

## CONSTRUCTION WORKS PROCUREMENT - AN OVERVIEW

### What is Construction Procurement?

The term encompasses the purchase of construction-related services with the ultimate aim of:

- alteration, refurbishment, maintenance, extension or demolition of an existing building or structure; and/or
- the creation of a new building or structure, including all associated site works.

To obtain the best service and performance from the construction industry, the Client should be closely involved at each step in the process. Successful construction procurement should result in a project delivered on time, to cost and to the desired quality capable of performing the specific business function of that client. The procurement process involves a wide range of skills for which training and development may be required.

### What are the essential requirements?

In the case of construction projects, the quality aspect of **Value for Money (VFM)** relates both to the functionality and build quality of the finished building/structure, and to the quality of service provided by the various consultants and contractors engaged by the Client. The former may include several factors such as design aesthetics; appropriateness and sensitivity to surroundings; ease of maintenance; adaptation to suit future client requirements; and impact on the wider environment. The latter should take account of the particular abilities, skills and strengths of potential service providers, including their aptitude for providing innovative solutions and for working effectively alongside the Client and other team members. (For further information on the VFM framework for construction projects, see [Section 2](#) of the Construction Works Procurement Guidance; [Section 3](#) of the Guidance provides further details on appointment processes).

Contract award procedures must be seen to be conducted in a fair and even-handed manner and in accordance with **legal requirements including European Community law**. Appropriate professional/legal advice must always be obtained at the earliest opportunity; expert procurement advice in these matters should be obtained from the Scottish Procurement Directorate's Policy and Best Practice Branch. (For further information, see the [Procurement Toolkit](#), and [Section 3](#) of the Construction Works Procurement Guidance).

All construction-related procurement decisions should be based on securing value for money (**VFM**) and, in instances where the [Public Contracts \(Scotland\) Regulations 2006](#) apply, this means that contracts must be awarded on the basis of an assessment of both price and quality rather than on the basis of lowest price. In construction procurement, the evaluation process may require the quality criteria to be considered separately from the price criteria. It must be stressed however that **all tenderers who have attained the (pre-determined) quality threshold must have their bids opened for consideration**. (For further information, see the [Procurement Toolkit](#), and [Section 3](#) of the Construction Works Procurement Guidance).

In the case of contracts and appointments which fall below the relevant EC monetary thresholds, the procedures can be simplified but the same principles apply – achieving **VFM**, using competition and being able to justify the contract award decisions. To justify contract award decisions, it is essential that **clear and defensible assessment criteria are established in advance of the selection of tenderers and the evaluation of their bids**. (For further information, see the [Procurement Toolkit](#), and [Section 3](#) of the Construction Works Procurement Guidance).

Finally, it should be emphasised that it is Scottish Government policy that all **contracts should be made in writing** unless there are exceptional circumstances. However, care should also be taken, when holding discussions with potential contractors and consultants, that no undertakings or commitments are unwittingly given which may later be construed as having established a binding contract. **'Letters of intent' should not be issued** other than in the most exceptional circumstances, having taken legal advice and obtained approval from the Director of Procurement, Scottish

Procurement Directorate. There may be situations where an 'interim agreement' can be justified but such a letter must have clearly defined contractual obligations and should also be the subject of legal advice and procedural advice from Scottish Procurement Directorate. (For further information, see the [Procurement Toolkit](#)).

The general principle should be that whenever consultants or contractors are appointed – either singly or as part of a joint venture – **fully executed contracts should be in place at the outset**, along with any appropriate bonds or guarantees. (See [Section 3](#) of the Construction Works Procurement Guidance).

### How does Construction Procurement differ from Goods and Services Procurement?

Specification for the procurement of goods and services is developed from the business case which is presented to SPD in the form of a requisition/request for procurement action – for example, the control document formally starting the procurement process. Construction procurement differs in that there can be no direct acquisition of a building (unless it is a small prefabricated unit, for example a school classroom). New buildings are seldom standard items and the refurbishment of existing buildings can never be standard. The act of creating a new – or extending or refurbishing an existing – building cannot be directly compared to the procurement of goods which can be requisitioned, are often 'off the shelf' and where an immediate choice can generally be made in terms of cost and quality. **The Client's accommodation or property requirements need to be defined and then various options considered.**

The procurement of a building involves commissioning professional services and creating a specific solution. The process is complex, involving the interaction of the Client, design team, contractor(s) (who provide the construction expertise, labour, materials and plant resources), suppliers and various statutory/public interest bodies. Building procurement is often the subject of joint funding, with the different parties having varying degrees of interest in the outcome of the building process. An agreement should be entered into with the various funders. (For further information on Jointly Funded Projects see the [Major Investment](#) section of the Scottish Public Finance Manual).

### Some Common Terminology in Construction Procurement

**Whole Life Cost** — all of the ownership costs related to a building or facility throughout its lifetime, comprising: its acquisition (including design, other consultancy, construction and equipment fit-out), its operational and running costs (including energy use, maintenance and replacement of equipment or components in relation to their respective life cycle costs), and its disposal costs.

**Investment Decision Maker** — the most senior role in the Client's chain of command, responsible for approving the project and thereafter maintaining the visible and sustained senior management commitment to its delivery. The role may be performed at Ministerial, Accountable Officer, board or senior official level.

**Project Owner** — a senior individual within the business area that requires the project, the **Project Owner** is the customer for the project and is accountable to the **Investment Decision Maker** for delivering the project requirements in accordance with the budget and the approvals given.

**Project Sponsor** — the officer appointed by the **Project Owner** who has day-to-day responsibility for the overall success of the project, including its delivery on time, within budget and to the required quality. Sponsoring Directorates (for projects carried out by public bodies) should identify and formally appoint an officer to be responsible for steering the project through the Directorate's finance and management systems.

**Non Departmental Project Sponsor** — where a project is undertaken wholly by an outside body funded by the Scottish Government, the officer appointed within that body with personal responsibility for successful delivery of the project. In some instances, responsibilities may be shared with a Directorate Project Sponsor, in which case the division of responsibilities must be set out in writing.

**Client Adviser** — an independent adviser with a specialist knowledge of construction, engaged at an early stage in the project to understand the Client's business needs and objectives, and to provide impartial guidance on the best way to proceed. This may be available in-house from an appropriately qualified person, but is more usually likely to need the involvement of a consultant adviser (who should not be engaged in any delivery role with the project).

**Project Manager** — the Client's professional agent in the detailed management of the project, who reports directly to the **Project Sponsor** and possesses defined delegated authority to take decisions on his behalf. This role is often carried out by a consultant (but can be accomplished by an in-house appointment with the necessary professional expertise) and provides the technical expertise to assess, procure, manage and monitor the resources needed to complete the project.

**Consultant** — an individual or organisation commissioned to provide the Client with design, cost, management or other professional services.

**Contractor** — the organisation which contracts with the Client to undertake the construction work associated with the project. Depending on the procurement route selected, this may also include design, management and operational responsibilities.

**Project Team** — the consultants, contractors, specialists and others who come together to design, manage and construct a project.

**CDM Co-ordinator** — an individual (usually a consultant) appointed by the client to implement the health and safety requirements of the Construction (Design and Management) Regulations 2007.

**Constructionline** — a national (UK) computerised database of information on building contractors and consultants, approved as being financially sound and technically capable of undertaking various types of contracts up to specified values for public sector clients. The database is owned by the UK Department of Business, Enterprise and Regulatory Reform.

### What are the Client Responsibilities?

A successful project relies on mutual integrity, cooperation, communication, fairness, objectivity, courtesy and professionalism. The Client is the pivotal figure in the project and is in a position to lead by example through the right approach to the project and a commitment to **teamworking** and **VFM**, so must therefore:

- allow sufficient time (before and during construction) to fully plan the project and get the construction sequence right;
- clearly and fully define his needs and expectations in the brief, since late changes of mind can prove expensive in terms of timescale, cost and quality;
- ensure that the appropriate team is appointed (either collectively or individually) to provide advice and to represent the Client's interests — they must be suitably resourced, qualified, experienced and able to work together as a team;
- analyse the risks attached to the project, quantify them, manage them and make appropriate financial and time provision for them;
- define the parameters of time, cost and quality before the construction phase commences;
- take account of project cost over its whole life and not on the basis of initial (construction and professional fee) costs;
- ensure that the necessary financial and other resources are available when required;
- meet all statutory obligations, including health and safety and EC legislation requirements;
- regularly monitor the entire development process throughout all of its stages, including responding to the reports of **gateway reviews** carried out at key approval points in the process and carrying out post project evaluations of the process and end product on completion; and
- display the leadership and management skills of a best practice Client.

## What comprises the Construction Procurement Process?

The **Generic Procurement Process** (see the [Procurement Policy Manual](#)) does not directly translate to construction procurement situations, but is broadly comparable. In construction procurement, once the decision to proceed with the project has been made, the Client will then embark on the procurement process. This can generally be described as follows.

### (a) Setting up the project

This includes:

- appraisal of all of the options available to the Client (including 'do nothing' or 'do minimum') and identification of those which will best serve the business aim (See the [Appraisal and Evaluation](#), [Major Investment](#) and other sections of the Scottish Public Finance Manual and HM Treasury's [The Green Book: Appraisal and Evaluation in Central Government](#));
- nomination of members of the client body to fulfil the specific Client roles (See [Section 1](#) of Construction Works Procurement Guidance);
- examination of the case for private finance using the Non Profit Distributing (NPD) model. An early contact should be made with the [Scottish Futures Trust](#);
- obtaining external professional advice and support if this is not available in-house. This may involve the appointment of a client adviser who will give guidance on the preparation of the economic appraisal and options to meet the Client's needs including possibly a non-build option (i.e. business re-organisation rather than a new or upgraded facility) (See [Section 1](#) of the Construction Works Procurement Guidance);
- confirmation of the business case by setting out those essential components which will subsequently form part of the strategic brief (for example, initial budget, outline programme, benefits and risks) and by establishing time, cost and quality benchmarks against which the project can be monitored as it proceeds (See [Section 1](#) and [Section 4](#) of the Construction Works Procurement Guidance);
- development of the Client's brief into a full project brief including consultation with end users;
- identification of the most appropriate strategy to procure the building (See [Section 3](#) of the Construction Works Procurement Guidance);
- appointment of the **Project Manager**, who will be responsible for taking the project forward to its conclusion. The role of the **client adviser** will diminish on this appointment (See [Section 3](#) of the Construction Works Procurement Guidance); and
- review of the procurement route on appointment of the **Project Manager**. This may be required due to changes in the Client's requirements or on the advice of the **Project Manager** (See [Section 3](#) of the Construction Works Procurement Guidance).

### (b) Defining the project

This includes:

- formal agreement of the strategic brief prepared by the **Project Manager**, including functions to be provided, cost parameters, quality of design and phasing of programme if required;
- establishment of project control and management procedures, including arrangements to meet the requirements of funders in the case of jointly-funded projects;
- preparation of a project execution plan by the **Project Manager**, and agreement of key aspects of that plan and timetable; roles, responsibilities and delegated authority; and
- ensuring that risk management and value management are employed and that robust capital and whole life cost control procedures are in place.

### (c) Assembling the team

This includes:

- drawing up a list of suitable consultants both in terms of technical and project specific expertise, and using data from Constructionline and other sources as appropriate (such as framework agreements) to check the market capacity;

- selecting and appointing the project team through a combination of competitive tendering/interviewing to obtain the most economically advantageous tender or, in specific circumstances, negotiating or conducting a “Competitive Dialogue” (See [Section 3](#) of the Construction Works Procurement Guidance); and
- drawing up contracts between the Client and design team defining the scope of service and obligations. **Where possible, standard unamended contract forms, issued by recognised bodies, should be used.** Bespoke or amended forms may be required in certain circumstances; however, it will be necessary to ensure that they are both legally and technically sound (See [Section 3](#) of the Construction Works Procurement Guidance).

#### (d) Design

The following refers to a traditional form of procurement (i.e. completion of design by specialists prior to tendering) and may need to be adapted for other forms of procurement. This includes:

- clarification of issues within the design brief;
- development of the concept design to detailed design by the design team in collaboration with the [project sponsor](#) and client body;
- ensuring that the statutory consents and legal, financial, insurance and health and safety matters have been resolved and site access is available prior to commencing construction;
- choice of the most appropriate procurement route (See [Section 3](#) of the Construction Works Procurement Guidance);
- establishment of change control procedures to regulate project cost;
- taking account of the [Scottish Government’s Policy on Architecture for Scotland](#), which aims to encourage good architecture in publicly and privately commissioned projects. (Further information can be obtained from the Architecture and Place Division of the Built Environment Directorate);
- consideration of sustainability issues (the materials chosen for the scheme and the overall impact of the building);
- taking the health and safety implications of construction and operation into consideration; and
- full consideration of life cycle and whole life costs.

Further information is contained in [Section 6](#) and [Section 7](#) of the Construction Works Procurement Guidance.

#### (e) The Public Contracts (Scotland) Regulations 2006

It is essential that these Regulations are followed where they apply and to ensure that the tendering process is competitive in an EC context. Full information on the Regulations can be obtained:

- in the [Procurement Toolkit](#);
- in the International Obligations section of the [Procurement Policy Manual](#); and
- from the Scottish Procurement Directorate’s Procurement Policy and Development Division.

#### (f) Tendering

This includes:

- normally, where the contract value lies above the relevant EC threshold, invite expressions of interest by placing a notice in OJEU;
- for contracts that are not subject to the Regulations, ensure the invitation seeking expressions of interest is suitably advertised (e.g. by using the [Public Contracts Scotland](#) portal);
- checking the financial and technical suitability of contractors (e.g. by use of [Constructionline](#) and other sources);
- ensuring that tendering procedures are clear, fair, capable of withstanding scrutiny by audit and are in line with Scottish Government requirements (See [Section 3](#) of the Construction Works Procurement Guidance);

- compliance with appropriate industry guidance or codes of procedure for selective tendering, insofar as they are compatible with the Regulations; and
- ensuring that all tenders are comparable on a like-for-like basis in terms of cost and contract period.

#### (g) Construction

This includes:

- management of the project during the contract period to control costs and avoid disputes. This necessitates the clear defining of responsibilities and encouragement of a **teamworking** approach;
- regular monitoring and reporting, to analyse all aspects of the project as construction progresses; and
- taking corrective action (if required) following the **gateway reviews**, carried out at key stages of the project (whether in-house or by independent scrutiny).

#### (h) Completion

This includes:

- oversight of testing and commissioning procedures;
- coordination of the reporting and remedying of defects;
- receipt of the health and safety file from the CDM Co-ordinator; and
- the agreement of final accounts in line with contractual requirements.

#### (j) Post project evaluation and post occupancy evaluation

This includes:

- completion of a formal post project evaluation in order to review the project performance, its delivery of objectives and **VFM**, and to identify lessons to be learned from the procurement process. These lessons should be used to influence the approach to the procurement of future schemes; and
- completion of a post occupancy evaluation (possibly by an independent consultant) which focuses on whether the building is meeting user needs and identifies lessons to be learned.

### What are Approval Gateways?

The need to carry out regular monitoring reviews at key stages in the procurement process is introduced in the [Appraisal and Evaluation](#), [Major Investment](#) and other sections of the Scottish Public Finance Manual. In the case of construction procurement the same principles apply, including the need for independent scrutiny in the case of certain mission critical or high risk procurements (**Gateway Reviews**), but there are a number of procurement route options available. As a result, the Client or funding organisation may need to tailor the **approval gateways** to the procurement route chosen and to ensure that the project does not proceed further without specific management and funding disciplines being in place. (For further information on **approval gateways** and the **VFM** framework, see [Section 2](#) of the Construction Works Procurement Guidance).

### Where does Estimating and Cost Control fit in?

It is vital to the success of the construction process that proper capital and whole life cost estimating procedures and strict cost control are employed in order to maintain budgetary limits. The **project sponsor** and **project manager** must ensure that cost targets are being met at each of the **approval gateways** and that procedures are in place to warn if the budget is in danger of being exceeded. These financial reviews must ensure that the project remains affordable and that funds are available to cover planned expenditure up to the next **approval gateway**. Appropriate early action must be taken, if required, to keep the project within budget. (For further information on financial aspects, see [Section 4](#) of the Construction Works Procurement Guidance).

## How vital is Risk Management?

An important element in the cost control and overall delivery strategy of a project is to ensure that potential risks are identified at an early stage and that a risk management strategy is put in place. This includes setting up a risk register, assessing the likelihood of occurrence, quantifying the impact and taking an appropriate response – such as risk avoidance, reduction, transfer, sharing or retention. Thereafter, the risk allowances built into the project budget must be monitored and controlled. Cost estimates should therefore comprise a base estimate plus a risk allowance to cover the expected costs of risks identified by the project team, working in collaboration with the Client. In practice, not every risk in the register will materialise and therefore the total risk allowance should not simply comprise an aggregation of all possible risks. It requires professional judgements to be made about the probability of each risk occurring as well as an evaluation of its financial impact. (For further information on risk management and allowances, see [Section 2](#) and [Section 4](#) of the Construction Works Procurement Guidance).

## Which Statutory Obligations apply?

There are numerous statutory obligations with which Clients may have to comply during the course of their projects, although the extent of these will depend on the scale of the project, its location and the legal status of the building (see next section on Crown Buildings). The following represents an indication of the broad range of statutory obligations which a Client may encounter:

- planning permission, including obligations regarding scheduled monuments, listed buildings, conservation areas and tree preservation orders;
- building regulations;
- Road Orders and Compulsory Purchase Orders;
- the need to obtain fire certificates, to meet public health requirements and to maintain insurance cover for legal liabilities;
- the Disability Discrimination Acts 1995 and 2005;
- EC procurement rules, as incorporated in UK Regulations;
- health and safety requirements including the [Construction \(Design and Management\) Regulations 2007](#), which place responsibilities on clients, designers and contractors throughout a project's lifetime (see [Section 5](#) of the Construction Works Procurement Guidance) and
- the provisions relating to adjudication and payments in construction operations as required by Part 2 of the [Housing Grants, Construction and Regeneration Act 1996](#).

## What about Crown Buildings and Building Regulations?

On 1 May 2005 most of the [Building \(Scotland\) Act 2003](#) came into force, but the section applying the Act to Crown buildings ([Section 53](#)) was not commenced at this time in order to ensure a smooth transition to the new building standards system. [Section 53](#) was implemented on 1 May 2009 for all Crown buildings except those occupied or used for the purposes of defence or national security by Ministry of Defence or Security Services, including Special Intelligence Agencies. In all other cases Crown buildings are now subject to building regulations. However, the implementation of [Section 53](#) contains transitional provisions which allow ongoing work to continue for a limited period with Crown immunity.

Compliance with building regulations requires the 66 mandatory expanded functional standards in [schedule 5](#) of the regulations to be met. [Technical Handbooks for Domestic and Non-Domestic Buildings](#) provide guidance on ways of meeting the standards. The main changes in 2005 to the regulations however relate to the procedures rather than the set technical requirements. For example, the application of standards to alterations and conversions is significantly different and the amount of work which can be carried out without a warrant, provided it is executed in a way that would comply, is significantly expanded.

The functional standards give considerable flexibility, but cases will remain where there is a doubt about whether proposals do comply with the standards. There is the option of the verifier and

applicant asking the Scottish Government Building Standards Division for a formal 'view' on whether a proposal complies.

After commencement of [Section 53](#), the system of Crown opinions will continue for ongoing projects still benefitting from Crown immunity under transitional provisions. The Crown opinions system is the equivalent of the views procedure which applies to projects that require a building warrant.

The role of the 32 Scottish local authorities has been extended to cover Crown buildings; providing a single route for gaining building warrant approval for all buildings in Scotland. The building standards service of each local authority operates as the verifier to process building warrant applications and accept completion certificates for all buildings in their own geographical area.

Further exemptions from the procedural requirement to gain building warrant approval have been included under Schedule 3 to Regulation 5 of the [Building \(Scotland\) Regulations 2004](#) (as amended) to cover particular Crown buildings. These buildings and types of work do not require a building warrant on the basis that the work will comply with the technical requirements of building regulations. The new types of building and work relate to Her Majesty's private estate, the Scottish Parliament and limited coverage for prisons and court custody suites.

### Where can I get further help and advice?

The construction process requires a wide range of skills and it is essential that Clients seek the advice and support of the appropriate professional expertise at an early stage. Help is available from the following sources:

#### (a) Construction Procurement Policy, Procedures and Best Practice

**Construction Advice and Policy Division of SPD** is the central contact point in the Scottish Government for advice on policy, procedural and best practice matters relating to construction procurement. It provides support on a range of project definition, management, cost and **VFM** issues. It also provides support on construction-related legislation. **It should, therefore, be the first point of contact for Clients considering such procurement**, but ultimately executive responsibility for the realisation of projects lies with the Client's team, notably the project sponsor.

#### (b) Roads and Bridges Procurement

**Transport Scotland** is responsible for all matters concerning the procurement of works, services and supplies for the management and operation of trunk roads and motorways in Scotland (including maintenance and new works). Although the broad principles of works procurement apply equally to roads projects, this is an area generally undertaken by specialists. Transport Scotland has a comprehensive set of procedural manuals and guidance notes concerning the particular aspects of their responsibilities as well as bespoke forms of contract for different types and size of project.

#### (c) Property Management, Acquisition and Disposal

**Property Advice Division** should be consulted on all property matters including management, acquisitions (leases or purchases), disposals, and appraisal and evaluation of existing property.

#### (d) Design Quality

The **Architecture and Place Division of the Built Environment Directorate** provides advice to Ministers on policy matters relating to architecture. The aim of the Unit is to contribute to a better physical environment through promoting and encouraging better architecture. The Division's duties include the provision of advice on design quality issues in respect of capital building projects and programmes. The Division also acts as the sponsor body for [Architecture and Design Scotland](#) which is a NDPB established to promote good architectural design.