Reform of Public Works Contracts – The Way Forward

The Public Works Contracts review has been ongoing since late 2013. While the Government Construction Contracts Committee (“GCCC”) is still of the opinion fixed term lump sum contracts have their place in the right circumstances, they accept that their role should be limited to certain types of contracts, ideally where the contract is easy to define.

Why Reform?

The new Public Works Contracts were introduced in 2007. The key objectives of the introduction of the new suite of contracts included ensuring greater cost certainty, better value and a redistribution of risk. The primary vehicle used to implement this was fixed price lump sum bidding as this allowed at least in theory all three goals to be achieved. The Government had expected a rough increase of 10% in tender pricing but with more reliable and efficient project management. However the introduction of the new contracts was parked as the recession commenced. Tendering bids became a race to the bottom, to the extent that contractors were out of pocket, usually leading to adversarial proceedings at the end of the project as developers sought in whole or in part to regain some of their outlay.

While one of the main problems with these types of contracts is their inflexibility, it is believed that the above measures go some way towards rectifying this. The report on the review of the performance of Public Works Contracts has made a number of interim recommendations, the rollout of which has already commenced, while more long term changes will be phased in over the coming years. The immediate changes will be as follows:

+ Making the Bill of Quantities the primary reference document for the pricing of public works tenders for project documents by the contracting authority.
Introducing a separate tender and subcontract for specialist works contracts.

Requiring all projects with a value in excess of €2,000,000 to be awarded on the basis of most economically advantageous tender with a significant weighting for quality.

An overhaul of the dispute resolution procedures for all public works contracts.

Bill of Quantities

A Bill of Quantities (“BOQ”) provides a detailed, itemised list of the building elements against which a contractor prices a rate for each element. The rate is then applied to a quantity provided by the quantity surveyor to provide a total price. By placing the BOQ at a higher level than drawings and specifications, the State retains greater risk. It is also believed that this will ensure greater scrutiny of design information, hence improving the standard of tender documentation.

Direct Specialist tendering

Under the current system generally a contractor will tender for 100% of the work. Then he hires specialists such as electricians and engineers. This means the body awarding the contract has little to no input into who carries out these specialist works. The new initiative proposes that on contracts where a significant amount of the work being carried out is being carried out by specialists, that the specialist works will be tendered before or at the same time as the chief tendering. This would then be included in the overall tender price. The main tender, will be obliged to include in its tender all costs for management of the various specialists.

Most Economically Advantageous Tender

This proposal entails the development of a detailed guidance system that will assist contracting authorities in developing detailed award criteria. The criteria would be objective and linked to the subject matter of the contract in question. This would involve elements such as lifts, windows and roofing systems being included in the awards criteria. Most importantly weighting could also be allocated to quality, with price retaining the majority weighting except in complex or innovative projects.

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Dispute Resolution

This is the area where we may see the largest overhaul as the current dispute resolution system has been shown to be not fit for purpose. Fueled by the economic downturn and an extremely competitive tendering environment disputes have been frequent. The upcoming introduction of adjudication in Ireland under the Construction Contracts Act should provide relatively quick determinations on more straightforward issues. Either party may refer a matter to adjudication at any time. It is also proposed that a dispute escalation procedure should be introduced which would set out specific timeframes to resolve matters before referral to conciliation. Lastly for high level contracts (€10,000,000 plus) a new single person dispute adjudication board (“DAB”) should be appointed. The identity of the adjudicator would be agreed upon by the parties from the outset of the contract. One of the main advantages of this would be the level of familiarity the DAB would have with the parties as well as the facts.

What’s next?

There are also a number of other proposals with the aim of improving the Public Works Contract system. Once the aforementioned proposals have all been implemented fully new strategies will be put in place. While the methods have not yet been fully determined yet some of the issues are risk management, encouraging co-operative behavior and introducing performance evaluation. Previous performance evaluations could also be examined in tenders.

While it is too early to judge the result of these new initiatives they most certainly seem like a step in the right direction. The phased introduction of the program has been commended in the industry. While the new changes are noteworthy what is in the pipeline over the next few years is more radical. Consultants will need to give careful consideration to the proposed changes as the manner in which they deal with State bodies in relation to projects is likely to be affected significantly by these changes.

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