



MBCA

MASTER BUILDERS
& CONTRACTORS
ASSOCIATION

MASTER BUILDERS' AND CONTRACTORS' ASSOCIATION POLICY DOCUMENT

DEPARTMENT OF EDUCATION
CAPITAL PROGRAMME FOR SCHOOLS



*The MBCA is a Constituent
Association of the Construction
Industry Federation.*

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This document outlines the views of the Master Builders' and Contractors' Association (MBCA) under a number of headings related to the delivery of the Capital Programme for Schools.

1 Introduction

The MBCA recognises that its members have a strategic role to play in the delivery of this Programme, and understands the importance

of working in partnership with the Department of Education (the Department) and the industry to deliver value to the State.

2 Communication and engagement

The MBCA welcomes the opportunity to engage with the Department, and looks forward to working with the Department to support the delivery of the Capital Programme for Schools in the State.

We would also like to recognise the Department's accessibility and responsiveness to the MBCA's requests for communication and meetings in the past. We strongly believe that it is in both

parties' interests to continue to communicate effectively and strengthen our relationship through a designated point of contact.

In this light, the MBCA would support the development of a regular forum where the Department and industry could discuss the various issues and challenges associated with the delivery of school projects.



3 Visible pipeline and reform of the Public Works Contract

The National Development Plan (NDP), which includes the Capital Programme for Schools, has committed the Government to the reform of the Public Works Contract (PWC). The purpose of this reform is to deliver more value and efficiency to the taxpayer by introducing better design documents, a fairer and more balanced distribution of risk, and more collaboration between all the parties to the contract. However, until these amendments are implemented, the current PWCs will continue to create an adversarial environment, which is prejudicial to good project management and wasteful of taxpayers' money.

Two of the most important factors necessary to achieve this are a visible pipeline of work and equitable conditions of contract.

The internationalised nature of the Irish construction industry means that the Irish Government must be a more competitive client to encourage contractors to allocate their resources from their export markets in the EU and UK back to Ireland. Two of the most important factors necessary to achieve this are a visible pipeline of work and equitable conditions of contract.

In regards to the visible pipeline, the NDP needs to clearly outline to all stakeholders in the industry when and what projects will be entering planning, design, procurement and construction on an annual basis to allow contractors to plan their businesses, allocate resources, recruit new capacity, innovate and invest in technology.

The second factor is the provision of equitable conditions of contract that are comparable with international norms, support collaborative problem solving, reward quality, effectively and fairly distribute risk, and manage the delivery of the project. The necessary resources should be put in place urgently to support the schedule of these reforms as set out in the NDP and the Office of Government Procurement (OGP) Medium Term Strategy.

4 Managing disputes on school projects

The MBCA supports the appointment of a standing conciliator on all school projects in order to assist in dispute avoidance and resolution. The Construction Industry Federation (CIF) has submitted its views on the role of the standing conciliator and project board on PWCs as part of the recent OGP review.

5 Employers' representatives

It is important that there is consistency in the performance of employers' representatives (ERs) across all school projects and the standing conciliator/project board has a key role in resolving disputes before they arise. Furthermore, ERs who have experience in and a good understanding of the PWC are critical in ensuring that parties to the contract are focused on the delivery of the asset.

6 Non-contractual parties

The PWC clearly sets out the role of contract parties, and their duties and obligations. Therefore, the employer and ER should ensure that there is no interference by third parties to the contract who may have no construction experience. The employer should ensure that only parties named in the PWC are involved with the delivery and project management of the project, in particular the processing of the programme, change orders, defects, snag lists, the release of retention, etc.

7 Knowledge of the contract

The MBCA believes that project success is highly related to the competence of all parties in the use of the PWC and its procedures and processes.

The MBCA strongly supports the OPG's Commercial Skills Academy, which is an excellent initiative to develop public procurement skills and support the role of the employer and their ER.

8 Procurement strategy

The MBCA recognises that the Department has various options at its disposal to design, procure and build schools, such as:

- minor works;
- traditional employer-designed contracts;
- frameworks;
- design and build; and,
- public private partnerships (PPPs).

On this matter, the MBCA recommends that the Department takes a balanced and proportionate approach when selecting the most appropriate procurement strategy.

We have outlined below some of our views on what the Department should consider when doing this. The MBCA's policy document, 'Delivering Value Through Public Private Partnerships', previously submitted to the department, also outlines recommendations that are relevant to all of the above, but primarily for Design and Build and PPP-type projects.

8.1 Access for SMEs

It is important that the Department ensures that SMEs have opportunities to tender for and construct schools to protect the construction supply chain, maintain employment, and attract new talent and skills into the industry.

8.2 Competition

Contractors must include the cost of tendering for work in their tenders; otherwise, they will not cover their business overheads. Therefore, contractors will generally assess the likelihood of winning a tender competition and their ability to cover the cost of tendering for it, before entering. In this light, too much competition in a tender process can be unattractive to contractors who, having experienced such a situation, may be less inclined to be involved in a similar tender competition with the same client in the future.

8.3 Pre-qualifications

In relation to pre-qualification questionnaires, it is important that the Department has a clear understanding of the responses they expect to receive based on the criteria outlined in the questionnaire. It is very costly for a contractor to submit a pre-qualification questionnaire and then to have it pulled and subsequently have to re-apply when it is re-released.

8.4 Two-stage tendering – open and restricted tenders

As stated above, tendering is a non-productive cost to contractors and the level of fees/costs associated with tendering rises depending on the procurement strategy. Therefore, the Department should strongly consider the application of two-stage tender processes proportionate to the type of contract involved. It is in the interest of both the industry and the Department to limit the imposition of unproductive costs and demands on limited resources in the construction supply chain.

These costs and demands should only be imposed at a point in the tender process where the contractor has a significant chance of success.

This matter is particularly important on contractor design and build contracts. Inviting large numbers of contractors to tender on an “open basis” for these, could impose unsustainable costs and resource demands on the industry.

For example, if 10 contractors are competing for a design and build project, each contractor will likely need to appoint an architect, structural consultant, mechanical and electrical (M&E) consultant, etc., as part of the bid. With the chance of only one contractor being successful, it makes this approach highly unattractive and commercially dangerous.

The MBCA and the CIF have in the past called on contracting authorities to put in place mechanisms to allow tenderers to recoup some of the costs/fees associated with design and build tenders if unsuccessful. This will help to support the supply chain and encourage contractors to compete for school projects.

8.5 Quality of design information

MBCA members have expressed serious concerns regarding the quality of the design documentation and works requirements that are being issued in the tender documents. While the contractor has no objection to taking on design responsibility, details of this must be clearly set out in the contract documents/works requirements/pricing document to allow them to assess the risk and include it in their tenders. Unfortunately, many of our members are discovering during the construction phase that designs are incomplete, omitted or

ambiguous, which leads to disputes and delays on site.

On design and build projects, many of the designs are barely beyond planning drawings and the contractor is being forced to carry significant validation of the tender documents, which should be accurate and set to a standard.

The appointment of consultants/ERs/Assigned Certifiers and designers should be done primarily on a quality basis and not based on lowest price. The criteria used to assess consultant tenders should be based on their experience, knowledge and competence in the following areas:

- planning and developing design documents, specification, specimen designs;
- PWCs;
- the dispute resolution mechanism in the PWC and the role of the standing conciliator;
- Building Control Regulations and practice notes;
- their resources and skills; and,
- the quality of their work.

8.6 Quality in award of construction contracts

MBCA members believe that the Department is too focused on ‘lowest price’ tendering and that there should be more focus on quality in the award of tenders, which is allowed for in public procurement rules.

The MBCA believes that all tenders should be awarded based on clear and succinct quality-based criteria, and that contracting authorities should have the capability to assess tenders based on these. It is MBCA members’ experience that other contracting authorities are adopting tender competitions that have a high weighting towards quality. Contractors are clearly more willing to engage in such competitions whereby their safety, quality, programme, management systems, etc., are evaluated as part of the overall tender submission, rather than price alone, which ultimately leads to a ‘race to the bottom’ scenario.

Furthermore, the Department and the industry will benefit from effective feedback meetings post tender to allow contractors to understand how they can improve their businesses in order to compete more effectively for school projects, and increase the standard and quality of their work.

9 Construction programmes

The role of the contractor is to programme the works using their experience to construct the school in a safe and efficient manner. Unfortunately, there appears to be a reluctance among employers to listen to contractors' recommendation on project programmes, which factor in health and safety, Covid-19, Brexit, and supply chain disruption factors. In some instances, the programme duration set out in the Form of Tender and Schedule can be ill considered, being either too short or too long, and the contracting authority is rarely willing to reconsider or amend the duration.

There also seems to be a lack of consistency across the Department on how the programme contingency provision should be applied, particularly how the two contingencies T1 & T2 are included within the contractor's programme. The MBCA view is that T1 and T2 must be included in the contractual programme and should not be excluded.

10 Allocation and management of risk

A critical element of driving value for money and reducing uncertainty in all forms of construction contracts is effectively managing risk on the basis that it is allocated to the party best able to manage it. The fundamentals of risk transfer are the production of accurate information on the risk and the interface when that information is transferred. Pertinent information should cover risk areas such as: ground conditions; legislation; political and economic policy; trade agreements; utilities; authority's personnel/contractors; and, most importantly, the quality of design being presented to tenderers.

It is also important to note that while risk may be managed contractually by one party, the overall responsibility for risk will always remain with the authority whose assets are being delivered.

Allowing unqualified dumping of all risk onto contractors, who cannot manage it, only serves to damage the

construction supply chain at a time when the Capital Programme for Schools is critical for recovery, sustainable growth and meeting societal needs.

We have outlined below some of our views on what the Department should consider when deciding where to allocate risk related to ground conditions and utilities.

10.1 Ground conditions

Regarding ground conditions, if the contractor is to take responsibility for this, then it must be done based on the provision of accurate information by the employer from their own investigations.

If this is not possible, how can a contractor be better placed to manage this risk than the employer, particularly when the contractor may not have the time during the tender process to get detailed analysis completed of the ground conditions and thus be able to manage this risk? Allow adequate time in pre-tender stage for accurate ground condition information to be developed and shared with tenderers.

10.2 Utilities

In the context of statutory obligations, all contractual parties and advisors should be aware that simply transferring utility risk to a contractor is restrictive and unfair because they cannot manage it.

They simply don't have the regulatory authority or other leverage over the authorities to deliver it. No amount of risk premium being paid for by the taxpayer will address it or persuade the utilities to collaborate in a way that delivers much-needed national infrastructure in accordance with the desired programmes.

The Department and their appointed design team would have more control over managing the planning, application and scheduled connection of utilities on site prior to the construction phase. Therefore, a mechanism should be created that brings the utilities companies into the design and planning process at an early stage. This should be managed by the State, which is best able to manage this process. The contractor can still retain the requirement to effect the connections, but the utilities need to be brought further on the journey by the public sector.

The Master Builders' and Contractors' Association is a constituent body of the Construction Industry Federation and the representative Association for firms involved in main and general building contracting.

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