

**Joint Oireachtas Committee on Infrastructure and NDP Delivery**

**Opening Statement from Paul Sheridan, Director of Main Contracting and Civil Engineering Services with the Construction Industry Federation (CIF)**

On behalf of the Construction Industry Federation (CIF), I would like to thank you for the opportunity to address the Committee on the importance of best practice in procurement policy to the support the objectives in the National Development Plan (NDP) and the Accelerating Infrastructure Plan.

Firstly, the CIF acknowledges the recent and ongoing reforms to the Construction Works Management Framework and Public Works Contract over the last several years; such as:

- Price Variation Mechanisms
- Limited Liability
- Professional Indemnity Insurance
- Alternative Dispute Resolution Mechanisms and
- Early Collaboration and Contractor Involvement

Unfortunately, these and further reforms must be accelerated.

This is critical to attracting contractors to public works, lowering embedded carbon and delivering complex infrastructure. Our analysis and regular Outlook Reports continue to show that almost 70% of contractors are doing no or low levels of public works.

The European Union has commenced the process to reform its Public Procurement Rules on the back of its own audit report. This report concluded that the rules have failed and have led to less competition for public works.

The CIF has set out its recommendations for the reform of public procurement in its “Strategy for the Improved Delivery of Public Infrastructure”, enclosed.

The main pillars of reform are related to:

1. Multi-annual funding and project trackers
2. Administrative Costs and Bureaucracy
3. Quality in Award
4. Design
5. Risk Management and
6. Collaboration

I will now discuss these briefly.

## **1 - Multi-annual funding and Project Trackers**

In the Accelerated Infrastructure Plan, the Government has provided policy intent to provide Multiannual funding for the projects under the NDP, along with sectoral plans detailing what projects will be delivered by different departments. This is critical for business continuity and certainty, which support business planning, resourcing, skills, innovation, productivity and investment by the industry.

Unfortunately, the sectoral plans published by departments do not provide the necessary detail to help contractors to align their business plans for public projects. In fact, the industry is currently operating well below capacity and is accelerating the export its services. However, we welcome the commitment of the Construction Sector Group to publish a more detailed 24-month tracker in early Q2.

## **2 – Administrative Costs and Bureaucracy**

We welcome the transfer of the OGP's Construction Policy Unit into the Department of Public Expenditure, NDP and Reform, which now recognises the huge distinction between the procurement of construction works and general public procurement. Construction is about the complex long term stakeholder, design, construction, logistical, risk and operational management of constructed assets.

To attract SMEs, who are also critical to the NDP, there must be a reduction in the administrative, cost and bureaucratic burdens involved in tendering for public procurement. We therefore support the rapid implementation of the new Digital Profile Platform being developed by PER and the GCCC.

## **3 – Quality in Award**

For most projects, Quality, Embedded Carbon and Life Cycle Costs should be the most important factors in determining who is awarded the contract. We must move away from the concept of lowest price, which according to the Ildiro report (enclosed) leads to extreme price competition, poor value for money and costly disputes.

While legislation is in place to allow projects to be awarded based on quality criteria, to do so requires:

- Reform of EU Public Procurement Rules: Public clients must be allowed to name the specific materials/systems/products that they want.
- The proportion allocated to quality should be determined by the nature of the project within a range of a minimum of 40%, up to 80%.
- Two stage tendering and the non-subjective assessment of multi-criteria.
- Digitalisation and the leveraging of AI.
- Adequate and skilled resourcing of public procurement authorities.

The Government is making headway on this through the BIM mandate, carbon budgeting, ARM 5, relaunched Commercial Skills Academy and the International Construction Measurement Standards, which the CIF is fully engaged with and supportive of. The CIF also supports the Quality Bill being brought forward by Senator Higgins and Deputy Gibney.

## **4 - Design**

The Design process is a critical part of the construction of infrastructure. It needs to be valued, given the necessary time to be done well and the political recognition that its essential work. The better the design the better the construction and operation of the asset.

More and more design is being carried out by contractors, due to technological advancement, changes within the design profession, liability and offsite manufacturing. This requires early collaboration and contractor involvement, which the Government Construction Contracts Committee is advancing and the CIF supports.

While contractors are willing to take responsibility for Design, they require full transparency and sufficient time to understand whether or not

- They are competent to undertake it.
- Their Professional Indemnity Insurance cover it and most importantly;
- They can measure and price the design and the following construction works.

It is extremely difficult for a contractor to price for the construction of works if the significant levels of design, including detailed integration of works elements, is not complete or worse; design teams include nebulous and ambiguous catchall phrases hidden deep within their procurement documents.

The use of Design and Build should only be used for complex projects where the final solution is not known at the start. It best suited to transport, energy, water and healthcare type projects where the expertise of contractors can be leveraged. Standardised housing is better delivered through Employer Designed Contracts.

## **5 - RISK Management.**

Poor risk management leads to adversarial relationships, generating project delivery issues and financial stress within the industry. Unfortunately, the Public Works Contract (unique only to Ireland) was designed to simply transfer as much risk as possible to the contractor, whether they were best able to manage it or not.

To improve risk management requires:

- Early Collaboration and Contractor Engagement and the increased use of Reserved Specialists.
- Reform of contractual clauses within the PWC, as set out in the CIF strategy document.

- Continue to allow the adoption of more flexible and balanced standard forms of contract such as the NEC and or RIAI form of Contract.
- All projects should have a risk profile and register; where information on risk is developed and assessed prior to transfer to those best able to manage it.
- And finally - Similar to Quality, risk should be evaluated separately to price.

More details on risk management are outlined in the Appendix A below.

## **6 - Collaboration**

To drive Collaboration in construction involves reforming:

- Procurement Processes
- Conditions of contract
- Behaviours and Culture

I have already mentioned some of the necessary reforms to Procurement and the Contract above to support better collaboration.

To changes behaviour will require giving contractual parties more powers to negotiate solutions before entering the claims and dispute processes. The CIF supports the proposed GCCC amendments to the Alternative Dispute Resolution mechanisms to create an early warning system. The increasing use in Ireland of the NEC standard form of contract is welcome as it contains performance incentives, which promote collaboration and problem solving.

Collaboration also requires mutual respect amongst all parties. This is built on a collective responsibility to the project's success, underpinned by leadership, incentives and the competence of both the client and contractor.

As referred to in the Accelerating Infrastructure Plan, systems like Integrated Project Delivery combined with Lean and Last Planner thinking, brings all three factors of process, conditions and culture together under one framework and could form the basis for the future of how Public Procurement is delivered in Ireland.

In summary, while reform is happening, it must be accelerated if the taxpayer is to extract as much value as possible from the National Development Plan.

Thank you.

## Appendix A - Risk Management

### A.1 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 lead to adversarial relationships generating project delivery issues and financial stress within the industry, such as:

- 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
- Awarding based upon lowest price

The report also contained some concerning statistics, which public clients should be aware of: **For example:**

- 96% of civil engineering contractors believe contracts are awarded on lowest price.
- Contractors are only including an average of 2.2% margin for risk; with a 30% applying 0% or negative risk.
- In relation to Profit margin, the report shows that most 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. Contractors' profits are often wiped out or more concerning, money is now being lost.

The impact of these practices is not only harmful to contractors' solvency and balance sheets, but also to the project itself. The practice undermines the ability of the industry to innovate and invest in their businesses, 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 has damaged the industry vital of economic success. That's why contractors have turned away from Public Clients and seek work with more mature private clients and export markets.

### A.2 - Key Risk Factors that need Reform

**Background information** – The Client must have responsibility for background information that they provide to the contractor, and they use to price their work. Any errors in background information must be a compensation event.

**Design Liability** must be based on Reasonable skill and care – and not fitness for purpose, which is not insurable.

**Ground Conditions** anything unforeseen ground conditions should be a compensation event.

**Utilities** – In general the contractor has no more control over Utility providers than the client. In fact, public clients have greater control and knowledge of what they need. Therefore, for the majority of projects, this risk must remain with the client.

Inappropriate risk transfer cannot simply be looked at as a cost the contractor can price for. This offers poor value for money for the tax-payer and public client; as they both may pay a premium for an event that might not occur or if it does; the contractor may not be able to effectively manage it within their own resources.

While some contracting authorities are using the New Engineering Contract, it should not be turned into a Public Works Contract using Z-Clauses. In recent tenders, the complete wording from one of the most onerous clauses in the Public Works Contract was pasted entirely in the NEC through a Z-Clause, which undermined the overall contract and led to ambiguity. The contracting authority was advised by its legal team who are not constructors and gain directly from contractual ambiguity and disputes.

In summary, Risk needs to be better understood and managed on infrastructural projects, before it is transferred.