Price of the Work Done to Date is withheld where no programme is identified in the Contract Data and the *Contractor* has not submitted a first programme for acceptance. Additionally, if the *Contractor* does not submit revised programmes within the timescales required five percent of the Price of Work Done to Date is retained until a revised programme is submitted. Refer to CRL NEC3 Contract clause 50.3.

Accepting a programme does not amend the contract Completion Date or any Key Date however the Accepted Programme is used when assessing the effect of any compensation event. Without an Accepted Programme effective operation of the compensation event mechanism can be problematic as the *Project Manager* has to make an assessment based upon their own programme – refer to CRL NEC3 Contract clause 64.2.

<sup>2</sup> The “total of the Prices” is often known as the Target Price.

*Policy Detail:*

Crossrail will endeavour to include an Accepted Programme within the contract at execution wherever possible. Where this is not done the submission and acceptance of a programme must be seen as a priority. The subsequent updating and acceptance procedure included within the CRL NEC3 contract must be strictly adhered to and must not be neglected. A robust but practical approach should be taken to programme management; the consequences and risk of not having an Accepted Programme can be greater than accepting a programme that does not strictly contain the level of detail specified in the Works Information.

**CAP5** The *Project Manager* should use both the Target Price mechanism and Defined Cost to incentivise *Contractors* to best manage and minimise the cost

*Contract Context:*

For the main civils works contracts Crossrail has used the NEC main option C target contract with a 50/50 (uncapped) *Contractor's* share arrangement. In addition, *Contractor's* Fee is not paid beyond the target.

Crossrail will therefore pay *Contractor's* Defined Costs (often referred to as actual incurred costs) and Fee up to the Target Price after which only 50% of Defined Cost is paid without Fee. The Target Price is only adjusted for compensation events.

*Policy Detail:*

By providing a share of the savings and any overspend on a 50/50 uncapped basis Crossrail has heavily incentivised *Contractors* and Crossrail to control costs and to remain within the Target. Crossrail see this mechanism as the primary cost control incentive and therefore control of the Target and Defined Cost must be given equal consideration.

Control of the Target is managed primarily by a robust and a contractually compliant approach to compensation events and is set out in more detail in CAP No.6. If the Target is not effectively managed, it increases the risk of an inaccurate and out of date Target and so may adversely affect both the *Contractor* and *Project Manager* behaviours.

Control of Defined Cost, from Crossrail's perspective, is primarily managed by a thorough assessment of Defined Costs and the correct application of Disallowed Costs – see CAP no. 7 and 8.

**CAP6** The *Project Manager* should determine both the principle and valuation of compensation events in a progressive and timely and efficient manner

*Contract Context:*

The NEC3 contract provides for the assessment of compensation events at the time of the event. Timescales for responses by the *Project Manager* in respect of compensation event actions under section 6 of the contract are generally 2 weeks. CRL have also retained the standard NEC3 concept of "deemed acceptance" where the *Project Manager* fails to meet such deadlines for some actions (refer to Clause 61.4, 62.6, 64.4), although it should be noted that there is provision for the *Project Manager* to extend the timescales for actions in respect of compensation events if both the *Project Manager* and the *Contractor* agree (refer to Clause 62.5).

The NEC3 also provides for the use of *Project Manager's* assessments (refer to Clause 64) of compensation events if:



- the *Contractor* has not submitted a quotation and details of his assessment within the time allowed,
- the *Contractor* has not assessed the compensation event correctly,
- the *Contractor* has not submitted alterations to the programme for the compensation event,
- the *Project Manager* has not accepted the *Contractor's* latest programme.

Once a compensation is assessed and implemented, the *Contractor's* only recourse is to trigger the dispute mechanism Option W2A (i.e. management discussion between the *Employer* and the *Contractor* or adjudication).

*Policy Detail:*

This policy is intended to discourage, as far as practical, the active use of extending timescales for compensation event submission and response as this may not promote proactive and progressive resolution of compensation events.

The contract provides for resubmission of a quotation if the first one is not in accordance with the contract. Normally this resubmission process should be used before the *Project Manager* makes an assessment to avoid any premature escalation to a dispute.

The use of *Project Manager's* assessments is encouraged to ensure that compensation events continue to be dealt with progressively and in a timely manner. This will help to avoid the problem of extensive unresolved commercial issues at the completion of the work.

This policy requires that the *Project Manager's* resources are sufficiently experienced in the nature of the works being undertaken so that any compensation event assessments and estimates are a reasonable representation of the work likely to be entailed.

In summary, *Project Manager's* should deal with compensation event issues in a timely manner and strictly in accordance with the contract.

**CAP7**     **The *Project Manager* should apply Disallowed Costs contemporaneously adopting a fair and reasonable position after discussion with *Contractors***

*Contract Context:*

There are a number of contractual provisions for disallowing costs under the CRL NEC3 contract (refer to CRL NEC3 Contract clause 11.2 (24)). **Appendix 5.7** contains notes for guidance and key principles to be applied to the Disallowed Cost provisions applicable to all Crossrail NEC3 based works contracts which adopt an Option C (Target based) approach.

*Policy Detail:*

The reduction of Defined Cost through the application of Disallowed Costs can be a controversial issue and should be discussed between the *Project Manager* and the *Contractor* when the relevant facts become known to the *Project Manager* and usually before the reduction of any payments. Crossrail does not consider that Disallowed Costs should be applied in a way that would conflict with the intentions of the Contract.

**CAP8**     **The *Project Manager* should work with the *Contractor* through each period to verify costs with an assessment of the amount due being made for each interim payment certificate**

*Contract Context:*

Each period, the *Project Manager* assesses the amount due taking into consideration any application for payment made by the *Contractor* and issues an interim Payment Certificate.

The key reason for issuing a periodic Payment Certificate is to maintain the *Contractor* in, as far as possible, a cash-neutral position. It is not an admission (implied or otherwise) that the costs included in a Payment Certificate are agreed as being incurred fully in accordance with the Contract and the *Project Manager* can correct any wrongly assessed amount due in later Payment Certificate – refer to clause 50.5.

It should also be noted that on applicable contracts payment is made into a Project Bank Account and that any interest made on this account is paid to the *Employer*.

*Policy Detail:*

This policy promotes collaborative and systematic working, between the *Project Manager* and the *Contractor*, to verify costs as the work proceeds with a final agreed position being the goal. Leaving verification of costs until well after the work has been undertaken is to be discouraged.

In practice it is not possible to verify all payment items. In assessing the amount due the *Project Manager* should validate Defined Cost to a reasonable level of detail taking into consideration the value of items and the source of information provided.

Interim Payment Certificates should be based upon verified costs and an assessment of other works. During the course of the works spending excessive time on assessing purely interim certificates is to be discouraged. Interim assessments should however include a review of the Defined Cost for accruals, duplication of cost and/ or for cost which is not project-related and a check for the inclusion of Disallowed Costs which have been identified through the cost verification process and have been duly consulted with the *Contractor*.

**CAP9**

**Where the final cost is anticipated to exceed the target the application of Contractor's Share prior to Completion shall be considered by the *Project Manager* in the context of the entire contract and the objective of incentivising the correct contract behaviours**

*Contract Context:*

The CRL NEC3 contract includes a provision that if the *Project Manager* assesses prior to Completion that the Price for Work Done to Date at Completion is likely to exceed the Prices (i.e. the cost will exceed the target) the *Project Manager* may deduct from sums otherwise due to the *Contractor* a sum equivalent to the *Project Manager's* assessment of the likely *Contractor's* share of the excess which sum is a proportionate amount having regard to:

- the Price for Work Done to Date at the relevant time,
- the unexpired duration of the contract, and
- any proposals submitted by the *Contractor* for future cost saving.

The intention of this clause is twofold:

- 1) It allows the *Project Manager* to progressively apply the *Contractor's* "pain share" rather than waiting until Completion and then seeking a "pain share" in largely one go and as a sum to be paid back to the *Employer* from the *Contractor*.

- 2) It allows the *Project Manager* to incentivise the *Contractor* at an early stage, and prior to application of any *Contractor's* share, to implement proposals that would bring the cost in within the target.

*Policy Detail:*

Application of this clause should take into account its intention and should also be applied only after discussion between the *Project Manager* and *Contractor* and after analysis of the cost and target over a number of periods. This clause should not be applied in the early periods of a contract.

To inform and assist these discussions it is desirable that the *Project Manager* obtains, in consultation, from the *Contractor* his forecast of the target and costs and understands and challenges the basis of these, clause 20.4 provides for this submission from the *Contractor*. In the absence of these submissions from the *Contractor* or agreement of them with the *Contractor* the *Project Manager* should make their own assessment for discussion with the *Contractor* and for use within the application of the *Contractor's* Share clause.

**CAP10** **Crossrail will proactively seek to settle disputes through managerial discussion before resorting to any formal adjudication process**

*Contract Context:*

The CRL NEC3 contract includes dispute resolution provisions that require the parties (CRL and the *Contractor*) to use their reasonable endeavours to resolve any Dispute by means of prompt, bona fide discussion at a managerial level appropriate to the Dispute in question. A formal adjudication procedure is also included. Refer to Dispute Resolution – Clause W2A.

It should be noted that any managerial discussions do not prejudice the parties' rights to refer a Dispute to adjudication.

*Policy Detail:*

CRL encourages items to be dealt with by *Project Managers* as far as practicable and in accordance with the contract prior to becoming a dispute. However, where this is unavoidable CRL will proactively seek to settle disputes through managerial discussion. To this end CRL Commercial Directors maintains an *Employer's* disputes management group to manage such disputes and to make recommendations in respect of their settlement.

**CAP11** **In carrying out their duties under the CRL NEC3 Contract, *Project Managers* should act impartially on certain matters**

*Contract Context:*

Whilst the parties to the contract are the *Contractor* and the *Employer* the majority of client duties under the CRL NEC3 contract fall to the *Project Manager* to undertake.

*Policy Detail:*

*Project Managers* should carry out their duties, make their decisions and administer the contract impartially in relation to matters of assessment and certification.

**CAP12** When certifying payment *Project Managers* should assess X7 delay damages in accordance with the contract

*Contract Context:*

Crossrail have included option X7 delay damages within the CRL NEC3 contracts; this allows for the application of liquidated damages where the *Contractor* completes the works later than the contract Completion Date. Such delay damages can also be applied to any sectional completion and in some instances may be used for Key Dates.

*Policy Detail:*

The application of delay damages can be a contentious and difficult subject however notwithstanding this it is expected that *Project Managers* will apply liquidated contract delay damages wherever these are included in contracts and wherever the conditions required to apply these damages are met. Any relaxation from this strict approach will be decided by the *Employer* after payment certification by the *Project Manager*.

**CAP13** The *Project Manager* should positively encourage and be supportive of *Contractor's* Value Engineering proposals during the Optimised *Contractor* Involvement stage and also throughout the duration of the contract

*Contract Context:*

The CRL NEC3 contract includes a Value Engineering clause that allows the *Contractor* to propose changes to the Works Information to result in a reduction in the forecast Defined Cost and/or required time. In addition, the Works Information includes a formal Optimised *Contractor* Involvement phase, which is a three month period at the beginning of the contract, where the *Contractor* can review the detailed design to improve buildability. Proposals coming out of this review are dealt with under the contract as Value Engineering items.

Where Value Engineering proposals are accepted then the Target Price is not reduced nor is the contract Completion Date amended. The *Contractor* therefore benefits through the *Contractor's* share mechanism.

*Policy Detail:*

Crossrail wish to encourage the proactive use of Value Engineering solutions to bring about benefits in both time and cost for both the *Contractor* and Crossrail.

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## 0.4 Governance Overlay

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### Introduction

The Commercial Management Plan (Reference R) sets out the overarching governance arrangements for contracts; and sets out the purpose of the CAM Works (this document) as well as other CAMS (design and miscellaneous contracts).

This section explains the relationship between the roles of the *Employer* and the *Project Manager* in the context of an integrated delivery team and it describes the internal governance and authority levels of:

- the *Project Manager*, *Supervisor*, *Project Manager's Representative* and *Supervisor's Representative* to manage works contracts;

It also sets out the principles and procedures to be followed to enable the Employer, where appropriate, to provide its input towards the assessment of significant compensation events

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### **Project Manager / Employer relationship**

The *Project Manager* is the agent of the *Employer* for the purpose of securing completion of the works under each Contract for which he has been nominated to perform that role.

As agent, the *Project Manager* is obliged to act in accordance with the instructions of, and in the interests of, the *Employer* so as to secure completion of the works in an economical and efficient manner subject to the duty to act impartially in relation to the assessment and certification of matters of contractual entitlement (see Key Processes section 2.2).

By the terms of his appointment, the *Project Manager's* authority is limited by:

- CRL's Scheme of Authorities (Reference A) and the delegations recorded in the Delegated Authority Register (Reference B);
- This Contract Administration Manual;
- Change Control and Budget Management Procedure (Reference C)
- Agreements Management Plan Manual (Reference D)
- Other CRL policies and procedures.

The persons to whom the *Project Manager* delegates his functions (*Project Manager's Representatives*) are subject to the same duties and limitations (which include the obligation to refer certain decisions to the *Project Manager*).

The *Project Manager* does not have authority to act on behalf of the *Employer* in relation to any contract or agreement other than the Contracts for which he has been nominated to perform that role except with and to the extent of any specific written authorisation to do so is provided by the *Employer*.

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## **Governance**

There are five key strands within Crossrail's governance arrangements:

### **1 The Scheme of Authorities (Reference A)**

This is the overarching authority document that is approved by the CRL Board; it covers Financial Control Authorities, Procurement Authorities, Authority for Land Transactions and other authorities such as the authority to settle claims, manage contracts and sign legal documents.

It is important to note that the Scheme of Authorities:

- Authorises the Chief Programme Officer (now Programme Director) to act on behalf of CRL as the *Employer* under the works contracts and to authorise individuals to act on his behalf.
- Authorises the Chief Projects Officer (now Delivery Director) to appoint individuals to act as the *Project Manager* or *Employer's Agent* subject to such persons acting in accordance with this Manual.
- States that the *Project Manager's* decisions on matters of contractual entitlement (e.g. compensation event assessments, extensions of time) are subject to the duty of impartiality and are **not** constrained by the Scheme of Authorities.
- States that the *Project Manager's* authority to issue instructions necessary to avoid or mitigate injury or damage is **not** constrained by the Scheme of Authorities.
- Authorises the *Project Manager* to issue instructions which are required for the proper management of the *works* subject to:
  - Compliance with the terms of the *Project Manager's* appointment, the Change Control and Budget Management Procedure, and this Manual.

## **2 Delegated Authority Register (Reference B)**

This document sets out the levels relating to Commitment Authority, Contract Authority and Payment Approval Authority which have been granted by the Scheme of Authorities or which have been delegated pursuant to the Scheme of Authorities.

It is important to note that:

- Commitment Authority is required in order to commit CRL to expenditure under works contracts and design contracts (eg issuing instructions and changes).
- Payment Approval Authority will be required in order to process through SAP payments due to Contractors. Payments pursuant to payment certificates will need to be authorised by the Delivery Director, the Chief Programme Officer, the Chief Finance Officer, the Commercial Director or the Chief Executive Officer depending on the amount.
- *Project Managers* and their Representatives may also need to exercise Commitment Authority in the event of a need to enter into ancillary agreements (e.g. an additional survey commissioned through a Purchase Order) necessary for the execution of the works.
- *Project Managers* and their Representatives do not have Contract Authority – they are not authorised to sign or enter into or amend contracts on behalf of CRL.

## **3 Contract Administration Manual.**

This document and the Delegated Authority Register govern the actions of the *Project Manager* and their representatives appointed under works contracts. It also governs the actions of the *Employer's* representative and *Employer's Agent* under the design contracts.

#### **4 Change Control and Budget Management Procedure (Reference C)**

This document sets out the Employer's processes for Investment Authority, contingency management and trend/change control.

##### **4a Investment Authority.**

In accordance with the Investment Authority Process, the Investment Authority for each Contract is established prior to award and thereafter may be revised as appropriate. If at any time the *Project Manager* forecasts that the anticipated final cost (AFC) will exceed the Investment Authority, he may apply for an increase in Investment Authority in accordance with the Investment Authority Process. The *Project Manager* must apply for an increase in Investment Authority prior to a need arising to certify payment in excess of Investment Authority.

##### **4b Contingency Management Process.**

This document contains the process for releasing and transferring contingency relating to works contracts.

##### **4c Trend and Change Control Procedure.**

This provides the process for raising and resolving trends and authorising changes.

#### **5 Agreements Management Plan Manual (AMP) (Reference D)**

The *Employer* has entered into or, may during the course of the Contract, enter into a range of Agreements (legally binding contracts) with other parties (third parties) which may limit or constrain the Contractor, or support progression of the Contract works. The *Project Manager* may similarly instigate the creation of Agreements between the *Employer* and third parties during the course of the works to support progression of the Contract works. The AMP manual formalises a best practice set of processes and procedures for identifying and creating Third Party Agreements (TPA), and details governance arrangements by which TPA are authorised and managed throughout their lifecycle to close out.

The *Project Manager* is responsible for all such Agreements at the geographical location and environs of the Contract works. In general, the *Project Manager* will therefore be the designated Agreement Client / Lead (pre-execution) and Agreement Manager (post-execution) and must adhere to the requirements set out in the AMP manual. A key objective of the Project Manager is to ensure that the Contractor complies with any such Agreements such that Crossrail are not placed in breach.



**A schedule of all TPA is held on the Agreements Management System (AMS). This IT enabling tool represents the centralised source of information for Agreements (both in the pipeline and existing), including their status and identification of individuals responsible for their creation and management.**

### **Integrated Delivery Team**

The *Project Manager* and his Representative function as members of the Crossrail integrated delivery team. This is significant only as a matter of internal organisation and should have no impact at all on dealings with the *Contractor*.

All communications with the *Contractor* under the Contract should be through the *Project Manager* and his Representatives unless:

- a Dispute is notified or referred to adjudication; or
- the *Employer* notifies the *Project Manager* that it intends to attempt to negotiate directly with a *Contractor* a commercial settlement of a Dispute or other matter, or
- the *Employer* wishes to issue a pay less or withholding notice (CI 51.2A)

It is important that this communications protocol is observed in order to avoid the risk of blurring lines of responsibility and contractual positions.

It is also important to preserve the *Contractor's* right to rely on all decisions and instructions of the *Project Manager* and his representative within their “ostensible authority” (i.e. for purposes connected with the Contract). For that reason, Crossrail’s internal governance processes are not a legitimate concern of the *Contractor* and it is not in the *Contractor's* interest to enquire as to the underlying governance process. If the *Contractor* raises a concern as to whether the *Project Manager* is complying with the duty of impartiality, the response should be that the *Employer* has expressly recognised the duty of impartiality in its governance arrangements. Decisions which are subject to that duty are not restrained by the governance process.

The *Project Managers* and their Representatives form part of the integrated delivery team and are entitled to receive support from all other members of the team as appropriate to each issue. Issues of contractual interpretation raised by the *Contractor* or identified by the *Project Manager* should be referred to the *Employer's* Delivery Contracts Director (see below). However, in all cases, the *Project Manager* is required to reach his own decision having considered advice received.

It is important not to provide advice to the *Project Manager* or his Representative in terms which could be construed as direction by the *Employer* on any issue which may require a decision subject to the duty of impartiality.

### **Handling compensation events and issues of contractual interpretation**

1. The following principles should be followed:

- (a) the *Project Manager* should inform the *Employer* promptly of any *significant* issue, namely:



- (i) any issue of interpretation of the contract which may be relevant to other contracts within the Crossrail programme;
  - (ii) any actual or potential difference of opinion between the *Project Manager* and the *Contractor* on which depends a target adjustment exceeding £100,000 or an extension of time;
  - (iii) any potential assessment of a compensation event exceeding £1,000,000;
- (b) the *Project Manager* should allow the *Employer* the opportunity to express its opinion on any such issue before reaching a decision;
  - (c) the *Project Manager* should take into account both the arguments put forward by the *Contractor* and the *Employer's* opinion in reaching a decision on the assessment of a compensation event;
  - (d) the *Project Manager* should not seek direction or approval from the *Employer* in relation to any such matter – doing so would be incompatible with the duty of impartiality;
  - (e) conversely, the *Employer* should only express opinions and should not instruct or direct the *Project Manager* in relation to any matter which is due for decision;
  - (f) decisions must be taken by the *Project Manager* on an impartial basis using professional judgment;
  - (g) the *Employer* may not agree with the *Project Manager* and may either reserve its position or challenge the *Project Manager's* decision (unlikely but not inconceivable) – in either case, that stance would not undermine the *Project Manager's* position or authority but would reinforce it.

2. The following procedure should be followed:

- (a) the *Employer* should be informed of *significant* issues as follows:
  - (i) issues falling within paragraph 1(a)(i) above should be notified by email to the Delivery Contracts Director;
  - (ii) issues falling within paragraphs 1(a)(ii) and (iii) above should be notified to the *Employer* through the periodic commercial reporting processes;
- (b) the *Employer's* team will then identify those issues which it wishes to consider;
- (c) the *Project Manager* should specifically notify the *Employer* of any issue on which he would like to receive the *Employer's* opinion;
- (d) the *Employer's* opinion may be the subject of a decision of the Executive Group;
- (e) it is not mandatory for the *Employer* to express an opinion on a compensation event issue – the appropriate action may simply be to reserve its position;
- (f) the *Employer's* decision as to its position and any opinion it wishes to express will be communicated to the *Project Manager*. It will be a matter for judgment by the *Employer* as to whether and, if so, to what extent any underlying legal advice is shared with the *Project Manager* at the time of communicating the *Employer's* position.

**Handling matters which may be appropriate for resolution as a commercial settlement**

6. The following principles should be followed:
- (a) the *Project Manager* should inform the *Employer* promptly of any *significant* issue which is unlikely to be resolved by a *Project Manager's* decision on entitlement or assessment of quantum and which, in the *Project Manager's* opinion, should be considered for resolution on a commercial basis. *Significant* issues include:
    - (i) any issue which is likely to impact negatively on the Contractor's willingness or ability to perform its obligations
    - (ii) any issue which is likely to be referred to adjudication.
  - (b) the *Project Manager* should advise the *Employer* of the reasons for that view and the parameters within which a settlement would be advantageous;
  - (c) care needs to be taken to ensure that opinions and assertions are not made by email or in other written form which could be discoverable and against the *Employer's* interests;
  - (d) guidance should be given by the *Employer* on a case by case basis as to the appropriate means of pursuing commercial settlement discussions, including the appropriate measures to take advantage of legal professional privilege and "without prejudice" negotiating privilege in relation to internal and external communications.
7. The following procedure should be followed:
- (a) the *Employer* should be informed of matters falling for consideration on a commercial settlement basis through the Delivery Director and raised at the Executive Group;
  - (b) such issues should, in the first instance, always be raised and discussed verbally;
  - (c) if it is considered appropriate to investigate the scope for a commercial settlement, the *Project Manager's* views and advice on proposed commercial settlement negotiations should be requested and, if expressed in writing, should be addressed to the Legal Services Director, or the relevant Project Solicitor, in order to enable legal advice to be given to the *Employer*;
  - (d) a decision as to whether to pursue a commercial settlement with the *Contractor* will be taken by the Executive Group. That paper will normally contain legal advice but will also encapsulate views and advice from the *Project Manager* and the Contract Administration, Programme Controls and other teams. ;
  - (e) negotiations with the *Contractor* relating to a potential commercial settlement may be carried out by the *Project Manager* or by the *Employer*. A decision by the *Employer* will be required in each case as to the more appropriate approach. If the *Project Manager* is to carry out the negotiation, clear parameters should be given by the *Employer* acting through the Executive Group.
8. Commercial settlement negotiations may also be initiated following service of a notice of Dispute. These will take the form of "managerial discussions" in accordance with the

dispute resolution procedure in the works contracts. A different procedure will apply in those circumstances.

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## **The Key Processes**

There are seven key processes as follows:

- General actions
- Deciding contractual entitlements under the works contracts
- Issuing instructions necessary to avoid or mitigate injury or damage
- Issuing instructions which are required for the proper management of the works
- The role of the *Supervisor*
- Instructing substantial Scope Changes
- Entering into Supplemental Agreements

### **2.1: General Actions.**

- The *Project Manager*, *Supervisor*, *Project Manager's Representative* and *Supervisor's Representative* act in accordance with their letters of appointment (see the Core Clause 1 section of this Manual)
- Generally, they consult at least one other person before carrying out an action.
- The table of actions and consultees are at **Appendix 0.1**. (Note: this Manual does not cover any health and safety or technical consultation that may also be required).
- The *Project Manager* should comply with Crossrail's cost reporting processes. In particular, each period the *Project Manager* is accountable for forecasts of the Anticipated / Potential / Expected Final Cost.



**This governance overlay is an internal Crossrail process and is not visible to the Contractor.**

### **2.2: Action: Deciding contractual entitlements under the works contracts.**

- Such decisions are subject to the duty of impartiality and are not constrained by the Scheme of Authorities or any other governance controls including this Manual.
- Examples include decisions by the *Project Manager* of the *Contractor's* contractual entitlements under clause 6 of the conditions of contract (compensation events) and certification of payments.
- If the *Employer* does not accept a decision of the *Project Manager*, the *Employer* is at liberty either to pursue a commercial discussion with the *Contractor* or to initiate the Dispute process.

- In relation to compensation events, the duty of impartiality applies when the *Project Manager* is unable to agree terms with the *Contractor* and is obliged to make an assessment.
- Consultation should be undertaken in accordance with the Commitment Authority Protocol shown in **Appendix 0.1**.
- Any such consultation does not affect the duty of impartiality on those deciding contractual entitlements. It simply affords the *Employer* an opportunity to express its views in the expectation that the *Contractor* will have had a similar opportunity.

2.3: Action: Issuing instructions necessary to avoid or mitigate injury or damage.

- The *Project Manager* or their Representative may issue such instructions at any time and are not constrained by the Scheme of Authorities or any other governance controls.

2.4: Action: Issuing instructions which are required for the proper management of the works.

- The *Project Manager* or their Representative may issue instructions which are required for the proper management of the works subject to:
  - The anticipated cost remaining within the Investment Authority for that contract; and
  - Authorisation and consultation in accordance with the Commitment Authority Protocol shown in **Appendix 0.1**.
- This category of instruction includes all matters which do not fall within 2.2 or 2.3 above (essentially these are changes or other actions which the *Employer* wishes to implement or which the *Project Manager* considers are in the *Employer's* interest) and is subject to the Trend and Change Control Procedure.
- The most common sources of instructions anticipated to fall within this category are:
  - 60.1(1) Instruction to change to Works Information including:
    - Changes to the Works Information arising from a change to the specification and description of the works (normally due to design issues).
    - Changes to the Works Information arising from the constraints on how the *Contractor* Provides the Works (normally due to construction issues including the timing and sequencing of the *works*).
  - 60.1(4) Instruction to stop or not start
  - 60.1(7) Instruction relating to object of value or historical interest
  - 60.1(8) *Project Manager's* or *Supervisor's* changed decision (depending on the nature of the initial decision).
  - 60.1(15) Certifying takeover of a part of the works before Completion / the Completion Date
  - 60.1(17) Correcting an assumption to a compensation event

2.5: The role of the Supervisor

- The role of the *Supervisor* is independent of the role of the *Project Manager*

- The prime purpose of the *Supervisor* is to ensure that the *works* are constructed in accordance with the Works Information.
- The *Supervisor* delegates day to day responsibility to the *Supervisor's Representative* (the Project Field Engineer) in accordance with the letter of delegation (see the Core Clause 1 section of this Manual)

#### 2.6: Substantial Scope Change

- CRL is subject to the Utilities Contracts Regulations. The Regulations apply to works and services contracts over certain thresholds – approximately £363,424 for services and £4,551,413 for works contracts at January 2018 prices.
- CRL's Head of Procurement and Executive Group should be consulted for any contract where the original contract value is over the thresholds and where the cumulative effect of any proposals to add work to an existing contract, exceed 50% of the original value of the contract.
- Additional work for this purpose is additional to the scope of the original contract rather than just further detailing, amendment or clarification of the existing scope.
- Further guidance can be sought from CRL's Head of Procurement.

#### 2.7: Supplemental Agreements

- Changes to the Works Information and Key Dates may be instructed by the Project Manager as instructions required for the proper management of the works subject to the limits of authority described in paragraph 1 above. Changes to Key Dates, Completion Dates and the Prices may also be made through the compensation event mechanism (see Core Clause 6 section of this Manual). See also **Appendix 2.6** (guidance note – contractor's liability on key dates – clause 25.3).
  - Changes to the conditions of contract, the form of agreement or the Contract Data (except Key Dates) can only be effected by an agreement in writing signed by the *Contractor* and the *Employer* (clause 12.3). Any such supplemental agreement requires Commitment Authority and Contract Authority and must be approved using the "Supplemental Agreement Execution Checklist & Approval Form" shown in **Appendix 0.2**.
  - The *Project Manager* is not authorised to enter into or sign any such agreements on behalf of the *Employer*.
- .....

## Appendices

### Reference documents

Ref:	Document Title	Document Number:
0.1	Commitment Authority Protocol	CRL1-XRL-Z-GML-CRG03-50008
5.7	Disallowed Costs Guidance and Key Principles	CRL1-XRL-Z-GML-CRG03-50023
A	Scheme of Authorities	CR-XRL-Z6-GPR-CR001-00003
B	Delegated Authority Register	CR-XRL-V2-LRG-CR001-50003
C	Change Control and Budget Management Procedure	CR-XRL-Z9-GPD-CR001-50003
D	Agreements Management Plan Manual – AMP Overview	CR-XRL-V-GPS-CR001-50001
R	Commercial Management Plan	CR-XRL-V-STP-CR001-50002

### Standard Forms / Templates

Ref:	Document Title	Document Number:
0.2	Supplemental Agreement Execution Checklist & Approval Form	CRL1-XRL-Z-GML-CRG03-50009

### Guidance Notes

Ref:	Document Title	Document Number:
2.6	Contractor's liability on key dates – clause 25.3	CRL1-XRL-Z-GML-CRG03-50030

The list of guidance notes may be added to, prior to the issue of the next revision of the CAM. CMS should be checked to identify the current list of guidance notes.

# 1 Core Clause 1: General

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## 1.1 Introduction

This section refers to Core Clause 1 of the *conditions of contract* and relate to actions, communications, the *Project Manager* and *Supervisor*, adding to the Working Areas, early warnings, ambiguities and inconsistencies and illegal and impossible requirements.



Core Clause 1 comprises 9 clauses that are usually found on pages 8 - 20 of the *conditions of contract*.

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## 1.2 The Key Processes

Six key processes are contained within Core Clause 1:

Clause 13	Clause 14	Clause 15	Clause 16	Clause 17	Clause 18
Communications	14.2 Delegation of the <i>Project Manager's</i> or <i>Supervisor's</i> action 14.3 <i>Project Manager's</i> instruction 14.4 Appointment of the <i>Project Manager</i> and <i>Supervisor</i> by the <i>Employer</i>	Adding to the Working Area	Early Warning	Ambiguities and Inconsistencies	Illegal and impossible requirements

Clauses 10, 11 and 12 do not need further explanation here.

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## Clause 13: Communications

### Background

The communications process is an essential component of contract management and is reflected in the Contract Administration Policy which states:

#### **CAP2**

CAP2 – CRL will provide efficient electronic communication tools that will be used by the *Project Manager* and the *Contractor* for all contract communications.

The Crossrail project adopts the use of eB (Enterprise Bridge) for its document management system (EDMS). Within eB are a range of work order modules (eBCA) which record transactions between the parties (*Employer, Project Manager, Supervisor* and *Contractor*). Upon completion of a transaction work order, eBCA creates a document within eB providing the auditable communication record (“Snapshot”). The eBCA tools also provide live shared contract registers for the contract Parties. Further details of eBCA work orders is given within a series of quick reference guides (**QRG Series 14 – Reference F**).

For contracts where CRL’s (eBCA) electronic communication system is not used, a series of templates can be supplied by the Commercial Directorate upon request. These templates have been created to standardise the communication process between the *Project Manager, Contractor, Supervisor* and *Employer*.

**Appendix 1.1** abstracts all of the conditions of Contract and sign-posts for each clause:

- Who has the obligation to act under the clause;
- What is the eBCA work order or form of communication to be used;
- Whether a ‘wet’ or ink signature is required to the template form or whether an e-signature suffices – in this context an e-signature means generally “sent from the person duly authorised to send the communication”, for example, the *Project Manager*; and
- To whom should the form of communication be distributed - this embraces clause 13.6 of the Contract.



Verbal communications, notifications or instructions are **NOT** allowed (clause 13.1)



Email is **NOT** a valid means of communication. (clause 13.1)

A communication has effect when it is received by the recipient at the last notified address, or the address in the Contract Data. Alternatively, the communication is posted on the host webserver set out in the Works Information, which is a specified amendment to the standard NEC form by Crossrail (clause 13.2).



Part 14.6.2 of the Works Information states the Electronic Document Management System (EDMS) for the Contract and the *Project Manager* needs to check this part of the Works Information.



Period for Reply

Generally, the *period for reply* is 14 days unless otherwise stated in the Contract Data or Works Information. It is essential that the *Project Manager* and the *Supervisor* are aware of the *period for reply* and ensure their dates of reply conform to the *period for reply* in the Contract, relative to the communication.

All communication registers track the *period for reply* and will highlight late replies from both the *Contractor* or the *Project Manager/ Supervisor*. If the *Contractor* is late replying, the *Project Manager* should send a reminder to the *Contractor* and consider raising an early warning.



**TIP**

It is a compensation event if the *Project Manager* or the *Supervisor* does not reply to a communication from the *Contractor* within the period required by this contract (clause 60.1(6)).

Notifications



Notifications under this contract are communicated separately from other communications (clause 13.7). This means that a notification of compensation event **CANNOT** be issued in the same communication as, for example, an early warning notice.

**Appendix 1.1** also highlights where notifications are required from the *Project Manager*, *Supervisor*, *Contractor* or *Employer*.

Central Communications (CECs)

From time to time, the *Employer* may instruct or request the *Project Manager* to issue a communication which is programme wide or specific to a series of contracts, typically to ensure a common approach is adopted.

The *Project Manager* will be issued with a directive with a “Central Communication” (CEC) through an eBCA (workflow). Changes to the generic works information are subject to Change Control (**Reference D**).

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## **Clause 14: The Project Manager and the Supervisor**

### **Clause 14.2: Delegation by the Project Manager or Supervisor**

The *Project Manager* may delegate or cancel delegation of any of their actions to an individual (*Project Manager's* representative) who will be notified to the *Contractor* by the *Project Manager* using the template letter shown in **Appendix 1.2** (clause 14.2).

The individual will be appointed by the *Project Manager* to act as the *Project Manager's* representative using the template letter shown in **Appendix 1.3**.

Similarly the *Supervisor* may delegate or cancel delegation of any of their actions to an individual (*Supervisor's* representative) who will be notified to the *Contractor* by the *Supervisor* using the template letter shown in **Appendix 1.4** (clause 14.2).

The individual will be appointed by the *Supervisor* to act as the *Supervisor's* representative using the template letter shown in **Appendix 1.5**.



**TIP** Note, neither the *Project Manager* nor the *Supervisor* delegated to the *Project Manager* Representative or *Supervisor* Representative have the ability to delegate.

All delegations have to come from the *Project Manager* or *Supervisor*.

The *Project Manager* and *Supervisor* shall ensure that with a record is kept of the current status of delegations.

The Commercial Directorate maintain a register of delegated Project Managers and Project Manager's Representatives in **Reference F**.

The Supervisor maintains a register of delegated authorities in **Reference E**.

### **Clause 14.3: Project Manager's instruction**

The *Project Manager* gives an instruction changing the Works Information or Key Date (clause 14.3) and by using the eBCA template.

#### **Programme Wide Instructions**

From time to time, the *Employer* may instruct or request the *Project Manager* to issue an instruction which is programme wide or specific to a series of contracts, typically changing the Works Information to reflect updated *Employer* requirements.

The *Project Manager* will be issued with a directive with a "Central Communication" (CEC) through an eBCA workflow. Changes to the generic works information are subject to Change Control (**Reference D**).

Clause 14.4: Replacement of the *Project Manager* and *Supervisor*

The *Project Manager* and *Supervisor* will initially be stated within the Contract Data Part 1. Where the *Employer* is replacing the *Project Manager* or the *Supervisor*, this will be notified to the *Contractor* using the template letter shown in **Appendix 1.6**.

The new individual will be appointed by the *Employer* to act as the *Project Manager* using the template letter shown in **Appendix 1.7**.

The new individual will be appointed by the *Employer* to act as the *Supervisor* using the template letter shown in **Appendix 1.8**.

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**Clause 15: Adding to the Working Areas**

The Site is defined in clause 11.1(56) and Contract Data Part One. The Working Areas are defined in Clause 11.1(63) and Contract Data Part Two and include the Site.

The *Contractor* may submit a proposal for adding an area to the Working Areas to the *Project Manager* for acceptance. A reason for not accepting is that the proposed area is either not necessary for Providing the Works or used for work not in this contract (*clause 15.1*).

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## Clause 16: Early Warnings

### Background

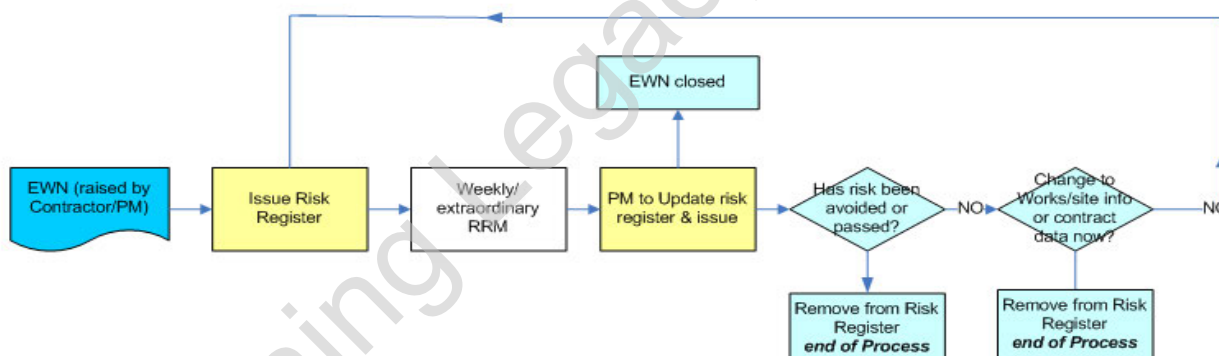
The early warning process is also captured in the Contract Administration Policy, as below:

**CAP3** CAP3 – CRL encourage the appropriate use of Early Warnings by the *Contractor* and *Project Manager* as a tool to manage project risk.

This Manual promotes the early warning process in 3 separate ways:

- Identifies a clear and proactive process (see below);
- Contextualises the early warning process and shows the interdependencies with the wider compensation event processes (refer to Overall Change Process at **Appendix 1.9**); The process should also reference the Employer's change control (Trend) process set out in Reference B.
- Highlights specific junctures where specific early warning notices may be issued by the *Project Manager*, e.g. the potential for late access under clause 30.1.

### Early warning process



Either the *Contractor* or *Project Manager* give an early warning by notifying the other as soon as a matter may arise (*clause 16.1*), and by using the eBCA early warning notice template. The Risk Register (*clause 11.2.55*) is the eBCA early warning risk register.



**TIP** Note, the event in the early warning may not materialise since the clause centres on the future and mitigation measures may stop the event happening.

This Manual highlights instances when the *Project Manager* should consider raising an early warning notice, for example if the *Employer* has not confirmed access to the site within 14 days of the *access date*.

When a *Contractor* raises an early warning notice, the *Project Manager* should consider:-

- Whether the early warning is valid, for example the event may have occurred therefore it is not for an event in the future and so should **NOT** be dealt with through the early warning process but through another process, for example, a notification of compensation event.
- If the early warning is valid, to decide whether the matter requires:-
  - An immediate action, for example issuing a *Project Manager's* Instruction;
  - An extraordinary risk reduction meeting to discuss the issue; or
  - Whether the early warning can be dealt with in the weekly risk reduction meeting

The *Project Manager* should confirm with the *Contractor* which forum will be convened for the particular early warning notice.

- The *Project Manager* should check whether the early warning has been correctly filled out; if not, the *Project Manager* should advise the *Contractor* where the early warning is lacking.



**TIP**

One of the fields in the early warning notice is “When did the *Contractor* become aware of the matter”? Filling in this field is important because should the *Project Manager* subsequently judge an early warning could have been given but was not, the *Project Manager* may disallow the costs arising from the failure to issue an early warning. (clause 63.5)



**DO NOT**

The *Project Manager* should conduct a regular review of the Crossrail Risk Database (ARM or equivalent) to check whether there are any risks of which he should be giving early warning. The *Project Manager* should not show significant relevant contract risks in ARM that have not been raised as Early Warnings under the contract.

### Risk Register and Risk Reduction Meeting



**TIP**

The *Project Manager* is to input the Contract Data risks into the Risk Register

Prior to the risk reduction meeting, the *Project Manager* should update the Risk Register with all valid early warning notices as well as early warnings where the previously identified risk action is still to be completed. The agenda for the risk reduction meeting includes:-

- Allocation of Actions - Assigning mitigating risk actions to the new early warning notices issued since the last risk reduction meeting;
- Review of Actions - Reviewing the mitigating risk actions previously identified but not completed;
- Validity - The *Contractor* may query the *Project Manager's* view regarding the validity of other early warnings.



**TIP**

The *Project Manager* chairs the risk reduction meeting and should endeavour to update the Risk Register during the risk reduction meeting. This enables the prompt issuance of the updated Risk Register after the meeting.

Where a risk action necessitates an instruction to change the Works Information, the *Project Manager* shall ensure that the instruction is given at the same time as the updated Risk Register is circulated.

Learning Legacy Document

## **Clause 17: Ambiguities and Inconsistencies**

The *Project Manager* or the *Contractor* notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The *Project Manager* gives an instruction resolving the ambiguity or inconsistency depending on what the correct approach is (*clause 17.1*).



**TIP** The standard Form of Agreement specifies that the order of preference of the Contract Documents in descending order is:-

- The form of agreement;
- The conditions of contract;
- Contract Data; and
- Works Information and Site Information (which has joint precedence).

The *Project Manager* should check that the Form of Agreement is in accordance with the standard.

The meaning of the Contract is that which a reasonable person with all of the background knowledge available to the Parties would attribute to it.<sup>1</sup> This meaning is arrived at taking the Contract as a whole. On this basis, care should be taken by the *Project Manager* when determining whether a query requires a clarification response through a *Project Manager's* Communication, due to a lack of understanding of the scope and/or constraints by the *Contractor*, or a response to change the Works Information through a *Project Manager's* Instruction due to an ambiguity or inconsistency (as recognised in contractual terms), the latter giving rise to a compensation event under clause 60.1(1).

Where the ambiguity or inconsistency is considered to be a programme wide/multi-site issue, as opposed to a local issue, the *Project Manager* is to alert the Employer such that consideration is given by the Employer to issuing a CEC to other contracts which may also be impacted.

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## **Clause 18: Illegal and Impossible Requirements**

The *Contractor* must notify the *Project Manager* as soon as he considers that the Works Information requires him to do anything which is illegal or impossible. If the *Project Manager* agrees, he gives an instruction to change the Works Information appropriately. (*Clause 18.1*)




Where the illegal or impossible requirement is considered to be a programme wide/multi-site issue, as opposed to a local issue, the *Project Manager* is to alert the Employer such that consideration is given by the Employer to issuing a CEC to other contracts which may also be impacted.

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<sup>1</sup> Keating on NEC3 – at 2-155

## 1.3 Golden Rules


### Communications


-  Verbal communications, notifications or instructions are NOT allowed, i.e. writing is in the language of this contract.
-  Under clause 13.1, email is NOT a valid means of communication.
-  The *Project Manager* or the *Supervisor* is to respond within the *period for reply*.


### Project Manager and Supervisor


-  The *Project Manager's* representative or the *Supervisor's* representative cannot delegate to others.
-  The *Project Manager* and his delegates must take account of their duty to act impartially when deciding contractual entitlements.

### Early warnings

-  Under clause 16.1, either the *Contractor* or *Project Manager* give an early warning by notifying the other as soon as either becomes aware of a relevant matter using the eBCA template. This is a positive obligation on both the *Contractor* and *Project Manager* and is not optional or discretionary.

-  Early warning notices should not be issued for matters for which a compensation event has previously been notified.

-  The *Project Manager* should check that all *Contractor* early warnings are valid.

-  The *Project Manager* should where possible update the Risk Register during the risk reduction meeting to enable the prompt issuance of the updated Risk Register after the risk reduction meeting.

The *Project Manager* should make the Employer aware of programme wide issues such that the Employer can arrange for Early Warnings or directions to be cascaded into other contracts.



## Appendices

### Reference Documents

Ref:	Document Title	Document Number:
1.1	Abstract of conditions of contract	CRL1-XRL-Z-GML-CRG03-00019
1.9	Overall Change Process	CRL1-XRL-Z-GML-CRG03-00029
D	Change Control and Budget Management Procedure	CR-XRL-Z9-GPD-CR001-50003
E	Current Supervisor and Supervisor's Representative Register	CRL1-XRL-O4-LRG-CR001_Z-50001
F	Current Project Managers and Project Managers' Representative Register	CRL1-XRL-W-LRG-CR001-50002

### Standard Forms / Templates

Ref:	Document Title	Document Number:
1.2	External Template Letter - PM Delegate Notification	CRL1-XRL-Z-GML-CRG03-00021
1.3	Internal Template Notification - PM Delegate Notification	CRL1-XRL-Z-GML-CRG03-00022
1.4	External Template Letter - Supervisor Delegate Notification	CRL1-XRL-Z-GML-CRG03-00023
1.5	Internal Template Notification - Supervisor Delegate Notification	CRL1-XRL-Z-GML-CRG03-00024
1.6	External Template Letter – PM & Supervisor Replacement	CRL1-XRL-Z-GML-CRG03-00026
1.7	Internal Template Letter - PM Appointment	CRL1-XRL-Z-GML-CRG03-00027
1.8	Internal Template Letter - Supervisor Appointment	CRL1-XRL-Z-GML-CRG03-00028

### Guidance Notes

Ref:	Document Title	Document Number:
F	QRG 14.0 - Introducing Contract Admin Work Orders	CR-XRL-Z3-GUI-CR001-50085

## 2 Core Clause 2: The *Contractor's* Main Responsibilities

### 2.1 Introduction

The *Contractor* has responsibilities for: providing the works; design; managing people, working with other parties, subcontracting and various other matters. His main responsibilities are set out in core clause 2.



Core clause 2 comprises seven clauses that are usually found on pages 22 – 26 of the *conditions of contract*.

### 2.2 The Key Processes

The clauses in the Contract which refer to the *Contractor's* main responsibilities are generally as follows:

<b>Clause 21</b> The Contractor's design	<b>Clause 23</b> Design of Equipment	<b>Clause 24</b> People	<b>Clause 25</b> Working with the Employer and Others	<b>Clause 26</b> Subcontracting
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Clauses 20 & 27 should be read but do not need any further explanation here.

Clause 22 is not used.

### **Clause 21: The Contractor's design**

The *Contractor* submits the particulars of his design as the Works Information requires to the *Project Manager* for acceptance. (clause 21.1)



The *Project Manager* must therefore read the Works Information and identify what parts of the works are to be designed by the *Contractor*. Any design by the *Contractor* should be included in the Accepted Programme and monitored by the *Project Manager*.

Guidance notes in respect of the design responsibility for MEP and architectural works and for systemwide contracts are included at **Appendix 2.4 and 2.5**.

The *Project Manager* must also understand whether any third parties or stakeholders are to review and/ or approve the *Contractor's* design. This should be highlighted by the Procurement Team during the Contract Handover Meeting.

If any third parties or stakeholders are to review / approve the *Contractor's* design, this must be done in the period of reply, which is normally 14 days. Unless otherwise specified in the Works Information.

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### **Clause 23: Design of Equipment**

The *Contractor* submits particulars of the design of an item of Equipment to the *Project Manager* for acceptance if the *Project Manager* instructs him to (clause 22.1)



It is for the *Project Manager* to decide on a case by case basis whether the *Contractor* is to submit particulars of the design for Equipment, however some factors to consider include:-

- Whether the Equipment is critical to the project;
  - Whether the Equipment may potentially adversely affect the Permanent Works;
  - Whether there is a Health & Safety issue with the Equipment;
  - Whether the Equipment may affect adjacent stakeholder property.
-

**Clause 24: People**

The *Contractor* either employs each key person named to do the job stated in the Contract Data Part Two or employs a replacement person with equivalent relevant qualifications and experience.

Where the actual name of the person is included in Contract Data Part Two, then the name has already been accepted during the procurement process. The Procurement Team will confirm this at the Contract Handover Meeting.

The only reasons for non-acceptance of a person is if the *Employer* or the *Project Manager* believes he is a security risk or his relevant qualifications and experience are not commensurate with the role or not as good as the person who he is replacing.

Providing other reasons gives rise to a compensation event.

Some later contracts have been amended to include *key person compensation* (clause 24.1B) when a key person is removed by the *Contractor* for reasons other than an instruction under clause 24.2 or other reasons which the *Project Manager* considers are outside the control of the *Contractor*. The purpose of this clause is to recognise the genuine cost incurred by the *Employer* as a consequence of the removal of key people for reasons generally within the control of the *Contractor*.

Where such circumstances occur it is then within the *Employer's* discretion whether the *key person compensation amount* is deducted from any amount due or any sum which at any time may become due to the *Contractor*.

The *Project Manager* shall notify the *Employer* of any key person that the *Project Manager* considers has been removed for the reasons stated in this clause to allow the *Employer* the opportunity to exercise its discretion as to whether the *key person compensation amount* should be deducted.

In addition, clause 24.1A creates a requirement for a minimum handover period of 4 weeks, the cost of which does not fall within the definition of Defined Cost under clause 11.2(21).

**Clause 25: Working with the Employer and Others**

If the *Contractor* does not provide services and other things as stated in the Works Information (clause 25.2) the following process applies:

- The *Project Manager* should notify the *Contractor* of those services or things that have not been provided by the *Contractor*;
- The *Project Manager* should review whether the *Employer* has or is likely to incur additional costs as a consequence;
- If the *Employer* has or is likely to incur additional costs, the *Project Manager* should notify the *Contractor* of this, summarise the nature of those additional costs and confirm that the *Project Manager* intends to either:
  - a) recover the cost from the *Contractor* as Other Amounts due (clause 25.2), or;
  - b) if appropriate, provide the *Contractor* with the opportunity to rectify the situation

- If the **Contractor** does not meet a **Key Date** (clause 25.3) the following process applies:
  - The *Project Manager* should immediately notify the *Contractor*;
  - The *Project Manager* should review the Contract Data (Part One) and establish whether the Key Date attracts Liquidated Damages or unliquidated damages;
  - If the Key Date attracts Liquidated Damages, then the *Project Manager* should automatically apply the agreed amount against the number of days that are beyond the Key Date and include the amount in the next Payment Certificate (and in parallel notify the *Employer* in advance of the payment becoming due);
  - If the Key Date attracts unliquidated damages, the *Project Manager* should immediately review the situation and consult with the *Employer* as to whether the issue has led or is likely to lead to the *Employer* incurring any loss, expense or additional costs (including costs arising in relation to other parts of the Programme or any other project);
  - If the *Employer* has or is likely to incur any loss, expense or additional costs, the *Project Manager* should notify the *Contractor* of this, summarise the nature of those additional costs and undertake a 14 day consultation process with the *Contractor*;
  - Within 4 weeks of the Key Date actually being met, the *Project Manager* should confirm the final assessed amount to the *Contractor* and that the loss, expense or additional cost incurred by the *Employer* is recovered from the *Contractor* as Other Amounts due in the next Payment Certificate (clause 25.3).
- A Crossrail internal briefing note has been produced to give guidance in relation to clause 25.3. This note is included at Appendix 2.6.

## CAP7

Clause 25.3 provides that the *Project Manager* should forward the cost within **4 weeks** of the *Contractor* not achieving a Key Date. As a development of CAP7, the *Project Manager* should carry out the above process for **all Employer additional cost issues no later than 4 weeks**.



### TIP

Note: the *Employer* can recover any loss expense or additional cost either

- in carrying out work or
- by paying an additional amount to Others in carrying out work

the additional cost including that arising in relation to other parts of the Programme or any other project which the *Employer* has paid or will incur. (Clause 25.3)

**Clause 26: Subcontractor acceptance and requirement to obtain a Subcontractor Warranty**

The process can be summarised in 6 key steps as below:

Step 1	Step 2	Step 3	Step 4	Step 5	Step 6
<p>Contractor to submit to the <i>Project Manager</i> detailed procurement procedures for the <i>Project Manager's</i> acceptance</p>	<p>Contractor and <i>Project Manager</i> to agree the form of subcontract conditions to be used and agree the critical packages</p>	<p>Contractor to submit to the <i>Project Manager</i> a Procurement Schedule</p>	<p><i>Project Manager</i> to advise whether any tenderer's names are to be rejected, to confirm need for a s/c collateral warranty and agree form of subcontract</p>	<p>For critical packages only, the Programme Supply Chain Team will undertake subcontractor risk evaluation and reporting</p>	<p>Contractor to submit Bid Tender Report proposing appointment of Subcontractor for <i>Project Manager's</i> acceptance</p>
<p>Within 4 weeks of starting date</p>	<p>Within 4 weeks of starting date</p>	<p>2 weekly</p>	<p>Within <i>period of reply</i> (14 days) of step 3</p>	<p>Within <i>period of reply</i> (14 days) of step 3</p>	<p>As/ when basis but 14 days prior to before each subcontract appointment</p>

**Step 1: Contractor to submit detailed procurement procedures**

Within 4 weeks of the *starting date*, the *Contractor* is to submit detailed procurement procedures to the *Project Manager* (*Works Information, Part 14.9*).

These procedures shall define the processes leading up to the procurement of Equipment, Plant and Materials, *Subcontractors* and services including the acceptance by the *Project Manager* of *Subcontractors* and Part 14.9 of the *Works Information* sets out the minimum requirements to be included in these procedures.



In addition the *Project Manager* should request:-

- That the long list of tenderers will be stated in the Procurement Schedules;
- Confirmation what financial checks will be undertaken by the *Contractor* on the tenderers, when these checks will be undertaken, the criteria for deciding if a tenderer passes or fails and whether this information will be shared with the *Project Manager*;
- Whether the periodic procurement schedule will specify the extent of design to be carried out by the *Subcontractor*, be it permanent works design or temporary works design;
- What form of subcontract conditions will be used?

The *Project Manager* shall consult with the Crossrail Supply Chain Deliver Director (or equivalent) prior to accepting detailed procurement procedures.

**Step 2: Contractor and Project Manager to agree the form(s) of subcontract conditions to be used and agree the critical packages**

As a development of Step 1, the *Project Manager* should agree with the *Contractor* the form(s) of subcontract conditions to be used and when they are to be used.

Below is a **guide only** of the form(s) of subcontracts and when they are to be used by a *Contractor*. The *Project Manager* should agree a table with the *Contractor* although the criteria will differ from Contract to Contract.

Cat	Form(s) of subcontract	When to use	Contract Data required
A	An NEC form of subcontract takes account of the key CRL clauses (see below) – refer to annexure 10 of the Contract	<ul style="list-style-type: none"> <li>Subcontractors providing a collateral warranty, or,</li> <li>Supply and installation of Permanent Works</li> </ul>	Yes
B:	Standardised hybrid subcontract which may not be an NEC form of subcontract but takes account of the key CRL clauses (see below)	<ul style="list-style-type: none"> <li>Supply &amp; Installation of Temporary Works</li> <li>Supply of Services in relation to Permanent Works</li> <li>Design of Temporary Works</li> </ul>	No
C:	A bespoke subcontract, for example a <i>Contractor's</i> Purchase Order or a <i>Subcontractor's</i> own terms and conditions takes account of the key CRL clauses (see below).	<ul style="list-style-type: none"> <li>Where the Subcontractor is single sourced procured and/ or for specialist works,</li> <li>Supply of Services in relation to Temporary Works</li> </ul>	No

As noted above, the Contract specifies a number of key CRL clauses have to be included in subcontracts. **Appendix 2.1** sets out the key CRL clauses and whether it is a mandatory requirement or whether the *Contractor* is to use reasonable endeavours to include.



The *Project Manager* should check that the form(s) of subcontract conditions take account of the key CRL clauses in **Appendix 2.1**. Where a *Contractor* does not intend to include a key CRL clause, the *Project Manager* may seek guidance from the *Employer*.

The *Project Manager* should seek guidance from the CRL Insurance Manager where the proposed subcontract contract data relating to insurance matters is not back to back (either by value or in description).

The *Project Manager* will request from the *Contractor* his draft Procurement Schedule setting out, inter alia, his proposed packaging. The *Project Manager* and the *Contractor* will meet to agree the critical work packages.

**Step 3: Contractor to submit Procurement Schedule(s)**

Within 4 weeks of the *starting date*, and in accordance with Part 14.3.8.8 of the Works Information, the *Contractor* is to provide Procurement Schedules setting out, amongst other things, the following:-

- The various Packages of works, which would be an extension of the Subcontract list
- Whether the package will be awarded as a subcontract
- Identify the packages agreed as critical

- Sourcing strategy, ie whether competitively tendered or single sourced
- Approximate tender value
- Tracking of the process, whether the procurement process is at ITT/ Bid/ Enquiries...
- Proposed Subcontractor's name,
- Proposed form of subcontract

Refer to **Appendix 2.2** setting out a typical Procurement Schedule



The *Project Manager* should request the following information with the Procurement Schedule:-

- That the long list of tenderer names (and their company registration numbers) are included in the Procurement Schedule
- Whether each package includes design
- The form of subcontract conditions to be used

**Step 4: The Project Manager will identify whether any tenderer names are rejected, the need for collateral warranties and nature of the subcontract conditions to be used**

The *Project Manager* is to consider whether the tenderers will allow the *Contractor* to Provide the Works. The objective tests are:-

- (i) Is the Package of works part of the *Contractor's* scope?
- (ii) Has the tenderer's name been selected in accordance with the procurement procedures submitted by the *Contractor* at Step 1?

If the selection of the tenderer's name passes the above tests, the tenderer's name will be acceptable. If not, the *Project Manager* should reply to the *Contractor* stating why the tenderer's name would not be acceptable.

Secondly, the *Project Manager* is to consider if a subcontractor collateral warranty is required, the guidance being:-

- Is the Subcontractor critical<sup>1</sup> to the successful delivery of the project and the Subcontract scope includes for Supply and Installation of Permanent Works? And/or
- Does the Subcontractor carry a design obligation for the Permanent Works or a design obligation for a critical part of the Temporary Works? And/or
- Does the Contract Data (Part One) specifically require from the *Contractor* that a subcontractor collateral warranty shall be provided in respect of CRL's obligations to Over Site Developers, Funders and Tenants for certain specified works (OSD)?
- Is the subcontractor providing any Plant or Equipment etc that would necessitate the need for a warranty with CRL's future Infrastructure Manager (IM) and/or Train Operating Company (TOC) in respect of future life cycle maintenance and/or operational requirement?



The *Project Manager* should consider the range of third party agreements applicable or likely to be applicable (identified in AMS – Agreements Management System). Third party agreements may be progressed post contract award and the Employer may seek additional warranties than those specified in the Contract Data.

<sup>1</sup> Forms part of the Contract Programme's critical path, is a specialist and or a significant element of the Contract.



If yes, to any of the questions above, the *Project Manager* should reply to the *Contractor* that a collateral warranty<sup>2</sup> would be required together with a copy of the executed sub-contract.



**TIP** Note, labour-only subcontractors do not fall within the above guidance because they do not supply and install.

Thirdly, the *Project Manager* should check whether the form of subcontract conditions for each package of works is aligned to the guidelines agreed with the *Contractor* under step 2. If it is not, the *Project Manager* should reply to the *Contractor* seeking reasons for the change.

**Step 5: For critical packages only, the Programme Supply Chain Team will undertake Subcontractor risk evaluation and reporting**

The PSCT will undertake the following analyses:-

- A Programme Capacity Risk Indicator Report, which measures the risk of the tenderers for the critical packages becoming over-exposed to Crossrail work. Further detail is included in the procedure Programme Supply Chain Team Process Manual; and
- A Failure Risk Test, which measures the likelihood of each critical package tenderer entering into insolvency over the following 12 months.

The Crossrail Supply Chain Deliver Director (or equivalent) will revert back to the *Project Manager* on an exception basis, ie where there is a high risk of the tenderer becoming over-exposed to Crossrail work or there is a real risk of company failure by the Subcontractor.



**TIP** Where a high risk has been identified, the *Project Manager* should not automatically reject the tenderer, however he should inform the *Contractor* of the results and ask the *Contractor* to specify risk mitigations measures.

**Step 6: Prior to the appointment of a Subcontractor, the Contractor is to submit a Bid Tender Report for the Project Manager's acceptance**

Part 14.3.4.9 of the Works Information states that prior to the appointment of a SubContractor, the *Contractor* must submit to the *Project Manager* a Bid Tender Report, including:-

<sup>2</sup> (A collateral warranty creates a direct/straightforward contractual right between a designer or *Contractor* and a third party with an interest in the building, such as a funder, purchaser or leaseholder. The *Scottish Widows Services Ltd v. Building Design Partnership case [2011] ScotCS CSIH\_35*, demonstrates the importance of securing collateral warranties)

- tender recommendation report for award of *Subcontractors* or Purchase Orders. All such recommendations shall clearly identify and reconcile relevant budget allowances with explanations between recommended amount and budget allowances;
- results of the *Contractor's* financial checks on all proposed *Subcontractors* to reduce the risk of *Subcontractor* insolvency, administration or similar financial failure and include the results in the tender recommendation report;
- subcontract conditions to be submitted if different from the standard conditions from Step 3 or amended;
- Contract Data (if appropriate); and
- Subcontractor Acceptance Checklist – refer to **Appendix 2.3**.

### Subcontractor's Name

In accordance with clause 26.2, the *Project Manager* should accept the name of the *Subcontractor* if

- the *Subcontractor's* name was on the long list of tenderers within the Procurement Schedule and the name was not rejected at Step 3; and
- following consultation with the Crossrail Supply Chain Deliver Director (or equivalent) **Y**, the *Subcontractor's* name is not on an exception report.

If the name was rejected at Step 4, the *Project Manager* should seek reasons why the *Subcontractor* is being proposed.



**TIP** The *Project Manager* should consider raising an early warning if the *Contractor* has proposed a *Subcontractor* whose name had been previously rejected or, in accordance with Step 5, where the Crossrail Supply Chain Deliver Director (or equivalent) have raised the tenderer's name as high risk and the *Contractor* has not submitted mitigation measures.

### Subcontract conditions

The *Project Manager* should accept the form of subcontract conditions proposed unless:

- a) there is a valid reason for not accepting them (clause 26.3);
- b) the *Contractor* has not included any of the key CRL clauses (Step 2)
- c) the *Contractor* has failed to include requirements for a collateral warranty (Step 4)

If the form of subcontract conditions are different from that previously proposed by the *Contractor* at Step 4, the *Project Manager* should seek reasons why different subcontract conditions are now being proposed and any changes must be carefully considered.



**TIP** The *Project Manager* should consider raising an early warning if the *Contractor* is proposing different subcontract conditions than what had been initially proposed at Step 4.

Crossrail have a licence that allows Crossrail and its *Contractor's* use of NEC3 contract terms (including electronic versions).



**TIP** Before providing any electronic versions of contracts to *Contractor's* the *Project Manager* must provide the *Contractor* with a copy of the licence and then obtain an undertaking from them that they will comply with the terms of the licence. Copies of contracts must not be supplied before this undertaking is received. Copies of the

licence and NEC contracts are available from the *Employer*.

### Contract Data

In accordance with clause 26.4, the *Project Manager* should accept the Contract Data if the Contract Data is aligned to the Main Works Contract's important points and to the Accepted Programme.

### Record of Subcontract

The *Project Manager* should ensure that a (PDF) copy of the sub-contract signed by all relevant Parties is obtained and held within eB alongside the warranty referenced.

### Subcontract Performance Bonds

Contractors may in some instances propose a subcontractor performance bond. Such bonds may be purchased either by the *Contractor* or by the relevant subcontractor.

Where such a bond is proposed then the cost of the bond should only be paid where it is agreed in advance by the *Project Manager*. When considering such requests the *Project Manager* should take into account the criticality of the work package and the failure risk of the subcontractor.

Furthermore, in the event that the *Project Manager* agrees that such cost will be Defined Cost, provisions should be put in place such that the *Contractor* calls on such bond as and when requested by the *Project Manager* and the proceeds of any call on such bond are shared equally between the *Contractor* and the *Employer*.

Such provisions may already be included within some versions of works Contracts, but where they are not then the *Project Manager* should apply the principles above.

## 2.3 Golden Rules

### Clause 25: *Employer* incurs additional cost



The *Project Manager* shall immediately notify the *Contractor* should the *Contractor* fail to provide the services required or fail to meet any Key Dates.



If the *Employer* has suffered additional cost as a result of a failure by the *Contractor*, then the *Project Manager* shall assess the cost and forward the cost to the *Contractor* not later than 4 weeks following the event.



The *Project Manager* should consult with the *Contractor* for 14 days prior to deciding whether to include the additional cost as a deduction in the next payment certificate.

### Clause 26: *SubContractor* Acceptance



The *Project Manager* should proactively agree with the *Contractor* guidelines as to what form of subcontract conditions will be used.



At the outset of the contract, the *Project Manager* should proactively agree with the *Contractor* what the form(s) of subcontract conditions will be.



The *Project Manager* should ensure that the *Contractor's* procurement procedures include for early identification of the tenderers for each package, whether the package has design and the intended form of subcontract conditions.



The *Project Manager* should engage with the Crossrail Supply Chain Deliver Director (or equivalent) to monitor the risk of over-exposure of a tenderer and Subcontractor to CRL's work.



The *Project Manager* should raising early warnings to the *Contractor* if the *Contractor* does not follow its procurement schedule.



The *Project Manager* should ensure that he obtains a copy of the executed subcontract.

## Appendices

### Reference Documents

Ref:	Document Title	Document Number:
2.1	Key CRL clauses to be inserted into subcontract conditions	CRL1-XRL-Z-GML-CRG03-00033
2.2	Procurement Schedule	CRL1-XRL-Z-GML-CRG03-00034

### Standard Forms / Templates

Ref:	Document Title	Document Number:
2.3	Subcontractor Acceptance Checklist	CRL1-XRL-Z-GML-CRG03-00035

### Guidance Notes

Ref:	Document Title	Document Number:
2.4	Guidance Note on design responsibility for MEP and architectural works	CRL1-XRL-Z-GML-CRG03-50028
2.5	Guidance Note on design responsibility for systemwide works	CRL1-XRL-Z-GML-CRG03-50029
2.6	Guidance Notes on Contractor's liability on key dates - Clause 25.3	CRL1-XRL-Z-GML-CRG03-50030

The list of guidance notes may be added to, prior to the issue of the next revision of the CAM. CMS should be checked to identify the current list of guidance notes.

### 3 Core Clause 3: Time (Part 1)

#### 3.1 Introduction

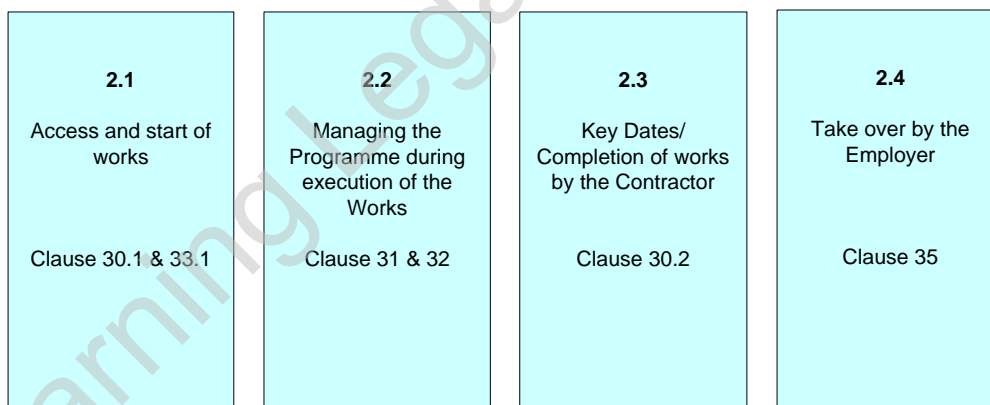
This section refers to Core Clause 3 of the conditions of contract relating to the performance of the contract by the *Contractor* from the initial start of work on the Site up to and including Completion of the *works* and their subsequent take over by the *Employer*. It sets out the actions that are to be taken by the *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* during this time period, as well as when they should be taken. It also deals with the Accepted Programme that has been described as the beating heart of the NEC3 Contract.



**TIP** The Accepted Programme is fundamental to the successful administration of the contract and all efforts must be employed by the *Project Manager* and *Contractor* to work together in maintaining it as the contract intends and requires.

#### 3.2 The Key Processes

Four key processes are contained within Core Clause 3:



Access and start of works

Background

Contract Data Part One sets out the *access date(s)* and it is these dates that the *Contractor* will expect to be delivered by the *Employer*. The *Contractor* does not start on Site until he is granted and given access by the *Employer*, or the *Project Manager*, on the *Employer's* behalf.

A *Contractor* may propose a later *access date* by showing the same on his Accepted Programme and this becomes the applicable date. However he has no right to bring an *access date* forward. Should a *Contractor* do so then this is a reason for the *Project Manager* not to accept the programme as it does not show the information that the Contract requires.



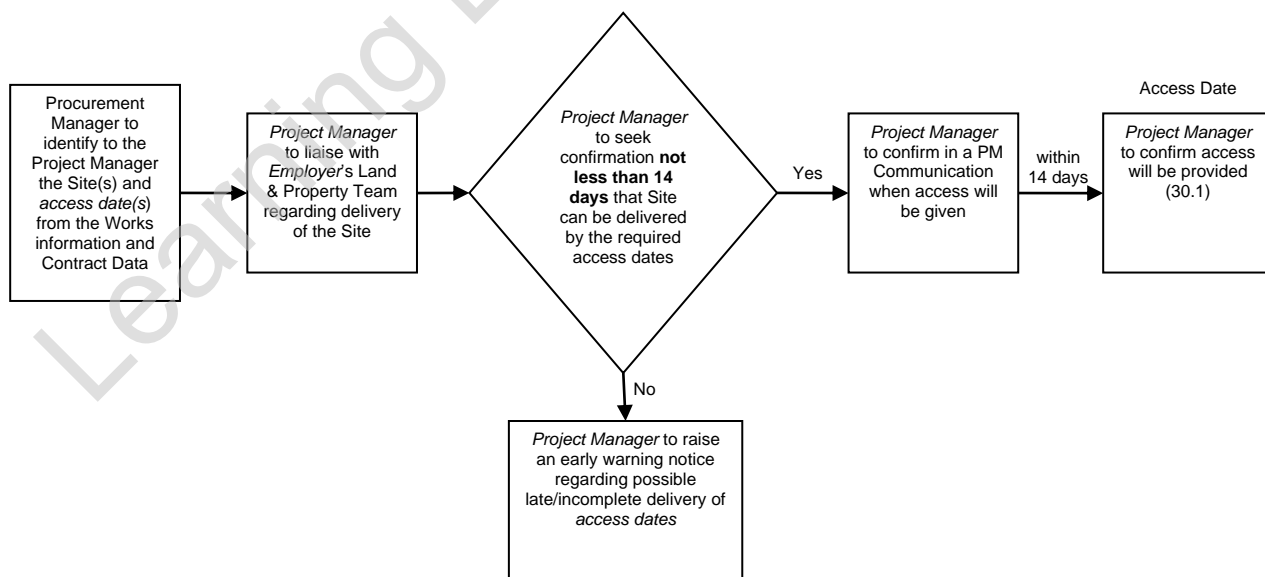
The *Project Manager* must however always check that **NO access dates have been advanced** by the *Contractor* in its Accepted Programme as if this point is missed and the programme is accepted, it increases the risk of a compensation event.



In the event that access is not granted by the later date, the *Contractor* will be eligible for a compensation event in accordance with clause 60.1(2). It is essential therefore that the *Project Manager* keeps records of all the *access dates* and how they may move and who caused this.

Providing Access

In the Contract Handover Meeting, the Procurement Team (Procurement Leader) will summarise the *access date(s)* and the Site(s). The *Project Manager* should get familiar with this / these requirement(s).



It is the *Project Manager* who must manage the process of providing access to the Site for the *Contractor*. This may involve liaison by the *Project Manager* with the various land and property departments of the *Employer* as well as other Stakeholders such as Network Rail, London Underground et al and the *Project Manager* of the preceding contract.



**TIP** Early liaison by the *Project Manager* with the *Employer's* Estates team is essential to ensure that the Site footprint and date for access is secured by the required date.



**TIP** The *Project Manager* should obtain confirmation from the *Employer's* Estates Team not less than 14 days before the required *access date*. Should the *Employer* be unable to confirm that access will be provided 14 days before the planned *access date*, the *Project Manager* should raise an early warning notice to the *Contractor*.

Once confirmation has been given by the *Employer's* Estates team in writing to the *Project Manager*, the *Project Manager* should immediately confirm to the *Contractor* within a communication the following:

- the *access date(s)*;
- *boundaries of the site* and any access issues;
- clarify whether the *Contractor* will be the Principal Contractor for the Site; and
- enclose any legacy Health & Safety File and/ or as-built drawings of the Site

A copy of this communication is to be copied to the *Employer* (Land & Property, H&S) and *Supervisor*.

In addition, on the actual day that access is granted, the *Project Manager* should confirm in a communication that access was granted and that the *Contractor* takes on the role of Principal Contractor.

The *Project Manager* will also be responsible for any subsequent handovers of the Site from one *Contractor* to another so it is essential that the *Project Manager* ensures that the *Contractor* maintains an up to date Health and Safety file including as built drawings where applicable.

#### Access for the *Contractor/s* during the Defects period

Note that following takeover of any part of the *works* by the *Employer*, it is the duty of the *Project Manager*, on behalf of the *Employer*, to arrange access to and use of part of the *works* by the *Contractor* for the purposes of correcting defects.

.....



Managing the Accepted Programme during execution of the works

### Background

The requirement for an Accepted Programme is a cornerstone of the Contract in terms of contract administration as without one effective and positive contract management is impaired. Clauses 31 and 32 relate to this topic and should be referred to by the reader.

**CAP4** The *Employer* expects and requires that the *Project Manager* should do all that is reasonably possible to ensure that there is an Accepted Programme at all times. The *Employer* recognises that this may entail the *Project Manager* relaxing certain non-essential requirements in order to do so.

The reason that the *Project Manager* should accept the *Contractor's* programme is because an Accepted Programme:

- Enables the *Project Manager* and *Contractor* to monitor progress;
- Is required to assess likely achievement of Key Dates, completion of any section of the *works* and Completion of the whole of the *works*; and
- Is needed to assess the time effects of compensation events, including changes to the Completion date and Key Dates.

Clause 30.1 relates to this provision of access to the *Contractor* but it also requires that the *Contractor* “proceeds with the work regularly and diligently so Completion is on or before the Completion Date”.



**TIP** The *Project Manager* is responsible for monitoring the *Contractor's* performance because this is a critical obligation on the *Contractor* that must be monitored.

All non-performance must be recorded in early warnings to the *Contractor*.

### First programme

The Procurement Team will advise the *Project Manager* whether an Accepted Programme is bound into the Contract, if not, then the *Project Manager* is referred to Clause 31.1 which requires that the *Contractor* has to submit a first programme to the *Project Manager* for acceptance within the period stated in the Contract Data. This is generally four weeks from the Contract Date but the *Project Manager* must check each individual contract as this time period may vary and may even be amended to commence from the *starting date*.

The *Project Manager* is responsible for ensuring that the *Contractor* complies with this provision.



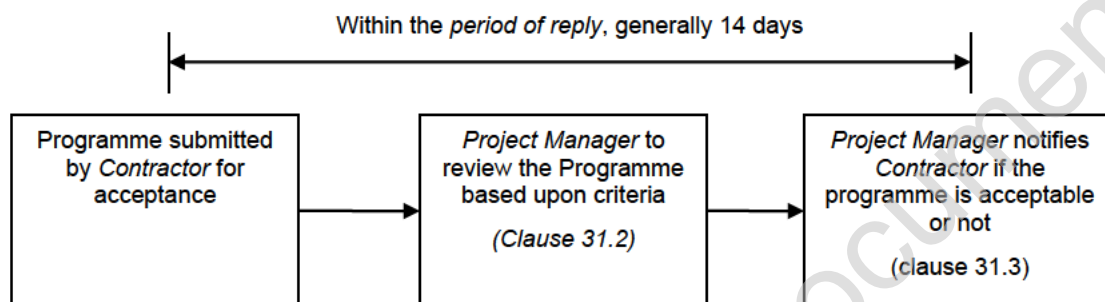
**TIP** Should the *Contractor* not comply with its obligations in respect of submitting a first programme within the time required is to do so the remedy stated in the Contract is to withhold 25% of the Price for Work Done to Date.

Requirements for a Programme

The requirements for a Programme are generally set out as follows:-

- Clause 31.2 of the *conditions of contract*
- Part 14 of the Works Information

Accepting a Programme (including revisions) by the Project Manager



Clause 31.3 sets out the criteria on which the *Project Manager* may legitimately not accept a programme. If the *Project Manager* rejects a Programme for other reasons it is a compensation event under 60.1(9)



The *Project Manager* can **NOT** reject a programme for reasons other than 31.3 without giving rise to a compensation event.

It has been recognised by the *Employer* that the requirements of Part 14 can act as an impediment to the *Project Manager* accepting what may be a reasonable programme, which is also counter to the *Employer's* CAP4.

As such the *Employer* expects the *Project Manager* to take all reasonable steps to accept a *Contractor's* programme and take a pragmatic approach employing professional judgement when considering the following criteria as requirements for accepting a programme:

- A logical and coherent critical path;
- Cover all of the *works* including all additional *works* notified by instruction and the effects of early warnings raised to the data date;
- Show all *access dates*, Key Dates/ Completion Dates as well as planned Completion (**NB Check that none have been advanced by the Contractor**);
- Separately identify time risk allowances from activities, total float and terminal float;
- Provision for health and safety requirements and the key procedures in the contract;
- The order and timing of the work by the *Employer* and Others, as agreed and/ or referred to in the Contract and/ or Works Information;
- The dates on which necessary consents and approvals are to be obtained (including those of the *Employer*);
- The dates from the *Contractor's* Procurement Plan and Procurement Schedule;
- Date for issuance of key document deliverables;

- Separately give details of resources in terms of people, major Equipment, Plant and Materials within a progressive rolling 6 month window where the further away in time the less detail is needed;
- Actual progress achieved by activity at the data cut off date;
- Include an explanation of changes since the last Accepted Programme and any effect upon the critical path;
- Include details on procurement of subcontractors, and key plant and major Equipment;
- Set out key assumptions;
- How any Defect(s) will be resolved; and
- In accordance with the Work Breakdown Structure (WBS).



**TIP**

Once a programme has been issued by the *Contractor*, the planners from the respective *Project Manager* and *Contractor* should be encouraged to enter into active and progressive dialogue over the programme.



Remember if a programme shows planned Completion later than the Completion Date this is **NOT** a reason for the *Project Manager* not accepting it, provided that the date shown on the programme is realistic and practicable.

Remember that if a programme is accepted with planned Completion later than the Completion Date this does not grant any automatic extension to or movement of the Completion Date. The only way that the Completion Date can be moved is as a result of a compensation event.



**TIP**

The *Project Manager* should always use the Programme Review and Assessment form and ensure that this is uploaded to eB - refer to **Appendix 3.1** for the template.

In accordance with clause 31.3 the *Project Manager* has a maximum of 2 weeks to either accept or reject the programme. If possible, the *Project Manager* should always seek to better the 2 weeks period of reply in order to reduce any potential period of time without an up to date current Accepted Programme if, for example, the *Project Manager* requires the *Contractor* to make any necessary updates following a rejection.

**CAP4**

Where a programme is to be rejected, and as an extension of the *Employer's* CAP4 policy above, the *Employer* expects the *Project Manager* to specify not only one of the reasons as above, but also provide sufficient constructive guidance to the *Contractor* on the particular deficiencies of the programme such that if the *Contractor* takes into account the *Project Manager's* guidance, the *Contractor's* revised programme can be acceptable.

Clause 32.1 covers the periodic and regular updating and resubmission of a revised Accepted Programme for acceptance, which must progressively include actual progress data as well as the effects of implemented compensation events on the Completion Date or Key Date(s) plus how Defects are to be dealt with and any other changes the *Contractor* proposes (clause 32.1).



**TIP**

Keep the programme meaningful and relevant and ensure it is updated with actual progress.



If the programme is outdated and used to analyse compensation events there is a likelihood any such analysis will produce an overstated time impact.



Should the Contractor not comply with its obligations in respect of submitting a revised programme for acceptance within the time required is to do so the remedy stated in the Contract is to withhold 5% of the Price for Work Done to date.

### Instruction to stop or not to start work

The *Project Manager* may give an instruction to stop work at any time to avoid or mitigate injury or damage. (clause 34.1)

### Acceleration



The *Project Manager* should remember here that clause 36.1 applies **only** when the *Project Manager* instructs the *Contractor* to achieve Completion before the Completion Date and must not be confused with seeking an alternative quotation in accordance with Clause 62.1. Acceleration is dealt with in more detail in Section 3 (Part 2), of this manual “Programme Recovery and Programme Acceleration”.



The *Project Manager* should similarly be aware that if the *Project Manager* accepts a value engineering proposal under clause Z15 **no changes** are made to the Prices, the Completion Date or the Planned Completion Date in the Accepted Programme.

### Key Dates / Completion of works by the *Contractor*

#### Key Dates

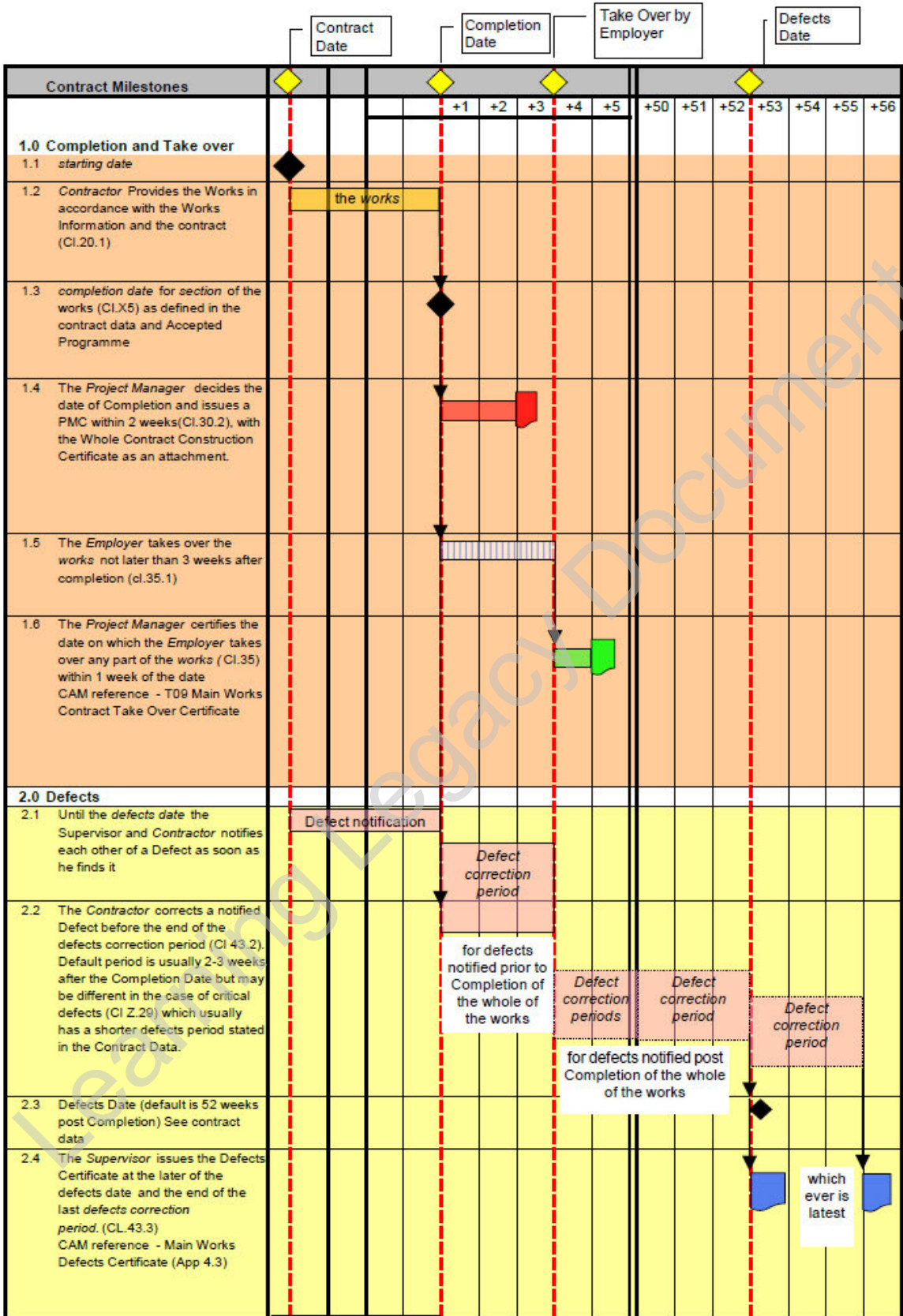



There is no requirement under the Contract for a formal certificate to be issued by the *Project Manager*, however, the *Project Manager* should record whether a Key Date has been achieved or not as it may trigger the start of delay damages or additional cost under clause 25.3 if the *Contractor* is late.

#### Completion (applicable also to sectional Completion)

In addition to the Completion process, as defined in the contract, it is important that the *Project Manager* also ensures that the *Employer's* internal completion processes are adhered to in the lead up to Completion (**Reference G**). These processes run in parallel with and support the contractual processes for Completion and are essential in providing the *Project Manager* with enough evidence that Completion has in fact occurred.

The diagram below sets out the generic Completion workflow and process for Completion, takeover by the *Employer* and how they interface with defects (see Core clause 4).



	<p>The processes for <i>sectional</i> Completion (CI.X5) and Completion are seen as being the same. It is important that the <i>Project Manager</i> carries out his duties for both i.e. Completion/sectional Completion certificate, management of defects and certifying take-over. Following sectional Completion the defects notification period continues until the <i>defects date</i> of which there is only one i.e. 52 weeks after Completion of the whole of the <i>works</i>. This can result in an extended defects notification period for sectional Completion works.</p>
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It is essential that all the steps defined in the Contract leading to Completion are followed correctly by the *Project Manager* and *Contractor* to ensure that the *Employer* receives the completed *works* as defined in clause 11.2 (7).

This requires that the *Contractor* has done all the work which the Works Information states he is to do by the Completion Date and corrected any notified Defects which would have prevented the *Employer* from using the *works* and Others from doing their work.

As part of the Completion process, the *Project Manager* should carry out the following:

- Ensure that the *Contractor* has complied with the *Employer's* Completion Processes (**Reference G**) and its obligations to maintain records. This will be confirmed through signature by the Supervisor of the Contractor's presented 'Whole Contract Construction Certificate (**Reference H**) [and/or Sectional Contract Construction Certificate (**Reference J**)]'. This process is described within the Works Information Volume 2B 'General Requirements' Part 13: 'Assurance, Records and Certificates to be Provided by the Contractor (Civils) (Systems contracts - Part 29).
- As part of this process the following information is required:
  - i) Ensure that the *Supervisor* confirms that the *Contractor* has corrected notified Defects which would prevent the *Employer* from using the *works* and Others from doing their *works*;
  - ii) Identify a list of other Defects that will be corrected in the *defect correction period*, which is typically 3 weeks. See Section 4 on Defects; and
  - iii) All necessary documentation as required in the Works Information, for example, as-built drawings and O&M Manuals.

### For Completion

Once the Supervisor signs the Whole Contract Construction Certificate (WCCC), the Project Manager signs to certify Completion.

The WCCC does NOT state the date of Completion. The Project Manager issues a project manager's communication (PMC) to the Contractor with a copy of the signed WCCC as an attachment. The PMC should state the following:

"In accordance with Clause 30.2 the certified date of Completion for the Contract is xxx. The defects date is 52\* weeks after the date of Completion of xxx. The uncorrected defects at Completion are set out within the attached Whole Contract Construction Certificate reference xxx".

\*The contract administrator must check in the contract data to ensure that the correct defects date is stated in the PMC.

The *Project Manager* should then compare the certified date of Completion to the Completion Date. If the date is later then in accordance with Clause X7 and the *Employers* CAP 12 Delay Damages are due to be paid by the *Contractor*. Any such *delay damages* should be included in the *Project Manager's* assessment of the amount due and subsequent payment certificates.

### For Sectional Completion

Once the Supervisor signs the Sectional Contract Construction Certificate (SCCC), the Project Manager signs to certify Sectional Completion.

The SCCC does NOT state the date of Sectional Completion. The Project Manager issues a project manager’s communication (PMC) to the Contractor with a copy of the signed SCCC as an attachment. The PMC should state the following:

“In accordance with Clause 30.2 the certified date of Sectional Completion (reference) is xxx. The uncorrected defects at this Sectional Completion are set out within the attached Sectional Contract Construction Certificate reference xxx”.

The *Project Manager* should then compare the certified date of Sectional Completion to the Sectional Completion Date. If the date is later then in accordance with Clause X7 and the *Employers* CAP 12 Delay Damages are due to be paid by the *Contractor*. Any such *delay damages* should be included in the *Project Manager’s* assessment of the amount due and subsequent payment certificates.



**TIP**

Remember it is the *Project Manager’s* responsibility to certify Completion within 2 weeks of Completion as per clause 30.2 by issue of the PMC stated above. There is no requirement under the conditions of contract for the *Contractor* to apply for Completion.

The *Project Manager* will also be responsible for any subsequent handovers of the Site from one *Contractor* to another so it is essential that the *Project Manager* ensures that the *Contractor* maintains an up to date Health and Safety file including as built drawings where applicable. These processes are not set out in the contract but defined as part of the *Employer* and *Project Manager’s* completion and takeover processes.



**TIP**

In the standard Works Information the level of deliverables/ documentation required for Sectional Completion does not differ from Completion. The *Project Manager* should check his Contract Works Information to understand the extent of deliverables/ documentation to be submitted prior to Sectional Completion.

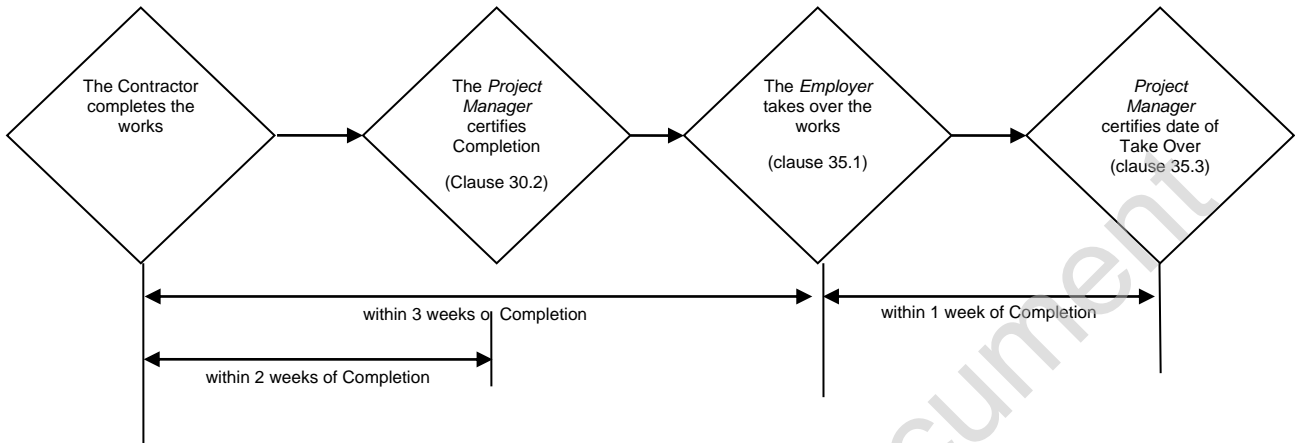


**TIP**

Completion triggers the commencement of the *defects correction period* for defects notified before the certified date of completion. The duration of the *defects correction period* is usually 2-3weeks and is defined in the Contract Data. See Core clause 4 Testing and Defects for more detail around defects management.

Take over by the *Employer*

Take over of the *works* or a part of the *works* is governed by clause 35 of the conditions of contract.



Under the contract the *Employer* must take over the *works* within 3 weeks of Completion or *sectional* Completion. The *Project Manager* must work with the *Employer* to ensure that there is a seamless transition process in place prior to Completion. The *Project Manager* must therefore check that the *Employer* has put in place security measures and has obtained insurance cover (or has ensured that another *Contractor* taking over responsibility for the Site has done so). On take over the responsibility for insurance and security cease being the *Contractor's* responsibility and become the *Employer's* responsibility.

In accordance with clause 80.1 this becomes an *Employer's* risk and the *Employer* is thereafter liable for any loss of or wear or damage to the parts of the *works* taken over, except loss, wear or damage occurring before the issue of the Defects Certificate due to

- an event occurring before take over which was not itself an *Employer's* risk or
- the activities of the *Contractor* on the Site after take over.

Reference is made to clause 35 and the Works Information as well as the Contract Data as these may include provisions which negate take over occurring and the *Project Manager* needs to be aware and alert to this. An example of this would be if the Works Information states that the *Employer* may use specific parts of the *works* for a period of time and therefore need not takeover the *works*.

If the *Project Manager* certifies take over of a part of the *works* before both Completion and the Completion Date it is a compensation event in accordance with clause 60.1 (15) and the *Contractor* is entitled to compensation for any additional costs incurred as a result of this early take over. See Section 6 for more details.

Care and Custody Provisions

The *Employer* will provide interim guidance relating to care and custody through Central Communications (CECs).



**TIP** The *Project Manager* issues take over certificates within the stipulated time periods and the *Contractor* does not have to apply for same.





The pro forma take over certificate to be used and issued by the *Project Manager* to both *Employer* and *Contractor* is at **Appendix 3.3**. This certificate covers options for a part of the *works* as well as a section of or the whole of the *works*.

The *Project Manager* is to liaise with the *Employer* (CRL Commercial and CRL legal) on the wording of the certificate in relation to the description of the *works* being taken over.

The *Project Manager* is reminded that the take over certificate is not the final certificate to be issued under the Contract. This is the Defects Certificate which is defined in clause 11.2 (6). It is either a list of Defects that the *Supervisor* has notified before the *defects date* which the *Contractor* has not corrected, or, if there are no such Defects, a statement that there are none. The Defects Certificate is issued by the *Supervisor* and is covered by Section 4 above.

### Commercial Close Out of Contracts

CRL require that contracts are closed out in a timely way and such that CRL's commercial interests are fully considered; the following steps must be taken by the *Project Manager*:

- Commercial Contract Close-Out Plan

At least six months before the anticipated Completion (whole of the *works* or start of care and custody period) of any contract the *Project Manager* must prepare a Commercial Contract Close-Out Plan and submit this to the Executive Sub-Committee for approval\*. Refer to **Appendix 3.4** for the items to be included in the plan.

Following Completion of a contract (or start of care and custody period) the *Project Manager* must prepare the following reports for submission to the Executive Sub-Committee:

- Contract Completion Commercial Report  
This report must be submitted to the next Executive Sub-committee three periods after contract Completion or the start of the care and custody period\*. Refer to the **Appendix 3.5** for a list of items to include.
- Contract Defects Date Commercial Report  
This report must be submitted to the next Executive Sub-committee after the *defects date*\*. Refer to the **Appendix 3.6** for a list of items to include.

\* Requirements for submission to Executive Committee will be subject to review by the Commercial Directorate. Low value contracts will not be presented, or may be presented in bundles (for example by Project).

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### 3.3 Golden Rules

**Time (These rules should be read in conjunction with Appendix 6.2 “Notes of various issues relating to the management of time”)**



Early liaison by the *Project Manager* with the *Employer's* Land & Property team is essential to ensure that the Site footprint and date for access is secured by the required date.



A pragmatic approach is to be taken to the requirements of a Programme.



The *Project Manager* should always check *access dates* and any *Employer* or Other or *Project Manager* deliverable dates included in an Accepted Programme.



Any time periods stipulated by the contract for acceptance and/or reply should be adhered to.



The only thing that can move the Completion Date or a Key Date is a compensation event.



If a *Contractor* shows Planned Completion later than the Completion Date, provided this is realistic and practicable, this is acceptable and **NOT** a reason for not accepting the programme.



It is the *Project Manager's* obligation to certify completion and take over within the stipulated time periods and these do not have to be requested by the *Contractor*.



A situation where the Accepted Programme becomes outdated is to be avoided as it can lead to disputes between the Contractor and Employer. The Project Manager should be aware that if such a situation transpires it can lead to a loss of clarity on time targets and increases the opportunity for the Contractor to argue that time administration has broken down.

## Appendices

### Reference Documents

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
G	Employer's Completion Process	CRL1-XRL-O4-GPD-CR001-50018
H	Whole Contract Construction Certificate Part 1 of 2	CRL1-XRL-O4-ZTM-CR001-50030
J	Sectional Contract Construction Certificate Part 1 of 2	CRL1-XRL-O4-ZFM-CR001-50009

### Standard Forms / Templates

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
3.1	Flowchart for Programme Acceptance	CRL1-XRL-Z-GML-CRG03-00036
3.3	Take Over Certificate	CRL1-XRL-Z-GML-CRG03-00038
3.4	Contract Commercial Close-Out Plan	CRL1-XRL-Z-GML-CRG03-50019
3.5	Contract Completion Commercial Report	CRL1-XRL-Z-GML-CRG03-50020
3.6	Contract Defects Date Commercial Report	CRL1-XRL-Z-GML-CRG03-50021

### Guidance Notes

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
6.2	Guidance Notes of various issues relating to the management of time	CRL1-XRL-Z-GML-CRG03-50031

The list of guidance notes may be added to, prior to the issue of the next revision of the CAM. CMS should be checked to identify the current list of guidance notes.

### 3 Core Clause 3 (Part 2) – Programme Recovery and Programme Acceleration

#### 3.1 Introduction

This guidance note is intended to advise on situations where:

- the *Contractor's* planned date of Completion is later than the Completion Date; or
- The *Employer/Project Manager* wishes the *Contractor* to achieve Completion prior to the Completion Date, or to meet the Condition stated for a Key Date earlier than the Key Date.

The *Project Manager* needs to clearly understand the distinctions and the significantly different contractual implications of acceleration, recovery, mitigation measures, re-sequencing and other options available to the *Contractor* to recover programme delay.

If planned Completion is later than the Completion Date: A *Contractor's* obligation is to recover programme delay

This is not a case of acceleration.

In accordance with Clause 30.1, the *Contractor* proceeds with the work regularly and diligently so that Completion is on or before the Completion Date. Clause 32.1 also requires the *Contractor* to show on each revised programme how he intends to deal with any delay.

The *Employer's* remedy for the *Contractor* failing to achieve Completion by the Completion Date is the imposition of delay damages.

The *Employer's* remedy for the *Contractor* failing to achieve a Key Date is either the recovery of any loss, expense or additional cost which the *Employer* has paid or will incur or delay damages (where it is indicated within Contract Data Part 2 that clause Z27 applies).

A *Contractor* may decide to mobilise additional resource and incur additional costs in order to recover delays for which he is liable in order to avoid liability for delay damages. This approach is not considered to be acceleration but simply discharging the obligation to recover delay.



**TIP** For NEC Target Contract arrangements, in accordance with Clause 30.1, the *Contractor* would be paid his delay recovery costs, as Defined Costs and no adjustment to the Target Price would be required.

Achieving Completion prior to the Completion Date or the Condition for a Key Date earlier than the Key Date: acceleration

Clause 36.1 allows the *Project Manager* to instruct the *Contractor* to accelerate in order to achieve Completion in advance of the Completion Date. Clause 14.3 allows the *Project Manager* to change a Key Date by instruction. Clause 60.1(4) recognises that any instruction to accelerate or change a Key Date is a compensation event.

Quotations for compensation events, however, comprise only delays to Completion Dates and Key Dates; hence the usual compensation event mechanism does not permit either type of date to be brought forward to an earlier date (clause 62.2). The written agreement of the *Contractor* is therefore required in order to change a Completion Date or Key Date to an earlier date and to bring forward the associated liability for damages (liquidated or otherwise). This would usually be obtained through a Supplemental Agreement.

The *Project Manager* is unable to change a Completion Date or Key Date to an earlier date using the compensation mechanism except by written agreement with the *Contractor*. Therefore, there can be no entitlement to earlier damages through a *Project Manager's* instruction under either 14.3 or 36.1.



**TIP**

For NEC Target Contract arrangements, in accordance with Clause 36.1, the *Contractor* would be paid his acceleration costs, as Defined Costs and in addition, an adjustment to the Target Price would be required.

#### Key points for consideration

- An instruction to accelerate does **not** guarantee that Completion will be achieved in advance of the Completion Date. Other events are likely to occur after the date of the instruction given to accelerate;
- An instruction to accelerate is treated like any other compensation event and hence the *Project Manager* may request quotations and make *Project Manager's* assessments if required. The Completion Date or Key Date itself (and the damages attached to such date, whether liquidated or otherwise) cannot however be brought forward by a *Project Manager's* assessment;
- *Project Managers* and *Contractors* may find it useful to approach programme recovery / acceleration on a two-stage basis:
  - measures required to achieve the Completion Date;
  - acceleration measures required to achieve an earlier Completion Date or Key Date;
- An alternative approach to agreeing acceleration measures can be for the *Project Manager* and *Contractor* by agreement to include within one quotation from the *Contractor* the combined effect of compensation events that extend the Completion Date and compensation events that bring back the Completion Date provided that the overall effect is not to bring forward the date.
- Acceleration may lead to increased disruption, reduced productivity, increased defects, increased costs, increased interfaces and potentially less safe working.



The *Project Manager* needs to proceed with caution and be aware of the significant risks and commercial implications of instructing acceleration in the absence of a written agreement with the *Contractor*.

Even with an agreed quotation in place, there is no guarantee that the desired results will in fact be achieved.



Given the commercial risks, an alternative approach to instructing acceleration under clause 36.1, is for the *Project Manager* to seek a range of quotations for a proposed instruction in accordance with clause 61.2, in order to satisfy himself in advance as to the likely benefits of an earlier Completion Date or Key Date.



When assessing quotations for acceleration *Project Managers* should be careful to only include for the cost of acceleration measures rather than for the *Contractor's* own costs of programme recovery.

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### 3.2 Golden Rules (These rules should be read with Appendix 6.2 “Notes of various issues relating to the management of time”)



The *Contractor* is already obliged to proceed regularly and diligently and notify the *Project Manager* on how he intends to deal with programme delays.



Approval should be sought from the Delivery Director in advance of any instruction to accelerate the works.



The *Contractor* can propose measures which can help toward achieving an earlier planned date of Completion, but only the *Employer* and the *Contractor* can agree an earlier Completion Date or Key Date (by means of a Supplemental Agreement).



The *Project Manager* should carefully consider any perceived benefits of acceleration and fully appreciate that acceleration is not a guarantee

## Appendices

### Reference Documents

Ref:	Document Title	Document Number:
	N/A	

### Standard Forms / Templates

Ref:	Document Title	Document Number:
	N/A	

### Guidance Notes

Ref:	Document Title	Document Number:
6.2	Notes of various issues relating to the management of time	CRL1-XRL-Z-GML-CRG03-50031

The list of guidance notes may be added to, prior to the issue of the next revision of the CAM. CMS should be checked to identify the current list of guidance notes.

## 4 Core Clause 4: Testing and Defects

### 4.1 Introduction

This section refers to Core Clause 4 of the *conditions of contract* relating to the quality of the work performed under the Contract by the *Contractor*, leading up to the ultimate issue of the Defects Certificate by the *Supervisor*. It covers how tests and inspection are carried out and how Defects are notified and corrected.

Core clause 4 should be read alongside Part 20 (Quality Management) of the Works Information and the Construction Quality Plan (**Reference K**).

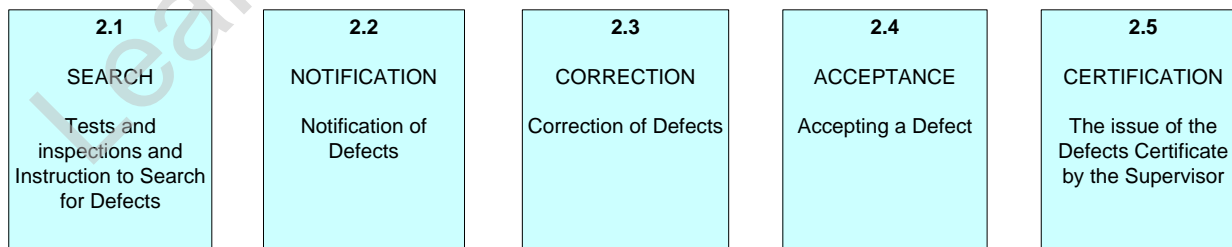
This section also covers the management of defects where works have been “Taken Over” by the *Employer* and then “Handed Over” to others (RfL). The additional arrangements for continued management of defects in such circumstances are as set out in a **Guidance Note [Reference 4.4]**.



**TIP** Core Clause 4 comprises six clauses with 18 sub-clauses that are usually found on pages 30 to 32 of the Main Civils Contract.

### 4.2 The Key Processes

Five Key processes are contained within Core Clause 4 and relate to progressive treatment of Defects during the Contract from starting up to the issue of the Defects Certificate. They are:



#### 4.2.1 Tests and Inspections and Instruction to Search for Defects



Notification of a Test and/ or Inspection

Clause 40.1 stipulates that the requirements of the Contract in terms of any test or inspection are restricted to what the Works Information or the Applicable Law require. This means that the Works Information is critical in the establishment of what tests should be carried out. It also similarly governs what materials and samples are to be provided for testing as per clause 40.2.

For clarity the *Supervisor* cannot ask for a test that is not specified or called for in the Works Information – if the *Supervisor* does, then it will be a compensation event. The *Contractor* however is not so restricted.

Both the *Contractor* and the *Supervisor* are required to give the other prior notice of a test and also advise the result of the test to the other as per clause 40.3. The *Supervisor* also has unfettered access to watch any test.

If a Defect is found as a result of a test then, it must be corrected by the *Contractor*, and the test repeated. (clause 40.4)



**TIP**

For further guidance on testing offsite, clause 41.1 confirms that the *Contractor* must not bring to the Working Areas those Equipment, Plant and Materials which the Works Information states are to be tested or inspected before delivery until the *Supervisor* has notified the *Contractor* that they have passed the test or inspection

Instruction to Search for a Defect

Clause 42.1 further states that until the *defects date*, the *Supervisor* may instruct the *Contractor* to search for a Defect. Supervisor's instruction's and communications are issued using eBCA workflows (where eBCA is not used, instruction templates are available from the *Employer*).

A *Supervisor's* Instruction should give reason(s) for the search with his instruction, being:

- uncovering, dismantling, re-covering and re-erecting work;
- providing facilities, materials and samples for tests and inspections done by the *Supervisor*; or
- doing tests and inspections which the Works Information does not require.



**TIP**

The *Project Manager* is referred to the Contract Data of the relevant Contract to establish what the *defects date* is. It is usually 52 weeks after Completion but this may vary so it must be checked.

The above means that, as is referenced above, the *Contractor* can be instructed to carry out a search for a Defect as per the Works Information, at any time up until the *defects date*, if instructed to do so by the *Supervisor*. (clause 42.1).

The *Employer* recognises that in some instances the site may have passed to another contractor and a defect may be uncovered during the course of the follow-on contractor's activities (for example where piles are excavated). In such circumstances, the first Contractor should be advised and invited to observe the defect. The Project Manager should consider the range of options available including arranging access for the first Contractor to correct the Defect.

However, it is recognised that in a number of situations it may not be practical for such access to be given. In these circumstances, the *Employer* should be advised.



**TIP**

In accordance with clause 60.1 (10) a compensation event occurs if the *Supervisor* instructs the *Contractor* to search for a Defect and no Defect is found (unless the search is needed only because the *Contractor* gave insufficient notice of doing work obstructing a required test or inspection.). See also **Section 6 on compensation events**.

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#### 4.2.2 Notification of a Defect

The *Supervisor* and the *Contractor* notify a Defect to each other as soon as it is found, which means that Defects are not to be left, they are to be dealt with promptly. (Clause 42.2)

Notifications to the Contractor are issued through an eBCA work flow.



**TIP**

In accordance with Core Clause 4 there is no active role for the *Project Manager* in the identification and notification of Defects. It is either the *Supervisor* or the *Contractor* to notify Defects, not the *Project Manager*.

What is a key point here, though, is that a failure by the *Contractor* to notify a Defect can indeed lead to any costs incurred in correcting of the relevant Defect being disallowed – refer to **section 4.2.4 below**.

Missing or incomplete deliverables are also classified as a Defect therefore the *Supervisor* should not only review the construction works but also documentation.



**TIP**

Where a key deliverable is missing which may affect the Accepted Programme, the *Supervisor* should notify the *Contractor* of this Defect and the *Project Manager* should consider raising an early warning.

Where works have been “Handed Over” to others (RfL), then the third party shall raise any potential contract defects through the process as set out in a **Guidance Note [Reference 4.4]**. Such potential defects may either be prior to Clause 30.2 Completion or within the defects period (typically 52 weeks after Completion).

### 4.2.3 Correcting Defects

The *Contractor* is obliged to correct a Defect whether or not the *Supervisor* has notified him of the Defect. (clause 43.1)

Any such correction by the *Contractor* has to be before the end of the *defect correction period*. The *defect correction period* begins at Completion for Defects notified before Completion and when the Defect is notified for other Defects. (Clause 43.2)



**TIP** The *defect correction period* is set out in the Contract Data Part 1, and is usually 3 weeks, but the *Project Manager* should check each individual contract as this may vary.

It follows that if the *Contractor* has to correct a Defect, it requires access to be provided to the defective work in order that it is able to do so. Therefore if the works have been taken over or are being worked on by another *Contractor*, the *Employer* or Others, clause 43.4 requires that the *Project Manager* arranges for the *Employer* to allow the *Contractor* access to and use of any such part of the works that has been taken over. In such a case the *defect correction period* begins when the necessary access has been provided to the *Contractor*.

#### Disallowed Costs

The *Project Manager* is referred to clause 11.2 (24) which defines Disallowed Cost and allows the *Project Manager* to disallow the *Contractor's* costs if these are incurred in:

- correcting Defects after Completion;
- correcting Defects caused by the *Contractor* not complying with a constraint on how he is to Provide the Works stated in the Works Information;
- correcting Defects before Completion caused by the *Contractor* not complying with the accepted quality plan referred to in the Works Information or this Contract; or
- correcting Defects notified to the *Contractor* by the *Supervisor* which the *Contractor* failed previously to notify to the *Supervisor* having had the opportunity to notify such Defect.

Clause 11.2 (21) also states that Defined Cost includes the amount of payments due to Subcontractors for work which is subcontracted **without** taking account of amounts deducted for (amongst other things) the correction of Defects after Completion.

It is quite clear from the above that, apart from the fourth bullet of 11.2 (24) which has already been covered in 4.2.1 above, any costs associated with the correction of Defects **post Completion** are disallowable.

This includes missing documentation and / or deliverables, which have not been issued by the *Contractor* at Completion.

The *Project Manager* has also to review all the *Contractor's* costs associated with Defect  
Section 4 - Page 4 of 8

correction pre Completion and if they are due to non-compliance with a Works Information constraint or non-compliance with its accepted quality plan, again these may be disallowable.



**TIP**

If the *Contractor* does not comply with his quality plan when carrying out the works, the *Project Manager* should consider raising an early warning.

**CAP7**

In order to ascertain if either of these two potential reasons for disallowing the cost have occurred the *Project Manager* is required to liaise closely with the *Supervisor* and also to discuss the issue fully with the *Contractor* prior to disallowing any of the cost. This action is needed to comply with the *Employer's* CAP 7.

Learning Legacy Document

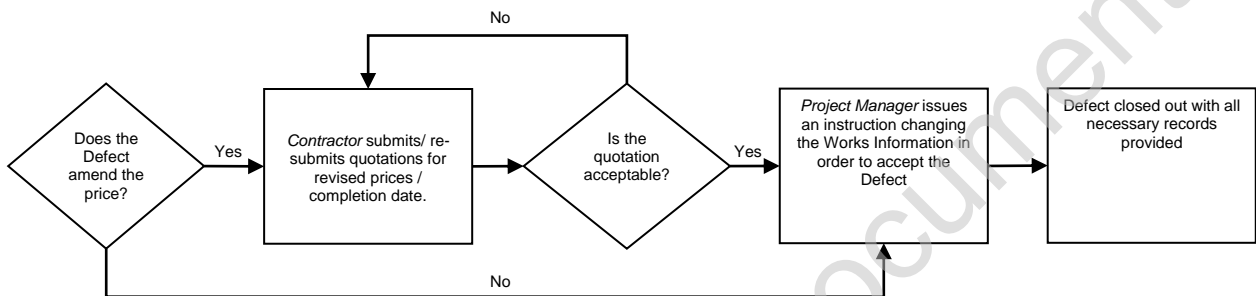
4.2.4 Accepting a Defect

As an alternative to correction of a Defect, in accordance with clause 44.1, the *Contractor* and the *Project Manager* may decide to propose to the other that the Works Information should be changed so that a Defect does not have to be corrected.



It should be noted that it is now the *Project Manager* who is involved and empowered to act, not the *Supervisor* although the *Project Manager* should consult with the *Supervisor* prior to deciding on the course of action.

Figure 3 – Accepting a Defect



The *Project Manager* (who as a matter of internal governance should consult with the *Supervisor*) decides whether a proposal is to be made that the Works Information is changed so that the Defect does not have to be corrected (clause 44.1).

It should be noted that accepting quotations for accepting defects are subject to the commitment authority levels shown at Appendix 0.1.



The *Project Manager* should remember that in accordance with clause 60.1(1) any such accepted change to the Works Information is **NOT** a compensation event.

Clause 45 summarises the two scenarios where a *Contractor* is given access in order to correct a notified Defect, but the Defect is not corrected within its *defect correction period*:

- where access is provided, clause 45.1 allows the *Project Manager* to assess the cost to the *Employer* of having the Defect corrected by other people and the *Contractor* pays this amount. The Works Information is treated as having been changed to accept the Defect. Again, in accordance with clause 60.1(1) any such change is **not** a compensation event.
- Where access is not provided, clause 45.2 requires the *Project Manager* to assess the cost to the *Contractor* of correcting the Defect and the *Contractor* pays this amount. The Works Information is also treated as having been changed to accept the Defect. Again, in accordance with clause 60.1(1) any such change is **not** a compensation event.

4.2.5 The Issue of the Defects Certificate by the Supervisor

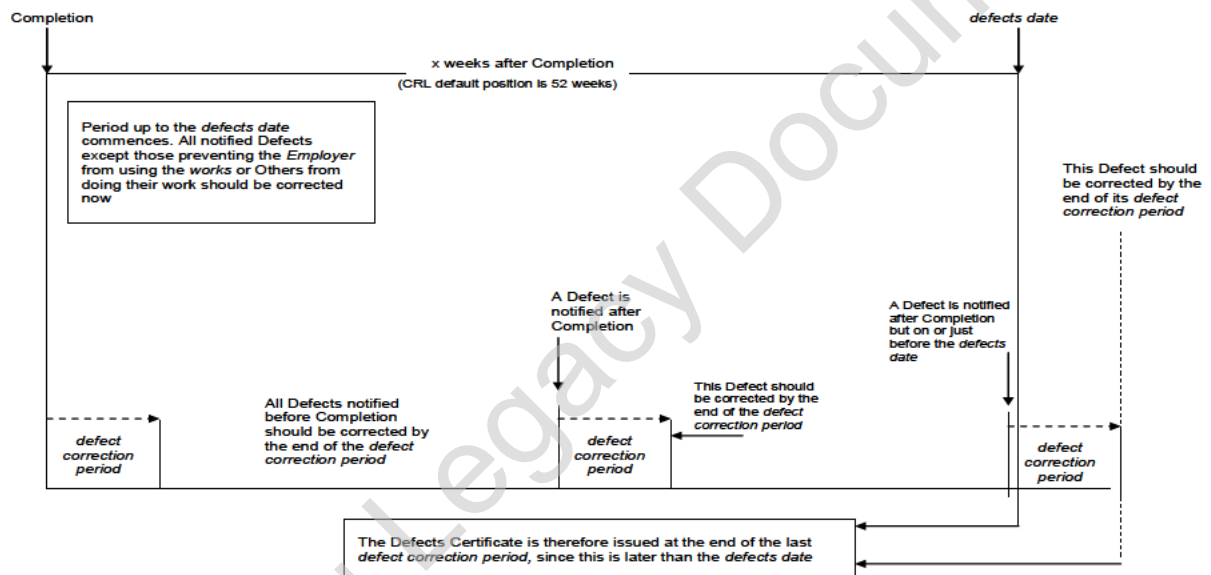
The Defects Certificate is defined in clause 11.2 (20) as either a list of Defects that the Supervisor has notified before the defects date which the Contractor has not corrected or, if there are no such Defects, a statement that there are none.



The Defects Certificate is issued by the Supervisor, not the Project Manager, in accordance with clause 43.3 at the later of the defects date and the end of the last defect correction period. Please refer to the process below

Again, this is an obligation directly on the Supervisor and there is no contractual requirement for the Contractor to have to request the issue of a Defects Certificate.

Issue of Defects Certificate by Supervisor



As per the diagram above, the Defects Certificate is normally issued at the defects date although as above it could be up to 3 weeks after the defects date if a late Defect is identified on or just before the defects date (assuming that 3 weeks is the defects correction period).



The Supervisor should use the proforma Defects Certificate at Appendix 4.3.

Once the Defects Certificate is issued, its date triggers the final assessment date for assessment of the amount due and issue of a payment certificate by the Project Manager. This assessment date is usually 8 weeks after the Supervisor issues the Defects Certificate (clause 50.1).

### 4.3 Golden Rules - Testing and Defects



Defects are notified by either the *Supervisor* (not the *Project Manager*) or the *Contractor*.



The *Contractor* is obliged to correct Defects whether they have been notified or not.



Failure to notify Defects by a *Contractor* can lead to Disallowed Cost before Completion.



Any costs associated with correction of Defects post Completion are disallowable. All costs pre Completion should be reviewed by the *Project Manager* to check that they are admissible as Defined Cost.



If Defects are not corrected by agreement between the *Project Manager* and *Contractor*, the Prices are only reduced and Completion Date only moved earlier and it is **NOT** a compensation event.



The Defects Certificate is to be issued by the *Supervisor* at the later of the *defects date* and the last *defect correction period*.

## Appendices

### Reference Documents

Ref:	Document Title	Document Number:
K	Construction Quality Plan	CRL1-XRL-N2-STP-CRG03-50004

### Standard Forms / Templates

Ref:	Document Title	Document Number:
4.3	Defects Certificate	CRL1-XRL-Z-GML-CRG03-00041

### Guidance Notes

Ref:	Document Title	Document Number:
4.4	Guidance Notes of Management of Defects after Handover to RfL	CRL1-XRL-Z-GML-CRG03-50035

The list of guidance notes may be added to, prior to the issue of the next revision of the CAM. CMS should be checked to identify the current list of guidance notes.

## 5 Core Clause 5 - Payment

### 5.1 Introduction

This section refers to Core Clause 5 of the conditions of contract, which relates to Payment. It also sets out the actions that are to be taken by the *Employer*, the *Contractor* and the *Project Manager* in relation to payment, as well as when they should be taken.

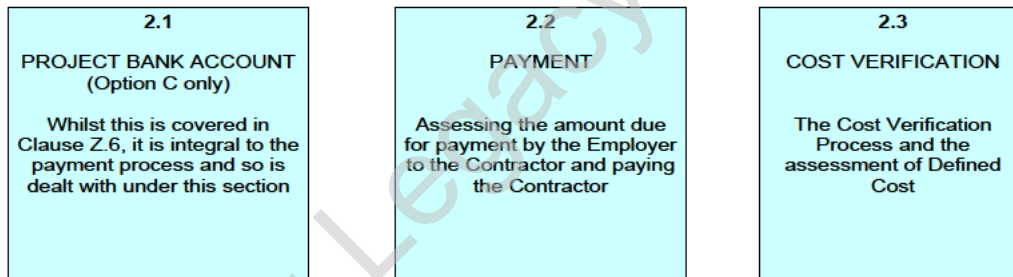
The *Employer's* objective is to encourage the *Project Manager* to concentrate efforts and resources on verification of cost, rather than on activities that relate purely to interim payments and cashflow into the Project Bank Account.



Core Clause 5 comprises five clauses that are usually found on pages 33 - 37 of the *conditions of contract*.

### 5.2 The Key Processes

There are three key processes relating to payment:-



#### 5.2.1 Setting up a Project Bank Account

The *Employer* establishes the Project Bank Account in accordance with clause Z.6 and within the time specified in the Contract Data and/or Part 14.3.3.1 of the Works Information, which states the Project Bank account will be set up within 1 week of the Contract Date.

The Project Bank Account is established by Crossrail Finance, and the Procurement Team will notify Crossrail Finance (Finance Controller) when a new contract is to be awarded.

In accordance with Part 14.3.3 of the Works information, the *Employer* should allow for the following Project Bank Account requirements:

- Remote access and administration via any web enabled computer system (subject to the project bank's access constraints and security requirements);
- *Employer* shall be the lead system administrator; and
- *Contractor* to have access rights to allow the *Contractor* to view and authorise payments from the Project Bank Account.



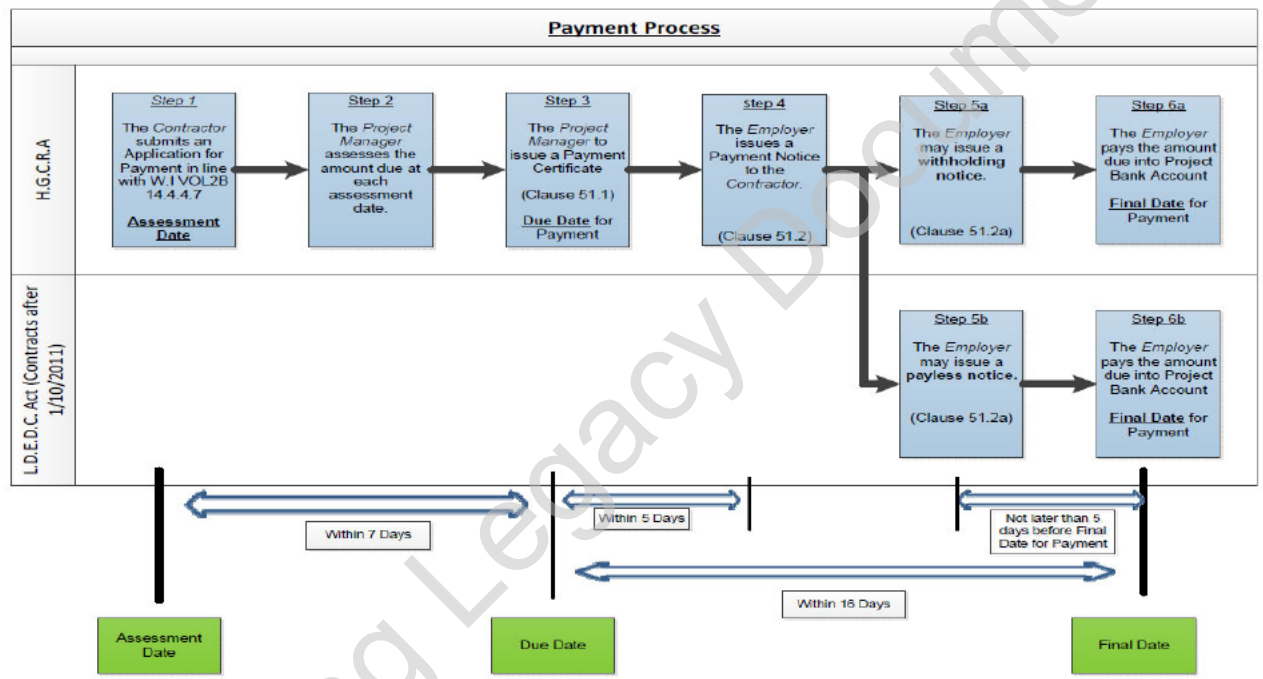


Once the amount due has been paid into the Project Bank Account by the Employer it is deemed to be payment to the Contractor.

It is worth re-emphasising the prime objectives of creating a Project Bank Account:

- a) The creation of a ring-fenced account to facilitate transparent payment practices to the supply chain in adherence with the CRL Fair Payment Charter; and
- b) The added protection for subcontractors and suppliers due to the Project Bank Account having trust status (following the execution of a Trust Deed between the Employer and the Contractor).

5.2.2 Assessing the amount due for payment by the Employer to the Contractor and paying the Contractor.



**Step 1 – Contractor submits an Application**

At the outset of the Contract, the Project Manager shall issue to the Contractor the Project Payment Calendar (refer to Appendix 5.1) and updated as necessary from the Crossrail Programme calendar.

On or before each assessment date, the Contractor submits an application for payment to the Project Manager (clause Z6.6 and/or 14.4.4.7 of 2B Works Information).

Clause 14.4.4.7 of 2B Works Information describes the level of detail expected of an application for payment from the Contractor. The following templates (Appendix 5.5) should be issued to the Contractor for submission of the application for payment:

- Application Summary Sheet
- Defined Cost Cashbook Statement
- Defined Cost in a currency other than the currency of this contract
- Forecast of Defined Cost – Subcontractors
- Forecast of Defined Cost – Schedule of Cost Components

- Forecast of Defined Cost – Staff/Consultancy/Agency

**Step 2 – Project Manager assesses the amount due**



This duty rests with the *Project Manager* and has to be discharged irrespective of whether the *Contractor* has submitted an application or not.

Prior to certifying the first payment to the *Contractor*, the *Project Manager* should liaise with the CRL Finance Team to check that the *Contractor* has a UTR tax number (to register them with CIS – Construction Industry Scheme) and their VAT number is in place. If not, the *Project Manager* should deduct 30% from the amount payable (which the *Contractor* should then reclaim from HMRC) and VAT will not be certified either.

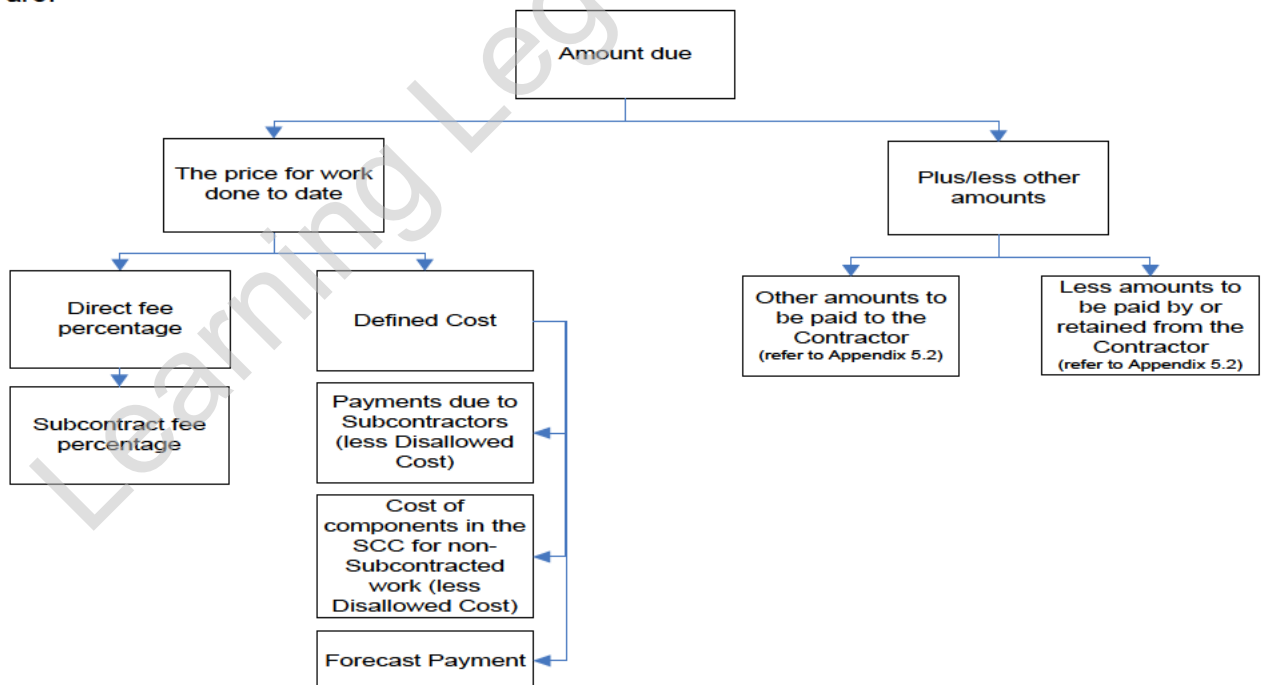
Clause 50.1 of the contract relates to the role of the *Project Manager* to assess the amount due to be paid to the *Contractor* at each assessment interval. This date/interval is set out in the Contract Data Part 1 and is generally, every four weeks up until eight weeks after the Defects Certificate has been issued.

The amount due is defined by clause 50.2 as :

- The Price for the Work Done to Date;
- Plus other amounts to be paid to the *Contractor*; and
- Less amounts to be paid by or retained from the *Contractor*.

To assist the *Project Manager*, a Payment Certificate Checklist has been produced dealing with other amounts outside of the Price for Work Done to Date (**Appendix 5.2**)

In diagrammatical terms, the amounts to consider are:



Any tax which the *Employer* is required to pay to the *Contractor* is included in the payment certificate. This relates to VAT and the *Project Manager* should ensure that at all times VAT is properly calculated as per the HMRC VAT rules and any items that are non Vatable such as *delay damages* are so rated.

Given that the intent of the interim payment process is to maintain the *Contractor* in a neutral cashflow position insofar as is reasonably practical, the extent of the *Project Manager's* assessment of a *Contractor's* application should include the following:

- i) To check there are no duplications within the Payments due to Subcontractors or the Cost of Components in the Schedule of Cost Components;
- ii) Review and check that the Defined Cost applied for and shown in the cashbook is represented within the *Contractor's* cost collection system (e.g. COINS/Siteman etc);
- iii) To check that the *Contractor* has not included for monies which are not payable under the Schedule of Cost Components;
- iv) To check that Subcontract payments are properly due under the terms of the particular subcontract and that the *Contractor* has correctly applied the terms of that subcontract;
- v) To check the Fee has been correctly calculated. The *Contractor's* Fee will be found in Contract Data Part 2 and should be applied to all admissible Defined Cost. This is clearly set out in clause 53.4B and is a specific variant to the standard NEC conditions;

**No Fee is payable on the amount by which Defined Cost exceeds the forecast total of Prices;**

- vi) To check that clauses 70 and 71 have been followed in relation to payments for Plant and Materials outside the Working Areas and/ or clause Z21.4A & B has been followed in relation to payment for the TBMs outside the Working Areas;
- vii) A review of the 4 week forecast cost, being the estimate of the Defined Cost spend between the assessment date and the next assessment date, to ascertain whether the forecast is reasonable;
- viii) A review as to whether costs are to be retained pending compliance of 'condition precedents' as below;
- ix) Interest on late payment;
- x) Ascertain whether delay damages are to be levied in accordance with the process below;
- xi) Ascertain whether *Contractor's* share is to be levied in accordance with the process below; and
- xii) Application of any Disallowed Costs arising out of the cost verification process as detailed below.

#### 'Condition Precedents'

There are a number of conditions in the Contract which should they apply will mean potentially a significant adjustment to the *Contractor's* application. They include:

- Failure to provide a first programme (if none was identified in the Contract Data) in accordance with clause 30.1 and 31.2 means that **twenty five percent of the Price for the Work Done to Date is retained** in the assessment of the amount due until such time as the *Contractor* submits the programme. (Clause 50.3). Also refer to Core Clause 3 – Time Page 4
- Failure to provide a revised programme under clause 32.1 in the time specified in clause 32.2 means that **five percent of the Price for the Work Done to Date** is retained in assessments of the amount due until such time as the *Contractor* submits a revised programme. (Clause 50.3)

- **No further payment** shall be made to the *Contractor* if it does not deliver a deed of novation and associated documents in the prescribed form (*Clause Z5.1*).

**CAP4** By strictly administering the first two conditions precedent above, this should promote the delivery of the proper administration of the programme as sought under the CA policy.

#### Interest on Late Payments

The *Contractor* is entitled to interest in the following situations:

- if a wrongly assessed amount due is corrected in a later certificate by the *Project Manager* in accordance with clause 50.5, then interest is paid.

Details of the assessment, dates and details of the calculation are given in clauses 51.3 and 51.4. It should be noted that if the amount due was wrongly assessed due to lack of information provided by the *Contractor*, no interest should be certified. Interest should only be certified in circumstances where the *Project Manager* makes an error, which should and could have been avoided, where the *Contractor* had provided all necessary information.

- If a payment is made late by the *Employer* or if the *Project Manager* does not issue a payment certificate, interest becomes due and is assessed from the date on which the payment should have been made up until the date it was made. This interest is calculated using the interest rate stated within Contract Data and is included within the next payment assessment and Certificate.

#### Delay damages

Under X7, the *Contractor* pays delay damages at the rate specified in the Contract Data from the Completion Date for each day until the earlier of:

- Completion; or
- The date on which the *Employer* takes over the works.

**CAP12** The *Employer's* CA policy states that *Project Manager* should assess X7 delay damages in accordance with the Contract.

This means that if the *Contractor* has not completed the *works* by the Completion Date, then delay damages are automatically included by the *Project Manager* in the Payment Certificate.

The *Project Manager* should make the *Employer* aware of all instances where delay damages are being applied or are anticipated to be applied within the next six periods. It remains at the full discretion of the *Employer* as to whether the certified delay damages should be waived and/or limited.

It should be noted that in accordance with Option X7.2, if the Completion Date is changed to a later date after delay damages have been paid, the *Employer* repays the overpayment of damages with interest.

Reference should also be made to **Appendix 2.6** in relation to clause 25.3 loss and expense or additional cost.

### Contractor's share

Clause 53 deals with the *Contractor's Share* which covers the potential gain / pain share. The *Project Manager* makes a preliminary assessment at Completion of the whole of the works using his forecasts of the final Price for Work Done to Date and the final total of the Prices.

To support the assessment and wider management of the forecast of Defined Cost and Total of the Prices positions, the *Project Manager* is required to produce and maintain each period, a Contract Commercial Status Analysis (CCSA) (**Appendix 5.9**). The report comprises both the *Project Manager's* view and the *Contractor's* view of the *Contractor's Share* position, the likelihood of delay damages, a forecast of disallowable cost and any other amounts requiring payment (including incentives).

The *Project Manager* should note that the method for calculating the *Contractor's share* is set out in clause 53.1 and the method of allocating it in clause 53.2.

Also, and importantly, clause 53.4A allows the *Project Manager* to make an assessment of the share **prior to Completion** if the Price for Work Done to Date at Completion appears likely to exceed the Prices. The *Project Manager* may then deduct a sum equivalent to his assessment of the likely *Contractor's share* of the excess.

**CAP9** *Employer's CAP 9* requires that any such deduction should only be made after discussion with the *Contractor* and after analysis of data over several periods. Importantly it should not be implemented in the early stages of a contract.



The application of *Contractor's share* under clause 53.4A should only be considered when the contract is more than 50% complete. Early application of the deduction of *Contractor's share* manages the *Contractor's* expectations from an early stage, and gives the *Contractor* maximum time to focus on efficiencies. Unexpected deduction of *Contractor's share* late in the contract period should be avoided.

The *Project Manager* should include in the payment certificate the *Contractor's share* as a proportion of the Price for Work Done to Date. The *Project Manager* shall re-assess the applicability of applying the share in each period thereafter, the *Project Manager* will continue to apply the *Contractor's share* on a proportionate basis.

The *Project Manager* advises the *Employer* (Delivery Contract Director) that *Contractor's share* will be levied in the next payment certificate and provides the *Employer* with a completed version of the "Contract Exposure Analysis" template in **Appendix 5.8** at least two periods prior to the deduction based on the forecast Price for Work Done to Date at Completion and the forecast final total of the Prices.

The *Project Manager* makes the final assessment using the final Price for Work Done to Date and the final total of the Prices. The *Contractor's share* is included in the final amount due. (Clause 53.4)

### Disallowed costs

**CAP7&8** The *Project Manager* should not actively seek to maximise Disallowed Cost because this does not accord with the requirement to act impartially and in a spirit of mutual trust and cooperation, and the *Employer's* CAP 7 and CAP8, which entail good communication and frequent consultation with the *Contractor*.

The *Project Manager's* administration of Defined Cost and the identification of Disallowed Cost should be carried out in a manner which is:

- Strictly in accordance with the contract's provisions;
- Based on the assumption that the *Contractor's* costs have been legitimately incurred until it is proved that some costs are not allowable under the Disallowed Costs provision of the contract; and
- Done in conjunction with and following consultation with the *Contractor*.

Appendix 5.7 contains notes for guidance and key principles to be applied to the Disallowed Cost provisions applicable to all Crossrail NEC3 based works contracts which adopt an Option C (Target based) or Option E (Cost reimburseable) approach.



The *Project Manager* is reminded that Disallowed Cost can only relate to actual payments made into the Project Bank Account and cannot relate to a forecast.

The *Project Manager* should maintain a register of Disallowable Cost using the template shown in **Appendix 5.6**.

### **Step 3 – Project Manager to issue a Payment Certificate**

In accordance with Clause 50.1, the *Project Manager* shall certify payment within 7 days of the assessment date using the respective template form at **Appendix 5.3A (Option A)** and **Appendix 5.3B (Option C)**.

The *Project Manager* has a contractual duty to advise the *Contractor* of the details of his assessment of the amount due. This can be done by revision of the templates submitted as part of the *Contractor's* application supported by the Disallowed Cost Register and any other documents to explain the *Project Manager's* assessment.

The *Project Manager* must ensure that all payment certificates are issued under cover of a *Project Manager's* communication and that this communication provides the *Contractor* with the details of the assessment. It may reference an attached spreadsheet or some other form of back up which details the calculations. (This is not the full package of back-up documentation, just the summary). This is especially important if the *Project Manager* has certified an amount that is different from the amount the *Contractor* has applied for.

The *Project Manager's* payment certificate plus the covering communication and any attachments must be sent to both the *Contractor* and the *Employer*. The copies to the *Employer* should be sent by email to the *Employer's* Finance Department – Accounts Payable. The email address in Accounts Payable that the *Project Manager* should send certificates to is:

AP@TFL.GOV.UK

The applicable tax invoice which the *Contractor* is required to submit to the *Employer* in accordance with Works Information Volume 2B – Part 14, should be issued within 2 days of receipt of the *Project Manager's* certificate. A **paper copy** of the VAT Invoice should be sent to *Employer's* Accounts Payable staff linked above and it should include a copy of the *Project Manager's* certificate. A copy of this Invoice should be sent to the *Project Manager*.

A pdf copy of the documents must be attached to the email and the relevant SAP Purchase Order Number must be shown on the certificate.

**Step 4 – Employer may issue a Payment Notice**

Clause 51.2 permits the *Employer* to issue a notice to the *Contractor* within 5 days of the date the payment becomes due (that is the date of the *Project Manager's* certificate) stating the amount to be paid or proposed to be paid. In the normal course of business, it is not expected to happen and, should it not occur, the *Employer* will then pay the amount certified by the *Project Manager*.

A payment notice may be issued by the *Employer* if the *Employer* decides to pay delay damages which had been deducted under a *Project Manager* payment certificate.

**Step 5a – Employer may issue a Withholding Notice**

If either *Contractor* or the *Employer* wish to withhold payment of an amount due to the other in accordance with clause 51.2A they can do so as long as they have issued a notice of withholding not later than **five days** before the final date for payment stating the amount(s) proposed to be withheld and the reason(s) for withholding payment. Such a notice is a condition precedent for withholding monies.

**Step 5b – Employer may issue a Payless Notice**

All contracts entered into after the 1 October 2011 are subject to the change in legislation from the H.G.C.R.A<sup>1</sup> to L.D.E.D.C<sup>2</sup>. and the conditions contained in the new legislation<sup>3</sup>.

If either *Contractor* or the *Employer* wish to Payless than the amount due to the other in accordance with clause 51.2A they can do so as long as they have issued a Payless notice not later than **five days** before the final date for payment by stating the amount(s) considered to be due, the basis and reason(s) on which the amount was calculated. Such a notice is a condition precedent for paying less.

If the *Employer* wishes to Withhold or Payless, a notice should be prepared in consultation with CRL Legal.

Grounds that may lead to such a withholding or payless by the *Employer* include:

- *Contractor* fails to provide Collateral Warranties (applicable to all payments due to the *Contractor*), clause 50.6A and the *Project Manager* has not withheld in his payment certificate;
- If a Subcontractor fails to provide Collateral Warranties (applicable only to payments due work executed by the Subcontractor in question), clause 50.6A; and
- Cross set-off from any other contract (with the TfL Group), clause 50.6B, **(although the *Employer* and *Project Manager* should check whether this clause is included in all contracts).**



**TIP**

Within **2** days of the issuance of a payment certificate, the *Project Manager* should advise the *Employer* whether any of the grounds exist for withholding and provide information so the *Employer* can come to an informed view whether the *Employer* should issue a withholding notice.

<sup>1</sup> Housing, Grants, Construction and Regeneration Act 1996

<sup>2</sup> Local Democracy, Economic Development and Construction Act 2009

<sup>3</sup> Please contact the *Employer* if you require more guidance.

**Step 6 – Employer pays the amount due into the Project Bank Account**

In accordance with clause 51.1, the date of the *Project Manager's* payment certificate triggers the date from which the *Employer* has to pay the *Contractor*. The date of the payment certificate is the date the payment became due. **The payment must thereafter be made by the Employer no later than 16 days from the date the Project Manager certifies payment.** (clause 51.2)

The *Employer's* Accounts Payable will check the Invoice against the *Project Manager's* attached Payment Certificate. They will also arrange for any other necessary internal *Employer* approvals (if any).

If the *Employer* does not pay in full by the final date for payment and has not given a proper withholding notice then in accordance with clause 51.2B the *Contractor* may suspend work on the contract and it would be a compensation event under clause 51.2C. However the *Contractor* may not exercise this right unless it has given at least seven days notice in writing to the *Project Manager* of its intention and reason(s) for doing so. The *Contractor* also loses any such right to suspend when the monies are paid in full by the *Employer*.

**The Cost Verification Process and the assessment of Defined Cost (Reference M)**

The *Project Manager* is responsible for the correct verification and assessment of Defined Cost. Clause 52 of the conditions of contract and Volume 2B: Part 14 of the Works Information requires the *Contractor* to keep financial, project and other records and accounts to support and justify Defined Cost. Clause 52 provides the *Project Manager* with the right to carry out audits and cost verification of those records to ensure that the *Contractor* is fulfilling its obligations under the contract. This requirement for records and accounts and access thereto is also passed down to Subcontractors as appropriate and where relevant. This is one of the requirements for acceptance of proposed Subcontractors.

**CAP8**

CAP 8 requires that the *Project Manager* should work with the *Contractor* through each period to verify costs.

The assessment by the *Project Manager* is to be conducted in the spirit of mutual trust and co-operation between the Parties to the contract as is laid down by clause 10 of the *conditions of contract*. To this end the *Project Manager* and *Contractor* have to collaborate through all stages of the process. The Contract requires the *Contractor* to make transparent all record keeping, financial management and related systems.

In addition to the ongoing verification of costs, the *Project Manager* shall undertake cost verification reviews ("deep dive audits") to identify areas and elements of cost where control by the *Contractor* is considered to be lacking. These reviews may be carried out with the consultation and support of the Crossrail Cost Assurance team.

Areas of Cost Verification include:

- Control Reports;
- The *Contractor's* Procurement and Subcontracts/Suppliers;
- People – Labour;
- People – Staff;
- Equipment (purchased and hired/rented);
- Plant and Materials;
- Other Costs (for example, Petty Cash, Services, Internal charges from within the *Contractors* organisation, Insurance); and
- Management and Sale of the *Employer's* temporary assets (Reference L).



Consequences of such identified lack of control may result (or could have resulted) in costs not being properly incurred and / or a lack of visible management control. Such findings should be communicated to the *Contractor* by the *Project Manager* as soon as possible setting out the concerns and setting target dates for correcting those concerns. Full supporting information including copies of documents and review checklists should be attached to any communication.

The findings should be logged giving details of the communication, area of concern and the agreed follow up action or *Contractor's* response. Where action items are identified, follow-on additional reviews / audits may need to be undertaken in the area where the finding occurred.

If an action item is not addressed by the *Contractor* the *Project Manager* will make a decision on whether the non-compliance is material and what further action or sanction should be taken in accordance with the contract and the *Project Manager's* impartial role in assessing payments.

Following the completion of the cost verification reviews and audits all costs claimed as amounts due which are not in accordance with the contract will be treated as either **not** Defined Cost or Disallowed Cost.

If costs are claimed by the *Contractor* which are not covered by or included within the Schedule of Cost Components, then by definition they are not Defined Cost. The *Project Manager* should be aware that this is a distinction to a Disallowed Cost which is a cost that falls within one or more of the bullets under clause 11.2 (24) of the *conditions of contract*. However for simplicity only one register for Disallowed Cost is maintained and any such not Defined Cost is to be included on same.

When it is considered that a cost is disallowed, a communication should be completed and sent to the *Contractor* highlighting what the cost relates to, the amount and why it is considered not allowable. Note that this follows the regular/ongoing discussions and reviews with the *Contractor*.

#### **CAP7**

*Employer's* CAP 7 discussion must be held with the *Contractor* prior to disallowance of any costs.

If the *Project Manager* or Cost Verification Team identifies a potential Not Defined cost or cost that is likely to be disallowed, the *Contractor* should be advised and the item added to the Not Defined Cost / Disallowed Cost Register with the amount to be deducted.

Once a cost is considered to be disallowable and the communication has been issued, then each item should be tracked to resolution which will mean either:

- The cost being returned (credited) by the *Contractor*, or
- The cost being identified in a separate part of the Schedule of Cost Components which is not classified as Defined Cost; or
- The cost being added to the Register of Not Defined Cost /Disallowed Cost.

### 5.3 Golden Rules - Payment



The *Project Manager* should check with the Procurement Team that a Joint Venture need to have their UTR tax number (to register for CIS) and their VAT number in place before payment of the first certificate.



The *Project Manager* is required to act impartially in assessing and certifying the amount due for payment by the *Employer* to the *Contractor*.



The *Project Manager* has to assess the amount due at each assessment date irrespective as to whether the *Contractor* has made an application for payment or not.



In assessing the amount due the *Project Manager* must consider both payments made from the Project Bank Account by the assessment date and payments forecast to be made by the next assessment date.



The *Project Manager* is to apply Disallowed Cost fairly and contemporaneously after discussing with the *Contractor* at each payment assessment.



No Fee is payable on the amount by which Defined Cost exceeds the total of the Prices.



The *Project Manager* must advise the *Contractor* how the amount due has been calculated.



The *Project Manager's* payment Certificate must be issued to both the *Employer* and *Contractor* within 1 week of the assessment date.



The *Contractor's* Share can be implemented by the *Project Manager* pre Completion if the *Project Manager* forecasts that the final Price for Work Done to Date will exceed the final Prices. However this must only be implemented after study of the minimum criteria set out above.



The *Employer* has to pay the amount certified into the Project Bank Account no later than 16 days after the date of issue of the *Project Manager's* payment certificate.



If either *Contractor* or the *Employer* wish to withhold payment of an amount due to the other in accordance with clause 51.2A they can do so as long as they have issued a notice of withholding not later than **five days** before the final date for payment stating the amount(s) proposed to be withheld and the reason(s) for withholding payment. Such a notice is a condition precedent for withholding monies.



If the *Employer* does not pay in full by the final date for payment and has not given a proper withholding notice then in accordance with clause 51.2B the *Contractor* may suspend work on the Contract.

## Appendices

### Reference Documents

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
L	Disposal of Temporary Assets Procedure	CR-XRL-Z-GPD-CR001-50001
M	Verification of Defined Cost Procedure	CRL1-XRL-Z9-GPD-CR001-50003

### Standard Forms / Templates

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
5.1	Project Payment Calendar (and Crossrail Programme Calendar)	CRL1-XRL-Z-GML-CRG03-00042 CRL1-XRL-Z9-TSC-CR001-50002
5.2	Payment Certificate Checklist	CRL1-XRL-Z-GML-CRG03-50010
5.3A	Payment Certificates MWC Option A	CRL1-XRL-Z-GML-CRG03-50006
5.3B	Payment Certificates MWC Option C	CRL1-XRL-Z-GML-CRG03-50007
5.5	Contract Application Templates	CRL1-XRL-Z-GML-CRG03-50011
5.6	Disallowed Cost Templates	CRL1-XRL-Z-GML-CRG03-50012
5.8	Contract Exposure Analysis	CRL1-XRL-Z-GML-CRG03-50018
5.9	Commercial Status Report Template	CRL1-XRL-Z-GML-CRG03-50016

### Guidance Notes

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
2.6	Guidance Notes on Contractor's liability on key dates – clause 25.3	CRL1-XRL-Z-GML-CRG03-50030
5.7	Disallowed Costs Guidance and Key Principles	CRL1-XRL-Z-GML-CRG03-50023

The list of guidance notes may be added to, prior to the issue of the next revision of the CAM. CMS should be checked to identify the current list of guidance notes.

## 6 Core Clause 6: Compensation Events

### 6.1 Introduction

This section refers to Core Clause 6 of the *conditions of contract* which deals with compensation events and sets out the actions to be taken by the *Project Manager* and the *Contractor* in relation to compensation events, as well as when they should be taken.



**TIP**

In essence Core Clause 6 and also Clause 16 (early warning notices) represent what is often referred to as the mechanism for “Change” under the Contract and sets out the procedures to be followed for identification, notification, assessment and implementation of a compensation event. Refer to **Appendix 1.9** for an overview of the overall change process and **Reference B** for the associated CRL governance of change control and budget management.

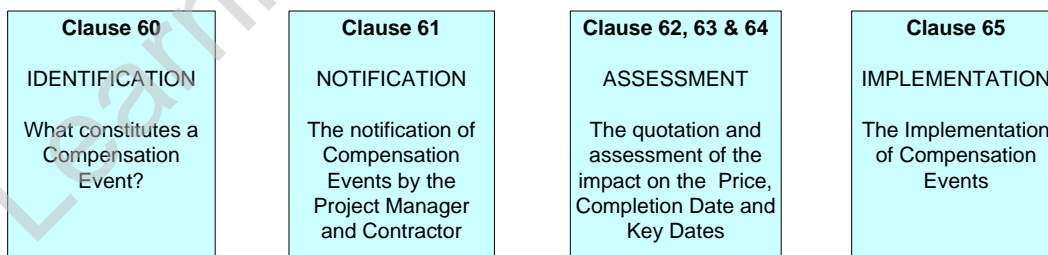


**TIP**

Core Clause 6 comprises six clauses that are usually found on pages 38 - 45 of the *conditions of contract*.

### 6.2 The Key Processes

There are four key processes contained within Core Clause 6 relating to compensation events and they are;



**Clause 60 - What constitutes a compensation event?**

Compensation events are *Employer's* risks and entitle the *Contractor* to assess the effect of the event on the total of the Prices, Completion Date and Key Dates.

Clause 60.1 lists out the main events that are to be accepted as a compensation event. The *Project Manager* is referred to clause 60.1 and is expected to be familiar with its contents.



**TIP**

The *Project Manager* should also review each particular Contract because there may also be other bespoke qualifying events in any particular contract such as clause X2 'Change in Law' which, if used, gives rise to an additional reason for a compensation event and Z23 (temporary measures in relation to sprayed concrete lining).



**TIP**

There are also other clauses within the standard conditions that define additional compensation events and the *Project Manager* must be alert to these. For example 51.2C when a *Contractor* suspends the works due a failure to pay



**TIP**

Read the Contract together with Supplemental Agreements (SAs). SAs on most of the later fit out contracts have subsequently introduced "Major Change Event" and bespoke terms. The principles contained within this section of the CAM are to be applied where such SAs are in place.

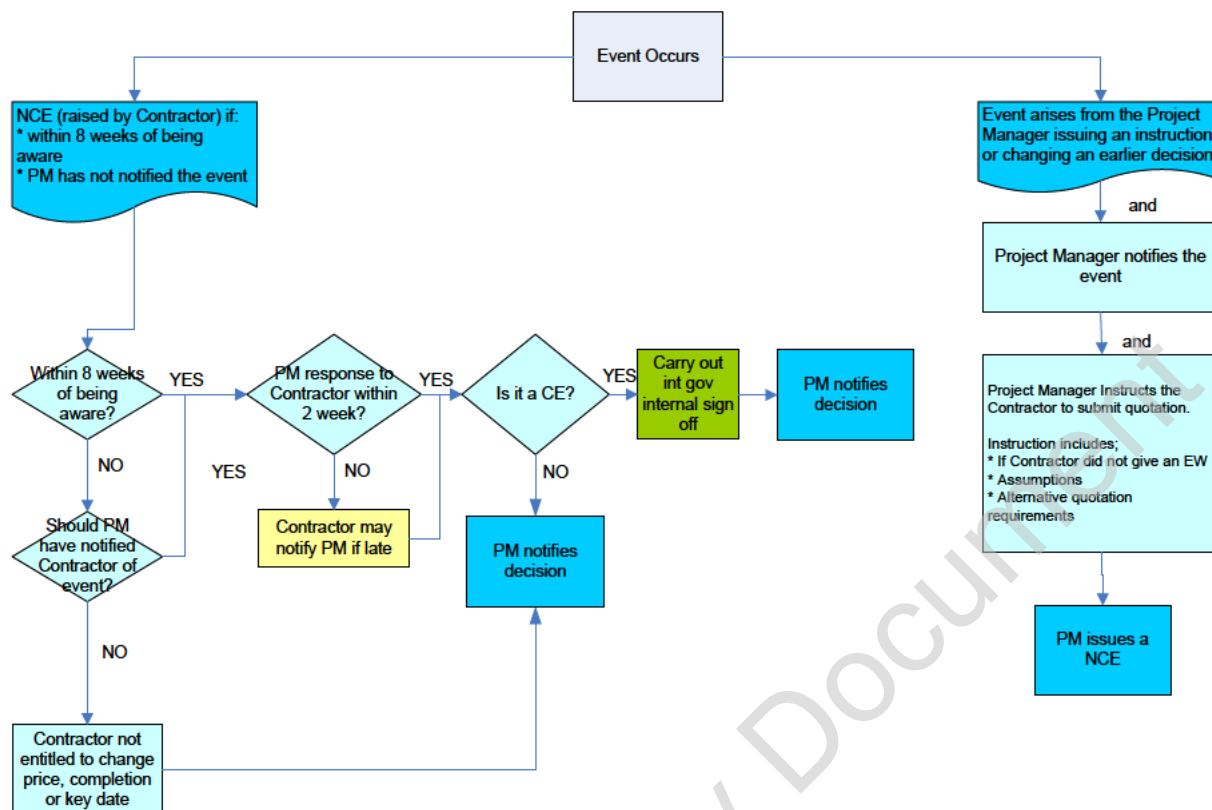
**Contract Administration Manual[Section 6 – Compensation Events]**

**CRL1-XRL-W-GML-CR001-50001 Rev 8.0**

The following table summarises the types of compensation events and gives an example of how the compensation event may arise.

Clause	Description	Example	Associated clauses
51.2C	Which states that if the Contractor exercises his right to suspend his performance under the Housing grants, Construction and Regeneration Act 1996, it is a compensation event.		
60.1(1)	Project Manager gives an instruction changing the Works Information	New drawings are instructed to the Contractor under a PMI)	14.3 & 29.1
60.1(2)	Employer does not allow access to and use of part of the Site	Stakeholder does not provide a site on time or the previous contractor is late finishing	33.1
60.1(3)	Employer does not provide something which he is to provide by the date for providing it shown on the Accepted Programme	Employer-supplied materials are delivered later than programmed	31.2
60.1(4)	PM gives an instruction to stop or not to start works or to accelerate	Programme-wide related issue occurs, e.g. security matter, and construction works are stopped pending resolution.	34.1
60.1(5)	The Employer or Others do not work within the times shown on the Accepted Programme, WI etc....	Employer's muck away contractors are late taking the tunnel contractor's spoil away to Wallasea Island	31.2
60.1(6)	The Project Manager or the Supervisor does not reply to a communication from the Contractor within the period required by this contract.	The PM accepts a document after 20 days instead of the specified 14 days period for reply	13.3
60.1(7)	The Project Manager gives an instruction for dealing with an object of value or of historical or other interest found within the Site	Archaeological remains are found during an excavation and archaeologists are called in to investigate	73.1
60.1(8)	The Project Manager or the Supervisor changes a decision which he has previously communicated to the Contractor.	The PM rejects a document which he had previously accepted	no specific
60.1(9)	The Project Manager withholds an acceptance (other than acceptance of a quotation for acceleration or for not correcting a Defect or acceptance of a proposal which does not comply with this contract) for a reason not stated in this contract	The PM rejects a subcontractor's name for a reason which was not related to the Providing of the Works	13.8
60.1(10)	The Supervisor instructs the Contractor to search for a Defect and no Defect is found unless the search is needed only because the Contractor gave insufficient notice of doing work obstructing a required test or inspection.	The Supervisor instructed additional concrete cube testing and all cube's passed their strength tests	42.1
60.1(11)	A test or inspection done by the Supervisor causes unnecessary delay.	The Supervisor instructs to test for Defects which necessitate the opening up of a ceiling line when there had been opportunities to test before the ceiling had been finished	40.5
60.1(12A)	The Contractor encounters physical conditions which ....Only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event.	The Contractor encounters say contamination not referred to in GBR whilst excavating	
60.1(12B)	The Contractor encounters conditions which.....Only the difference between the conditions encountered and those set out in the GBR are taken into account in assessing a compensation event.	The Contractor encounters a significantly greater clay course than anticipated on GBR	also see 60.2 & 60.3
60.1(13)	A weather measurement is recorded ..... the value of which, by comparison with the weather data, is shown to occur on average less frequently than once in ten years.	Lots of snow in Summer when Contractor was planning to excavate	no specific
60.1(14)	An event which is an Employer's risk stated in this contract.	Change in Law, e.g. VAT rise	80.1
60.1(15)	The Project Manager certifies take over of a part of the works before both Completion and the Completion Date	Decision that a follow-on contractor can finish off the works of the preceding contractor	35.3
60.1(16)	The Employer does not provide materials, facilities and samples for tests and inspections as stated in the Works Information.	Employer's test runnings are late	40.2
60.1(17)	The Project Manager notifies a correction to an assumption which he has stated about a compensation event.	PM tells a Contractor changes the start date for a CE	61.6
60.1(18)	A breach of contract by the Employer which is not one of the other compensation events in this contract.		no specific
Z23	Also gives a further reason for a compensation event should the Contractor experience additional temporary measures in its sprayed concrete lining works if relevant. clause Z23.		

**Clause 61 - The notification of compensation events by the Project Manager and Contractor**



A compensation event can be notified by either the *Project Manager* or the *Contractor* as follows:

Under clause 61.1 the *Project Manager* initiates a notification of compensation event arising from the *Project Manger* or the *Supervisor* issuing an instruction or changing an earlier decision.

CRL’s (eBCA) electronic communication system provides templates, however in contracts whereby CRL’s (eBCA) electronic communication system is not used, a series of templates can be supplied by the *Employer* upon request.

The *Project Manager* is expressly required to notify the following compensation events:

- 60.1(1) Instruction to change to Works Information
- 60.1(4) Instruction to stop or not start
- 60.1(7) Instruction relating to object of value or historical interest
- 60.1(8) *Project Manager* or *Supervisor* changed decision (depending on the nature of the initial decision)
- 60.1(15) Certifies takeover of a part of the works before Completion / the Completion Date
- 60.1(17) Corrects an assumption to a compensation event

Where the *Project Manager* issues an instruction for one of the express matters above, the *Project Manager* shall at the same time issue a PM\_NCE.

Under clause 61.3 the *Contractor* initiates a notification of compensation event which has arisen from an event which he considers to be a compensation event and which has not been notified by the *Project Manager*.



The *Contractor* shall notify the *Project Manager* on all remaining compensation event matters not stated above.

A *Contractor's* notification of compensation event is an event which has happened or expects to happen, ie there is at least a **high probability** of the event occurring. This should not be confused with an early warning notice where there is a **medium probability** of occurrence.

The *Project Manager* **must** respond to a *Contractor's* notification of a compensation event as soon as possible and **not later than 2 weeks of the Contractor's notification or a longer period to which the Contractor has agreed (Clause 61.4).**

In view of the above, **weekly NCE meetings** are held with the *Project Manager*, the *Project Manager's* delegate and his team to review the *Contractor's* notification of compensation events issued in the previous week and decide whether these notifications are in fact compensation events.

When responding to a *Contractor* notification of compensation event, the *Project Manager* shall state:

- Whether the notification was given by the *Contractor* within eight weeks of the event, if not then the evaluation should be **nil** unless the notification should have been given by the *Project Manager*; and
- Whether the *Contractor* should have given an early warning of potential compensation events. If the *Project Manager* decides that the *Contractor* did not give an early warning of the event which an experienced *Contractor* could have given, he notifies this decision to the *Contractor* when he instructs him to submit quotations. (Clause 61.5)



The *Project Manager* should progressively seek the *Contractor's* agreement to *Project Manager*-rejected notification of compensation events.

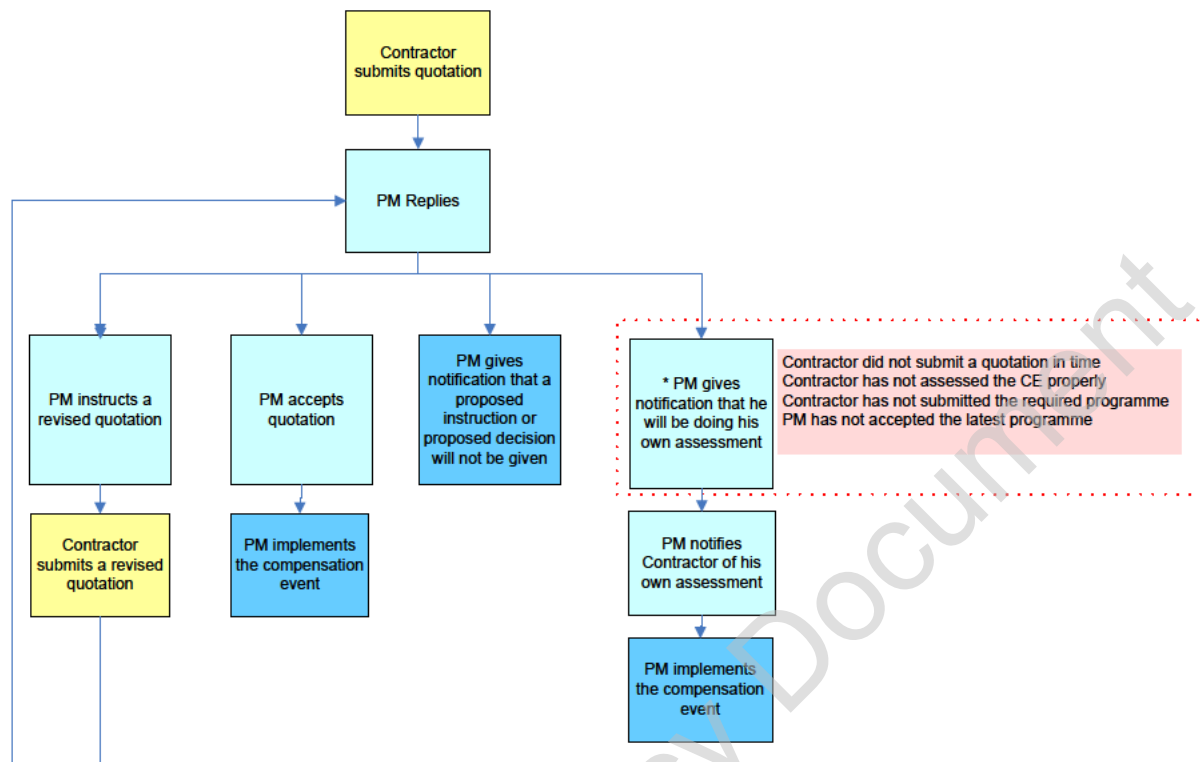


A compensation event is not notified after the *defects date*. No change in Prices is made in respect of any matter notified after the *defects date*. (Clause 61.7).



**Clause 62 - The quotation and valuation of the impact on the Prices and contract dates**

Quotation process



It is important to note that a change to the total of the Prices and Key Date(s) / Completion Date is completed at the same time for each event, however not all events will result in a change to both price and time. Compensation events can have both a positive or negative effect to price and time. Each quotation will include a revised programme and an assessment of the effect of the event upon actual cost of the work done, the forecast cost of the work yet to be done and the resulting fee.

Instruction to submit a quotation



To assess the impact on the Prices and/or Dates, the *Project Manager* issues an instruction to the *Contractor* to submit quotation(s). Where possible this should be done at the same time as notifying the compensation event.

Under clause 61.2 the *Project Manager* issues an instruction to submit quotation(s) for a proposed instruction/changed decision (i.e. a potential compensation event which may be implemented in the future). The *Contractor* does not put a proposed instruction or a proposed changed decision into effect.

The *Project Manager* may, if he decides that the effects of a compensation event are too uncertain to be forecast reasonably, state assumptions about the event in his instruction to the *Contractor* to submit quotations. Assessment of the event thereafter is based on these assumptions. If any of them is later found to have been wrong, the *Project Manager* notifies a correction (clause 61.6) which is itself a secondary compensation event in accordance with clause 60.1(17).

After discussing with the *Contractor* different ways of dealing with the compensation event which are practicable, the *Project Manager* may instruct the *Contractor* to submit alternative quotations. The *Contractor* submits the required quotations to the *Project Manager* and may submit quotations for other methods of dealing with the compensation event which he considers practicable. (Clause 62.1)



**TIP**

*Project Manager's* assumptions and discussions in respect of alternative quotations are useful tools that the *Project Manager* should pro-actively use if required for the correct administration of the contract.

#### Contractor's submission of a quotation

**CAP6**

The *Contractor* is to be encouraged to comply with the Contract timescales meaning that most of his quotations shall be based on estimates rather than actual cost.

Encouragement will take two forms, being the promotion of early acceptance by the *Project Manager* (where reasonably possible) as well as the alternative of *Project Manager's* assessments.

The *Contractor* submits quotations within **three weeks** of being instructed to do so by the *Project Manager*. The quotation is to be broken down into the project-WBS coding agreed with the *Project Manager*

The *Project Manager* must attempt to agree key Defined Cost rates so that the *Contractor's* quotation is based upon cost.

#### Project Manager's reply

The *Project Manager* replies within the two weeks of the submission and the reply is to specify:

- an instruction to submit a revised quotation including setting out constructive reasons for doing so;
- an acceptance of a quotation;
- a notification that a proposed instruction will not be given or a proposed changed decision will not be made; or
- a notification that he will be making his own assessment. (clause 62.3).

Note if the *Project Manager* does not reply to a *Contractor's* quotation within two weeks and, following a *Contractor's* notification of this, the *Project Manager* does not reply in the second period of reply then the *Contractor's* quotation is **deemed accepted**. (Clause 62.6)

The date when the *Project Manager* instructed or should have instructed the *Contractor* to submit quotation(s) divides the work already done from the work not yet done (clause 63.1). Note that the use of the words "should have" places an obligation on the *Project Manager* to instruct in a timely manner.



**TIP**

Assessment of the effect of a compensation event includes risk allowances for cost and time for matters which have a **significant** chance of occurring and are at the *Contractor's* risk under this contract. (*Clause 63.6*). **Therefore, there should not be a carte blanche consistent risk percentage added to each quotation, say under the guise of pricing risk.**

The quotation should objectively consider the risk inherent with the quotation in question, and quite often there will be no risk. An example though of a risk is if there is excavation during the winter months, a significant risk is productivity which may be affected by frost.

There is a need to differentiate between *Contractor's* assumptions and *Project Manager's* assumptions as only the latter's assumptions can lead to a compensation event being 're-opened'. Quotations with *Contractor's* assumptions should not be accepted.



**TIP**

If the effect of a compensation event (save for the type referred to in clause 60.1(12A)) is to reduce the total Defined Cost:

- the Prices are proportionately reduced (save in relation to any value engineering proposals accepted under clause Z15); and
- the *Contractor* shall not be entitled to any payment in respect of loss of profit or loss of opportunity in respect of the same save in relation to any omission pursuant to clause Z16.1 that does not fall into the categories of the omissions referred to in clause Z16.2.

A delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme. A delay to a Key Date is assessed as the length of time that, due to the compensation event, the planned date when the Condition stated for a Key Date will be met is later than the date shown on the Accepted Programme (*clause 63.3*).

For guidance, the Accepted Programme indicates time risk and float. These should be separately identified against each programme activity and in essence mean:-

- Time risk: - a genuine allowance of additional time to complete a programme activity. Typically to cover the *Contractor's* production associated risks, eg labour hours and the like. This is wholly owned by the *Contractor*.
- Total float is associated with the activities within the programme and shall be separately identified from time risk. Total float may be used to offset the impact of a compensation event or other event which impacts on time. It is therefore available to the *Project Manager* and the *Contractor* to mitigate the impact of change.
- "Terminal float" is a term sometimes used for the difference between planned Completion and the Completion Date. Because delays are assessed with reference to planned Completion, the *Contractor* has the benefit of the period of time between planned Completion and the Completion Date.

#### Project Manager's assessment

**CAP6**

The CA Policy 6 promotes the use of *Project Manager* assessments as a proactive way to manage the Prices to carry out his own assessment.

The *Project Manager* should undertake *Project Manager* assessments in the following situations:

- if the *Contractor* has not submitted a quotation and details of his assessment within the time allowed;
- if the *Project Manager* decides that the *Contractor* has not assessed the compensation event correctly in a quotation and he does not instruct the *Contractor* to submit a revised quotation;
- if, when the *Contractor* submits quotations for a compensation event, he has not submitted a programme or alterations to a programme which this contract requires him to submit; or
- if, when the *Contractor* submits quotations for a compensation event, the *Project Manager* has not accepted the *Contractor's* latest programme for one of the reasons stated in this contract.

Has the *Contractor* failed to provide a quotation within 3 weeks and following a reminder failed to provide a quotation?

or

If the *Contractor* has submitted a quotation but following discussions with the *Contractor* there is a significant differential (be it in terms of valuation or percentage) between the *Contractor's* quotation and the *Project Manager's* valuation.

The *Project Manager* assesses a compensation event using his own assessment of the programme for the remaining work if:

- there is no Accepted Programme; or
- the *Contractor* has not submitted a programme or alterations to a programme for acceptance as required by this contract. (Clause 64.2)



Do **NOT** issue the *Project Manager's* assessment late as it can lead to a deemed acceptance of a *Contractor's* quotation (Clause 64.4).

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## Clause 65 - The implementation of compensation events

The *Project Manager* shall notify the *Contractor* of an implemented compensation event.






The contract does not contain any reference to implementation of compensation events. Rather, when the steps defined in the contract have occurred the event is implemented - see clauses 65.1 and 65.4.






When accepting quotation or issuing a *Project Manager's* assessment, issue at the same time, an ICE notification which states the revised total of Prices and any revision to Dates.

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**Golden Rules – Notification for compensation events**

-  The *Project Manager* is to respond to *Contractor's* notification of compensation events within the normally 2 weeks.
-  When considering *Contractor's* notification of compensation events, the *Project Manager* should consider whether an early warning should have been issued and was not, and to advise the *Contractor* if that was the case.
-  The *Project Manager* shall set up a weekly notification of compensation event meeting to decide whether to accept the principle of a notification of compensation event



**Golden Rules – Quotations for compensation events**

-  Review a submitted quotation. Request a re-submission if necessary and explain why.
-  Ensure the compensation event quotations are completed before any of the affected work is done.
-  Time and cost implications must be addressed.
-  Do not allow the *Contractor* to make “assumptions” only the *Project Manager* can do this. Assumptions must only be to resolve uncertainty and allow an assessment to be made.
-  Where quotations are reviewed and agreed at a meeting, the *Contractor* must be requested to resubmit the quotation at the agreed total (to allow for acceptance of the *Contractors'* quotation) and in order to prevent potential disputes in the future.

**Golden Rules – *Project Manager's* assessment of compensation events**

-  Notify the *Contractor* if you intend to make a *Project Manager's* assessment following consideration of the criteria.
-  Assessments must be based on an estimate of Defined Costs and realistic estimates of output likely to be achieved (not tendered costs/outputs).
-  If there is not an Accepted Programme, the *Project Manager* must use his programme to assess the compensation event.
-  The *Project Manager* assesses a compensation event as if the *Contractor* had given an early warning.

**Golden Rules – *Project Manager's* implemented compensation events**

-  Implement compensation events in accordance with either an accepted quotation or alternatively a *Project Manager's* assessment.
-  Obtain the *Contractor's* agreement, if possible, to the final status and agreed impact(s) of all compensation events in order to calculate the Final Total of the Prices.



Assessments for changed Prices for compensation events are in the form of changes to the Activity Schedule. (Clause 63.12)



When issuing either the accepted quotation or the *Project Manager's* assessment, issue an ICE notification which shows the revised total Prices at the same time and any revision to Dates.

Golden Rules – assessing time (These rules should be read in conjunction with the guidance note shown in **Appendix 6.2** “Notes of various issues relating to the management of time”)



Establish a “bite date” for each compensation event which is the date the *Project Manager* requested or should have requested the quotation.



Establish a “host programme” which is the Accepted Programme current at the “bite date”. If there is no current Accepted Programme the *Project Manager* assesses a compensation event using his own assessment of programme (Clause 64.2).



Update the “host programme” with the actual progress up to the “bite date”.



Impact the compensation event into the updated “host programme”. If planned Completion is delayed, then investigate mitigation measures (Clause 60.4) and/or discuss different ways of dealing with the compensation event which are practicable (Clause 62.1) and assume that the Contractor reacts competently and promptly (Clause 63.7). Apply mitigation measures and assess the delay to planned Completion.



Include within assessments risk allowances for time for matters which have a significant chance of occurring and are at the *Contractor's* risk under the Contract. In assessing such risk allowances the Project Manager should consider the view of risk at the time of assessment and not that within previous programmes.



Once an assessment is complete and the compensation event is implemented the “host programme” is redundant. The only time effect of an implemented compensation event is to move the Completion Date, Sectional Completion Date or Key Date.



Programmes submitted for acceptance by the Contractor must show the order and timing of the operations which the Contractor plans to do in order to Provide the Works (Clause 31.2). To Provide the Works means to do the work necessary to complete the works in accordance with this contract and all incidental work, services and actions which this contract requires (Clause 11.2 (53)). Programmes must therefore include all instructed work and NOT just implemented compensation events.

## Appendices

### Reference Documents

Ref:	Document Title	Document Number:
0.1	Commitment Authority Protocol	CRL1-XRL-Z-GML-CRG03-50008
1.9	Overall Change Process	CRL1-XRL-Z-GML-CRG03-00029
B	Change Control and Budget Management Procedure	CR-XRL-Z9-GPD-CR001-50003

### Standard Forms / Templates

Ref:	Document Title	Document Number:
	N/A	

### Guidance Notes

Ref:	Document Title	Document Number:
6.2	Guidance Notes on various issues relating to the management of time	CRL1-XRL-Z-GML-CRG03-50031

The list of guidance notes may be added to, prior to the issue of the next revision of the CAM. CMS should be checked to identify the current list of guidance notes.

## 7 Core Clause 7: Title

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### 7.1 Introduction

This section refers to Core Clause 7 of the *conditions of contract* and deals with ownership and title of Equipment, Plant and Materials, both inside and outside the Working Area.



**TIP** Core Clause 7 should be read in conjunction with the Schedule of Cost Components for target and reimbursable contracts and Core Clause 5 Payment.

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### 7.2 The Key Processes

The main processes in Core Clause 7 are:

- Acquisition and transfer of title;
- Payment for off-site Plant and Materials;
- Marking of off-site Equipment, Plant and Materials; and
- Removing Equipment.

#### Acquisition and transfer of title

Clause 70.1 provides that whatever title the *Contractor* has in Plant and Materials passes to the *Employer* if it has been brought within the Working Areas and that title in Plant and Materials outside the Working Areas passes to the *Employer* on payment being made. Only title to Equipment purchased for the work included in the Contract passes to the *Employer* on payment being made for such Equipment.

Clause 70.2 provides that title to Equipment, Plant and Materials passes back to the *Contractor* if it is removed from the Working Areas with the *Project Manager's* permission.

In general terms, the Contractor will remove Equipment, Plant and Materials no longer needed for the works or not used to Provide the Works. The *Project Manager* should give consideration to the following in relation to these Equipment, Plant and Materials:

- Is the temporary asset register up-to-date with all temporary assets on site;
- Is the 'open market sale price' for Equipment or market value of Plant and Materials independently verified prior to permission being given to remove any Equipment, Plant and Materials from the Working Areas;
- Are there any specific circumstances that would suggest that the *Employer* may wish to dispose of the assets directly and account for the proceeds e.g. where the Contractor owes or may owe monies to the *Employer* or where indemnity provisions have been invoked; and



- Where change has caused Plant and Materials to become redundant, has due consideration been given to accounting for the value and proceeds of such Plant and Materials through the Defined Cost account?
- Disposal of temporary assets shall be undertaken in accordance with the Disposal of Temporary Assets Procedure (**Reference L**).

#### Payment for off-site Plant and Materials



**TIP** This section cross-refers with the Section 5 – Payment process.

Clause 70.3 provides that the **Project Manager must give his permission** and the *Contractor* must provide an on-demand form of bond **prior** to any payment being made for Plant and Materials which are outside the Working Area.



**TIP** Caution needs to be exercised when agreeing to Working Areas by the *Project Manager* as it removes the obligation for the *Contractor* to provide a bond

The *Project Manager's* permission should take into account the following:

- That the Plant and Materials are for the *works*;
- That the Plant and Materials procurement is in line with the Accepted Programme; and
- Whilst the Plant and Materials may not be in their final form, they should be recognisable as being required for the *works*. Permission should **not** be given for say bags of cement in a Supplier's yard but should be given for tunnel segments in their final form.

Note that clause 73 does not refer to Equipment therefore no Equipment outside the Working Area is to be paid for through the Payment Certificate process. The **only** exception to this are TBMs which are payable in accordance with Z21.

The process for issuing and accepting an on-demand bond is as follows:-

- The *Contractor* proposes the Surety **prior to** the obtaining of the on-demand bond including the Surety's registered name, address and company number.
- The *Project Manager* will liaise directly with the Head of Financial Control (CRL Finance) who will advise whether the name of the Surety is acceptable. Given that the *Project Manager* is to respond within the *period of reply*, generally 14 days, CRL Finance is to respond to the *Project Manager* within 7 days.
- CRL Finance will consider whether the Surety is commercially strong enough to carry the bond and shall take into account the following objective criteria:
  - Does the Surety have a S&P credit rating and /or financial strength rating of A (or equivalent from a rating agency of similar standing);
  - Does the Surety have a D&B rating of 5A 1;
  - Does the Surety have a D&B failure score of 86/100; and
  - Is the Surety licensed to carry out surety business in the United Kingdom?
- The *Project Manager* is to confirm to the *Contractor* whether the Surety name is acceptable or not based upon the Head of Financial Control. A *Project Manager's* Communication will be used for this response.

If the Surety is rejected, the *Contractor* is to propose another Surety name and the process will revert back to Step 1.

- The *Contractor* will issue the on-demand bond to the *Project Manager*. The *Project Manager* will check the on-demand bond is in the same form as Annexure 5 Part B of the Contract and executed correctly by both the Surety and the *Contractor*.



If the “on demand” bond is acceptable, the *Project Manager* shall complete the Form set out at **Appendix X.1** and issue the form and bond under cover of a Memo to CRL Legal.

CRL Legal will arrange for the on-demand bond to be executed by CRL and for a copy of the on-demand bond to be uploaded onto the Electronic Document Management System. CRL Legal will send a copy of the e-path to both the *Project Manager* and CRL Finance.

### **Replacement on-demand bond**

CRL Finance will regularly review the rating of each Surety and should the rating of the Surety drop below Standard & Poor’s “A” grade, then the CRL Finance will advise the *Employer’s* Representative who may request a replacement on-demand bond.

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### **Supervisor to identify off-site Plant and Materials and Equipment**

Once the *Project Manager* has given his permission in accordance with clause 70.3, the *Supervisor* is to inspect the off-site Plant and Materials or Equipment.



Assuming the *Contractor* has prepared the Plant, Materials or Equipment (‘the goods’) for marking, the *Supervisor* should check:

- That the ‘goods’ are stored separately from other goods in the supplier’s storage facility. The *Supervisor* should request a drawing of the storage facility and the location of the ‘goods’ from the supplier, and check the drawing is accurate;
- That the ‘goods’ are in accordance with the Works Information;
- That the ‘goods’ are clearly labelled and then photograph the ‘goods’; and
- That the label is stuck onto the packaging of the ‘goods’ and states:
  - a. “[the ‘goods’] are the property of Crossrail Limited”;
  - b. the project number / name; and
  - c. the date of the inspection.

The *Supervisor* should inform the *Contractor* and the *Project Manager* of the results of the inspection prior to a *Project Manager’s* payment certificate being issued.

**Removing Equipment**

The *Contractor* removes Equipment from the Site when it is no longer needed unless the *Project Manager* allows it to be left in the *works*.

The *Project Manager* shall ensure that the value of any assets for which CRL has title are properly valued prior to granting permission for removal and that the proceeds are accounted for within the Defined Cost.

**The *Project Manager* should actively review the *Contractor’s* Equipment register on a regular basis.** Particular attention should be paid to the Equipment on the register and the *Contractor* should be notified of any Equipment that is not correct for undertaking the *works*

In certain circumstances, there may be assets which are owned by CRL but which are surplus to requirements and not part of the *Contractor’s* contract. For example, surplus free issue materials or equipment which CRL may have purchased directly. The *Project Manager* arranges for disposal in accordance with the Procedure for Disposal of CRL Assets (**Reference P**)

**Appendices**

**Reference Documents**

Ref:	Document Title	Document Number:
L	Disposal of Temporary Assets Procedure	CR-XRL-Z-GPD-CR001-50001
P	Procedure for Disposal of CRL Assets	CRL1-XRL-F-GPD-CR001-50001

**Standard Forms / Templates**

Ref:	Document Title	Document Number:
X.1.	Contract Execution Form	CRL1-XRL-Z-GML-CRG03-00053

## 8 Core Clause 8: Risks and insurances

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### 8.1 Introduction

This section covers the risks of loss, damage, injury or death and the insurance which is available to cover them. These risks are allocated either to the *Employer* or the *Contractor*.



Core Clause 8 comprises eight clauses that are usually found on pages 48 – 51 of the *conditions of contract*.

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### 8.2 The Key Processes

The main processes in section 8 are:-

- Management of Risk
- Insurance Provisions
- Incident notification
- Claims handling
- Recovery of costs

#### Management of Risk

Whilst the paragraph below briefly summarises the contract allocation of risk, it is essential that clauses 80 to 87 of the conditions of contract (together with the Contract Data and Works Information) are read in full before interpreting the provisions of these clauses.

There are other risks which are dealt with under other parts of the Contract. For example, the financial risk of additional work instructed under Clause 60.1(1) is carried by the *Employer* in Option C contracts. Similarly under Clause 60.1(14) the *Employer* carries the financial risk if any events that occur are his risk under Clause 8.

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#### Insurance Provisions

##### Contract Insurance Requirements

The responsibility for providing insurance is set out at clauses 84, 85, 86 and 87. It is vital that the obligations for insurance are met and the policies provided fulfil the requirements of the Contract.

The *Employer* has taken out an Owner Controlled Insurance Programme (OCIP) the core of which is a substantial **Contract Works** and **Third Party liability** cover that indemnifies all parties involved in the central section including contractors and sub-contractors of all tiers. The OCIP policy is summarised in the *Employer* provided insurance details in Contract Data Part 1.

The deductibles under OCIP are substantial and generally higher than those under a *Contractor's* own annual insurance policies as the policy has been designed as a major loss programme. The deductibles applying to OCIP are:

Contract Works:

General deductible	£ 250,000 any one incident
Stations / wet works etc	£1,000,000 any one incident
Tunnels	£1,500,000 any one incident

Third Party Claims

Bodily Injury	NIL
Property Damage	£ 75,000
Vibration, removal of support etc	£ 250,000

A full version of the OCIP is available on request to CRL's Insurance Manager.

It should be noted that a number of contracts were awarded before the OCIP came into effect on 31<sup>st</sup> December 2009. For those Contracts, the *Project Manager* must be aware of the original contract requirements in conjunction with any negotiated contract amendments to subsequently incorporate OCIP. The CRL Insurance Manager can assist should there be any doubts as to the types of policy that are required to be in place.

Depending upon the terms of the particular contract the *Contractor* may be obliged to provide some or all of the following insurances:

**Employer Liability Insurance** – this is to provide an indemnity in respect of death and bodily injury sustained by employees of the *Contractor*. For major tunnelling and deep civil engineering contract the minimum indemnity has been set at £25m, for other contracts this may have been reduced to £10m.

**Professional Indemnity Insurance** - the minimum requirement is for a limit of indemnity of £10m any one occurrence / claim with no aggregate limit in any period of insurance. For major Civil Engineering and Tunnelling contracts this is increased to £25m.

**Equipment Insurance** - The OCIP covers Plant and Materials only (whether provided by the *Employer* or *Contractor*). There is therefore a compulsory requirement for the *Contractor* to separately insure Equipment.

**TBM Insurance** - There is an option within the OCIP for insurance on the TBMs when acquired. Each relevant contract states whether the *Contractor* insures the TBM(s) (as an item of Equipment) or whether the TBM(s) is to be insured under the OCIP.

The TBM cover under the OCIP has an inner limit, on transit by any means, of £5m, which is less than full value, and substantial restrictions on marine transit.

Note: If the OCIP option is taken rather than the *Contractor's* insurance then additional transit insurance must be purchased.

**Other Insurances** - There may be specific insurances required to meet the needs of an individual contract. This may include a range of marine insurances for the contract(s) for the removal of spoil, for transit of the TBMs and further insurances required for systemwide contracts (for elements which are not covered by the OCIP).

Any such additional insurance will be specified in the individual contract Insurance Tables and

Contract Data.

Note: Motor Insurance cover is not provided under the OCIP. Whilst there is no contractual requirement for the *Contractor* to maintain such cover, any query in this respect should be passed back to the *Contractor* to arrange.

The *Project Manager* must review and understand the insurance cover required for each individual contract and which policies the *Employer* or *Contractor* are contractually obliged to obtain. This information can be found at Clause 84 (Insurance cover) and Contract Data Part 1 (8 Risks and insurance).

### Proof of Insurances

Before the *starting date* of a contract **and at each renewal date** until the *defects date*, the *Contractor* should submit to the *Project Manager* for acceptance certificates and policies which state that the insurance required is in force and the terms on which it is held (clause 85.1).

The *Contractor* must also provide the *Project Manager* with contact details of his insurance co-ordinator. The *Project Manager* should pass these details to the CRL Insurance Manager (TfL Group Claims Manager).



**TIP** The *Project Manager* should check that the insurances are in force and then pass all policy information to CRL's Insurance Manager for a review of the terms of the insurances before giving their acceptance. See also the Crossrail Manual of Insurances (**Reference N**) for further guidance and information.

In the event that the *Contractor* resists providing its full policy, guidance should be sought from CRL's Insurance Manager.



**TIP** The *Contractor* must ensure that the procurement of sub-contractors and suppliers of any tier shall comply with the terms and conditions of the insurance policies.

The CRL Insurance Manager will review insurances taking the following into account:

Insurance taken out specifically for the project must be in favour of "Crossrail Limited" and not any former names such as Cross London Rail Links, or CLRL. CRL expects, as a minimum, a general Indemnity to Principal or, preferably, a named indemnity to Crossrail Limited as Principal.

In lieu of the full policy CRL may agree to accept (at the direction of the CRL Insurance Manager) instead a letter from either the insurance company or brokers confirming, as a minimum, the following details of these insurances:

- Limit of indemnity, and basis of indemnity (e.g is the limit "each and every" or "in aggregate");
- Period of Insurance;
- Major restrictions in cover (e.g. in pollution, asbestos, jurisdiction or other geographical limit);
- Identity of main insurers - If Lloyds, the identity of the lead syndicate, if "London Market" or UK, the name of at least the lead insurer; and
- Value of deductibles and significant inner limits (if any).

As a general rule the *Employer* expects to see insurances placed with reputable insurers – that means an S+ P rating of no lower than A.

The *Project Manager* must update the contract 'Master Deliverable List (C03.021 Site Insurances)' with the details of the *Contractor's* Insurances once the policies have been accepted.

Should the *Contractor* fail to provide the required insurance policies, the *Project Manager* must bring it to the *Employer's* attention and the *Employer* may decide to insure the risk with the cost of the insurance recovered from the *Contractor* (clause 86.1).

Should the *Employer* fail to provide the required insurance policies, the *Project Manager* must also bring it to the *Employer's* attention, and the *Contractor* may decide to insure the risk, with the cost of the insurance reimbursed by the *Employer* to the *Contractor*.

### Incident Notification

All incidents are reported in the RIVO system by the site team. The Crossrail Insurance Manager reviews all RIVO incidents and decides which require notification to the Project Loss Adjustors.

The Project Loss Adjustors run a database (Newloss.com) which will automatically send a notification to the *Employer*, the *Employer's* insurers and brokers and the relevant Loss Adjuster. If requested Project Managers may have access to Newloss.com to view notified incidents



**TIP** Where an event or loss has not been notified onto RIVO and the *Project Manager* believes that the incident should be notified then this can be done by calling the Crossrail Helpdesk who will enter onto RIVO.



**TIP** The *Project Manager* shall monitor the *works* and actively consider if any incidents are potentially claimable under the *Contractor* or *Employer's* insurance policies.

### Claims Handling

The *Employer* has appointed the following Loss Adjustors to manage claims arising under OCIP:

- Cunningham Lindsay International
- Crawford and Co
- Advanta

The *Project Manager* must provide all relevant information, and procure that the *Contractor* does likewise, to allow the Loss Adjustor to complete their investigations.

The Crossrail Small Claims Scheme (“CSCS”) is a statutory scheme, established by the *Employer* pursuant to an undertaking given during the passage of the Crossrail Act, for the fair and expeditious handling of small Third Party Property damage claims, not exceeding £5000, and not arising from alleged subsidence/ ground settlement.

CSCS claims must also be reported via newloss.com in the same way as any other incident.

Only the CSCS Administrator, TfL (ex CRL) Helpdesk, CRL Legal Team or CRL Insurance Manager may respond to the public on (small) property damage claims (eg. where there is clearly no personal injury claim likely to arise, non-subsidence matters and where the estimated loss is less than £5,000). Any other claim that falls outside these parameters must be left to the Adjusters to consider a response in the first instance.



If there is a strong public relations reason to communicate with the public on any claim which falls outside these parameters, this must first be discussed with CRL's Insurance Manager or, in his absence, a member of the CRL legal team prior to any contact being made.



**In respect of any claim, there must be no admission of liability, or acknowledgement of any actions taken post-incident.**

CRL should be reactive only on any incident arising above CSCS boundaries and wait for any third party to contact us. When they do, CRL should only acknowledge the incident, record appropriate information, and confirm that Loss Adjusters will be contacting them within our normal service standards i.e. 24 hours for any third party incident. This is particularly important for any injury claims, irrespective of size, as the insurers handle claims ground up (no self-insurance) and CRL staff must not do anything that would prejudice the insurer's position or CRL risks paying the claim itself.



When investigating claims the Loss Adjuster will establish whether the OCIP deductible is to be met by the *Employer* or the *Contractor*.

### Recovery of costs

When a claim arises from an event which is a *Contractor's* risk, the *Contractor* indemnifies the *Employer* against all claims, proceedings, compensation and costs (clause 83) and the *Contractor* is responsible for paying the deductible (and Loss Adjuster fees where the claim is within the deductible) (clause 85.4). In such circumstances the Loss Adjuster will place the *Contractor* on notice that he is responsible for the deductible.

If any amount has already been paid by the *Employer* before liability has been ascertained e.g. to a third party in settlement of a claim or to the *Contractor* for the repair of damage to the *works*, any such amount up to the deductible amount must be recovered from the *Contractor* and should be shown as an amount to be paid by the *Contractor* (pursuant to either clause 83 of 85.4 as applicable) pursuant to clause 50.2.

When a claim arises from an event which is an *Employer's* risk, the *Contractor* will be entitled to a compensation event (clause 60.1 (14)) and the *Employer* is responsible for the deductible amount and any shortfall between the loss and insurance proceeds.



Any amounts **in excess of the deductible** are recovered by the *Employer* from the Insurers regardless of liability allocation as notified by the Loss Adjuster.



To the extent that the *Employer* does not recover in full from the Insurers (eg. policy exclusion) and the cost has resulted from a *Contractor's* risk then the amount of under-recovery is deducted in the next certificate from the amount otherwise due to the *Contractor* (clause 85.4).



Defined Cost does not include the cost of taking out insurances (with the exception whereby the *Contractor* may insure a risk on behalf of the *Employer* (clause 87.3)

### Indemnity

It is important to understand the 'stand alone' indemnity provision (clause 83) and the obligation on the parties to insure the works in accordance with the Insurance Table (clause 84) and the requirements of the Contract Data (Part One).

Insuring the works is a means of reducing the commercial risk of an event occurring, and notwithstanding the ability for the insured party to recover any losses incurred from insurance underwriters, the indemnity provision remains intact regardless of this.

Costs incurred by the Employer as a result of the Contractor's breach of contract (or other Contractor's risks) in the form of

- liabilities to third parties (including other works contractors) may be recovered from the Contractor under the general indemnity provision (clause 83.1) though delay-related costs are not separately recoverable if the delay is subject to the payment of Liquidated Damages



- additional Employer's cost arising under the contract which has been breached (i.e. increased share of Defined Cost and additional overheads to the Employer) may only be recovered under the general indemnity provision (clause 83.1) in the case of a breach of duty to use professional skill and care which is required to be covered by Professional Indemnity (PI) insurance. In these circumstances, the Employer can claim its costs and losses from the Contractor, who can seek indemnity from its PI insurers in respect of said liability to the Employer and its own costs and losses.

It is for the Project Manager to notify the Employer of any breaches of contract and of any costs of the type referred to in paragraph above. Any decision to pursue such costs from the Contractor will be the Employer's.

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### 8.3 Golden Rules



The *Project Manager* must ensure prior to any *starting date* that all the appropriate insurance policies required to be in place between the *Employer* and the *Contractor*, are and remain in place for the duration of the *Works*.



All incidents should be formally recorded via RIVO



Ensure that the *Contractor* accurately and separately records all costs incurred in connection with any insurable event / recordable incident. This may help the Loss Adjuster (notwithstanding his independent obligation to assess the incident loss).



The *Project Manager* certifies any repair costs of a recorded event as Defined Cost and incorporates the amount in the payment certificate.



Following his investigations, the Loss Adjuster will advise the *Project Manager* whether the event is an *Employer's Risk* or a *Contractor's Risk*.



If the event is an *Employer's Risk*, then the matter is a Compensation Event for the *Contractor*.



If the event is a *Contractor's Risk*, the *Project Manager* should include for the deduction of costs (up to the appropriate deductible amount) in the Certificate in Other Amounts due to the *Employer*.



The timing as to when the recoverable costs / deductible amount are included in the payment certificate should be discussed with the *Employer*.



The Loss Adjuster will advise the *Project Manager* on the full net loss of the recorded event.



If the full net loss is in excess of the deductible amount, then any difference is directly reimbursed to the *Employer* from the Insurers.

## Appendices

### Reference Documents

Ref:	Document Title	Document Number:
N	Manual of Insurances - A summary of insurance coverage procedures and guidelines	CR-XRL-Z8-GML-CR001-50001

### Standard Forms / Templates

Ref:	Document Title	Document Number:
	N/A	

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## W Dispute resolution W: Option W2A

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### W.1 Introduction

This section provides guidance on the structured handling and resolution of disputes arising under CRL's consultancy agreements and works contracts (which are based on the NEC suite). The objective of this section is to provide clear direction on how disputes are avoided, managed, structured, handled and resolved.

In the event of a dispute arising under any CRL contract which is not NEC based (including agreements with third parties), regard should be had to the dispute provisions of the relevant contract and where appropriate the principles set out in this procedure should be followed.



It is worth reinforcing that whilst the *Project Manager* and the *Contractor* have clearly defined roles and responsibilities within NEC contracts; the actual Parties to the contract (and therefore any Dispute) are the *Employer* and the *Contractor*.

In respect of the Framework Design Contracts (FDC), the same principle applies in terms of the *Employer's Agent* and the *Consultant* (in the rest of this procedure "*Contractor*" includes "*Consultant*").

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### W.2 The Key Processes

#### What is a Dispute?



A Dispute is any dispute or difference between the Parties as to the construction of the contract or any matter or thing of whatsoever nature arising under the contract or in connection therewith.



The *Project Manager* may not notify a Dispute.

It is important to emphasise that for every dispute or difference between the *Contractor* and the *Employer* the key to effective dispute avoidance and resolution is to ascertain clearly the nature of the issues and each party's position on each issue. The aim should be to ensure that the subject matter in question is crystallised into clearly drawn positions and that all options available under the contract have been exhausted, before a Dispute is referred under the contract.

## Stages of a Dispute

### **Potential Dispute**

A potential Dispute is a matter which, in the opinion of the *Project Manager* or the *Employer*, presents a significant risk of becoming a notified or referred Dispute.

### **Notified Dispute**

A notified Dispute is a Dispute which is the subject of a notice or request to initiate bona fide managerial discussions at a level appropriate to the Dispute in question.

**Whenever a notification of a Dispute is received it should be immediately scanned and e-mailed to the Crossrail Programme Director, General Counsel (CRL Legal), CRL's Commercial Director.**

### **Referred Dispute**

A referred Dispute is a Dispute which is the subject of a notice of intention to refer a matter to adjudication or litigation.

### **Related Dispute**

Any Dispute which raises issues of fact or law which are the same as, or relate to, issues raised in an unresolved dispute between the *Employer* and any Other.

## Dispute Avoidance

The *Project Manager* advises promptly CRL's Commercial Director of any matters which are the subject of significant disagreement with the *Contractor* on issues of contractual interpretation and includes them on a register. The *Project Manager* provides updates to CRL's Commercial Director for any matters which are the subject of notified Disputes or the subject of managerial discussions.



**TIP** It is important that the *Project Manager's* Representative is diligent in completing and updating this register as it is the primary means by which the *Employer* acquires visibility of issues at an early stage. Without this visibility the *Employer* will be unable to take a Project wide view of specific issues, initiate commercial discussions on alternate dispute resolution processes or commence preparation for the conduct of proceedings.

The register need not contain any extensive detail and should not contain any comments or other statements on the strengths or weaknesses of the arguments raised.

## Record Keeping

It is crucial that the *Project Manager's* Representative maintains an accurate record of events and the appropriate documentation relating to any significant issue, potential, notified or referred Dispute. This will greatly assist in the avoidance and swift resolution of any matters raised.

In parallel to the requirement to maintain accurate records, it is equally important to be able to quickly access and retrieve all relevant documentation that forms the basis of evidence that can be presented to any third parties.

eB is the mandatory document storage system and all documentation should be quickly and readily accessible to the *Employer*.

All electronic communications, emails and manuscript records must be of a professional standard as they are discoverable and may be used in evidence in adjudication.



**Beware of making any personal remarks about the *Employer*, or the *Contractor* or your colleagues in internal communications – they may be used as evidence in court!**

### Dispute Resolution

The *Employer* recognises that during the currency of the contract, differences will exist between the *Contractor* and the *Employer* and that the contract provides for differences to be dealt with in a structured way, prior to the referral of a Dispute to adjudication or litigation.

### Managerial Discussions

The Works Contract states that the Parties (the *Employer* and the *Contractor*) shall use reasonable endeavours to resolve any Dispute which may arise by means of prompt, bona fide discussion at a managerial level appropriate to the Dispute in question.



Any documents from the Project Manager's records used in the managerial discussions shall be marked "Without Prejudice"

On behalf of the *Employer*, the Executive Group is responsible for giving guidance and direction regarding the avoidance and resolution of Disputes adopting a value for money discipline.

It is important to note that the obligation to discuss at managerial level is without prejudice to each Party's rights at any time to refer a Dispute to adjudication.

### Adjudication Proceedings

It is important to note that adjudication may be commenced:

- I. Before managerial discussions are held;
- II. Immediately afterwards; or
- III. At any time thereafter.



**In accordance with CRL's Scheme of Authorities (Reference A), any decision to commence formal legal proceedings for the determination of a Dispute (including adjudication proceedings under CRL contracts or the termination of a Contract) requires the authorisation of the Chief Executive Officer (CEO).**



Any documents produced by the Project Manager in preparation for adjudication must be marked "Confidential and Privileged" and addressed to the General Counsel and/or a member of the *Employer's* Legal team as directed by the General Counsel.

### Court Proceedings

It should not be understated that construction litigation can be a costly and time-consuming process for all involved. Given the range and complexity of potential proceedings, each case will be considered on its own facts. The strategy for handling any litigation will be considered by the Executive Group.

### Alternative Dispute Resolution

It is important to note that the Parties are free to consider and mutually agree and consent to any other form of Alternative Dispute Resolution (ADR) other than automatically proceeding with a Dispute to litigation. Such alternatives are Mediation, Expert Determination etc (the engagement in Mediation can be relevant to cost orders in litigation).

### Obligation to notify the Sponsors

Pursuant to Clause 7.6 of the Project Development Agreement (PDA) CRL is required to take all steps necessary to defend any litigation, arbitration or administrative proceedings which are current, threatened or pending against it.

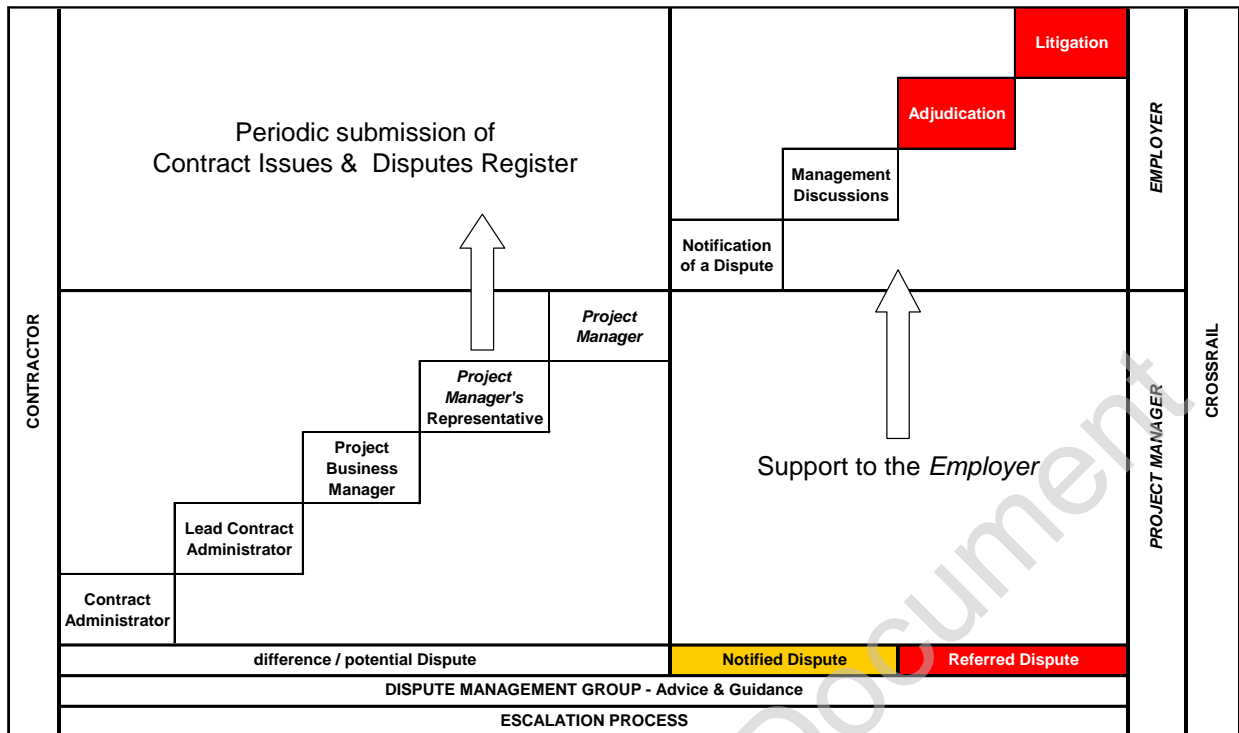
CRL is required to notify the Sponsors (DfT/TfL) of any claims, disputes or proceedings raised or made by or against CRL (or any other party under any Industry Partner Agreement or Delivery Contract) which when aggregated with the disputed portions of any other outstanding claims, disputes or proceedings raised or made between the same claimant and respondent, exceed £25m.

CRL is also required to keep the Sponsors informed on a regular basis in reasonable detail of the progress of such claims, disputes or proceedings and, if requested by the Sponsors, provide copies of all documentation relating to the same.

The Parties may agree that the adjudicator's decision shall be final and binding and shall finally determine any Dispute, or in the absence of such agreement, may otherwise refer such Dispute to the courts of England and Wales for further determination (Clause W2A.5).

### Dispute Escalation Process

The following illustrates the overall escalation process of a subject matter that is initially a difference at site level, turning into a potential Dispute, then a formally notified Dispute and then resolution via either management discussions between the *Employer* and the *Contractor* or the commencement of legal proceedings.



Executive Group

The *Employer* has formed an Executive Group, which on behalf of the *Employer*:

- a) Monitors all potential, notified or referred Disputes;
- b) Provides guidance and direction on the avoidance, handling and resolution of all Disputes and potential Disputes (including the conduct of any proceedings); and
- c) Provides guidance and direction on the initiation and conduct of commercial negotiations and the terms of any proposed commercial settlement of a Dispute or potential Dispute.

**CRL’s Commercial Director, is responsible for the submission of papers to the Executive Group and should be fully consulted on any papers that are presented.**

The *Employer* will maintain a Master Disputes Register (MDR) (**Appendix W.1**) tracking the status of all potential, notified and referred Disputes raised on the Programme, the contents of which will be presented by CRL’s Commercial Director to the Executive Group on a periodic basis.

CRL’s Commercial Director is responsible for maintaining the MDR.

Authority to settle Contractual ‘Claims’



**The *Project Manager* must remember to act in accordance with the requirements of the Contract. The *Project Manager* has no authority to reach a commercial settlement with the *Contractor*.**

CRL’s Scheme of Authorities specifies the levels of authority for the settlement of claims and Disputes by the *Employer*.





**TIP**

It is important to re-emphasise that the *Project Manager* has absolute authority to decide contractual entitlements under the CRL Works Contracts, notwithstanding that such decisions may be challenged by either the Contractor or the Employer via the Dispute process.



It should be noted that CRL is unable to settle or compromise any claim brought by or against CRL where the value of such claim, when aggregated with the disputed portions of any other outstanding claims, disputes or proceedings between CRL and the same counterparty exceeds or is reasonably likely to exceed £50m without the prior written consent of the Sponsors.

### **W.3 Golden Rules**



The actual Parties to the contract (and therefore any Dispute) are the *Employer* and the *Contractor*.



The *Project Manager* may not notify a Dispute.



It is crucial that the *Project Manager's* Representative maintains an accurate record of events and the appropriate documentation relating to any significant issue, potential, notified or referred Dispute.



Any documents from the Project Manager's records used in the managerial discussions shall be marked "Without Prejudice"



Any documents produced by the Project Manager in preparation for adjudication must be marked "Confidential and Privileged" and addressed to the General Counsel and/or a member of the *Employer's* Legal team as directed by the General Counsel.



It is important to note that the obligation to discuss at managerial level is without prejudice to each Party's rights at any time to refer a Dispute to adjudication.



The *Project Manager* must remember to act in accordance with the Contract. The *Project Manager* has no authority to reach a commercial settlement with the *Contractor*.



On behalf of the *Employer*, the Executive Group is responsible for giving guidance and direction regarding the avoidance and resolution of Disputes adopting a value for money discipline.



## **Appendices**

### **Reference Documents**

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
A	Scheme of Authorities	CR-XRL-Z6-GPR-CR001-00003

### **Standard Forms / Templates**

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
W.1	CRL Master Issues & Disputes Register template	CRL1-XRL-Z-GML-CRG03-50032

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## Secondary Option Clause X

### Introduction

The Secondary Option clauses are in addition to the Core Clauses 1 – 10 and can vary between Crossrail contracts depending on the contract and procurement strategy adopted. It is important that the Procurement Team goes through these Options at the Contract Handover Meeting and that the *Project Manager* understands which Options are used.



Secondary Option Clause X comprises up to 9 clauses that are usually found on pages 59 to 64 of the conditions of contract.

### The Key Processes

The conditions of contract may set out up to 9 Options, however of these only inflation, changes in law, collateral warranty requirements, performance bonds, limitation of liability and key performance indicators are set out in this section. Below is a summary of all the sections within Secondary Option Clause X.

X1 Price adjustment for inflation Dealt with below	X2 Changes in Law Dealt with below	X4 Parent Company Guarantee The Procurement Team will deliver this – please refer to the Procurement Procedure	X5 Sectional Completion Sectional Completion is dealt with under Section 3 Time	X7 Delay Damages Delay Damages are dealt with under Section 5 Payment
X8 Collateral Warranty Agreements Dealt with below	X13 Performance Bonds Dealt with below	X18 Limitation of Liability Dealt with below	X20 Key Performance Indicators Dealt with below	

In addition, X12 (Partnering) is not included within the standard Crossrail contract data. This may be introduced (through Supplemental Agreement). For further information, contact the *Employer*.

## **X1 Price adjustment for inflation**

Not all Crossrail Main Civil's Contracts have selected Secondary Option X1 but where this has been selected the following applies.

The *Project Manager* is responsible for calculating the relevant price adjustments when assessing or checking compensation event values and also when assessing the amount due.



**TIP**

Price adjustment does not affect the Price for the Work Done to Date (Defined Cost) but does affect the total of the Prices (the "Target"). This is because Defined Cost is paid at the amount due/cost incurred by the Contractor and so is therefore already at current day prices.

Price Adjustments are calculated using the Price Adjustment Factor (PAF) – the methodology for calculating this is found within clauses X1.1 to X1.4. The products and proportions used within the calculation are found within the Contract Data of each particular contract; these may well vary between different Crossrail contracts. Support in the determination of the PAF and the relevant indices are available from Crossrail's Head of Cost.



**TIP**

It could be beneficial to maintain, and agree with the Contractor, each period the Price Adjustment Factors applicable to each period to date taking into account any published corrections of indices.

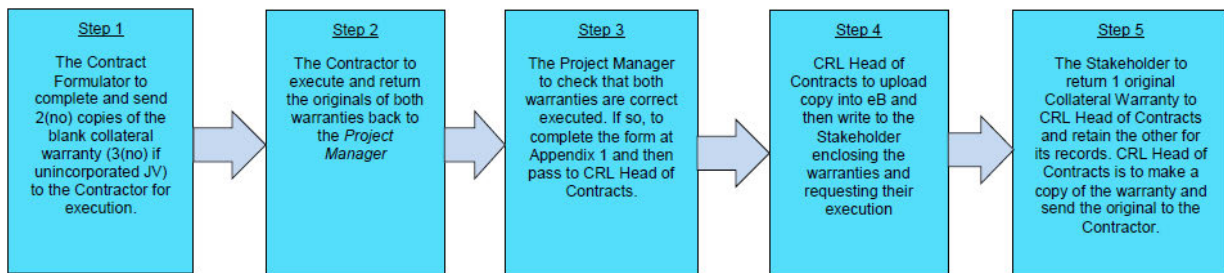
## **X2 Changes in Law**

A change in Applicable Law is a compensation event if it occurs two years after the Contract Date.



**TIP**

Any proposed compensation events for a change in law should be carefully checked against the definition of Applicable Law.

**X8 Collateral Warranty Agreements in favour of Stakeholders****Step 1:**

Where X8 is used, the *Contractor* has an obligation to provide *collateral warranty agreements* on execution of the Contract **or within 14 days** of the identity of the beneficiary being given to the *Contractor*. For this reason, management of *collateral warranty agreements* process rests with the Procurement Leader and the *Project Manager*.

The Procurement Leader (Procurement Team) shall prepare the Collateral Warranty engrossments in favour of any known beneficiaries and issue the Collateral Warranties to the *Contractor* at the time as issuing the Contract Documents. Note, beneficiaries unknown at contract award, eg an oversite developer, will be prepared by the *Employer with support from Legal*.

When preparing the engrossments, the Procurement Leader should include the following details into the Collateral Warranty:-

- *Contractor's* Name & Company Number.
- *Contractor's* Registered Office
- if the *Contractor* is an unincorporated Joint Venture, then each Joint Venture partner comprising the *Contractor* is to be separately named and to separately execute
- If the *Contractor's* obligations are guaranteed, then the Procurement Leader is to refer to CRL Legal regarding the wording of the Collateral Warranty.
- level of Professional Indemnity insurance

**Step 2 and Step 3:**

The *Contractor* is to execute and return the originals to either the Procurement Leader or the *Project Manager* who is to check that the Collateral Warranty has been correctly executed. If

- the *Contractor* fails to deliver within 14 days, or,
- the *Contractor* makes manuscript changes to the warranty which are not accepted by CRL's Legal Team, or,
- the *Contractor* fails to execute the warranty correctly (generally 2 Director signatures or 1 Director/ 1 Company Secretary or Company Seal or Power of Attorney with witness). (Note if a Power of Attorney is used, the *Project Manager (Project Manager)* is to obtain a copy of the Power of Attorney from the *Contractor* and pass to the Stakeholder Manager for forwarding to the Stakeholder).

the *Project Manager* will notify the *Contractor* that properly executed Collateral Warranties are required within the next 7 days and if not received, the *Project Manager* will recommend to the *Employer* to withhold monies as per clause 50.6A.



If the Collateral Warranty has been correctly executed, the *Project Manager* will complete the checklist at **Appendix X.1** and shall pass the original collateral warranties to the *Employer*.

**Step 4:**

The *Employer* shall then (via recorded delivery) forward to the Stakeholder (via the Stakeholder Manager) using the letter template at **Appendix X.2** and enclose all the collateral warranties for their signature and dating.

**Step 5:**

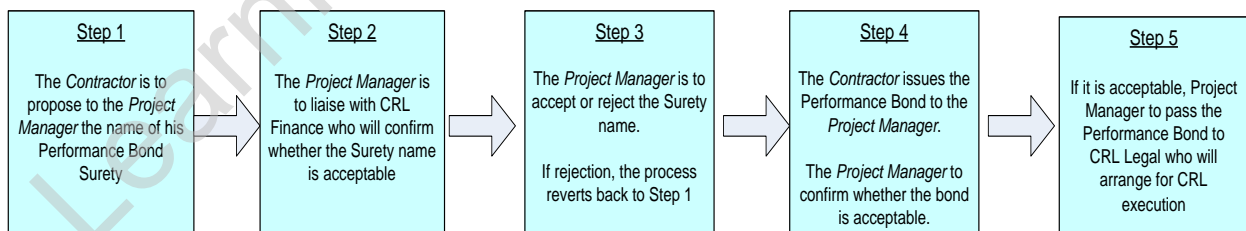
The Stakeholder executes and dates, and will then retain one collateral warranty for their records before sending back all the other collateral warranties to the *Employer*. The *Employer* shall check that the collateral warranties have been correctly executed and dated in association with the Stakeholder Manager. If not, the Stakeholder Manager is to revert back to the stakeholder. If they are correctly executed, the *Employer* will upload one copy of each collateral warranty onto the Electronic Document Management System (eB), replacing the earlier (part signed) version uploaded during Step 4 above.

Thereafter the *Employer* will send the collateral warranties to the *Contractor*, via the *Project Manager*.



The *Project Manager* should confirm via a Project Manager’s Communication that the originals of the contractor’s copy of the warranties have been returned to him, setting out when and how. The *Project Manager* should seek to hand over originals directly and not use mail.

**Performance Bonds**



**Step 1:**

Where X13 is used, the *Contractor* has an obligation to provide a Performance Bond within 4 weeks of the Contract Date. For this reason, management of the Performance Bond process rests with the *Project Manager*, not the Procurement Leader.

In accordance with X13.1, the *Contractor* is to provide to the *Project Manager* details of the Surety who will provide the Performance Bond, including registered name, address and company number **prior to** obtaining the bond.

**Step 2:**

The process for issuing and accepting a Performance bond is as follows:-

- The *Contractor* proposes the Surety **prior to** the obtaining of the Performance Bond including the Surety's registered name, address and company number.
- The *Project Manager* will liaise directly with the Head of Financial Control (CRL Finance) who will advise whether the name of the Surety is acceptable. Given that the *Project Manager* is to respond within the period of reply, generally 14 days, CRL Finance is to respond to the *Project Manager* within 7 days.
- CRL Finance will consider whether the Surety is commercially strong enough to carry the bond and shall take into account the following objective criteria:-
  - Does the Surety have a S&P credit rating and /or financial strength rating of A (or equivalent from a rating agency of similar standing), and,
  - Does the Surety have a D&B rating of 5A 1, and,
  - Does the Surety have a D&B failure score of 86/100?
  - Is the Surety licensed to carry out surety business in the United Kingdom?

**Step 3:**

The *Project Manager* is to confirm to the *Contractor* whether the Surety name is acceptable.

A *Project Manager's* Communication will be used for this Communication.

If the name of the Surety is rejected, the *Contractor* is to propose another Surety name and the process will revert back to Step 1.

**Step 4:**

The *Contractor* will issue the Performance Bond to the *Project Manager*.

The *Project Manager* will check the following:-

- That the Performance Bond is in the same form as Annexure 5 Part A of the Contract
- That the Performance Bond has been executed correctly by both the Surety and the *Contractor*. Note, the execution criteria within the Collateral Warranty section above.

If the Performance Bond is acceptable, the *Project Manager* is to complete the checklist set out at **Appendix X.1** and issue the form and Bond to the *Employer* who will arrange for signature via CRL Legal.

### **Step 5**

CRL Legal will arrange for the Performance Bond to be executed by CRL and for a copy of the Performance Bond to be uploaded into eB. CRL Legal will send a copy of the eB path to both the *Project Manager* and CRL Finance. The original of the Bond will be held in the CRL legal vault.

### **Replacement Bond**

CRL Finance will regularly review the rating of each Surety and should the rating of the Surety drop below Standard & Poor's "A" grade, then the CRL Finance will advise the *Employer's Representative* who may request a replacement Performance Bond

### **Release and Return of Bond**

This stage will occur after the defects date with the site demobilised, and will therefore need to be undertaken by the *Employer* directly.

### **Step 1**

The Contractor will typically seek the return of the Performance Bond following receipt of the Defects Certificate by the *Supervisor*. The *Employer* will arrange for the Bond release checklist to be prepared and authorised as per the checklist set out in **Appendix X.3** together with a Bond release cover letter as set out in **Appendix X.4**.

### **Step 2**

Upon authorisation of the checklist, a representative of the Contractor is invited to recover the Bond (in person) from CRL offices. The Contractor signs receipt of the cover letter acknowledging that the Bond has been handed over. The *Employer* take a copy of the acknowledgement and issue an *Employer's communication* to the contractor (on eBCA) confirming handover and attaching the letter of receipt as evidence.

### **Step 3**

The return cover letter original together with a copy of the Bond are held in the CRL legal vault. Records of the return (letter and checklist) are held in eB.



**TIP**

Do not send the original of the Bond by post or take to site. Always get the contractor to come to CRL offices to collect in person from the *Employer*.

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### **Limitation of Liability**

Limitation of Liability is often a term that will vary from one Contract to the next. It is important that the Procurement Leader states within the contract Handover Process both the **extent** of any Limitation of Liability clause and the **quantum** of any limitation.

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**Key Performance Indicators**

The *Project Manager* is responsible for

- Ensuring that the *Contractor* reports its performance to the *Project Manager* as specified;
- Ensuring the *Contractor* submits its proposals for improvement if a KPI is not forecast to be achieved; and
- Transmitting to the *Contractor* any new KPI added by the *Employer*.

***Appendices***

**Reference Documents**

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
	N/A	

**Standard Forms / Templates**

<b>Ref:</b>	<b>Document Title</b>	<b>Document Number:</b>
X.1	Bond, Warranty Acceptance Checklist	CRL1-XRL-Z-GML-CRG03-00053
X.2	Template letter to Stakeholders	CRL1-XRL-Z-GML-CRG03-00054
X.3	Bond Release Checklist	CRL1-XRL-Z-GML-CRG03-50025
X.4	Bond Release Letter Template	CRL1-XRL-Z-GML-CRG03-50026

## Z Option Z: Additional conditions of contract

### Z.1 Introduction

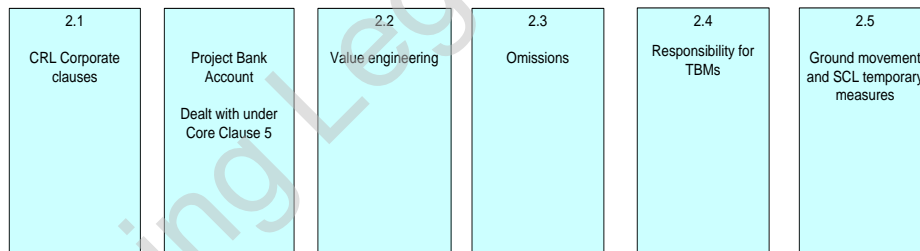
The Option Z clauses are also in addition to the Core Clauses 1 – 10 and vary depending on negotiations with the *Contractor* from one Contract to the next. It is important that the Procurement Team goes through these Options at the Contract Handover Meeting and that the *Project Manager* understands which Options are used.



Option Z clauses comprise 23 clauses that are usually found on pages 63 to 82 of the *conditions of contract*.

### Z.2 The Key Processes

The 'Z' clauses can be split into 6 key sections as follows:-



## CRL Corporate clauses

There are a number of z clauses which the *Contractor* has to comply with in the z-clauses, being:

- Z3 Equality and diversity
- Z8 The Parties use of materials
- Z9 Publicity
- Z10 Data Protection
- Z11 Access to Information
- Z12 Freedom of Information
- Z13 Confidential Information



Some of the above clauses have to be flowed down into subcontracts, the extent of these are set out in **Core Clause 2, Appendix 2.1**

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## Value engineering

### **CAP13**

The *Project Manager* should positively encourage and be supportive of *Contractor's* Value Engineering proposals during the Optimised Contractor Involvement stage and also throughout the duration of the contract.

The *Contractor* is encouraged to propose value engineering solutions under Z15, and especially during the Optimised Contractor Involvement stage. The Procurement Team (Procurement Leader) should confirm whether OCI is applicable to the contract.

When considering a *Contractor's* value engineering proposal, the *Project Manager* should take into account some wider factors, including:-

- Time and cost impact of any re-design by the *Employer's* design consultants;
- Whether any stakeholders need to be consulted/ approve the value engineering solution;
- Whether the proposal affects the Constraints on how to do the works



The *Project Manager* should similarly be aware that if the *Project Manager* accepts a value engineering proposal under clause Z15 **no changes** are made to the Prices, the Completion Date or the Planned Completion Date in the Accepted Programme.

## **Omissions**

Z16 allows the *Project Manager* to remove or withdraw all or part of the works from the *Contractor* and arrange for the works to be undertaken and/ or completed by a third party.

A key consideration is whether the *Contractor* has failed to comply with the Accepted Programme: if the *Contractor* has failed then,

- the *Employer* may recover the costs resulting from the same in excess of the cost of such works, provided for in the total of the Prices;
- the *Contractor* shall not be entitled to make any claim in respect of such omission including for any loss of profit or loss of opportunity.



**TIP** The *Project Manager* should consider whether the *Contractor* has failed to comply with the Accepted Programme **PRIOR** to removing or withdrawing part of the works.

A second consideration is whether the Works Information identifies part of the works which may be removed or withdrawn without the *Employer* incurring any liability for loss of profit/ opportunity. In the Contract Handover Meeting, the Procurement Team (Procurement Leader) should identify to the *Project Manager* whether this option is available to the *Project Manager*.



**TIP** If the Works Information specifies that part of the works can be removed or withdrawn, the *Contractor* shall not be entitled to make any claim for loss of profit or loss of opportunity.

## **Responsibility for TBMs**

Clause Z21 provides that the ***Project Manager* must give his permission** and the *Contractor* must provide an on-demand form of bond **prior** to any payment being made for a Tunnel Boring Machines (TBM(s)) which are outside the Working Area.



**TIP** Caution needs to be exercised when agreeing to Working Areas by the *Project Manager* as it removes the obligation for the *Contractor* to provide a bond



**TIP** This section cross-refers with the Section 5 – Payment process.

The process for issuing and accepting an on-demand bond is as follows:-

- The *Contractor* proposes the Surety **prior to** the obtaining of the on-demand bond including the Surety's registered name, address and company number.
- The *Project Manager* will liaise directly with the Head of Financial Control (CRL Finance) who will advise whether the name of the Surety is acceptable. Given that the *Project Manager* is to respond within the period of reply, generally 14 days, CRL Finance is to respond to the *Project Manager* within 7 days.

- CRL Finance will consider whether the Surety is commercially strong enough to carry the bond and shall take into account the following objective criteria:-
  - Does the Surety have a S&P credit rating and /or financial strength rating of A (or equivalent from a rating agency of similar standing), and,
  - Does the Surety have a D&B rating of 5A 1, and,
  - Does the Surety have a D&B failure score of 86/100.
  - Is the Surety licensed to carry out surety business in the United Kingdom.
- The *Project Manager* is to confirm to the *Contractor* whether the Surety name is acceptable or not based upon the Head of Cost Assurance's response. A *Project Manager's* Communication will be used for this Communication.

If the Surety is rejected, the *Contractor* is to propose another Surety name and the process will revert back to Step 1.

If the Surety is rejected, the *Contractor* is to propose another Surety name and the process will revert back to Step 1.

- The *Contractor* will issue the on-demand bond to the *Project Manager*. The *Project Manager* will check the on-demand bond is in the same form as Annexure 5 Part B of the Contract and executed correctly by both the Surety and the *Contractor*.



**TIP** If the on demand bond is acceptable, the *Project Manager* to complete the Form set out at **Appendix X.1** and issue the form and bond under cover of a Memo to CRL Legal

CRL Legal will arrange for the on-demand bond to be executed by CRL and for a copy of the on-demand bond to be uploaded onto Electronic Document Management System. CRL Legal will send a copy of the e-path to both the *Project Manager* and CRL Finance.

CRL Finance will regularly review the rating of each Surety and should the rating of the Surety drop below Standard & Poor's "A" grade, then the CRL Finance will advise the *Employer's* Representative who may request a replacement on-demand bond

Z21.4B provides that the TBM(s) are clearly tagged, identified as the *Employer's* and set aside for the *Employer*. This includes:-



- That the TBM(s) are stored separately in the supplier's storage facility. The *Contractor* should request a drawing of the storage facility and the location of the 'goods' from the supplier, and check the drawing is accurate.
- That the TBM(s) are in accordance with the Works Information.
- Clearly label and then photograph the TBM(s) and label.
- The label should be stuck onto the packaging of the 'goods' and state,
  - a. "[the TBM(s)] are the property of Crossrail Limited"
  - b. the project number/ name
  - c. the date of the inspection

The *Contractor* should provide evidence of this tagging to the *Project Manager*.

**Ground movement & SCL temporary measures**

At the Contract Handover meeting, the Procurement Team (Procurement Leader) should inform the Project Manager whether Z22 and Z23 are included in the conditions of contract.

Z22 deals with ground movement and clarifies what is a *Contractor* risk and an *Employer* risk. This needs to be borne in mind when considering compensation events for ground movement related matters.

Z23 provides that the SCL quantities stated in the Works Information is an *Employer* risk and any change to the quantities **in excess** of those quantities is a compensation event. The valuation of the compensation



**TIP** The valuation of the compensation event is based upon the schedule of rates for the SCL Temporary Measures as set out in the Works Information

**Appendices**

**Reference Documents**

Ref:	Document Title	Document Number:
	N/A	

***Standard Forms / Templates***

Ref:	Document Title	Document Number:
2.1	Key Clauses to be inserted into Subcontract Conditions	CRL1-XRL-Z-GML-CRG03-00033
X.1	Bond, Warranty Checklist	CRL1-XRL-Z-GML-CRG03-00053