

GUIDANCE NOTES
DESIGN BUILD AND OPERATE CONTRACT

Option X29 Climate Change

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

IDENTIFIED AND DEFINED TERMS

Three 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 Service in accordance with the Scope. A failure to do so will be a breach of the *Contractor's* obligation stated in clause 20.1 and a Defect (clause 11.2(5)) that the *Contractor* will have to correct. 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 contract or including substantial risk allowances within their bids.

Climate Change Requirements could include things such as levels of recycling, use of renewable power or electric vehicles, reducing waste generation, designing out waste, designs that reduce carbon emission etc. but are likely to focus more on the operation of the completed asset under a design build and operate contract. The Climate Change Requirements can also cover information 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.

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 *Service 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*.

EARLY WARNINGS

Early warnings are to be notified for events which may impact the achievement of the Climate Change Requirements.

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 *service* progresses due to, for example, changes in the ordering and timing of the *service*, the *Contractor's* methodology or changes in Scope. The *Service 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 *Service Manager* fails to reply to the *Contractor's* submission. The *Contractor* and *Service Manager* should work together to get the Climate Change 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. 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.

CONTRACTOR'S PROPOSALS

Clause X29.6 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 Affected Property on climate change. The process requires the mutual agreement of the *Contractor* and the *Service Manager* to proceed, in that the *Contractor* may propose changes but does not have to, and the *Service 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.