

**Specification for a generic form of CECA Sub-Contract
following consultation and feedback received
from CECA Southern Members in December 2018**

1. Background

- 1.1 The Board gave its approval last year to the preparation of a detailed specification for a new “generic” Form of CECA Sub-Contract. A note prepared by Tom Pemberton and Mark Bezzant setting out a proposed specification was subsequently circulated to CECA members for consultation.
- 1.2 Pursuant to the consultation, and in view of the feedback received from CECA Southern Members in December 2018, the Board is invited to recommend to CECA Members that a new generic form of CECA Sub-Contract is prepared on the basis set out below.
- 1.3 The overall objective is to provide a form which is flexible and reflects best current practice, with the intention that it will be periodically updated to reflect changes in law (for example governing retentions) and developments in procurement methodology.

2. Key features of the new form

- 2.1 The generic form will have the same “look and feel” as the existing CECA sub-contract forms which were published for use with the Measurement and Design and Construct Versions respectively of the ICC Conditions (last updated in 2011), but will be drafted for use in relation to the wide variety of main contract forms typically used in the civil engineering industry by major clients including Network Rail.
- 2.2 As part of a process of rationalisation, the Schedules will be reduced from five in number to two. The First Schedule will be populated by particulars of the Main Contract. The Second Schedule will set out the Sub-Contract Particulars, identifying the further documents to form part of the Sub-Contract, pricing information, the Contractor’s Facilities, the required insurances, and other items of information as referred to non-exhaustively in this paper. There will be guidance notes to assist CECA members to complete the Schedules in an appropriate manner.
- 2.3 The key proposed specific features of the new form are detailed below.

3. Documentary requirements

- 3.1 Parent company guarantee: where the Sub-Contractor is part of a company group structure, there will be an option for the Sub-Contractor to be required to provide a parent company guarantee (PCG) in favour of the Contractor from its parent company (or ultimate holding company), in the form identified in the Sub-Contract Particulars. Guidance will be given on the risk factors which Members should bear in mind when considering whether to require a PCG, including the value of the Sub-Contract Works and the extent of the losses potentially arising from Sub-Contractor

default.

- 3.2 **Performance bond:** there will be an option for the Sub-Contractor to be required to provide a performance bond to the Contractor in the ABI standard form, unless another form is identified in the Sub-Contract Particulars. Guidance will be given on relevant considerations in this connection, including those referred to above in relation to PCGs where the Sub-Contractor is not part of a company group structure.
- 3.3 **Collateral warranties:** where so specified in the Sub-Contract Particulars, there will be a requirement for collateral warranties to be provided by the Sub-Contractor in favour of the Employer, funders and/or other beneficiaries, in the forms specified in the Main Contract. Guidance will be given as to the advisability of ensuring that the Main Contract requirements in relation to collateral warranties are sufficiently flexible to permit amendment where reasonably requested by the sub-contractors, since this may be a requirement of their insurance.

4. **Payment**

- 4.1 **Retention:** there will be provision for retention to apply, in recognition that Main Contracts typically provide for retention and that where this is the case CECA's Members will expect retention to apply under their Sub-Contracts on a "back to back" basis. However, there will be guidance that in appropriate cases retention may be "nil", or alternatively that any retention requirement may be covered by a retention bond where the Sub-Contractor is able to procure this (although feedback received from CECA Southern Members indicates that retention bonds are not readily available to T2 sub-contractors). In most cases, the starting point for negotiations will be the position under the Main Contract, although the guidance will confirm that CECA supports the objective of achieving zero retention across the industry.
- 4.2 **Final payment:** There will be an option for the final payment procedure to start within one month of the Sub-Contractor completing the Sub-Contract Works. This will be an alternative to the existing provision (which will remain the default position) that the final payment procedure will start after the Sub-Contractor has discharged its obligations in relation to outstanding works and defects following the end of the defects correction period under the Main Contract. There will be guidance that the new option will not cut across the Contractor's rights in respect of holding a balance of the retention monies until after the Sub-Contractor has discharged its obligations in relation to the making good of defects in the Sub-Contract Works, and the Contractor's the right to claim damages for default by the Sub-Contractor (e.g. for delay in completing the Sub-Contract Works) will not be affected.
- 4.3 **Project bank account:** There will be an optional clause for use where payments are to be made through a project bank account.
- 4.4 **Costs savings:** There will be optional supplemental provisions for the Sub-Contractor to provide cost saving proposals, provided that do not prejudice the functionality of the relevant elements of the Sub-Contract Works. The Sub-Contractor would retain

a pre-agreed proportion of the savings and there will be guidance that this should be set at a level which incentivises the Sub-Contractor to provide cost saving proposals.

- 4.5 Target cost option: Consideration was given to including an option for the Price to be on a target cost basis. However, experience shows that target cost sub-contracts do not always deliver the intended benefits. While this view was endorsed by some of the respondents to the consultation, other feedback indicated that some Members would find it useful to have a target cost option. If there is sufficient demand among CECA Members, a new form of target cost sub-contract may be therefore be commissioned as a separate exercise. The amendments to the generic form would need to be fairly extensive since as well as changes to the payment mechanism, other consequential changes will be required to reflect the different contractual basis of a target cost sub-contract compared to a lump sum or re-measurement sub-contract.

5. Programme

- 5.1 Date for commencement: There will be provision for alternatives of date(s) for commencement to be stated in the Sub-Contract Particulars or subsequently notified.
- 5.2 Coordination: The Sub-Contractor will be obliged to comply with the reasonable directions of the Contractor in relation to the coordination of the design and execution of the Sub-Contract Works with the works carried out by the Contractor and its other sub-contractors, provided that the directions are given in a timely manner.
- 5.3 Delay damages: As an alternative to the existing position (which will remain the default position) that the Sub-Contractor is liable for general damages for delay if it fails to complete the Sub-Contract Works within the Period for Completion, there will be an option providing for the Sub-Contractor to be liable for liquidated damages for delay at a pre-agreed rate. This should be easier to administer on the basis that the Contractor would not have to prove actual loss, although limiting the Contractor's entitlement to claim its delay related losses in circumstances where these are notoriously difficult to pre-estimate accurately. The guidance notes will therefore make it clear that liquidated damages should only apply to simple sub-contract packages where there is little risk of critical delay or impact on other sub-contractors. In all other cases, the Sub-Contractor should be liable for general damages for delay.

6. Design

- 6.1 Standard of care: The provisions regarding the design of the Sub-Contract Works will be extended to include dual obligations (i) to use the standard of skill, care and diligence reasonably to be expected of an appropriately experienced and qualified design professional, and (ii) to comply with the Contractor's Requirements as set out or referred to in the Second Schedule. "Fitness for purpose" language will be avoided, as this can result in lack of clarity and disputes concerning the "purposes" of the Works/Sub-Contract Works.

- 6.2 PI insurance: There will be an obligation to take out and maintain PI insurance provided that it remains available at commercially rates and on commercially reasonable terms.
- 6.3 Design submission procedure: There will be a requirement to comply with a design submission procedure, which will follow that in the Main Contract where applicable.
- 6.4 Copyright: There will be an option for copyright in the Sub-Contractor's designs to vest in the Contractor. This should be selected if copyright in the Contractor's (and its sub-contractors') designs is to vest in the Employer pursuant to the terms of the Main Contract.
7. **Dispute resolution**
- 7.1 Adjudication: there will be provision for the statutory Scheme for Construction Contracts to be the default adjudication procedure unless a different procedure is stated to apply in the Sub-Contract Particulars (e.g. where disputes under the Main Contract are subject to another procedure). There will be no time limit for the dispute to be referred to litigation (or arbitration) if either party is dissatisfied with the Adjudicator's decision, since otherwise there is a risk that that a dispute may be referred to litigation (or arbitration) under the Main Contract in circumstances where a connected claim under the Sub-Contract is time-barred. This would leave the Contractor with no recourse against the Sub-Contractor if the former is held liable for damages (or a non-pecuniary remedy) by the judgment/arbitration award in circumstances where an adjudicator appointed in respect of the dispute under the Sub-Contract has reached an inconsistent decision in relation to the connected claim.
- 7.2 Litigation/arbitration: there will be provision for litigation to be the ultimate default dispute resolution procedure, since in our experience most main contracts provide for disputes to be subject to the jurisdiction of the relevant national courts. There will be an option for arbitration to apply where so provided by the Sub-Contract Particulars.
8. **Statutory requirements**
- 8.1 A general provision will be included which obliges the Sub-Contractor to comply with all statutory requirements. These will be widely defined to include all duties arising under law, and also codes of practice published in relation to compliance with particular regulations.
- 8.2 Consideration was given to the addition of specific obligations to comply with duties arising under particular statutes/regulations, including the Bribery Act 2010, the Modern Slavery Act 2015, the Data Protection Act 2018 (which implemented the General Data Protection Regulations), and the Construction (Design and Management) Regulations 2015. There will be obligation to comply with these statutory requirements pursuant to the general provision referred to above. To the extent that the Contractor cannot rely on this, together with the Sub-Contractor's general obligation not to cause the Contractor to be in breach of the Main Contract, any specific requirements can be set out in the Contractor's Requirements or other

documents specified in the Second Schedule. These are likely to be based on the detailed requirements of the Main Contract where applicable. Guidance will be included to this effect.