



Oifig um Sholáthar Rialtais
Office of Government Procurement

12th March, 2019

Ms Éilis Fallon
Committee Secretariat
Committee of Public Accounts
Leinster House
Dublin 2

Dear Ms Fallon,

I refer to your letter 28th February regarding further information sought on the National Children's Hospital. As requested, I am now responding to the information sought in your correspondence.

1. The Capital Works Management Framework

The Capital Works Management Framework (CWMF) is a structure that has been developed to deliver the Government's objectives in relation to public sector construction procurement reform. It consists of a suite of best practice guidance, standard contracts and generic template documents that form the four pillars that support the Framework as outlined below.

Pillar 1 - consists of ten forms of Contract for Public Works, each of which is appropriate in different circumstances, their associated Instructions to Tenderer, Forms of Tender and Schedule, Model Forms and the Arbitration Rules.

Pillar 2 - consists of two Standard Conditions of Engagement, their associated Instructions to Tenderer, Forms of Tender and Schedule, Model Forms, Authorised Bonding Businesses Note, Weather Events Note and the Arbitration Rules.

Pillar 3 - consists of Standard Forms for Cost Planning & Cost Control (for building projects and civil engineering projects) and Suitability Assessment Questionnaires consists of a number of suitability assessment questionnaires that are used in different circumstances for Service Providers (Restricted and Open Procedures); for Works Contractors (Restricted and Open Procedures); Works Specialist for Specialist Area of Work; Reserved Specialist (Restricted Procedure) and associated Supplements and Appendices.



Pillar 4 - consists of a comprehensive suite of guidance notes aimed at facilitating the implementation of the Government's reforms in construction procurement. These guidance notes are intended primarily for the guidance of Sponsoring Agencies embarking on capital works projects. However, the roles of the Sanctioning Authorities and any external consultants appointed in relation to the capital works projects are also considered.

All the documents that make up the framework are available online at:

<https://constructionprocurement.gov.ie/capital-works-management-framework/>

2. Delivery timeline for the National Paediatric Hospital

Appendix II, on page 9 of my letter of 22nd February to the Committee stated:

*'From this early engagement (**October 2013**) it became apparent that the scale, complexity **and required delivery timeline** associated with the National Paediatric Hospital presented a range of challenges from a project perspective which prompted a different procurement approach than the fixed-price lump sum approach.'*

[My emphasis added in bold]

Further to your request for a note on this and by way of context I refer you to a press release issued by the then Minister for Health, Dr James Reilly T.D. on the 6 November 2013. The full text of the press release is available here: <https://health.gov.ie/blog/press-release/minister-reilly-outlines-progress-to-date-on-the-new-childrens-hospital/>

In that press release Dr Reilly refers to the appointment of the National Paediatric Hospital Development Board (NPHDB) in August 2013. He notes the recruitment process for the Programme Director post is ongoing, the procurement of the design team is underway and the design brief is to be finalised shortly. It also notes that planning permission is to be obtained by December 2014 with a contractor to have started on site by Spring 2015.

Once the design team was appointed in September 2014, the programme was considered further and was the subject of a submission to the GCCC meeting of 20th May, 2015. The timelines below are taken from the NPHDB's Procurement Strategy tabled at that meeting and dated 25 March 2015.

- Planning Submission - end of July'15
- Planning Permission (anticipated date) – end of Jan'16
- Issue Tender Documents to Main Contractors – Oct'15
- Issue Tender Documents to Sub Contractors – Nov '15
- Issue Demolitions/ Site Clearance Sub Contract – Oct '15
- Main Contractor Tender Returns – End of Jan'16
- Sub-Contractor Tender returns – End of Jan'16
- Demolitions / Site Clearance tender Returns – End of Dec '15
- Cost Milestone / Cost Review to achieve +/- 10% Cost Update – March '16

- Start Work on Site (Enabling Contract)– March '16
- Agree /Sign off for overall GMP – Dec '16
- Full contract agreement – Dec'16

3. Minutes and attendance list for the meeting of the Government Contracts Committee for Construction when the request for a derogation by the National Paediatric Hospital Development Board from the standard forms of contracts was considered and agreed.

Government policy requires the use of the Capital Works Management Framework (CWMF) on all projects delivered under the Exchequer-funded element of the public capital programme. The public works contract is a key component of the CWMF and is a lump sum, fixed-price contract which is to be used on all public works projects. It is possible for public bodies to seek a derogation from the use of the standard forms of contract from the Government Contracts Committee for Construction (GCCC). This process has been availed of by Sanctioning Authorities for complex or large projects which have specific requirements which do not naturally fit with the standard 'lump sum' contracts.

The National Paediatric Hospital Development Board commenced their formal engagement with the GCCC in May 2014 with a view to securing such a derogation. Members of the Board made two formal presentations during the course of the development of their procurement strategy and a number of meetings with individual members of the committee to discuss detailed aspects of the strategy and contract were also held.

It is important to note that a derogation, if agreed, does not approve the approach or strategy of the Contracting Authority, but simply acknowledges that the circumstances are such as to warrant a different approach than the standard. It is a matter for the Contracting Authority and the Sanctioning Authority to satisfy themselves as to the adequacy of the approach with regards to compliance with procurement rules and project appraisal in accordance with the Public Spending Code.

Copies of the relevant extracts from the following GCCC Meetings are enclosed.

- GCCC Meeting 21 May 2014
- GCCC Meeting 20 May 2015
- GCCC Meeting 6 April 2016

I trust this response is of assistance to the Committee and adequately addresses the information sought in your letter. Further information can be provided at your request.

Yours sincerely,



Paul Quinn,

Chief Procurement Officer,

Office of Government Procurement.

Oifig um Sholáthar Rialtais
3A Sráid an Mhéara Uacht,
Baile Átha Cliath 1.
D01 PF72
www.ogp.gov.ie

Office Of Government Procurement
3A Mayor Street Upper,
Dublin 1.
D01 PF72
www.ogp.gov.ie



**An Roinn Caiteachais
Phoiblí agus Athchóirithe
Department of Public
Expenditure and Reform**

Appendix I

The NPHDB made a total of three formal submissions to the Government Contracts Committee for Construction (GCCC). Of these three submissions the NPHDB made two formal presentations to the GCCC, the first on 20th May 2015 and the second on 6th April 2016.

1. A memorandum dated 20th May 2014 was issued on behalf of the NPHDB. The memorandum set out the NPHDB's preliminary proposals for an alternative construction procurement approach. It was discussed at the GCCC meeting of 21st May 2014. Representatives of the NPHDB did not attend on this occasion. Those in attendance are listed on the attached extracts from the Minutes.
2. A formal presentation on the draft procurement strategy was made by representatives of the NPHDB and their appointed design team to the GCCC meeting of 20th May 2015. Those in attendance are listed on the attached extracts from the Minutes.
3. A second formal presentation setting out the final procurement strategy was made by representatives of the NPHDB and their appointed design team to the GCCC meeting of 6th April 2016. Those in attendance are listed on the attached extracts from the Minutes.

Government Contracts Committee for Construction (GCCC) Meeting

21 May 2014

**Conference Room, Office of Government Procurement,
2nd Floor, Bishop's Square, Redmond's Hill, Dublin 2**

In Attendance:

Office of Government Procurement (OGP):	David O'Brien (Chairman)
	Eileen Dalton
National Development Finance Agency (NDFA):	Colm Lynch
	David Corrigan
Dept. of the Environment, Community & Local Government: (DECLG)	Aidan O'Connor
Department of Defence (DD):	Neil Murphy
Office of Public Works (OPW):	Gerard Kennedy
	Georgina Keeley
	Liam Basquille
Dept. of Education & Skills (DES):	Larry McEvoy
National Roads Authority (NRA):	Gerry O'Brien
	Michael Nolan
Health Service Executive (HSE):	Peter Finnegan
Dept. of Agriculture, Food & Marine (DAFM):	Noel Clancy
Railway Procurement Agency (RPA):	Fergal Ruane
<u>Apologies:</u>	
National Development Finance Agency:	Gerard Cahillane
	Steven Burgess
Health Service Executive (HSE):	Eleanor Masterson
Dept. of Agriculture, Food & Marine (DAFM):	John McHale
Department of Defence (DD):	Tadhg O'Doherty
Office of Public Works (OPW):	Michael Caden
	Ciaran O'Connor

The Chairman noted apologies and welcomed David Corrigan (NDFA) deputising for Steven Burgess, Colm Lynch (NDFA) deputising for Gerard Cahillane, Liam Basquille (OPW) deputising for Michael Caden;

3. Note from the National Paediatric Hospital Development Board.

The Chairman informed members that the NPHDB are currently looking at options for the development of the new children's hospital and how best to manage it. He said that the NPHDB was considering as an option splitting the project into a number of separate construction contracts.

The NPHDB believe that the ideal procurement approach to the construction of the hospital will deliver cost certainty, value engineering, collaboration, early contractor engagement, effective use of resources, and an efficient programme. In the present market the NPHDB are considering a two-stage procurement approach as a more appropriate method to deliver these goals. It is envisaged that the exact content of each of the contracts, the Form of Contract, and the procurement approach will be developed and tested by the Design Team following their appointment in June through a feasibility study, in consultation with the NPHDB at Stage 1. This study will also consider how specialist equipment and fit-out contracts will be procured and also how the building will be handed over to the Client on a phased basis. It was noted that should the two stage procurement approach be adopted modification to the Public Works contract will be required. The NPHDB are proposing that the construction of the project will be split into a number of separate construction contracts:

- Contract 1: Demolition, Service diversions, Access Roads & Excavation
- Contract 2a: Basement concrete works to underside of podium
- Contract 2b: Superstructure and Completion

Summary:

Enabling Works - Contract 1 - will use the PWC form for works designed by the Employer (PW-CF1/PW-CF3). Once the Main Contractor for Contract 2a/2b is appointed Contract 1 will be novated under them. This will ensure the optimum overlap of construction activities on site.

Basement Contract 2a/2b - It will use a modified version of the PWC Contracts (Fixed Price Lump Sum designed by the Employer) to be determined following the completion of the Feasibility Study on procurement approach noted above. 2b – detailed design on-going during 2a.

It is hoped that Contract 2a/2b will use a two stage tender procurement approach. The initial tender will include two parts. The first part Contract 2a (as defined above) will be tendered on a fully defined lump sum basis with design by the Employer. The second part comprising the remainder of the building (Contract 2b) will be tendered using a bill of approximate quantities with PC/provisional sums for large work packages such as Mechanical and Electrical Works, Vertical transportation and Curtain Walling. Both parts will be tendered at the same time. For Contract 2a/2b the Main Contractor will be asked to tender preliminaries for the whole project (2a & 2b), and to price the bill of approximate quantities with a schedule of rates that will be brought forward to determine a Guaranteed Maximum Price (GMP) for Contract 2b. The mechanism and procedure in determining the GMP will be set out in the Contract 2a/2b tender documentation. Contract 2a/2b will be awarded as a single contract with a break clause (Termination at Will) for the NPHDB if a GMP cannot be finalised for whatever reason prior to the construction works contained within Contract 2b commencing on site.

While the construction of Contract 2a is on site the Design Team will complete the detail design of the project. The Design team will finalise the tender documentation for Contract 2b in the same way as a traditional contract. The QS will complete the bill of quantities and insert the contractors tendered rates into it to determine the GMP. This will then be issued to the Contractor for agreement of the GMP.

The Specialist Works packages (excluding Specialist Equipment) will also be procured using the same two stage tender approach. The initial tender of the Specialists and the Main Contract for Contract 2a/2b will occur simultaneously. The Design Team/NPHDB will finalise a GMP with the specialist work contractors. This will be concluded at the same time as the finalisation of the GMP with the Main Contractor. The Specialist Contractors will enter into a predefined sub-contract with the Main Contractor prior to Contract 2b going to site.

During the Contract 2a/2b procurement period the Design team would have advanced the detail design by approximately four months. Prior to the award of the 2a/2b contract additional checks will be undertaken to confirm that nothing substantial has changed as a consequence of the detailed design undertaken or conditions of planning that would impact on the agreement of an appropriate GMP.

Following the Award of Contract 2a/2b the Design Team will complete the detail design of the project taking into account early engagement inputs by the Contract 2a/2b Main Contractor and the specialist work Contractors. The main/specialist works contractors will be appointed to provide design input, coordination, value engineering, site set up, constructability and innovation, and programme input during Contract 2a timescale for the purpose of contract 2b.

The Design Team will be required to partake in value management exercises based on early contractor engagement. This process will be tracked using a change control tool to be agreed between the NPHDB and the Architect as ER supported by the Design Team.

The Main Contractor GMP will include for the management and coordination of the specialist equipment and specialist fit outs together with the physical works required by the Contractor. Specialist equipment would include Group 2, 3, 4 Medical equipment and Fit outs would include Theatres and Radiology for example. The procurement of the Group 2, 3, & 4 equipment will be by the NPHDB and will take place during Contract 2b.

Main Contract 3 (if required) - If the NPHDB decide that discussions leading to the determination of a GMP for the Main Contractor or Specialists are not delivering value for money or for other legitimate reasons they reserve the right to end the GMP discussions by Termination at Will and will re-tender Contract 2b as Contract 3 to the market. The Design Team would have completed the Detail Design and the Tender Documentation for the purpose of determining the GMP; this would now be used to tender the project using a traditional approach. The Project will be re-tendered to the previously shortlisted Contractors and Specialists using a framework. At the bid stage for Contract 2a/2b the Main Contractor and the specialist works contractors will be asked to price for the time associated with the Early Engagement process, so that they will be fairly reimbursed for this input if it is decided not to appoint them for Contract 2b stage. Should it be determined that one or more of the Specialist packages should be re-tendered but the Main Contractor should proceed to execute Contract 2b there is sufficient time to re-tender the specialists and for them to enter into a sub-contract with the Main contractor without delay to Contract 2b.

The HSE informed members that the design team tenders are currently being evaluated and that the ambitious approach outlined above is embedded in the design team procurement. The Chairman referred to the proposed interim recommendations as part of the review of the public works contracts and agreed that a significant risk is generated by including the specialist's areas of work into the single lump sum price provided by the main contractor. The HSE said that specialist areas of work could represent up to 50% of the cost, which would be taken out of the contractors remit. The HSE agreed that it will be a challenge for the design team to meet the aggressive targets being proposed whilst still developing the design. The Chairman agreed that there is pressure to complete the hospital as early as possible and to insist upon a completed design before going to tender could add a minimum of six months to the programme. He also noted that the management of risk is being looked at in the context of scale of the project relative to the existing market. With regard to amendments to the

contracts the Chairman said that the proposed approach held significant implications and noted that this would be the subject of a more detailed submission.

The HSE said that a 2 stage approach helps to remove a certain amount of risk of inflation to contractors since the price variation would only be fixed upon the award of the contract for each section. They said that contractors will be asked to tender preliminaries for the whole project. Dept of Defence asked on what basis will preliminaries be priced – the HSE noted that this has not been worked out yet and will have to be teased out. The DoD referred to the previous Mater project, which had been tendered as 2 separate contracts. The HSE said that the current approach being considered integrates both stages and ensures continuity of programme. It was noted that the NPHDB will be seeking value engineering etc. in the early stages.

The HSE referred to the implications of a 2 stage approach to the public works contracts. The contract will require amendments to provide for conditions to apply to 2 stages:

- (i) Contract 2a – Lump Sum Contract;
- (ii) Contract 2b - Tendered on the basis of bill of approximate quantities with provision for:
 - Value Engineering;
 - Fixing of a Guaranteed Maximum Price.
 - Determination by Expert on make-up of rates and prices where the parties are in dispute as to the application of specific rates and prices. The basis for the determination by the Expert is to follow the provisions for the determination of payment for a compensation event under Clause 10 of the PWC.

The Chairman suggested that a better balance between certainty of outcome and quality could be achieved with this approach on a project of this scale given that the risk is being managed to the greatest extent possible whilst still maintaining the requirement for greater cost certainty.

The Chairman said that the basic principles of the approach being considered is 3 contracts, 2 of which will be built into one, with a break option which will include a provision that the employer will have an entitlement to determine the Contract in the event that agreement on the finalisation of the Guaranteed Maximum Price cannot be reached, or alternatively the employer is dissatisfied with the amount of the Guaranteed Maximum Price or the performance of the Contractor on Contract 2a. In the event of termination the employer will be entitled to

re-advertise and re-tender the Works incorporated under Contract 2b and to appoint a new Contractor.

It was noted that planning was likely to pose a greater programme risk than the procurement of the contractor with the HSE agreeing and noting that the planning process will also need to include 2 satellite sites. The approach being proposed is a response to the very challenging programme, the fragile state of the industry currently and a desire to proactively manage risk through all stages of the delivery rather than to transfer the risk to a main contractor. In relation to the splitting of the contracts this would also meet the requirements to break contracts into lots where appropriate as set out in Circular 10/14. The DoD noted the approach taken on the original Mater site was to split the contracts with the contractor for the superstructure being required to sign off that they were satisfied with the Works as completed by the contractor engaged to construct the basement. It was appreciated that the approach outlined for the James's site was being considered for programme reasons but noted that there was an attendant risk with such an approach such that the Employer would be very reluctant to terminate the contract and risk a delay. The Chairman suggested that this may also be turned to the Employer's advantage since it acts as an incentive for a contractor to stay on board. The Chairman said that he will reflect the views of the Committee back to the NPHDB and will await a more detailed presentation once the procurement strategy has been tested by the appointed design team.

Date of next meeting: Wednesday, 9 July 2014 in the Office of Government Procurement, 2nd Floor, Bishop's Square, Redmond's Hill, Dublin 2.

David O'Brien
Chairman

21 May 2014

Government Contracts Committee for Construction (GCCC) Meeting

20 May 2015

**Conference Room, Office of Government Procurement,
2nd Floor, Bishop's Square, Redmond's Hill, Dublin 2**

In Attendance:

Office of Government Procurement (OGP):	David O'Brien (Chairman) Michael Farrington Eileen Dalton
National Roads Authority (NRA):	Gerry O'Brien
Dept. of Education & Skills (DES):	Larry McEvoy
Dept. of the Environment, Community & Local Government	Maura Connolly
National Development Finance Agency (NDFA):	Colm Lynch
Office of Public Works (OPW):	Gerard Kennedy Ciaran O'Connor
Health Service Executive (HSE):	Eleanor Masterson Peter Finnegan Paul de Freine (item 1)
Dept. of Agriculture, Food & Marine (DAFM):	Noel Clancy
Department of Defence (DD):	Neil Murphy
Railway Procurement Agency (RPA):	Fergal Ruane
<u>Item 1:</u>	
Tom Costello	Chairman NPHDB
Tim Bouchier-Hays	Deputy Chairman NPHDB
Richard Fitzpatrick	NPHDB
Sean Mahon	OCMA Architects
Peter McHale	Bruce Shaw Partnership
<u>Apologies:</u>	
Dept. of Agriculture, Food & Marine (DAFM):	John McHale
Department of Defence (DD):	Tadhg O'Doherty
National Development Finance Agency:	Gerard Cahillane Steven Burgess
Office of Public Works (OPW):	Georgina Keeley

1. Update by the National Paediatric Hospital Development Board on their Procurement Strategy

The Chairman welcomed the members of the National Paediatric Hospital Development Board (NPHDB) to the meeting. Copies of the NPHDB hand-out 'Procurement Contract Review' draft dated 20 May 2015; and 'New Children's Hospital Procurement/Contractual Issues Overview (updated for Review 8th May 2015) was circulated to Members. The NPHDB requested that the documents circulated should be treated as confidential. Mr Costello set out the context of the project and stated that the completion of the hospital is a priority for Government noting that it represents the single largest project in the health sector in the history of the State. The Board are mindful of the requirements of public procurement regarding VFM, managing risk in delivering a hospital of the highest standard. He outlined that it was initially intended to be a design build project but following review by the Board the decision was taken to procure it under an employer-designed contract on the basis that such a model would be more attractive to potential bidders and ensure competitive bids. He also noted that the principles of 'lean construction' would be applied to the project, noting that it has been successfully adopted in the delivery of large projects and should ensure that things are done in a collaborative team approach. Reference was made to the complexities of the St. James site, the owner is required to put in place a robust health and safety system, deliver VFM and ensure cost certainty.

Mr McHale set out the key dates of the contracts as set out in documentation circulated. The project will be delivered through one contract with 2 phases (Phase 1 which will include basement, sub-structure and enabling- €40m; Phase 2 - superstructure works - €360m). Both phases will be tendered at the same time, the Phase 1 works will be tendered on the basis of a lump-sum, fixed price contract whereas Phase 2 will be tendered on the basis of a bill of approximate quantities based on reasonably detailed drawings and specifications. It is intended that the period between the commencement of the Phase 1 works and their near completion will permit greater detail to be developed on the Phase 2 works with a guaranteed maximum price (GMP) to be achieved by December 2016. If a GMP cannot be achieved within this period there is provision in the Board's programme to retender the phase 2 works. The core reasoning for adopting this approach is to reduce the overall programme and mitigate the projected inflation of €1.5 - €2m per month for a project of this scale but also to obtain the benefit of early involvement of the main contractor and specialists in the detailed design phase which is part of the risk management strategy. Tenderers will be advised that the site will be available on a phased basis. The main contractor will be engaged on a single contract. The BoQ will measure every component and which will inform the adjustment for Phase 2 – negotiation will not be undertaken to arrive at the GMP, the BoQ will form the basis with 3rd party expert determination called upon to resolve any disputed items.

Key issues for consideration:

- Parties will be encouraged to work collaboratively during phase 1 to arrive at the GMP and tie down the final costs. The contract will include a terminate at will provision and may also provide for a pain/gain share mechanism to reinforce collaboration.
- Product identification will be tied down in line with the specification prior to signing up to the GMP to resolve issues of product substitution.

- Specialist sub-contractors. The NPHDB noted that they preferred the direct appointment of subcontractors as outlined in the proposed amendments to the PWCs over novation. This will be undertaken by the contractor from day 1 – main contractor will carry the responsibility for the performance of the specialists with a provision to adjust the contract sum for compensation events. The NPHDB noted that they were not proposing direct payment provisions, payment will be through the main contractor with use of a standing adjudicator included for in the conditions of contract.

Mr Costello, in summarising, noted that the approach outlined today has been following consultation with the Board and a consensus view that this is the right approach. The next step is to draft legal documents to reflect the amendments required.

The Chairman responded to the presentation noting that the high level approach being proposed by the Board had been set out clearly and noted that a considerable amount of detail had yet to be considered. He referred to the extent of risk analysis undertaken as this had not been specified in the presentation. He asked how robust the analysis has been referring in particular to the ambitious programme, the current market conditions and market capacity for a project which is the largest single building project that has been undertaken in the State by some margin. One of the key indicators that these issues have been considered will be the response to the pre-qualification process which resulted in significant issues in the same stage on the Mater site.

Mr McHale replied that they are satisfied that there is sufficient market capacity. He said that further breakdown of specialist sub-contract works will be necessary – for example they are looking at 3 separate packages for cladding systems alone.

The Chairman noted the intention to issue tender documents in advance of obtaining a final planning decision. He asked had any consultation been undertaken in respect of this. In referring to risk and tender costs he referred to the PPPs where some compensation is available to cover tendering costs which may encourage greater participation. Mr McHale replied that he would not see a necessity for this. He noted that the change in the status of the BoQ will lead to a reduction in tendering costs to contractors because they can focus their energy on pricing on the basis of the BoQ. He further noted that the NPHDB will determine the percentage rate that would be applied for GMP. The early engagement management fee that the main contractor will be paid in the phase 1 period will be a tendered rate. The NDFA asked in regard to timeline when would the GMP be fixed. The NPHDB said that this would happen during Phase 1, finalise bill of approximate quantities during first 8 months. The NPHDB noted that the adjustment rate for the GMP provided in the circulated documents was indicative for illustrative purposes and would not be decided until closer to the issue of the main contract tender documents in October 2015.

The HSE asked about a bonus element as part of a collaborative approach in a GMP and made reference to enabling works (Phase 1) and asked what happens with on-going delays. The NPHDB said that they needed to work more on this as part of value engineering where there will be a degree of reward. Where delays arise with enabling works the main contractor will be entitled to relief under the contract. The NPHDB view is that the collaborative approach envisaged is seen as attractive in the market soundings undertaken so far.

The DECLG referred to GMP experience in the private sector and noted possible challenges in the public sector regarding product naming and asked whether this will be achievable. The NPHDB replied that they must use generic terms in naming products. The 8 month period prior to agreement of the GMP and the inclusion of a 'terminate at will' clause is intended to tease this out. The MEAT evaluation stage will also focus on up to 20 key products. 95% cost certainty on tender return is the target.

The NDFA referred to where the GMP is exceeded with the adjusted tender sum, the cost of going back out to the market and the possible challenges of doing this. The Chairman asked about the mechanisms and safeguards put in place for re-measurable BoQs so that there can be no challenge on the basis of post-tender negotiation. The NPHDB said that the adjustment % to the GMP will include for scope change and will not be expended if no such changes are instructed. If the GMP is exceeded and cannot be agreed then the Board will consider exercising the termination provision. It is the NPHDB's view that the BoQ issued at the tender stage will result in 95% cost certainty and the extent of adjustment will centre on costs associated with greater specification definition and clarification of products rather than significant changes to quantities, 3rd party expert determination will be used to resolve any issues with regards to specification and rate disputes.

The NPHDB were asked whether a decision had been taken yet on which form of contract will be used. The NPHDB said that they will be using the revised PWC July 2015 version as the basis for the drafting to mirror the amendments currently being detailed by the GCCC. The Chairman said that the NPHDB will be included in the circulation of the draft revised contract.

The DE&S queried whether 8 months is sufficient to get to a GMP given the extent of work involved not to mention aspects such as design amendments arising out of any planning conditions. The NPHDB said the time period will be 8 months plus the tendering period and that there was provision to award the enabling works contract separately to the main contract should significant changes be required to the design as a result of the planning process. The OPW raised concerns with M&E and the extent of definition that will be provided for such works. The NPHDB said that they are going to tender with full BoQs for M&E works. The DE&S asked about use of construction inflation rates. The NPHDB said that inflation will be allowed up to the point of the GMP on the basis of CPI. From the GMP onwards there will be no price variation permissible for 3 years as per the PWC.

The Chairman concluded the presentation noting that the GCCC had raised no objections to the proposal outlined at the GCCC meeting of 21 May 2014 accepting that a project of this scale and complexity would necessitate a bespoke approach that the standard PWC forms would not support. The presentation today and the documents circulated provided greater detail on the proposals and are largely in line with the note considered at the meeting of 21 May 2014 with some notable exceptions. He also noted that the Board have ultimate accountability for the delivery of the hospital and the GCCC's remit in this process is to ensure that the high-level objectives of the 2004 Government Decision including cost certainty are achieved in any contracting strategy adopted and to flag concerns regarding weaknesses and possible exposure. He urged the Board to consider the Early Contractor form of PWC since many of the elements presented today are echoed in this form of contract. The NPHDB noted that they had looked at it but that their intention is to retain to the greatest degree possible the core principles of PW-CF1 with the necessary amendments to deal with the approach outlined to achieve cost certainty to the greatest extent possible. The NPHDB noted their intention to

come back to the Committee with their proposed changes to the draft revised PWC that will be circulated to stakeholders in June.

Prior to the departure of the NPHDB the Chairman advised that he would draft a letter to the NPHDB summarising the Committee's response to the proposals.

After the NPHDB departed the Chairman undertook to circulate the letter to Members before issuing to the Board to ensure the letter summarises the Committee's view whilst focussing on the Board's proposed amendments. He noted that these would include the following:

- the extent to which the greater project definition envisaged through Phase 1 engagement could be considered as material and result in procurement challenges.
- the extent to which it is realistic to terminate the contract failing agreement on the GMP given the work that will be completed at that stage and the likelihood that retendering the works will result in higher prices being returned than the figure which prompted termination.
- the risk inherent in proceeding with a tender where the decision on the planning application is not known. It was noted that the Board has outlined that this decision is not a matter for the GCCC and has decided that the programme benefits outweigh the risk of a potentially poor tender response which they believe their contracting strategy will mitigate against.
- the process used for the appointment of specialist subcontractors must align that adopted in the amendments to the public works contracts – hence the proposal to circulate the draft amendments to the conditions to the NPHDB at the same time as the stakeholders.

The Chairman noted apologies and welcomed Colm Lynch (NDFA) who was deputising for Gerard Cahillane.

Date of next meeting: Wednesday, 8 July 2015 in Room B13, Dept. of Public Expenditure & Reform, 7-9 Merrion Row, Dublin 2, at 10 a.m.

David O'Brien

Chairman

20 May 2015

Government Contracts Committee for Construction (GCCC) Meeting

6 April 2016

In Binchy Room, 5th Floor

Office of Government Procurement

3A Mayor Street Upper, Dublin 1

In Attendance:

Office of Government Procurement (OGP):	David O'Brien (Chairman)
	Eileen Dalton
	Michael Farrington
National Development Finance Agency (NDFA):	David Corrigan
	Colm Lynch
Dept. of Education & Skills (DES):	Larry McEvoy
Department of Defence (DD):	Neil Murphy
	Tadhg O'Doherty
Office of Public Works (OPW):	Gerard Kennedy
	Georgina Keeley
	Angela Rolfe
Health Service Executive (HSE):	Peter Finnegan
	Eleanor Masterson
Transport Infrastructure Ireland (TII):	Geraldine Fitzpatrick
Dept. of the Environment, Community & Local Government	Maura Connolly
Dept. of Agriculture, Food & Marine (DAFM):	Noel Clancy
NPH	Richard Fitzpatrick
NPH	Tim Bouchier-Hayes
NPH	Peter McHale

Apologies:

Office of Public Works (OPW):	John Kelly
-------------------------------	------------

Dept. of Agriculture, Food & Marine (DAFM):

John McHale

National Development Finance Agency (NDFA):

Gerard Cahillane

2. National Paediatric Hospital Development Board (NPHDB) update on the contracting strategy

The Chairman referred to the ongoing meetings that have been taking place with the NPHDB regarding their contracting strategy for the children's hospital. The NPHDB informed Members that they are planning on going to tender following planning permission in May. The Chair referred to the most recent meeting with the NPH on 21 March 2016, which was to discuss the key amendments being made to the standard PW-CF1 contract by the NPHDB in order to meet the requirements of the project's procurement strategy. The NPH then proceeded to go through the note of that meeting:

- Pricing Model / Guaranteed Maximum Price (GMP)
 - The works contract will be tendered as a single contract with two phases, the first phase A (basement and substructure works) based on full design and BoQ, the second phase B (all other construction works) tendered on a 2-stage basis with a Bill of Approximate Quantities and associated design. The same tendering approach will apply to the specialists.
 - The contract will be awarded for both phases with an instruction to proceed with first phase works only. The contractor will also be instructed to work with the design team (and paid a tendered fee for so doing) as part of the second phase to close-out the design, scope and quantities to achieve a revised contract sum against which 2.5% will be added to the Phase B element to achieve the GMP. Once the GMP has been agreed the contractor will take full responsibility and ownership for all quantities.

It was noted that GMP is an entirely prescriptive process. Tendered rates will be included in the revised BoQ.

- If the NPHDB cannot agree an acceptable GMP with the contractor, the NPHDB has the right to terminate the contract and re-tender the second stage works (as a full design) with the contractor progressing the completion of the first phase A works.
- Variations and Scope Changes
 - Only a scope change can result in an adjustment to the GMP. A scope change is where there is a change in the client's requirements (i.e. additional theatre, more rooms, etc.) or the actual cost of the specialist supplier is higher/lower than the Reserved Sum – only applicable to Reserved Specialists who are to be appointed after the award of the contract. It is proposed that a list of examples of what does and does not constitute a scope change be included in the tender.

It was noted that the contractor will take ownership of quantities in the contract once the GMP is achieved. A change in quantities only will be a variation change and will not affect GMP.

- Where variations arise (for example an upgraded specification for a door) this will be managed through the change control process with the contract sum being adjusted but no adjustment to the GMP.
- Scope changes and variations will be managed using the Compensation Event (CE) process.
- The same approach to variations and scope changes will apply to the specialist contracts.
- Share of savings
 - Any savings that emerge from the process to agree a GMP are not shared with the contractor. The NPHDB agreed that they may need to reflect on this further to minimise risk.
 - The contractor will get 50% of the difference between the final contract sum and the GMP if the final account has been agreed at a sum lower than the GMP.
- Prime Cost Sums / Provisional Sums
 - It was agreed the terms PC sums and provisional sums would be replaced with the terms Reserved Sums and Contingency Sums.
 - The tender will include Reserved Sums (PC sums) for various work elements (e.g. Mechanical and Electrical Installations) including the specialist suppliers which will be replaced once actual costs have been determined. The majority will be replaced at the GMP stage with those remaining related to specialist appointments that will be made late in the programme – typically for specialist medical fit out works such as operating theatres.
 - The tender will also include Contingency Sums (provisional sums) circa 3% of the contract value which will be based, where possible, on a measured amount. These PS items will be removed/cancelled out as part of agreeing the GMP.
- Liquidated Damages (LADs)
 - LADs will be included in the contract and the NPHDB will determine what the value of these will be.
 - The approach proposed is that LADs will be applied on a graduated / stepped basis and capped at an appropriate value (to be determined).
- Inflation
 - Given the duration of the construction contract (circa 48 months) inflation will be a significant feature.
 - In line with the arrangements in the GCC contract the contractor will include the cost of inflation within his tender for the first 30 months.
 - There is the option for the NPHDB to include within the contract a provision/allowance for inflation payable to the contractor over the last 18 months and if inflation was higher than the provision the contractor would carry the cost of this.

- There is also the option to have the contractor tender the cost of inflation in which case he would carry all the inflationary risk.
- Further work to be done by the NPHDB to determine the market's view on how inflation should be approached on a major project like the NPH.

It was agreed that the NPHDB need to revisit this issue.

- Dispute Management
 - As there are a number of mechanisms within the contract to manage disputes (project board, standing conciliator, Construction Contracts Act requirements) it was proposed at a previous meeting attended by the GCCC chair and two other GCCC members that the arbitration clause would be removed from the NPH contract. It was noted by the GCCC members in attendance at that meeting that they would not see a difficulty with this provided the board were satisfied that the remaining options noted above would meet their requirements. It was noted however that the Courts may still be reluctant to take on a construction dispute and may recommend that arbitration be undertaken in any event.
- Other Points of Discussion
 - A robust approach will need to be taken to the management of client (CHG) changes post agreement of the GMP and noted that this was fundamental to successful cost management of complex, publicly-funded projects.
 - In the case of a specialist default, the contractor may be granted an extension of time addressed as a delay event rather than a compensation event. Consideration may also be given to allowing the contractor an "LAD holiday" if this resulted in a programme delay. There may also be the need to consider advanced payments for some specialist suppliers (cladding contractors) which would be covered with an appropriate bond.

The NPHDB said that upfront payments need to be addressed and details worked out.
 - Owner controlled insurance will be incorporated into the contract and the contractor will have the opportunity to review and agree the policy provisions.
 - There is the need to consider if/how the contractor's liability is addressed as this is currently unlimited in the PW-CF1 contract.

The NPHDB may have to put a cap on the contractor's liability.
 - Social clauses will be included in the contract. It was noted that the NPHDB have a suite of social clauses for the project.

The Chairman said that risk and risk management are key to the success of the project and that this has informed the NPHDB approach from the outset. He said that the GCCC are generally supportive of the approach proposed. However key elements of risk on a project of this size remain to be confronted – cap on liability, liquidated damages.

The NPHDB set out the timeline for agreement of GMP. Phase A works are scheduled to be complete within a 14 month period to November 2017. During the Phase A works, the design for the Phase B element is finalised and the contract sum adjusted in accordance with the mechanism set out to agree GMP by April 2017. This permits time to go back to market if the GMP cannot be agreed.

Other issues raised by the GCCC included:

- Termination and bonding requirements.
- Provision for compensation for client if GMP cannot be agreed.
- Tender evaluation criteria re: price. The NPHDB said that the evaluation of price is for the overall contract to avoid any front loading in phase A, the entire project will be a full BoQ. Phase B will include detailed design (but not full design).
- Arrangements where a break occurs between phases A and B. The NPHDB noted that the project is employer designed, if this should occur then Phase B works will be tendered on the basis of a fully measured BoQ.
- Bond requirement. The NPHDB set out that the main contractor will require a bond upfront (in the amount of €40m) in phase A and this will increase in phase B. Specialists will also require bonds but the beneficiary of specialist bonds will be the main contractor.
- Will end price be adjusted? The NPHDB confirmed that the GMP will only be adjusted for Compensation Events as is the case with the standard PWC. The contract sum will be adjusted up to the point where the GMP is set. There will be no negotiation, a price adjustment mechanism will be used instead based upon detailed BoQs with quantity adjustments. Where item descriptions or specification issues arise an expert determination will be undertaken by an independent person.
- Where variations arise this is managed through the change control process with the contract sum being adjusted but with no adjustment to the GMP – will this not dip into the buffer zone? The NPHDB confirmed that this would result in a reduction in the buffer zone.
- Computation of GMP – no adjustment to contract price – share difference in GMP.
- Replacement Contractor – in the event of a failure to reach GMP agreement and the project is retendered will the replacement contractor take on the risk of the Phase A works?
- What saving will be achieved by not going out to market with a fully designed contract? The NPHDB set out that the main contractor (phase 2) will be appointed in August/September with a 3 month mobilisation, starting works in

November/December. This approach will minimise risk, gain 6 months in time on tendering and inflation costs. It is envisaged that a full GMP will be available at May 2017 with Phase B works commencing thereafter. Project management becomes key.

- Breach of contract – will arise only if contractor decides not to proceed.

The Chairman noted that a project of this size, the largest single building project undertaken in Ireland in recent years, must include risk mitigating strategies to both parties. Whilst cost certainty can only be said to arise at GMP stage, the involvement of the contractor in the design finalisation stage up to the GMP is crucial to the risk mitigation strategy. This is intended to allow the contractor to get to grips with the detailed design aspects, finalise quantity and specification aspects and undertake the necessary steps to manage risks within the period prior to GMP. On the Employer side the option to terminate in the event that GMP cannot be achieved provides protection to the taxpayer but it is acknowledged that this option would not be exercised lightly. The HSE said that the interim measures to amend the Public Works Contracts had been taken on board by the NPHDB and acknowledged that the 2 stage approach is the optimum solution for an extremely risk averse market whilst still presenting considerable project risks and ultimately cost exposure for the taxpayer until the GMP is agreed.

The NPHDB concluded by noting that a detailed pre-tender estimate is currently being prepared, it is based on a data-base of current market rates that are plugged into the BoQs used for tender. Once this estimate is completed the budget for the project is finalised and may not be exceeded. The tender price is based on:

- fully measured BoQ for Phase A works with detailed bills of quantities with an element of approximate quantities for Phase B works (because the design will not be fully complete);
- contingency of 3% in the form of provisional sums are provided to cover the fact that design is not finalised – applies to Phase B works only. These will be removed at GMP;

The risk is managed in the Phase B stage through the inclusion of a pre-stated % contingency that is applied to the contract sum (as adjusted in accordance with the pre-stated mechanism) at the GMP stage to arrive at the GMP. This contingency is to be shared in the event that it is not used during the phase 2 works. It is intended to cover cost increases associated with variations that are contractor risk items. Scope change is a Compensation Event and will result in an adjustment to the GMP. If the final cost of the project exceeds the GMP, the contractor pays the additional cost above the GMP.

Because of the scale and risks posed by the project, the NPHDB market soundings indicated that a 2 stage collaborative process would be key to attracting and sustaining market interest thus generating a competitive tender.

The Chairman brought the item to a close noting that the GCCC is generally satisfied that the approach will meet Government policy requirements for cost certainty notwithstanding the fact that this is not achieved until the GMP is agreed. It is considered that the 2 stage process will provide the optimum balance to both parties in testing the risks presented by the project and allows the contractor input into the final design aspects to explore value engineering options. However there must be sufficient detail provided to tenderers on the price adjustment

mechanism used in the first stage to arrive at the GMP in order to meet the level of transparency required under the EU treaty principles. It is acknowledged that the provision of expert determination to resolve disputes relating to specification and measurement is prudent in dealing with unforeseen issues that are likely to arise in this first stage. Once the challenge of obtaining planning permission is met, the next hurdle facing the NPHDB will be to ensure the tender and GMP come within the final budget figure. He will write formally to the NPHDB to summarise Committee's views. The NPHDB left the meeting at this stage.

The Chairman continued with the remainder of the agenda. Apologies were noted and Angela Rolfe, OPW, who will be replacing Ciaran O'Connor, OPW, was introduced to the committee.

Date of next meeting: Wednesday 18 May 2016.

David O'Brien

Chairman

6 April 2016

Extract from Minutes of GCCC Meeting 20 May 2016 - NPHDB

