



## **Construction Employers Federation submission to the Public Accounts Committee on their Inquiry into Public Procurement in Northern Ireland, May 2024**

### **Introduction**

The Construction Employers Federation (CEF) is the sole certified representative body for the second largest industry in Northern Ireland, the construction industry. We represent approx. 70% of construction in NI and around 800 businesses of all sizes employing over 30,000 staff directly and 65,000 in the wider supply chain.

### **Comments on the Inquiry**

We welcome this Inquiry as a direct follow-on from the NIAO report that was published in April 2023.

Given that we gave evidence to the NIAO as part of said report – and agreed with the recommendations that it made – we believe it best to focus on each of the four recommendations and provide additional comments on each.

As the Committee is also preparing to consider the NIAO update report on Major Capital Projects, we would be happy to submit more detailed evidence on this matter in the coming months.

### **Recommendation 1**

*The Department of Finance should commission a fundamental review to ensure that arrangements support effective strategy setting, policy development, governance and accountability for procurement. This should involve a detailed consideration of the role, responsibilities and composition of the Procurement Board. The review should also include an assessment of how the Board's role and responsibilities relate to those of other key stakeholders, including the NICS Board, the Executive, and CoPE.*

Although the CEF was represented on the Procurement Board as was reconstituted by the then Finance Minister at the end of 2020 (and, indeed, had been represented on previous iterations of the Board at various stages of the past twenty years) we agree that the Department and wider Executive should take time to consider the role, responsibilities and composition of the Board.

While much of the work of the Board between 2020 and the Executive's collapse in the spring of 2022 was beneficial – perhaps most notably the positive development of the Procurement Policy Notes on Scoring Social Value and Supply Chain Resilience – we expressed concerns at the time as to the speed of the removal of the then Procurement Guidance Notes as well as the concurrent development of the Construction Toolkit.

In our view – a view that was shared by others in the construction sector – a lot of good work was lost in that process and while, equally, we understand that a review had to take place and a new Toolkit be published, the process felt very rushed and appeared to be more about meeting deadlines for action to be taken as opposed to developing a revised set of policy guidance which industry could have confidence in.

With the Procurement Act 2023 coming into force in October and the Department already having committed to a review of public procurement in NI, we therefore believe now is a good opportunity to review the structures as they are and make sure they are fit for purpose for the forthcoming new procurement regime.

We do firmly believe, however, that any revised Board must have a greater number of representatives from outside of Government, that these are appointed through the Public Appointments process and that, once in place, the Board executes its business in the same manner as that of any other board of a public body.

## **Recommendation 2**

*The Department of Finance, in consultation with procurement practitioners, should develop a new strategy to underpin how procurement functions in Northern Ireland. This strategy should be time-bound and set out clearly the objectives and priorities that procurement authorities will work to deliver within this timescale.*

While we appreciate that the National Procurement Policy Statement (<https://www.gov.uk/government/publications/national-procurement-policy-statement>) that was published by the UK Government on 13<sup>th</sup> May both does not apply in NI and is very high-level in its scope and detail, we believe there is merit in a similar statement of policy intent being brought forward by the Executive (perhaps through the Programme for Government).

In addition to what is covered in the UK NPPS, there are then several issues which we believe need addressed either as an element of a NI NPPS/PfG or as standalone matters:

### Procurement pipeline

It is vital that the Department and wider Executive do all they can to ensure that a robust public sector pipeline of works is available to the local construction sector.

This is critical in terms of giving the market the confidence it needs in the sustainability of work that is coming from public sector clients. In turn that will then encourage economic growth as well as job creation – something which will make a significant contribution to the Executive's focus on 'good jobs'.

However, within this we have to accept the current lack of multi-year budgets, uncertainty as to when the UK Government's next Comprehensive Spending Review will complete and, above all else, a capital budget which is subject to significant restraint.

Therefore, while the pipeline is of paramount importance to our members, so to is its realism – something that should also extend to the next Investment Strategy when published.

### Pre-market engagement

As something which garners significant focus in the Procurement Act 2023, we believe that there needs to be step-change in how pre-market engagement is undertaken by clients in Northern Ireland.

While the concept is not new, it would be hard to argue that it has always been delivered successfully locally. Projects and/or frameworks have too often been poorly scoped at the outset leading to significant problems – such as lack of market interest – at subsequent tender stages.

Equally, where clients have engaged in pre-market exercises, it has often been the case that industry feedback has been ignored again leading to a lack of market interest further down the line.

That said, a number of clients have actively been taking onboard the feedback from previous procurement issues and have translated this into the development of a much more collaborative approach in procurement and contractual design – perhaps most notably the partnerships between industry and NI Water that currently underpin the delivery of their PC21 programme.

If we are to maximise the limited capex available to the Executive, then it is critical that we do much more pre-market engagement and that we do it right.

### Contract options

Building on the above, steps need to be taken by Government Departments/Clients so they can adapt the form of contract they use for major building projects such as schools and hospitals.

Since the mid-2000's, the Executive has mandated the use of the NEC form of contract. In other jurisdictions, this form is used a lot less/not at all for a combination of reasons. As has been regularly cited by a range of industry professionals, the NEC's inflexibility (and inappropriateness with respect to maintenance contracts) is problematic. However, what also plays a role is the NEC 'option' which is chosen.

Far too often in the NI public sector, we utilise the fixed price tendering approach – something that, even with the inclusion of an index-linked inflation clause, gets nowhere near covering off the pressures that firms have been facing in recent years.

We instead need to use more of the 'two-stage' approach. This is where contracts are awarded on the basis of an agreed target cost with an agreed 'pain/gain' mechanism built in for client and contractor.

The budget envelope is therefore set sufficiently wide (but not so wide as to be unjustifiable) so that client and contractor can feel confident that a project can advance.

This would also remove a lot of the current risk around business case inflexibility and, therefore, contribute to actually building out a public procurement pipeline which industry can have confidence in.

The necessary change in guidance and approach could be brought through a change to the NI Construction Toolkit and we would also advocate, within this, that other forms of contract such as JCT be available for clients to use.

### National frameworks

Recent years have seen a significant proliferation of National Frameworks for construction maintenance and works. These have included, but are not limited to, Crown Commercial Service, Fusion21, Pagabo and Scape.

While such frameworks very much have their role in the delivering of all manner of projects, and have acted as a further route for local firms to expand into Great Britain, the Executive should take steps to make clear under what circumstances they could and should be used for public works in NI. They should also take steps to ensure that those that provide such frameworks present more accurate information on the level of construction work/turnover that will likely go through them in any one year as part of any relevant procurement opportunity. This information must be robust and must also, at point of tender, include a list of all clients who will utilise said framework/s for their duration.

### **Recommendation 3**

*The Department and/or the Procurement Board should develop the strategic oversight of capacity and capability. This should involve agreeing baseline standards for CoPE and contracting authorities against which performance can be measured.*

A long-standing concern of the industry has been the lack of commercial awareness and experience within public sector procurement. This has led to a number of issues over the years including poorly prepared documentation, unfair transfer of risk, significantly long periods between the various stages of procurement processes (PQQ, ITT, contract award etc) and lack of reward for innovation which, taken as a whole, have left many contractors frustrated and looking to grow their businesses in other markets.

When added to the insufficient pipeline of public works on account of the Executive's annual capital budget facing recurrent constraints (2024/25 seeing it at the same level, in cash terms, as some 17 years ago), it has inevitably led to a lack of confidence in the local market, and it is something which must be addressed.

It is undoubted that that commercial capability has improved in recent years – something that we have seen be more pronounced as clients and contractors worked together on delivering the outcomes of Procurement Advisory Note 01/21 in the wake of the unprecedented inflationary challenges that began in early 2021, as well as the innovative procurement approaches taken for projects such as the Belfast Grand Central Station Main Works – but we still believe it has a way to go.

We understand the intent of the Procurement Act 2023 to aid in that enhanced commercialisation, however we don't necessarily take the view that the Act and its outcomes, in and of themselves, will be the only driver that is needed.

Therefore, we would concur that a review of public procurement in NI should look to address the matter further and it is something that industry would want to collaborate closely with Government on as we fully appreciate the challenges that are placed on the public sector and it should be for everyone to seek to ameliorate them.

#### **Recommendation 4**

*The Board should establish arrangements to ensure that all bodies provide complete, accurate and timely procurement data to enable effective oversight of public procurement activity. This data should support meaningful assessment of the value for money of procurement activity by public bodies, and of the impacts of the expenditure incurred.*

We would welcome this matter be further considered as part of a review of public procurement in NI as we believe that greater transparency would be of benefit to all that have an interest in the matter. In that context, we would be supportive of the extension of an element of the Procurement Act 2023 which we understand, at this stage, would not apply in NI which relates to the publishing of comprehensive information on contract management including performance against KPIs, spending through contracts, confirmation of use of options / contract changes and contract expiries / terminations through the publicly available Open Contracting Data Standard

Further detail on this is available via the UK Government Commercial Function publication of December 2023 entitled *Procurement Act 2023 Knowledge Drop for contracting authorities – Northern Ireland*:

<https://assets.publishing.service.gov.uk/media/6569fc4a946226049cc567e8/20231127-factsheet-Northern-Ireland.pdf>