

Schedule 2D rates: A contract within a contract – hidden in plain sight



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Some years ago, I had a contractor client that fell into dispute on a PW-CF1 Public Works Contract over a significant change order in the region of €450k involving heavy excavators, rock-breakers and 40t dump-trucks. The contractor owned his own plant outright, which was the lion's share of the value of the change order and in Part 2D of the Tender & Schedule, the contractor tendered (negative) -50% as his tendered % deduction to the cost of plant giving him the comparative tender advantage over his rivals, winning him the contract.

The Employers Representative ("ER") had determined evaluation under 10.6.4 and had conclusively directed that the plant element of the change order was valued at 50% of the cost which amounted to the square root of nothing! Given the windfall to the Employer, the ER was shrugging his shoulders saying *"the contract is the contract."* I directly asked the contractor's estimator why he had put a deduction 50% against the cost of plant, and he quietly replied: *"I thought they only asked me to tender for an estimated overrun of €40,000 worth of plant."*

On further enquiry, the young estimator referred me to Appendix 5 of the Instructions to Tenderers ("ITT"). Like a bolt of lightning, on review of Appendix 5 of the ITT, it became clear what these Schedule 2D tendered rates were, and what they were intended to do!

For a number of years since, by pointing out the undeniable logic of what that young estimator identified to me, I have successfully pursued and recovered claims for contractors, unfettered by the Schedule 2D rates, against ER's who have not understood the intended purpose and limitations of those rates.

I decided to publish this paper after being quite shocked as an Irish taxpayer at a recent seminar attended by a ballroom full of public employers, at which the speakers were setting out their firm views on what should or should not be considered as abnormally low tenders, when contractors tender a Schedule 2D "zero" rate. Because of their lack of understanding, and unfortunately also the lack of any authority on the point¹, I thought it might be helpful to set out my views here.

First, it is important to understand how Schedule 2D rates are generated and what they are for. The story begins with Appendix 5 of the ITT.

ITT, Appendix 5:

A typical Appendix 5 of the ITT is set out below. In essence, it informs the Contractor that, in addition to the *Tendered Contract Sum*, the price it includes in its tender will be assessed on certain assumptions in relation to overruns on labour, plant, materials and time, which it also must price.

For Information Purposes Only: Candidates are not to complete this table

Contract Sum			€
Tendered Contract Sum (Form of Tender ¹²)			
Tendered Compensation Events Charges			
€280,000	labour 40%	x 7.5% adjustment (Schedule, part 2D)	
€280,000	materials 40%	x 7.5% adjustment (Schedule, part 2D)	
€140,000	plant 20%	x 7.5% adjustment (Schedule, part 2D)	
40 days	Site Working Days' delay	x tendered rate (Schedule, part 2D) ¹³	
SUB-TOTAL			
Tendered date for Substantial Completion (if used)			
En/a	Value per calendar day	x days in excess of the earliest date for substantial completion ¹⁴	
SUB-TOTAL			
TOTAL COMPARATIVE COST OF TENDER			

¹ Reference my previous article *"The Perfect Storm"*, which addressed the removal of the case stated procedure with the arrival of the 2010 Arbitration Act.



In the example above, the assumptions for the project, estimated by the Employer's Design Team, are an overrun on the costs of labour of €280,000, the same for materials, €140,000 for plant and 40 Site Working days of time of expected delay costs.

The Contractor prepares its price for the overruns on those assumptions, which is then added to the "*Tendered Contract Sum*". This forms the "*Total Comparative Cost of Tender*", which figure the Employer compares with the other tenderers.

What's critical are the assumptions upon which the Contractor basis its tendered rates and the specific reference to Schedule, part 2D of the Contract, where it's clear that the Contractor's tendered rates are used to evaluate overruns up to those estimated limits.

In contractual law terms, the ITT, and the assumptions included in it, are the "invitation to treat" upon which the Contractor is being asked to make its "offer".

Tender & Schedule Part 2D / Contract conditions Clause 10.6.4 and 10.7.1

The Tender & Schedule that the Contractor completes is, for the purposes of contract law, the "offer" made to the public authority, which it may accept by way of the Letter of Acceptance.

The Contractor inserts its "*Tendered Contract Sum*" in the first page of the Tender and Schedule. It then inserts its *tendered rates* for the estimated overruns for labour, plant, materials and time (as communicated to it in Appendix 5 of the ITT) in Part 2 D of the Schedule.

In the PWC MF1.4 Letter of Acceptance, the Tendered Contract Sum becomes the "Contract Sum" when accepted by the Employer, and the Schedule 2D *tendered rates* become accepted when "*appended*" to the Letter of Acceptance.

In this way, there is a direct link between Appendix 5 of the ITT and Part 2D of the Schedule. In legal parlance, the assumptions in Appendix 5 of the ITT are carried through to the

contract by reference and/or implication because:

- the ITT specifically references Part 2D
- the assumptions represented² in the ITT inform how the tendered percentages and rates are derived
- the ITT sets the evaluation basis upon which the rates were competitively tendered, and,
- the ITT provides the only objective reference point for understanding the percentages' and rates intended application

The relevant Contract Conditions (clauses 10.6.4 and 10.7.1) also assist in identifying a direct link between Appendix 5 of the ITT and the contract because both clauses make specific, and very intentional multiple references to the Contractor's "*tendered*" rates.

This language expressly incorporates what has been "tendered", which, logically, must include the assumptions that the Contractor has tendered upon as identified by Appendix 5 of the ITT.

So, what's the misunderstanding?

The issue is that certain Employers and Employer's Representatives fail to take the above into account and decide (either wilfully or out of ignorance) that the rates included in Schedule 2D apply beyond the assumptions the Contractor has been asked to price by Appendix 5 of the ITT i.e. that the rates included in Schedule 2D apply ad infinitum. They also argue that Appendix 5 of the ITT is for "tender comparison purposes" only, so is really of no relevance to the Contractor nor indeed do they form part of the Contract.

Taking the last point first, which is the one usually made. If Appendix 5 of the ITT was of no relevance to the Contractor, then why is it

² Not to be confused with any misrepresentation that might trigger Section 45 of the Sale of goods Act 1980 if the tenderer was induced into contractor to his detriment .



part of the ITT? Why does it identify assumed overruns? Why are these being communicated to the Contractor? And, why is the Contractor being told that its price (and the rates it includes in Schedule 2D) will be assessed on that basis? Appendix 5 is there for a reason – it includes critical information on a contract within a contract where the Contractor is invited to competitively tender rates for a quantified overrun (an overrun for which he otherwise would've been entitled to damages) and this is part of the “invitation to treat” that the Contractor prepares its “offer” in response to.

Regarding the Schedule 2D rates applying ad infinitum, this could never be the intention of the parties:

- It would allow the Employer turn the contract into a “time and materials” contract if very large variations (beyond the assumptions for overruns in ITT Appendix 5) were directed pursuant to clause 10.6.4.
- It would result in the Employer being unjustly enriched: the Employer could wilfully breach the contract causing delay and contractor would not be able to recover its actual losses – this runs contrary to the legal doctrine that a party cannot benefit from its own breach of contract.
- In relation to the cost of labour, it could result in payments to the Contractor for labour being below the relevant SEO rates but at the same time require the Contractor to pay those rates to its operatives – in essence, the public authority would be breaching employment legislation on an on-going basis – this could not be the intention of any public contract.

What happens when the assumptions expire?

This is where the “*rubber meets the tarmac*” and where the Contract terms do not readily assist. To give context we must look at the philosophical approach that was taken to the

PWC, which was to take out all uncertainty in public tendering. This is most evident in prohibiting provisional sums in preparation of bills of quantities, but it is equally evident with this issue.

It comes back to the Employer’s Design Teams’ “*professional judgment*” as to the assumptions included in Appendix 5 of the ITT. It is clearly open to the Design Team to include whatever assumptions it wants in that document – including an ad finitum assumption! It clearly cannot do this and must use its professional judgment to assess what the overruns on the project might be, (because if these overruns are genuinely too large, than the Sponsoring Agent is de facto not ready to go to tender). However, the Design Team gets it wrong all the time, and what are we left with then?

Luckily, we are left with the law. As per contract law “101”, if the Employer has breached the contract (e.g. delayed beyond the assumption included and priced for in the Contract) and there is no contractual mechanism to cater for that occurrence (the assumption limits have expired) the contractor will be due the damages that naturally flow from the Employer’s breach. This would include all damages that the contractor would suffer (subject to remoteness) including its costs, losses and damages, whatever they may be (including prolongation cost, overhead and profit).

The above analysis restores logical, practical and legal sense to matters, and it amazes me how Employer’s / ERs look to ignore this, in order to hold Contractor’s to ransom and unjustly enrich themselves by incorrectly and inappropriately applying Schedule 2D rates beyond what they should.

If a public procurement body were to exclude a tender that had a €Zero Schedule 2D daily delay rate, on the grounds that it considered it to be abnormally low (as suggested by the presenters to the ballroom of public employers), then in my view that might indeed be cause for a challenge.



When there is a dispute on the applicability of the rates...

When the Employer sticks to the position that the Schedule 2D rates apply *ad finitum*, we again revert to contract law “101”.

If the matter was litigated, courts would invariably look to the ITT as part of the “factual matrix” to interpret ambiguous or unclear terms in line with the *juris prudencia* for interpretation of contracts – they would do so because Appendix 5 of the ITT underpins the rates that the Contractor inserts in its tender and gives construction to the applicability of those tendered rates and the relevant contract terms.

In addition, the tendered rates and sub-clauses 10.6.4, 10.7.1 and 10.7.4 would also be interpreted as *exclusion clauses* (that is what they are: designed to deny the contractor what would otherwise be a common law right for breach of contract), which means they would be narrowly interpreted against those who were trying to enforce them.

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What to do?

In my experience, when faced with the above, sensible public authorities will recognise their risk and with the help of equally sensible independent third-party mediators or conciliators, will generally settle with Contractors on a basis more aligned with their proper rights and entitlements.

What we really need though, as I set out in my previous article “*The Perfect Storm*” is the re-introduction of the case stated procedure as per the 1954 Arbitration Act, so that certainty on the above and similar issues can be provided by way of case precedent. Otherwise, many will continue to operate in the dark and will not receive their proper rights and entitlements under contract – the last thing this does is serve any type of justice. It must be changed if we are to evolve sensibly as an industry.

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