

GUIDANCE NOTES
ENGINEERING AND CONSTRUCTION CONTRACT

Option X29 Climate Change

Option X29 is intended to reduce the impact of the creation, operation, maintenance and demolition of the *works* on climate change.

IDENTIFIED AND DEFINED TERMS

Four additional defined terms are added when Option X29 is incorporated into the contract.

Climate Change Requirements

Climate Change Requirements are stated in the Scope and are therefore things the *Contractor* has to provide or comply with in order to Provide the Works in accordance with the Scope. A failure to do so will be a breach of the *Contractor's* obligation stated in clause 20.1. If the failure relates to the *works* this will be a Defect (clause 11.2(6)) that the *Contractor* will have to correct. If the failure relates to how the *Contractor* is to Provide the Works i.e. working practices this will not be a Defect but would still need to be addressed. The Climate Change Requirements do not need to be in a specific section of the Scope, but it may assist the parties in administering X29 to have a specific section in the Scope or to identify parts of the Scope that are considered to be Climate Change Requirements.

Careful consideration has to be given as to the content of the Climate Change Requirements to make sure they are achievable and do not place undue risk upon the *Contractor*. If the Climate Change Requirements are unduly onerous this may lead to bidders refusing to bid for the work or including substantial risk allowances within their bids.

Climate Change Requirements could include things such as levels of recycling, use of renewable power on-site or electric vehicles, reducing waste generation, designing out waste, designs that reduce carbon emission etc. It may also cover requirements to be included in the Climate Change Plan or details over what information relating to climate change that the Parties may use, disclose and publicise. The Climate Change Partners are also identified in the Climate Change Requirements.

The Climate Change Requirements are likely to be set by the *Client* but some or all could be requested from the bidder. They could also be developed jointly between a bidder and the *Client* depending on the procurement process used.

The Performance Table

The Performance Table provides a performance management regime in relation to matters that may impact climate change. It enables a *Client* to set financial incentives to encourage the *Contractor* to achieve stated performance targets. The incentives can be positive and / or negative.

Whilst it is expected that a Performance Table will commonly be used with secondary Option X29 it is not mandatory and the secondary Option can be used with just the Climate Change Requirements. Where a Performance Table is used the *Client* has the flexibility to include within this any targets that it wants the *Contractor* to achieve related to climate change. Secondary Option X29 is in some ways a combination of secondary Options X17 low performance damages and X20 Key Performance Indicators, and it is recommended that it is not used with these Options.

The Climate Change Requirements can be contrasted with targets for performance stated in the Performance Table. The targets in the Performance Table are targets which

the *Contractor* may be incentivised to achieve through positive and/or negative financial incentives. If the *Contractor* fails to achieve these targets this will not result in a Defect that has to be corrected, as the Performance Table is not Scope. Any failure will instead be addressed through the Performance Table itself. The Performance Table may contain positive incentives, negative incentives, a combination of the two or even no financial incentive at all and instead be used only to measure and record the performance achieved. Where there are financial incentives in the Performance Table, and in particular negative incentives, careful consideration needs to be given as to the values included and the potential risk this may impose on the *Contractor*. The Performance Table can include limits on the level of money paid to or deducted from the *Contractor* both in relation to each target and overall. If secondary Option X18 limitation of liability is included in the contract, payments under the Performance Table are an excluded matter (clause X29.13) and so careful consideration has to be given as to the potential loss the *Contractor* may be exposed to under the Performance Table.

Targets in the Performance Table may be in the form of key performance indicators, or specific values or requirements to be achieved. They may be stretch targets beyond the levels that must be achieved as stated in the Climate Change Requirements.

There is no restriction on what elements of the *Contractor's* performance can be incentivised in the Performance Table, but each performance target should be capable of objective measurement, so that the Parties know when it has been achieved. The use of subjective judgements, for example using phrases such as 'reasonable satisfaction' etc., should be avoided. The method of measuring performance against the target needs to be stated.

There is also no limit on how many targets can be incentivised. It is however, suggested that only a few of the most important targets are incentivised otherwise their impact may be lost.

The Performance Table sets out the adjustments to the amount due if a performance target is not achieved, met or exceeded. To do this the table should identify the

- subject / issue to be addressed
- performance target
- unit of measurement
- date when performance is to be measured
- adjustment to the amount due if the target is not met
- adjustment to the amount due if the target is met or improved upon and
- any limits on the amounts to be paid by the *Contractor* in accordance with the Performance Table including any overall limits.

The Performance Table should also include a statement of the method and rules used to compile it to make clear the coverage and method of measuring the performance targets.

The *Contractor* is required to report its performance against the targets in the Performance Table at regular intervals (clause X29.12). The interval should be stated in the Performance Table. In deciding the interval to be stated, where applicable, consider aligning it with the *Client's* routine reporting periods whether it be monthly or quarterly.

An important difference between the Performance Table and the Scope is that since the Performance Table is not Scope (clause X29.12(4)) it cannot be changed unilaterally by the *Project Manager*.

The targets in the Performance Table will likely be set by the *Client*. If a bidder is required to offer targets, it may be appropriate to include those targets in a bid evaluation.

An example of a Performance Table is provided in Appendix A.

COLLABORATION

Clause X29.2 requires the *Contractor* to collaborate with other Climate Change Partners identified in the Climate Change Requirements. These can be identified as specific companies or by work type or activity they will undertake. The *Project Manager* has the power to change the Scope and so can revise the list of Climate Change Partners as necessary, for example when other contractors or consultants are engaged by the *Client*. Where there are multiple parties involved in the delivery of the project consideration may also be given to using X12 multiparty collaboration. However, the interface between the Key Performance Indicators in the Schedule of Partners in X12 and the content of the Performance Table would need to be carefully considered.

EARLY WARNINGS

Early warnings are to be notified for events which may impact the achievement of the Climate Change Requirements. Where an event may impact the achievement of targets in the Performance Table these will be reported and addressed through clause X29.12 performance measurement.

CLIMATE CHANGE PLAN

The Climate Change Plan sets out the *Contractor's* strategy for achieving the Climate Change Requirements (e.g. setting out stakeholders, roles, timescales, key milestones, tools and tasks to get there). Detailed requirements in respect of the form and content and of the Climate Change Plan can be included in the Climate Change Requirements.

In many cases a Climate Change Plan will be submitted by a bidder and included in the Contract Data at the Contract Date. However, there is also the option for a first climate change plan to be issued, within a fixed period of time after the Contract Date. It should be noted that there is no financial sanction on the *Contractor* if they fail to submit a first Climate Change Plan. If the *Client* wants to ensure that a Climate Change Plan is in place early in the contract, they can make this a part of the tender process and include it in Contract Data at contract award.

The Climate Change Plan may need to be revised as the works progress due to, for example, changes in the ordering and timing of the *works*, the *Contractor's* methodology or changes in Scope. The *Project Manager* and the *Contractor* can instigate a revision and reissue of the climate change plan at any time and should do so when the current plan is out of date. There are no clauses that would lead to a default of acceptance of the climate change plan if the *Project Manager* fails to reply to the *Contractor's* submission. The *Contractor* and *Project Manager* should work together to get the Climate Changes Plan in place in keeping with the requirements of clause 10.2.

There are no direct contractual sanctions if the *Contractor* fails to comply with the Climate Change Plan. Similar to the Accepted Programme it is a statement of intent, a plan of how the *Contractor* intends to achieve the Climate Change Requirements and it is a failure to deliver those Climate Change Requirements that will be addressed under the contract.

DISCLOSURE

A specific clause has been included to allow for information relating to climate change to be used, disclosed and publicised to Others in accordance with the Climate Change Requirements. This reflects that clients and contractors are increasingly required to report and publicise their climate change credentials. This also potentially allows for good practice to be shared with the wider industry.

ACCELERATION, ACCEPTING DEFECTS, COMPENSATION EVENTS

Where a Performance Table is used and linked to financial incentives there needs to be a mechanism to adjust the targets, amounts and dates stated within it as a result of compensation events or agreements being made in relation to the acceptance of Defects or acceleration. Therefore, clauses to this effect have been included within the secondary Option.

Clause X29.9 is included to address the situation where a compensation event only impacts the Performance Table and so would not be covered by the compensation event process in the core clauses of the contract. Clause X29.9(2) is included to address the limitation in clause 63.6 of the core clauses in relation to the Parties' entitlements as a result of a compensation event.

It should be noted that, as with all periods to reply under the contract, the period for responses to notified compensation events etc, can be extended by the mutual agreement of the *Contractor* and *Project Manager* under clause 13.5.

CONTRACTOR'S PROPOSALS

Clause X29.11 is included to allow the *Contractor* to propose changes to the Scope in order to reduce the impact of the creation, operation, maintenance or demolition of the *works* on climate change. The process requires the mutual agreement of the *Contractor* and the *Project Manager* to proceed, in that the *Contractor* may propose changes but does not have to, and the *Project Manager* can choose not to accept the proposal for any reason. However, one would expect that the parties would want to work together to enable a viable proposal to proceed if it will deliver climate change benefits. The clause also protects the *Contractor* in that the Scope cannot be changed as proposed by the *Contractor* unless the *Contractor's* quotation is accepted.

Clause X29.11 refers specifically to changes in the Scope, which therefore includes changes to the Climate Change Requirements. If the *Contractor* can better the targets stated in the Performance Table, then they will be rewarded for this via the Performance Table itself.

PERFORMANCE MEASUREMENTS

The Performance Table provides details of the *Client's* performance requirement and the targets that are to be achieved. The *Contractor* is required to report at regular intervals its actual past and forecast future performance with regards to these targets. It would be sensible for the *Project Manager* and *Contractor* to meet to discuss the format and requirements of the reports in advance of producing the first one.

Careful consideration should be given to the frequency of reporting against the targets in the Performance Table so as to provide regular and early awareness of issues that may impact their achievement.

A proposal for improving performance is submitted by the *Contractor* where it is failing to achieve a target or where it forecasts failure against a target. For this to be effective the measurement, reporting and corrective/preventative action cycle must be short in duration. Where the *Project Manager* does not accept the *Contractor's* proposals it must give details as to what is wrong with the submission so as to allow the *Contractor* to correct it.

This ensures that problems that are preventing or will prevent a target being met, and methods to overcome them, are identified as early as possible. This will enable the *Contractor* and *Project Manager* to work together to ensure that the targets are met wherever possible.

Clause X29.12(3) provides the mechanism for making assessments and payments in accordance with the Performance Table. The dates when performance will be assessed is stated in the Performance Table with amounts then becoming due in the next assessment after the relevant date.

The performance of the *Contractor* is assessed by the *Project Manager* in accordance with the dates stated in the Performance Table.

When the *Contractor* is setting up subcontracts after the *starting date*, it would be the responsibility of the *Contractor* to offer any incentives to its Subcontractors it thinks are necessary to encourage them to help the *Contractor* achieve its performance targets.

APPENDIX A – EXAMPLE PERFORMANCE TABLE

Performance Table

Ref	Subject / issue to be addressed	Target	Units	Date when performance is to be measured	If performance does not meet the target stated in the Performance Table, the <i>Contractor</i> pays the amount stated (sum or rate)	Limit on sum to be paid by the <i>Contractor</i> (if any)	If performance exceeds or meets the target stated in the Performance Table, the <i>Contractor</i> is paid the amount stated (sum or rate)	Limit on sum to be paid to the <i>Contractor</i> (if any)	Reporting frequency (weekly/ monthly/ at completion)
						[For a per target limit]		[For a per target limit]	
	Total limit on sum to be paid					[When an overall limit will apply]		[When an overall limit will apply]	(weekly/ monthly/ at completion)

The method and rules used to compile the Performance Table are