
RESPONSE TO GCCC POSITION PAPER

To: Office of Government Procurement

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Date: 4th April 2017

RE: Submission to the GCCC in Respect of a Public Sector BIM
Adoption Strategy

The publication by the Government Construction Contracts Committee (GCCC) of its position paper entitled “*A Public Sector BIM Adoption Strategy*” (15th March 2017) is a very welcome development and indicates a clear intention on the part of Government to incorporate BIM processes into the public procurement of construction projects. As the position paper notes, the adoption of such BIM processes in other countries and also in parts of the private sector in Ireland is already well advanced and it is to be hoped that this experience can be built on in order to advance the adoption of BIM in the public sector in Ireland quickly. As solicitors focussed on the area of Construction Law, Hussey Fraser has closely observed the development of the contractual environment in Ireland over many years. This submission is intended to assist and contribute to the debate as to the approach to be followed in the adoption of a strategy for BIM in the public sector.

The Capital Works Management Framework (CWMF) provides a comprehensive environment within which public procurement is undertaken. It provides a necessary and essential structure which is to be followed during public procurement. As currently drafted, the CWMF does not cater for BIM processes and, as acknowledged in the position paper, work will be necessary to include such BIM methodologies and processes as are required.

One of the pillars of the CWMF is the Public Works Contracts (PWCs). This pillar includes contracts, model forms, arbitration rules, invitations to tender (works), forms of tender and schedules (works). When the CWMF was introduced in 2007 it included a suite of standard form PWCs. The stated purpose of the PWCs was “.....to bring cost certainty and value for money.....” (GCCC Guidance Notes April 2006) and to allow for the transfer of risk from the employer to the contractor on the basis that “.....a high level of comprehensive quality information should allow for a high level

of risk to be transferred” (GCCC Guidance Notes April 2006). The new forms aimed at supporting certainty of outcome in terms of cost, quality and programme.

It is now ten years since the PWCs were introduced and it is submitted these forms have failed to deliver the intended outcomes. In addition, these forms have hampered the recovery and development of the construction industry. The report of Forfás entitled *“Ireland’s Construction Sector: Outlook and Strategic Plan to 2015”* (published in 2013) identifies the PWCs as one of the barriers influencing the prospect of recovery of the construction sector. It highlights (at page 41) the difficulties specifically associated with the Government contracts and highlights, by way of example, the difficulties industry stakeholders have in adequately pricing for risk due to instances where incomplete information has been provided to contractors.

The Forfás report also included an action, at action point no 16 (page xxii), to:

“Undertake, with the involvement of both Government and Industry stakeholders, a review of the current contract for public works and implement any changes if required to ensure fair and reasonable terms for all parties involved, and at the same time maintain the achieved levels of price certainty which are of benefit to all parties”.

The report on the review of the performance of the PWCs (“the Review”) (published by the GCCC in December 2014) identified (at page 1):

“The initial stage of the Review has concluded that risk is not currently being priced in many tenders for a variety of reasons and, where risk arises, it is leading to claims. The outcome, in circumstances where risk arises, is often the opposite of that intended since cost certainty, in a significant number of cases, is not being bought but deferred to the dispute resolution phase. Since the dispute resolution procedures are private to the parties concerned, there is no wider dispersal of the outcome leading to uncertainty in the interpretation of key clauses in the contract”.

In relation to encouraging co-operative behaviour the Review also noted (at page 18):

“Whilst co-operation is a requirement of the public works contract, it is acknowledged that in the circumstances of an unsustainable price that the opposite can often arise – an adversarial position may be adopted which can compromise the successful outcome of the project. The period of engagement between industry and the GCCC will be used to explore how co-operation measures can be better integrated into contracts and parties incentivised to ensure a better outcome for the project”.

And at page 19:

“It has been acknowledged in this report that the currently published forms of contract are not suited to all construction projects and section 1.6 singles out heritage, refurbishment and certain high risk engineering projects where new forms should be developed.....Therefore as part of the medium term strategy we propose to consider alternative forms of construction contracts that may meet our requirements”.

In its submission to the Review, the Office of Public Works (OPW) noted (at page 27):

“Fundamental revision of the contract is required – revert to the GDLA amended as necessary. Consideration should be given to alternative forms of contract, NEC, FIDIC, etc. which foster a partnership or collaborative approach rather than the adversarial approach engendered in the current forms”.

The idea of the benefits to be derived from greater collaboration in construction is not new. In the UK, as far back as 1994, the report *“Constructing the Team”* by Sir Michael Latham found that poor relations and distrust among participants in the industry were endemic and that an adversarial culture produced high levels of conflict and litigation as contractors sought to recover profit from underbid projects. The recommendations as to contract conditions were supportive of a partnering approach. In the context of the Latham report partnering was used as a generic term embracing a range of approaches aimed at establishing joint working and co-operation at varying degrees of formality.

In the intervening years other reports have supported these findings. At the same time huge developments in Information and Communication Technology (ICT) mean that these technologies are now making large contributions to delivering construction projects efficiently. The traditional low levels of productivity in construction are now being overcome through the adoption of processes such as BIM (Building Information Modelling) and Integrated Project Delivery (IPD) both of which foster collaboration and integration between different members of the team engaged in delivering a construction project.

In order to fully benefit from these new processes and technologies the Irish construction industry will have to move towards processes and standard contract forms which facilitate more collaboration and interworking. The current PWC forms are adversarial and are interpreted inconsistently as there is no precedent or guidance available from the courts. There is a danger that if the PWCs (as part of the CWMF) are merely amended on a piecemeal basis to incorporate these new collaborative processes greater upset and difficulties will be encountered in the future when these technologies and processes continue to develop (for example to BIM Level 3) far beyond anything that was contemplated when the PWCs were originally conceived.

It is submitted that now is the right time to accept that the PWCs have failed to deliver the intended objectives. These forms should be abandoned and replaced by more collaborative and integrated standard form contracts which are widely available and used internationally.

6th April 2017
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