



**CONSTRUCTION  
INDUSTRY  
FEDERATION**

# **STRATEGY FOR THE IMPROVED DELIVERY OF PUBLIC INFRASTRUCTURE:**

**FAIR AND BALANCED REFORM OF PUBLIC  
PROCUREMENT IN IRELAND**

**NOVEMBER 2024**



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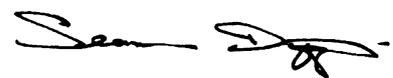
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# STATEMENT BY THE CHAIRPERSON OF CIF'S PROCUREMENT, TENDERING AND CONTRACTUAL MATTERS SUBCOMMITTEE

The reform of public procurement and contracts has been a core policy of the Construction Industry Federation (CIF) for many years. While there has been welcome and meaningful reform over the last few years, CIF believes that further and accelerated reform is necessary to support the delivery of the critical infrastructure to support Housing for All, climate action, and critically to funding all of this, foreign direct investment. Construction contractors are essential to building Irish infrastructure, such as water, energy, transport, education and healthcare. This is required to support the Irish economy, which in turn supports our society, communities and housing.

Unfortunately, CIF members believe that public procurement remains an unattractive option for a significant portion of the Irish construction industry because of delays, unfair risk transfer, low price tendering, low margins, bureaucracy and the cost of tendering. This is not sustainable if we are to address our infrastructural deficit and meet the demands of a growing population. CIF is supported in its views by a recent EU report on public procurement, and the Housing Commission's Report, all of which align with the need to make public procurement more attractive. In this light, CIF has produced this strategic document entitled 'Strategy for the Improved Delivery of Public Infrastructure' to set out the rationale for the reform and what this reform looks like. CIF looks forward to working closely with the Office of Government Procurement to put in place a reformed public procurement system and contract, which delivers value to the taxpayer, while supporting the construction industry as a critical partner of the Irish State.

Seamus Duggan



# PROCUREMENT, TENDERING AND CONTRACTUAL MATTERS SUBCOMMITTEE MEMBERS

## CHAIRPERSON

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3. Sarah Murphy Carey Building Contractors (MBCA)
4. John Curtin PJ Hegarty and Sons (MBCA)
5. Barry Desmond John Cradock Ltd (CECA)
6. Damian Giles Walls Construction (MBCA)
7. John Pentony Jons Civil Engineering Co. Ltd (CECA)
8. Francis Mulry JJ Rhatigan & Co. (Western/Midland Region)
9. Maurice Killeen PJ Hegarty (Southern Region)
10. Niall Bourke T Bourke & Co. Ltd (M&ECA)
11. John Sheridan Designer Group (M&ECA)
12. Danny Murphy Highway Markings Ltd (ASCA)
13. Ed Cronnelly BRFS (ASCA)
14. Leonard Daly Mythen Construction (Southern Region)
15. Cormac Smith Clancy (IHBA)
16. John Carroll Carroll O'Keeffe & Co. Ltd (Western/Midland Region)
17. Eamonn Foy Weltec (M&ECA)
18. Conor O'Brien Kirby Group (M&ECA)
19. John Lucy BAM Ireland (CECA)
20. Alan Nevin Flynn (MBCA)
21. Trevor Cavanagh Monami (Western/Midland Region)

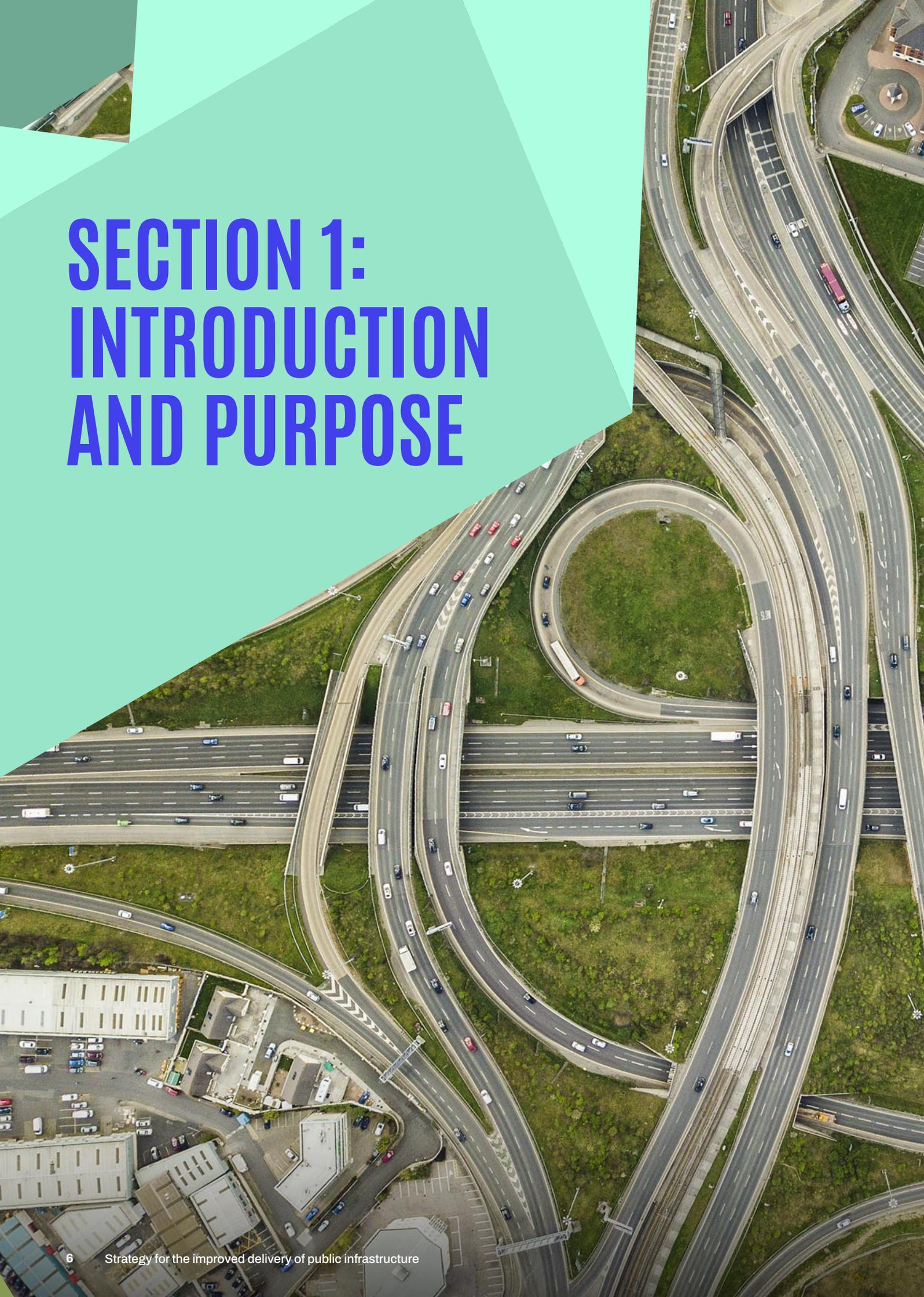
## ALTERNATES

- |                    |  |
|--------------------|--|
| Trevor Wills       | Wills Brothers (CECA)                          |
| Ger Ronayne        | JJ Rhatigan & Co. Ltd (Western/Midland Region) |
| Mark Cronin        | Townmore Con. Ltd (Western/Midland Region)     |
| Ger O'Leary        | Weltec (M&ECA)                                 |
| Brendan O'Halloran | Barnmore Demolition & Civil Eng. (ASCA)        |
| Gary Morris        | Collen Construction (MBCA)                     |
| Chris Chambers     | Clancy (IHBA)                                  |

## CIF STAFF SUPPORTING COMMITTEE

- |                    |                |               |               |               |
|--------------------|----------------|---------------|---------------|---------------|
| Helen Earley       | Jonathan Flynn | Justin Molloy | Gillian Ross  | Joanne Treacy |
| Hubert Fitzpatrick | George Gill    | Julie O'Gara  | Paul Sheridan | Denise Tuffy  |

# SECTION 1: INTRODUCTION AND PURPOSE





**SECTION 1: INTRODUCTION AND PURPOSE**

CIF has been calling for the reform of the Construction Works Management Framework (CWMF) and Public Works Contract (PWC) since before its introduction in 2007. CIF has always believed that there was a better way to deliver public infrastructure through fairer and more balanced procurement.

The core pillars of CIF’s policy on the reform of the CWMF/PWC are:

- ▶ prequalification;
- ▶ quality in award;
- ▶ effective risk management;
- ▶ greater collaboration;
- ▶ liability, insurance and indemnity; and,
- ▶ dispute resolution.

Over the last 18 years, there has been significant engagement and activity both by CIF and the Office of Government Procurement (OGP) in the reform of public procurement as outlined below:

- ▶ CIF’s detailed submission to the Government Construction Contracts Committee (GCCC) seeking reforms in 2011;
- ▶ followed up in 2013, by a CIF

international conference showcasing the best in class in public procurement;

- ▶ in 2014, the OGP published the Report on the Performance Review of the Public Works Contract, which set out interim recommendations for amendments to the PWC;
- ▶ in 2016 CIF issued a medium-term strategy proposing a range of interim measures, which were intended to rebalance the level of risk transferred, while providing greater visibility of the price makeup of a construction project; and,
- ▶ in 2021, CECA/Idiro Analytics Report ‘Public Tendering Practices and their Impact on Delivering Value in the Construction Sector’.



**Over the last 18 years, there has been significant engagement and activity both by CIF and the Office of Government Procurement (OGP) in the reform of public procurement.**

## SECTION 1: INTRODUCTION AND PURPOSE

Through engagement like this, the industry has seen several amendments to both the CWMF and PWC. Some of these amendments include:

- ▶ lump sum risk – risk of Bill of Quantities errors transferred to employer\* – 2016;
- ▶ specialist pricing risk – reserved specialist procedure introduced – 2016;
- ▶ dispute risk – standing conciliator and project board – 2016;
- ▶ compensation event pricing risk – tendered labour rates removed and default setting for delay cost is costs unavoidably incurred – 2018;

- ▶ Covid-19 shut down risk – entitlement to costs – 2021;
- ▶ fixed price risk – moderation and simplification of the Price Variation clause – 2021-23;
- ▶ inflation periods link to the tender submission date to speed up commencements;
- ▶ Supply chain delay risk – *ex gratia* supply chain delay relief available – 2022;
- ▶ liability risk – consultant’s and contractor’s liability capped – 2023;
- ▶ reduction in the administration burden for the Pre-Qualification

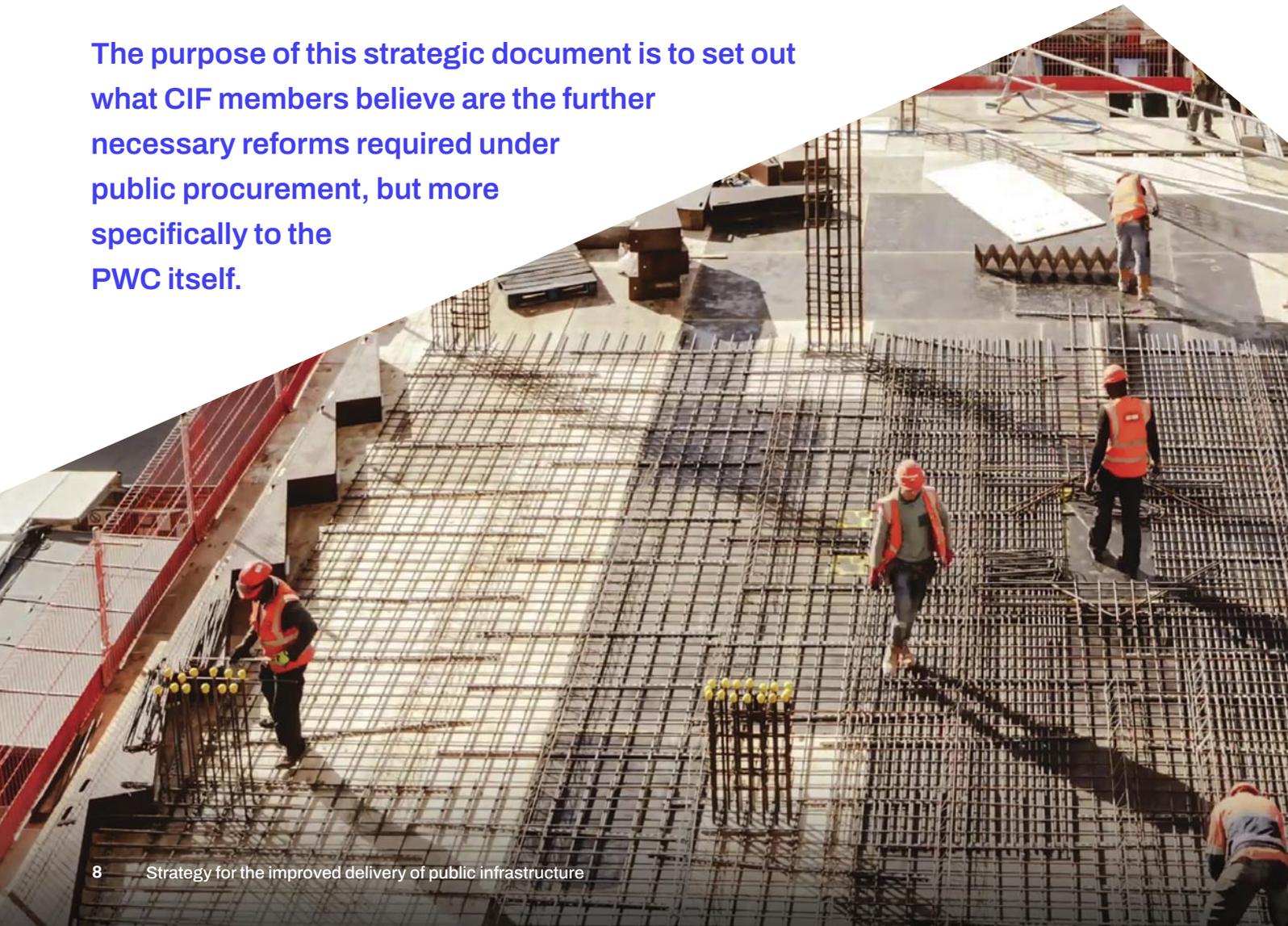
- ▶ Questionnaire stage; and,
- ▶ the reduction of the number of decision gates in the Public Spending Code.

*\*For employer-designed contracts.*

While these reforms are welcome and positive, there remains a significant opportunity for the OGP and the industry to engage on further amendments to the contract to further improve outcomes for the State, taxpayer and create a more sustainable industry for the future development of Ireland. The purpose of this strategic



**The purpose of this strategic document is to set out what CIF members believe are the further necessary reforms required under public procurement, but more specifically to the PWC itself.**



document is to set out what CIF members believe are the further necessary reforms required under public procurement, but more specifically to the PWC itself. The required amendments are listed under the key pillars of:

- ▶ quality in award;
- ▶ collaboration;
- ▶ risk management including liability for design; and,
- ▶ dispute resolution.

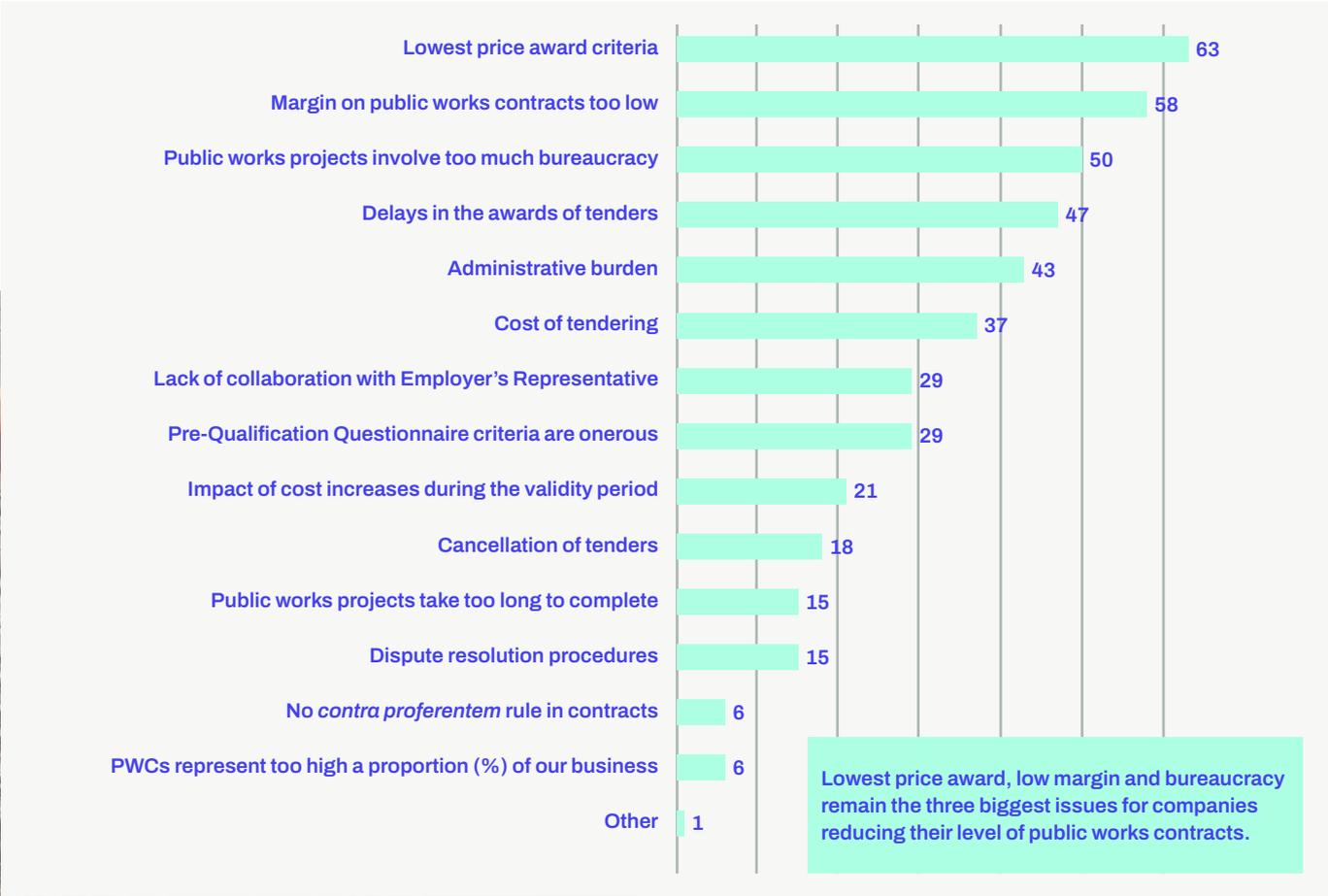
These pillars are reflected in **Figure 1**. It illustrates the main challenges that

contractors experience when undertaking public work contracts. This data is taken from the recent survey by CIF of its members on public works contracting.

The strategy document will outline the rationale for further reforms based on the OGP’s work programme, CIF member experience, and reports recently published by the European Union and Housing Commission. The findings of the survey of CIF’s membership will also be presented, which further emphasises the need for urgent reform and increasing

the attractiveness of public procurement projects. Finally, the document will lay out in tabular format the list of recommended amendments to the PWC, including a rationale for the change but also a solution.

**FIGURE 1: MAIN CHALLENGES EXPERIENCED BY CONTRACTORS ON PUBLIC WORKS CONTRACTS.**





# SECTION 2: RATIONALE FOR REFORM

Over the last year, several reports and works programmes have been released by the EU and Government bodies, such as the Housing Commission and the OGP. The recommendations and objectives of these reports are outlined below and serve to underpin and support CIF’s policy around the reform of the CWMF and PWC.

**2.1: 2023 Special Report: Public Procurement in the EU**

This report found there is: “Less competition for contract awards for works, goods and services in the 10 years up to 2021”.

The findings of the 2023 European Court of Auditors’ ‘Special Report: Public Procurement in the EU’ are clear and alarming. It shows that the objectives of public procurement have not been achieved and in fact, have led to a decrease in competition for public works projects. The report recognises that public procurement is not as commercially

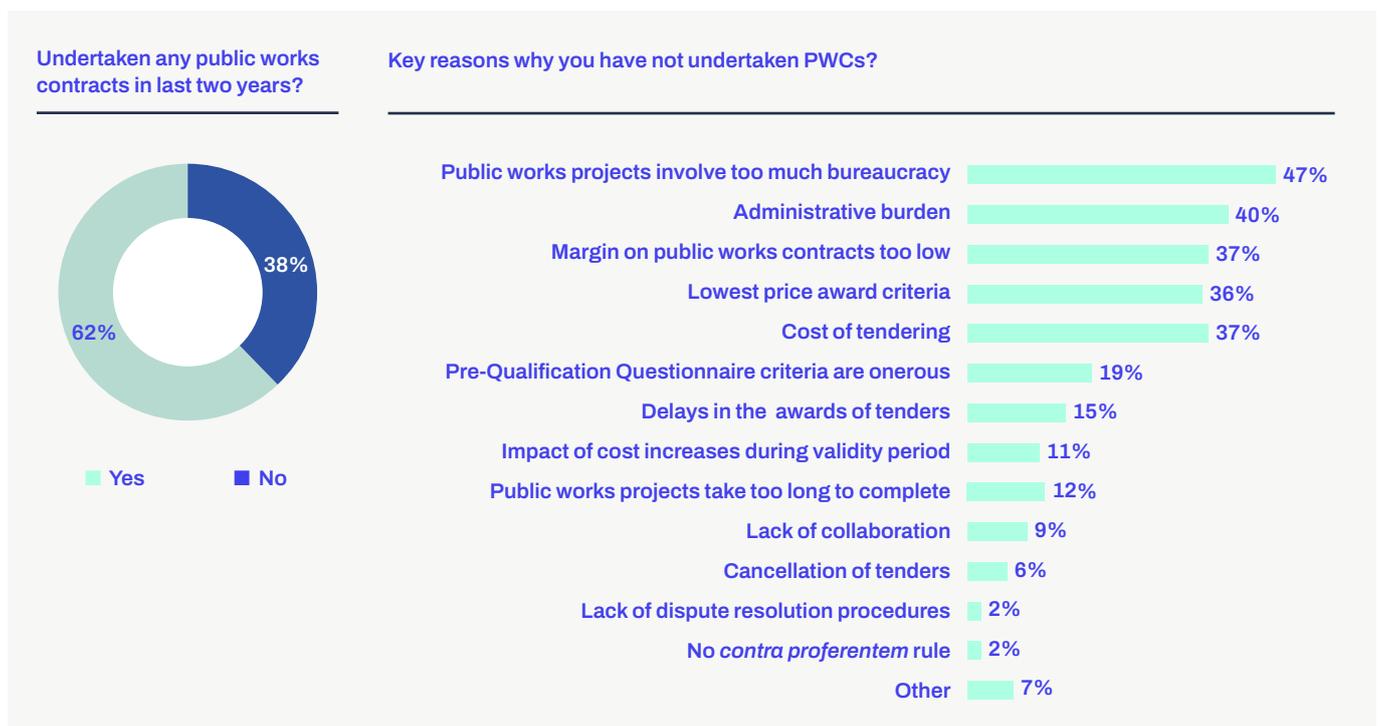
attractive as other sources of construction work for contractors. It goes on to recommend the following improvements to public procurement, which are aligned to what CIF has been calling for over many years:

- ▶ make public contracts more attractive to companies;
- ▶ reduce any unnecessary administrative burden;
- ▶ promote the development of efficient procedures, particularly regarding the choosing of selection and award criteria;
- ▶ strengthen administrative capacity; and,
- ▶ foster exchanges of best practice.

The results of the EU report also align with the results of a recent survey of CIF members, which asked about their level of participation in public works over the last two years, and the reasons why they may not have participated.

The results are shocking and show that 38% of all companies reported not having undertaken any public works contracts in the last two years. The key reasons appear to centre around bureaucracy and cost concerns around tendering and risk management (Figure 2).

**FIGURE 2: LEVEL OF PARTICIPATION IN PUBLIC WORKS CONTRACTS AND KEY REASONS WHY.**



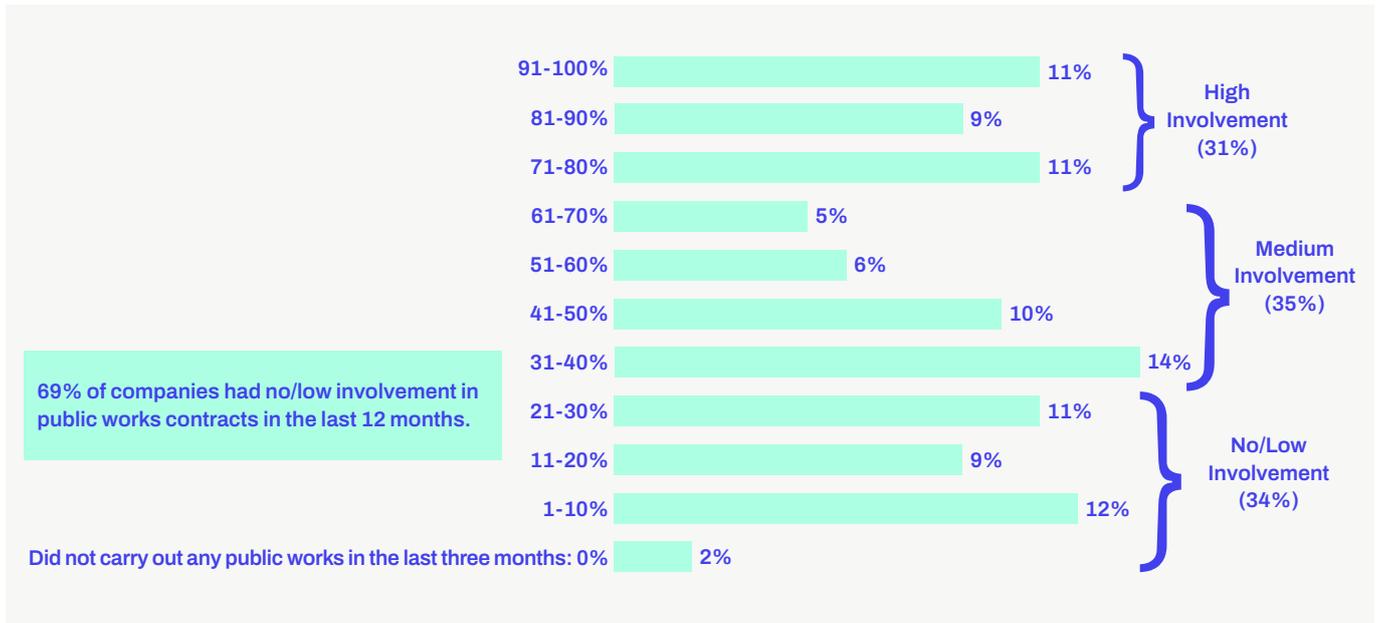
## SECTION 2: RATIONALE FOR REFORM

When we take a closer look at the data in **Figure 3**, we can see that almost 69% of companies have no/low/medium involvement in public works contracts.

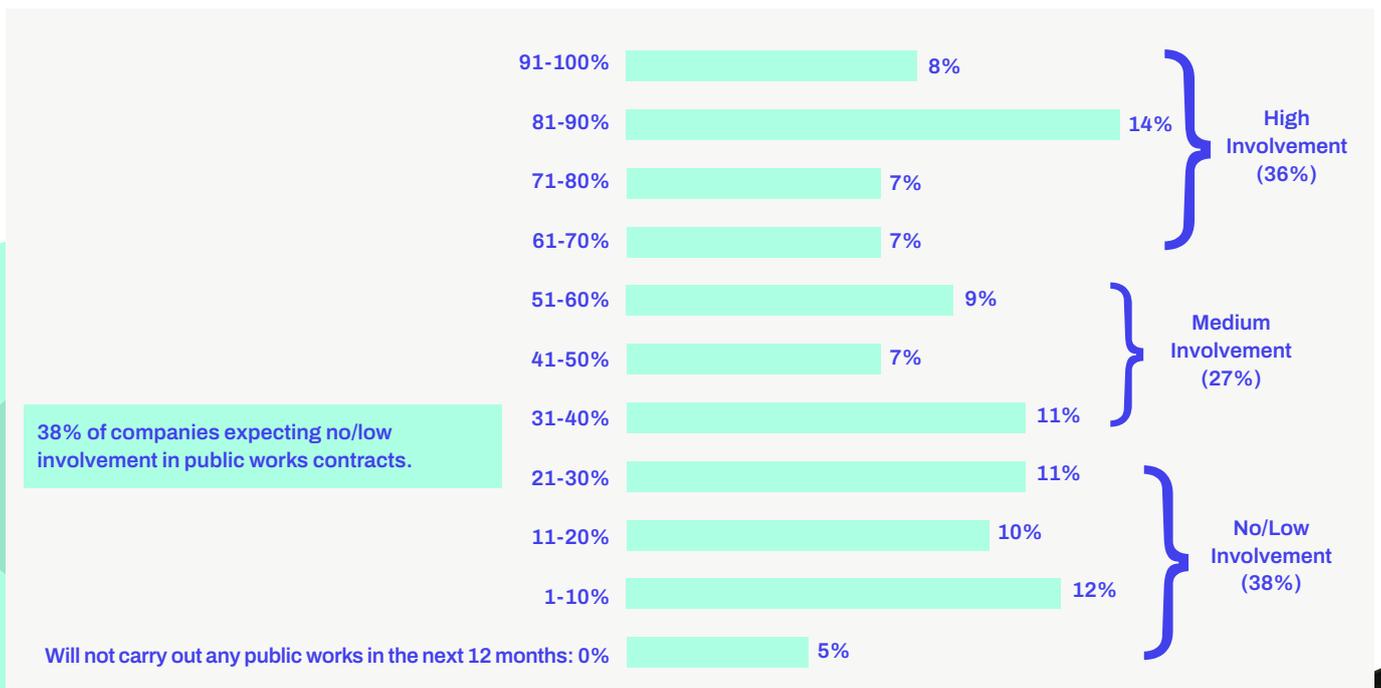
As shown in **Figure 4**, 38% of companies stated they will continue to have no or low involvement in public works in the next 12 months, despite the

Government's signalled commitment and capital budget increases to the National Development Plan (NDP). What is also worrying is that according to

**FIGURE 3: PUBLIC WORKS CONTRACTS ON ORDER BOOKS AS A PERCENTAGE OF TURNOVER IN LAST 12 MONTHS.**



**FIGURE 4: PUBLIC WORKS CONTRACTS ON ORDER BOOKS AS A PERCENTAGE OF TURNOVER IN NEXT 12 MONTHS.**



**Figure 5**, 19% of companies state there will be a reduction in public works contracts on their order books in the next 12 months.

The implications for all this are that the State is likely to be reliant primarily on a core of approximately 40% of the construction market to deliver the NDP, Housing For All, and climate actions. It must address the factors that make public contracting an unattractive commercial opportunity. The Government needs to attract a greater proportion of contractors to construct essential State infrastructure. It needs to convince contractors that this work can be strategically important to their companies' growth and operations, alongside their private and/or international export markets.

## 2.2: 2024 Report of the Housing Commission

Next we look at the 2024 Report of the Housing Commission. Under recommendations 27 and 28 outlined in Section 5: Capacity, Collaboration and Innovation in the Construction Sector,

the report includes the following statement:

"#27: Introduce a National Housing Procurement Strategy that **promotes collaboration** between contracting parties and the supply chain to support the delivery of housing, and **reform the Public Works Contract** with a new focus on **collaboration and dispute resolution**". [Emphasis added]

"#28: Enhance contracting and supplier procurement teams with appropriate resources and competencies to accelerate the delivery of housing programmes".

In sub-sections 5.5.3 and 5.6.3 of these recommendations, the follow-on actions listed include:

1. More collaboration between contracting parties.
2. Higher quality in design briefs.
3. Higher quality in background information, such as site surveys.
4. Align tender evaluation criteria to a focus on quality, green procurement, innovation and outcomes.
5. Early contractor involvement.
6. Identify risks and implement risk balancing mechanisms.

7. Establish a centre of excellence to train contracting authorities.
8. Support small and medium enterprise (SME) access by amending pre-qualification processes.

CIF is supportive of the above recommendations and they align clearly with CIF policy held over many years.

## 2.3: OGP's Construction Procurement Policy Unit – Work Programme 2024

The OGP has stated that the objectives of review of the CWMF will be to enable the delivery of sustainable assets under the NDP by:

- ▶ developing procurement and contracting strategies that prioritise quality solutions and support the most efficient means of delivery;
- ▶ embedding appropriate risk management measures within the project development, procurement and construction stages; and,
- ▶ deploying digital solutions throughout the project delivery stages.



**Less competition for contract awards for works, goods and services in the 10 years up to 2021.**

**FIGURE 5: LEVEL OF PUBLIC WORKS CONTRACTS ON ORDER BOOKS OVER THE NEXT 12 MONTHS.**



## SECTION 2: RATIONALE FOR REFORM

The OGP acknowledges that this will require a model shift from how public projects are procured and delivered through the contract. The biggest change will be moving away from measuring and evaluating public works projects based solely on the capital cost, to one based on the total cost of ownership. The OGP states that this can be achieved through the development of:

- ▶ standardised metrics for life cycle costing (LCC) and assessment; and,
- ▶ utilising the data handling capacity of building information modelling (BIM).

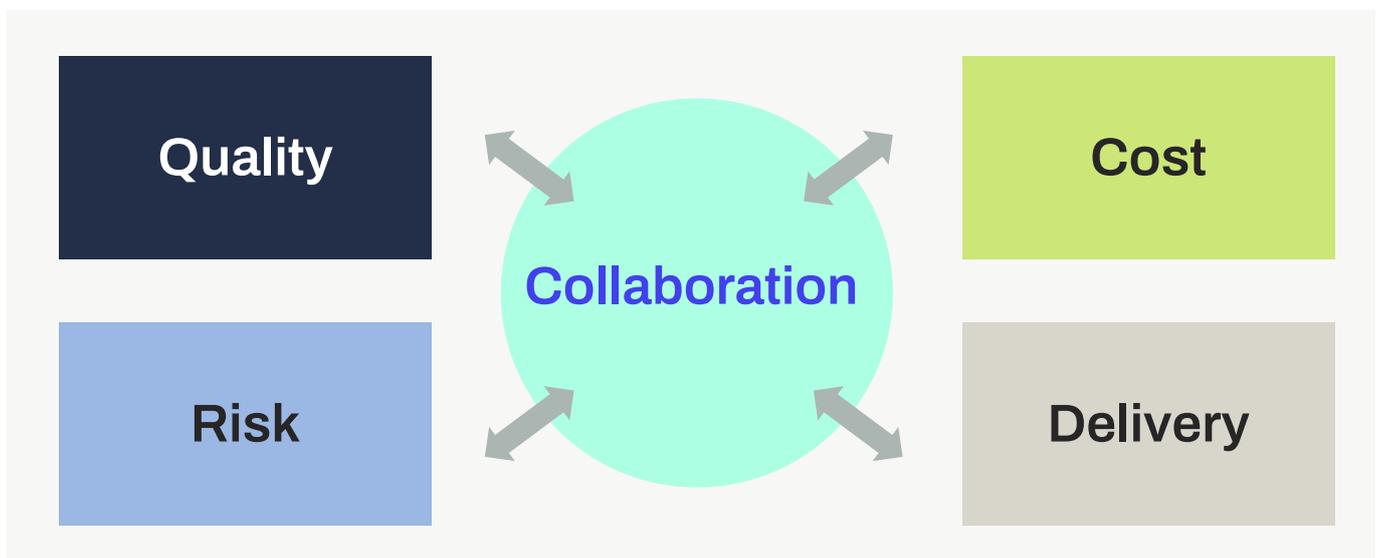
While CIF supports these objectives, it also believes that greater emphasis on quality in the award of projects based on objective quantitative criteria will be essential in achieving the OGP's objectives. The use of LCC and BIM can support this, including the allocation of risk to the party best able to manage it. This includes removing the requirement for tenderers to include prices, such as daily delay rates and programme

contingencies, during a competitive tender process for future hypothetical events that may or may not happen, particularly when no contractor could reasonably predict what the economic conditions could be at such a future date. This flies in the face of standard domestic and international norms. Regarding risk management, an issue of critical importance relates to the accuracy of background information provided to the contractor through the tender period and contract. Responsibility for background information should remain with the party who provided it or if it is transferred, it should be a compensation event. We recognise that the OGP's work programme includes the reform of the consultant engagement agreements and the quality of design briefs. Similar to the design consultant, a contractor's/specialist's design indemnity should only be provided based on reasonable skill and care, rather than, as is currently drafted, "fitness for purpose".

Furthermore, to effectively implement the digital transformation and the greater use of BIM and modern methods of construction (MMOC) in public works, the provision supporting collaboration within the contract must be strengthened, including more symmetrical notice provisions around instructions, contractors' submission, cost recovery, and determination processes. This includes the increased use of dispute avoidance mechanisms, which promote problem solving initially, prior to the initiation of the determination processes. It is also incumbent on the Government to remove wording under the contract related to arbitration, which does not follow the established Rules of the Superior Courts, whereby costs follow the event. It is therefore welcome to see the key pillars of the OGP's Work Programme outlined in **Figure 6**, relating to:

- ▶ collaboration;
- ▶ quality;
- ▶ risk;
- ▶ cost; and,
- ▶ delivery.

**FIGURE 6: OGP WORK PROGRAMME 2024 – KEY PILLARS.**



The OGP has also committed to a further review of risk allocation in the PWC alongside the process mapping of procedures under the CWMF to improve efficiency and speed up the delivery of projects and commencements. What is welcome is that collaboration is central to the other four and at the heart of reform.

#### 2.4: Idiro Analytics Report

The 2022 Idiro Analytics Report outlines the negative impact that public authorities have on constructors' commercial decisions through the way they procure work. The report found that there are several public tendering practices that might lead to an adversarial relationship between clients and contractors, generating project delivery issues and financial stress within the industry. The following points have been identified as the most critical issues within the public tendering process:

- ▶ lack of dialogue and client engagement pre tender and during the tender process;
- ▶ unreasonable transfer of risk from clients to contractors;
- ▶ low margins within the industry; and,
- ▶ awarding based upon lowest price instead of the best value for money.

The report also contained some concerning statistics supporting these, which public clients should be aware of, such as that 96% of civil engineering contractors believe contracts are awarded on the lowest price. In terms of risk margin on average, contractors are only

including a 2.2% margin for risk, with a third applying 0% or negative risk. And finally on profit margin, the report shows that the majority of construction contractors are only earning a margin of between 2% and 3% on public tenders.

This low level of risk mitigation creates issues for these projects when unexpected events materialise, such as inflation, supply chain problems, and ground risk.

The report's results highlight that the current tender award system generates extreme price competition, where quality and technical skills are commonly ignored, leading to dangerous below-cost practices. The impact of these practices is not only harmful to contractors' solvency and balance sheets, but also to projects. Ultimately, the practices affect the ability of the industry to develop, grow and innovate because there are simply insufficient margins for re-investment.

The short-term focus of Government on achieving lowest price tenders is ill judged and in fact, has over the last decade decimated the Irish civil engineering sector.

The report makes several recommendations on how to improve things:

- ▶ promote early engagement and collaboration;
- ▶ adopt a more flexible and modern contract (i.e., the NEC);
- ▶ provide a complete project description, where risks are identified and explained;
- ▶ promote multi-stage procurement; and,
- ▶ encourage multi-criteria awards.

The results and recommendations in this report are similarly aligned to the reports above and again, further underpin CIF policy.

#### 2.5: CIF's members' survey on public works contracting

##### Background and objectives

Many CIF members have regularly raised a range of challenges facing Irish contractors seeking to bid for and win public works contracts. It was therefore decided by the Procurement, Tendering and Contractual Matters Subcommittee to conduct a survey of CIF members to quantify the contractual challenges facing contractors seeking to bid for and win public works contracts. The purpose of the survey was to produce data to help:

- ▶ provide an informed and streamlined underpinning rationale for CIF's advocacy around the reform of the PWC;
- ▶ inform CIF discussions with the Government and help identify and prioritise the key areas for reform;
- ▶ provide market intelligence and insight for both CIF and OGP respectively; and,
- ▶ disseminate findings and market knowledge across the industry for both contractors and clients.

The survey provides solid data across the key areas of reform being sought by CIF, namely:

1. Quality in award.
2. Collaboration.
3. Risk management and cost.
4. Dispute avoidance.

## SECTION 2: RATIONALE FOR REFORM

### 2.5.1 Methodology

The research was conducted via an online survey with CIF members and responses from 221 companies were received, well above the standard threshold necessary for statistical analysis. All surveys were conducted between May 27 and June 5, 2024.

### 2.5.2 Key findings

#### 2.5.2.1 Quality in award of contractor

To meet the Government and OGP's objectives around sustainability and a focus on total cost of ownership the objective quality criteria must be the paramount factors in the evaluation and award of projects. However, according to the CIF survey:

- ▶ 85% of those who have undertaken public works contracts in the past 24 months feel that the contract rewards low bid prices above quality of work and realistic costs and timelines for a tender;
- ▶ as illustrated in **Figure 7**, companies

express clear concerns regarding the evaluation criteria employed in the PWC around below-cost bidding, price/quality, validity period, and the subjectivity of the process;

- ▶ 87% of companies believe that abnormally low-cost tenders should be disqualified and 85% believe a quality/price formula should be used;
- ▶ 75% believe that the technical evaluation of tenders should be independently carried out; and,
- ▶ 82% responded that tender validity periods should be reduced from 180 to 90 days.

#### 2.5.2.2 Collaboration and dispute avoidance

As outlined in the sections above, one of the key amendments to the PWC relates to improving collaboration.

Unfortunately, the experience of contractors is that collaboration is not at the level required to meet Government and OGP objectives. For example:

- ▶ 54% of companies report the level of

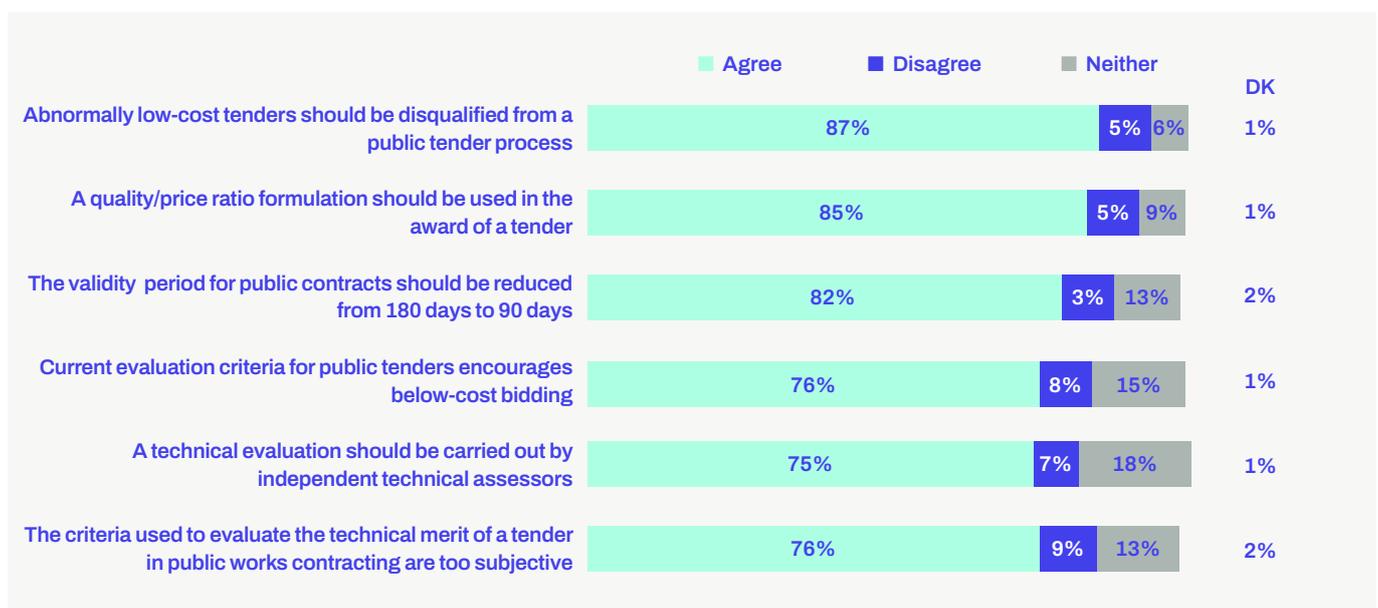
- collaboration to be less than good;
- ▶ almost two-thirds agree that clause 10.5 Employer's Representative's (ER) Determination in the PWC, provides limited opportunity for collaboration prior to determination;
- ▶ 77% have experienced delays in employers issuing required instructions in the past two years;
- ▶ 36% report their employer failing to issue a sectional completion certificate until completion of the project; and,
- ▶ 88% agree that the PWC should contain a dispute avoidance provision before the dispute is referred to the project board/conciliation.

#### 2.5.2.3 Risk management and costs

##### Background Information

As referred to in section 2.4 above, CIF believes the accuracy of background information is the client's risk. Over 58% of contractors who

**FIGURE 7: RESULTS ILLUSTRATING COMPANY CONCERNS WITH QUALITY IN AWARD.**



Note: Figures may not add up to 100% due to rounding.

worked on projects under the PWC (in the last two years) reported that they were asked to take on the risk for inaccurate and/or incomplete background information provided to them by the employer/contracting authority.

It is unfair and worrying that of those companies who were asked to take on this risk, 75% reported that the employer/contracting authority benefited from providing them with inaccurate and/or inconsistent background information.

Background information should be at the provider's risk or if it is transferred, it should be a compensation event.

Furthermore, 54% of companies also hold the view that the *contra proferentem* rule should be included in PWC to ensure that contracting authorities take the investigation, development and provision of background information as a critically important task for the successful outcome of a project, and the avoidance of cost overruns and disputes.

### Delay costs

How costs associated with compensation and delay events are being calculated is a source of ongoing conflict on public projects and needs to be addressed. The result of the survey shows that:

- ▶ 47% of companies experienced a disagreement in the past 24 months as to whether clauses 10.6 Adjustments to Contract Sum or 10.7 Delay Costs apply in respect to and whether actual delay costs are recoverable – of those who had experienced this challenge, 78% reported that they experienced the

issue several times in the past 24 months;

- ▶ of those who experienced such disagreements in the past 24 months, 87% report that clause 10.6 is used by the Employer Representative (ER) to ascertain what costs are recoverable; and,
- ▶ in addition, almost two-thirds report that disagreements in the application of clauses 10.6.3 and 10.6.4 are commonly the source of disputes between the employer and contractor in contract sum adjustments.

CIF believes that the calculation of costs for compensation and delay events should be based on the actual costs associated with these events, rather than tender for delay costs.

### Programme contingency

CIF has long called for the removal of the programme contingency due to its impact on the safe delivery of the construction programme, its complexity, and the requirement to provide prices associated with delays that may or may not happen during a competitive tender. In the results from the survey the members reported that:

- ▶ 39% believe that the programme contingency clause should be removed, primarily due to an inconsistency in the interpretation of how the contingency should be applied;
- ▶ if it is to stay, then over 85% of this cohort hold the view that the clause requires modification; and,
- ▶ only 17% hold the view that the programme contingency clause is fair to the contractor during the competitive tendering process.

### Collateral warranties

A total of 29% report being involved in a public works contract where the employer has required them to provide the duplication of collateral warranties.



**CIF believes that the calculation of costs for compensation and delay events should be based on the actual costs associated with these events, rather than tender for delay costs.**

# SECTION 3: RECOMMENDED AMENDMENTS TO THE PUBLIC WORKS CONTRACT



## SECTION 3: RECOMMENDED AMENDMENTS TO THE PUBLIC WORKS CONTRACT

This section sets out what CIF believes are the required changes to the PWC to support quality in award, collaboration, effective risk management, liability, and dispute avoidance.

There are four tables below, which set out amendments related to:

- ▶ consultant engagement contracts;
- ▶ pre-construction contract matters;
- ▶ matters arising during the contract;
- and,
- ▶ dispute and post-contractual matters.

Each recommended amendment will contain where appropriate either all or some of the following attributes:

1. Relevant clause no.
2. Title of amendment or clause.
3. The challenge presented by the current status/clause wording.
4. The proposed amendment.
5. Explanation for the change.

“

This section sets out what CIF believes are the required changes to the PWC to support quality in award, collaboration, effective risk management, liability, and dispute avoidance.

# CIF RECOMMENDED AMENDMENTS TO THE PUBLIC WORKS CONTRACTS

Matter	Proposal
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**Table 1: General matters which must be dealt with in consultant's conditions of engagement prior to changes to public works contracts.**

Life cycle costing	Life cycle costing to be introduced as a part of tender assessment
Risk management	Development of risk templates and ratings
BIM	Building information modelling processes to be utilised on public works contracts

Clause	Title	Issue	Proposal
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**Table 2: Pre-Contract matters.**

N/A	Quality in award	Below cost tendering,	<p>It is recommended to introduce a price/quality ratio into tender evaluation. The use of quantitative multiple selection criteria are recommended to evaluate tenders based on quality. Non-subjective criteria should be avoided as much as is practical.</p> <p>The criteria selected should adequately differentiate between quality and price so that price does not become the default award basis.</p> <p>The proportion allocated to quality in award for a construction project should be reflective of the overall nature of the project including its complexity, opportunity for design development and innovation, and the associated planning conditions. CIF's view is that the proportion allocated to quality should be determined based on these factors within a range of a minimum of 40%, up to 80%. It is recommended that an independent competent assessor should also be appointed to ensure that the quality criteria are consistently and accurately evaluated prior to the price criteria.</p> <p>Abnormally low tenders should be eliminated.</p>
N/A	Validity periods	Delay to commencement of construction	Validity periods should be reduced from 180 to 90 days.
Schedule 1K	Delay to the works caused by the order or other act of a court	Risk	The contractor should be entitled to a compensation event in the schedule for legislative enactments, changes in law and orders of court.
Article 4	Inclusion of all risks in contract sum whether they could or could not be foreseen	Risk	This article should be removed – all risk events should be dealt with under the contract or within schedule 1k.
1.10	Background Information	Risk	Employer should take the risk of background information or this should be a compensation event beyond defined circumstances.
5.5	Collateral warranties	Cooperation	Clause should require that the warranty be in place prior to first payment to sub-contractor.
9.3	Delays and extensions of time	Risk	Delay costs should not be tendered.
11.2	Unfixed works	Payment and cash flow	Consideration should be given to off-site manufacturing where a significant capital-intensive proportion of the works is undertaken at a manufacturing facility. There should be a mechanism in the contract that allows for stage payments to be made to manufacturers, proportional to the works completed. Consideration should be given to designating the manufacturing facility as part of the site for the duration of the works that are specific to that project.
9.4	Programme contingency	Risk	<p>Remove the requirement for this or amend the provision. The following reforms are recommended:</p> <p>Fix the duration of the contingency under the first threshold based on the length of the programme. For example, a maximum of 5% of the contract duration or a defined term of four weeks, whichever is shorter.</p> <p>Eliminate the second threshold.</p>

**Table 3: Issues arising during the course of the contract.**

4.1	Cooperation	Cooperation	Should include a requirement for a meeting to deal with issues alongside an obligation to negotiate prior to entering into a determination process.
4.5	Instructions	Cooperation	Should be an obligation for ER to issue an instruction with an appropriate and prompt timescale.
4.7	Contractor submissions	Cooperation	Entitlement to seek further information should only be allowed once and it should be approached in a collaborative manner, where the parties discuss the submission, and the 10-day notice should be suspended.

## Explanation

Conditions of engagement must include for the provision of this service.

Consultants will be required to be involved in development of such templates and ratings and therefore their conditions of engagement must provide for same.

Conditions of engagement must contemplate the use of BIM modelling for certain contracts.

To meet our climate objectives, whole life cycle costing, and reducing embedded carbon to comply with environmental legislation, all projects need to be awarded predominantly on quality and whole life cycle value. Lowest priced tendering in a competitive process leads to below cost tendering, which is detrimental to the project's success, the client's long-term needs, and the viability of the contractor's business.

Contracting authorities should be incentivised to award contracts and commence construction in order to avoid material cost escalation impacting on their budgets and the lack of ability for contractors to absorb inflation costs on their original tender over 180 days. Contractors need definite commitments and a shorter timeline to enable them to plan the resources and equipment.

A contractor should not be held liable for the costs or delays associated with the introduction of legislation by the Government and in most cases their indirect client. They have no control over or foresight regarding the introduction of legislation to mitigate costs.

While a new cap on liability has been introduced into the contract it is unreasonable to ask a contractor with a limited balance sheet to accept all risks whether seen or unforeseen in the contract sum, particularly in a competitive tender process awarded on lowest price. Contractors can only price what they can measure and what is known. Any unknown risk should remain with the client and their specialist advisors.

Risk to the contractor is extremely high and as it is the employer who provides the information, they are best placed to take responsibility for that risk.

In practice, sub-contractors who are to provide collateral warranties may not be in place prior to the main contract.

Circumstances of delay cannot be known; it would be fairer to allow reimbursement based on demonstrable actual costs.

There has been and will be an increasing use of off-site construction in the construction industry, which will greatly increase the productivity of the sector. Under this clause, payment to a manufacturer is prohibited until the works have been completed and are substantially ready to be incorporated into the works. In terms of off-site construction, particularly in relation to 3D construction, the manufacturer's own working capital is financing the project. This practice is unsustainable and prohibits the growth of off-site manufacturing.

- ▶ The construction programme needs to reflect and comply with health and safety, and allow both the PSDP and PSCS to carry out the programme safely and effectively.
- ▶ Programme contingency is unnecessarily complex and not well understood and clear guidance must be provided at the very least.
- ▶ There are clearer ways of achieving price certainty.
- ▶ It encourages inefficient production of information by the architect.
- ▶ The contractor is asked to second guess in a competitive tender the amount of delay to be expected against an unknown set of circumstances and instructions. If this risk is properly priced, the contractor will lose out to another that prices the delay at zero.
- ▶ Tenderers are asked to competitively price a delay cost for a delay that may or may not happen, that is not their fault and could happen, the cost of which varies depending on when the delay happens. Tenderers are rewarded for underpricing something that might never happen, so invariably take the risk. This concept rewards "the lucky and the stupid".
- ▶ The contingency is used for delays essentially caused by the ER. Yet it is the contractor's risk to consider the thresholds and daily delay rates when tendering. The Main Contractor (MC) should not be held accountable for delays caused by compensation events.

The intent and spirit of this clause is rarely achieved and placing a positive obligation to cooperate on the parties would encourage this. Introducing a mechanism to incentivise collaboration between all parties is in the interest of project success.

Current wording allows the ER a discretion, which in practice may not be exercised properly or appropriately. This impacts on the contractor's ability to maintain the programme.

Therefore, the 10-day notice period should be suspended if further information is sought.

# CIF RECOMMENDED AMENDMENTS TO THE PUBLIC WORKS CONTRACTS (CONTD.)

Clause	Title	Issue	Proposal
4.11	Time for employer's obligations	Cooperation	Any information to be given to the contractor should be given immediately or at earliest possible time in a spirit of mutual trust and cooperation.
8.1	Standard of workmanship and work items	Risk	Standard should be that of reasonable skill and care as is the case for designers.
10.4	Proposed instructions	Cooperation	Where a proposed instruction is not implemented, the contractor's demonstrable costs should be reimbursed.
10.5	ER's determination	Cooperation/CCA 2013	<p>Failure by the ER to act should result in an entitlement for the contractor:</p> <p>If the ER fails to take any of the actions in sub-clause 10.5.1 within a period of 20 working days or reply within 10 working days to the contractor as set out in clause 10.5.1(1), the contractor may give notice thereafter to the ER requiring it to make a determination on the claim or proposal within a period of 10 working days from the date of delivery of the notice.</p> <p>Such notice will be stated to be given under sub-clause 10.5.3. If the ER fails to provide its determination within the said 10 working days it will be deemed to have made a determination that the contract sum be adjusted and that an extension of time be granted in accordance with the contractor's claim or proposal.</p> <p>The determination will be deemed to have been made on the last day of the said period of 10 working days.</p>
10.6	Adjustments to the contract sum	Risk	Delete the provisions of clause 10.6.4.
10.7	Delay cost	Risk	10.7.4 should be deleted or the contractor compensated for reasonable delay.
10.9	Employer's claims	Cooperation	Notice periods should match those of contractor and include time bars.
11.1	Interim payment	CCA 2013	Time periods should align with payment periods to sub-contractors under CCA 2013.
11.3	Retention	Risk	The practice of retention should be dealt with using alternative methodologies, such as a bonding arrangement only. It should be limited to 12 months from practical completion. The use of monetary retention should be avoided to ensure positive cashflow for the contractor and the supply chain.
11.6	Time for payment	Cooperation/CCA 2013	<p>Strengthen wording to state that interest is always payable on late payment.</p> <p>Wording needs to be amended as it conflicts with 11.1. Clause must permit main contractors to comply with their obligations under CCA 2013.</p>
15.4	Change in law	Risk	The scope of what changes are included under clause 15.4 (i) should be expanded to include all changes in legislation outside the control of the contractor.

**Table 4: Post-contract and dispute issues.**

12.3	Suspension by the contractor	CCA 2013	Clarification is required.
12.5 & 12.6	Termination at employer's election	Risk	<p>Compensation should be available for financial loss.</p> <p>In the case of termination, the amount certified shall include 5% of the difference between the contract sum and the sum that would otherwise be certified by the ER under this sub-clause to compensate the contractor for loss of profit. However, the contractor should also be entitled to recover from the employer any additional loss, damage and expenses incurred by it as a result of the termination.</p>
13.2.10	Conciliation	CCA 2013	The phrase "[where the dispute is a dispute relating to payment]" should be removed.
13.3.3	Adjudication	CCA 2013	Clarification is required.
13.4 FTS – footnote no 4	Arbitration	Dispute avoidance	<p>Pre agreement setting out arbitration costs should be defined.</p> <p>Amend the provisions to bring them in line with the long-established rules and traditions in Irish jurisprudence, which provide that 'costs follow the event'.</p> <p>Furthermore, any sealed offers should be dealt with in line with accepted practice (e.g., under 'Calderbank offer' procedures), and which are equitable to all parties to the contract, and which will incentivise the resolution of a dispute at an early stage.</p>

## Explanation

The 10-day period currently provided is too long and acts as an unnecessary constraint on the efficient progress of the works.

Fitness for purpose obligation is unreasonable, unfair, and uninsurable and is also a higher standard than required of designers.

It takes time, resources and costs to address these. Issues arise where proposals incur substantial costs but are subsequently not acted upon. In order to promote viable proposed instructions, these should be compensation events to ensure that the contractor's costs are covered in the event that the proposed instruction does not proceed – such a provision would help ensure that ERs act appropriately in seeking proposals and would facilitate a more cooperative relationship.

In the current wording of the clause, the contractor is penalised by the ER's failure to act, which is unfair and unreasonable.

The wording of clause 10.5.4 appears to contravene the statutory entitlement to refer a dispute to adjudication "at any time".

Provisions under clauses 10.6.1, 10.6.2 and 10.6.3 provide the ER with sufficient option to be able to make a fair assessment of the adjustments for compensation events. The inclusion of 10.6.4 is unfair as it links back to tender rates, which could be artificially low driven by lowest price award criterion in a competitive process. It increases the likelihood of a race to the bottom regarding the tender labour rates. Employers should accept that they should pay a fair and actual cost price for compensation events, which the contractor is entitled to compensation for under the contract.

Employer bears no responsibility for own delay, which is unfair and unreasonable.

Inconsistency between notice periods for contractor and employer goes against the spirit of cooperation set out in Clause 4.

Payment period of 35-40 days as envisioned by this clause does not allow main contractors to comply with their obligations to make payments to sub-contractors within 30 days. Payment provisions must ensure that main contractors can fulfil their statutory obligations under the Construction Contracts Act 2013.

Retention has an ongoing impact on cashflow and if it must be continued, should be at a reasonable percentage with the possibility of retention bonds throughout project not just after first moiety release.

Employers are reluctant to pay interest for late payment. The Government must lead the way on ensuring fair and prompt payment.

Difficulties for main contractors arise when their payment periods do not align with payment periods for sub-contractors, leading to significant cash-flow issues.

A contractor should not be held liable for the costs or delays associated with the introduction of legislation by the Government and in most cases their indirect client. They have no control over or foresight regarding the introduction of legislation to mitigate costs.

The point at which "notice has been served by either party referring the dispute to adjudication" is unclear.

Unfair and unreasonable provision, which may become a deterrent to contractors to bid for contracts.

There is nothing to prevent adjudication of all disputes being included as a contractual entitlement.

The phrase "In the event that no decision is reached by the adjudicator, the parties may continue to resolve the dispute under the dispute management procedure or conciliation from the date the dispute was referred to adjudication" requires clarification as to its intention on how dispute procedures interact with one another.

Unsatisfactory nature of arbitration as the final dispute resolution process, particularly in light of the wording in the form of tender in relation to costs. This wording should be removed and costs payable as per the arbitrator's award.

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