

## **Trowers & Hamblins/CABE – Briefing Paper for ISSG: Monday 1<sup>st</sup> February**

### **What work are Trowers and Hamblins currently engaged with in the procurement and valuation space?**

We act for many clients in the public and private sector, advising them on compliance with public procurement law and structuring procurement process to secure the best outcomes. We are committed to working and engaging with any parties who are interested in helping reforming public procurement to protect the public interest. The paper on Price Evaluation is one part of the process of necessary reform but there are many other areas that require exploration.

Trowers & Hamblins have a MOU with CABE and have joined forces, primarily in the building safety and procurement space, to progress a wide-ranging discussion on best practice in construction procurement and the need to change behaviours. This builds on CABE's commitment to reforming construction practice and professionalism.

Rebecca heads up T&H's Public Procurement expertise and sat on WG11 for Procurement Competency and is a member of the MHCLG PAG. Richard was involved in WGs 0, 6, 7 and 9 and has spent a significant amount of time working on competency standards including drafting the Flex8670 (overarching standard for building safety competence which includes behavioural competencies aimed at driving industry reform).

### **What do you see as the biggest barriers to improving procurement practices?**

#### **Client capacity**

Given that the Chapter 9 procurement recommendations are not being legislated for, the only "players" in the construction sector that are able to mandate them to improve the response of the supply chain are clients.

#### **Understanding evaluation models**

Despite clients using price/quality ratios that prioritise quality (eg 40/60 or 30/70), the price formula that most often sits behind the declared weighting (where lowest price = highest marks) encourages a "race to the bottom" that can only be partially mitigated by a prioritised quality weighting. Moreover, by adopting this ratio, the client is encouraging poor bidder behaviour by asking them to provide a price that it thinks is going to be low enough to win the contract, not a realistic price for the contract requirement to be performed.

This evaluation message needs to be considered in light of the current (and historic) state of the UK construction industry, where margins are low and competition is significant. Given the lack of fat in the prices bid, contractors often seek to make up the money they lost to win the contract by submitting multiple variations and claims. Put another way, because the relationship has been established on a fiction, the result of the procurement leads to mistrust and frustration between the parties, substitution of materials specified for ones of lesser quality, poor payment practices down the supply-chain, disputes, claims and poor safety outcomes.

#### **Understanding what behaviours their business model drives**

Clients continue to pursue current procurement practice based on time and cost assumptions that are simply wrong. Any change in procurement which more accurately manages time and cost will therefore appear to change terms of business to the client's detriment i.e. they will appear to be more expensive and potentially take longer. This creates a significant barrier to adopting better procurement practice that more effectively manages risk and cost. Until time and cost are properly accounted for this will continue to make choices based on distorted expectations.

In reality it is common for the overrun cost (in real terms taking into account additional construction costs, variations, client time and resource, operational under-performance, reduced durability, defects, snagging, dispute resolution including litigation, lower asset value, increased maintenance, lower satisfaction) to be significantly higher than the tender price, and the programme is often also longer.

Quality of design and construction also suffer seriously as a result of this vicious cycle. Clients are dissatisfied with the perceived failure to deliver and push harder on price reduction to cover overspend in future projects; the construction industry responds by finding further marginal cost reduction measures or through contractual mechanisms rather than focusing on delivery. But seeking to manage cost in this way is a collective delusion:

- The building could never be built for the price tendered
- The works could never be completed in the time required
- The client lacks the ability to interrogate quality of many hidden aspects of the building work they receive; industry can only balance budgets by sacrificing intangible aspects of quality.

**Do you think the culture of the construction industry is moving away from the previous focus on lowest cost during procurement processes leading to a “race to the bottom”?**

Not yet. There is a general misunderstanding as to what creates the "race to the bottom". Clients believe that if they weight quality 51% or more in the overall evaluation then they will be procuring on a quality-led basis. This is not the case (see the White Paper at p11 "Bidder Behaviour") but anecdotal evidence shows that numerous procurement professionals and clients in the construction sector see weighting (rather than the scoring rules or methodology) as the defining factor in an evaluation model.

By using a relative pricing model, whereby the lowest priced bid gets the highest marks, with the other, more expensive bids, receiving pro-rated scores, a client encourages bidders to create a fiction. This fiction is the price that the contract will be performed at, because by adopting such a relative pricing model the client is not asking the bidder to provide a realistic price for the contract to be performed, but a price that the bidder thinks is going to be low enough to win that contract.

Certainly in the construction industry where margins are low, this approach to pricing in procurement sets the tone for the entire relationship, with the clients suspending disbelief to claim the savings at the point of procurement. Clients are also seriously disadvantaged in being able to properly evaluate design and construction quality at bid stage, exacerbating the fiction that value is being achieved.

Further, there are numerous governance frameworks (eg the Regulator of Social Housing's Value for Money Regulatory Standard) that frames "best value" as "the desired standard at the lowest price". Further procurement legislation and case-law compounds this position by noting that "Most Economically Advantageous Tender" must be a mixture of quality/non-price elements and price – with the price being assumed as the lowest price (rather than lowest realistic cost).

The problems inherent within construction need to be seen as conjoined with client actions and responsibly for the reasons set out above. Trying to separate industry behaviour from client decisions risks obscuring the joined up actions required to see the construction sector itself evolve in the right way.

**How has the publication of your “White Paper: Price evaluation models for the housing sector” been received?**

Positively. We pro-actively sent it to other procurement lawyers (over 80 of them), contractors, consultants and a significant number of our private sector and public sector clients, as well as the Cabinet Office (Rules Reform Team, Crown Commercial Service and the Infrastructure Projects Authority), MHCLG, Homes England, BEIS, the LGA, the Regulator of Social Housing, Chartered Institute of Housing, the National Federation of Housing, Construction Leadership Council, Constructing Excellence, the National Housing Forum etc.

But it is the beginning of the journey. We need clients to adopt it, trial it and report back to ensure that the alternative price models work and clients can have confidence in them. We also acknowledge that price evaluation is just one piece of the procurement jigsaw and needs to be supported by Quality Assurance Standards, collaborative procurement models, better cost and programme estimates and a definitive lead on all of these from central government. Nevertheless, we see it as a key element of the procurement process and one that deserves particular attention.

Clients decide on what they need, and how they want it delivered. The construction industry is highly optimised to respond to these clients requirements and can do so quickly if clients re-define the rules of engagement. Clients must accept that a profitable construction industry is fundamental to safe outcomes, and should engage responsibly to ensure that projects are realistically priced.

This will not by any means solve all of the construction industry’s problems overnight. What we do know for certain is that continuing as matters stand will almost certainly support poor business practice in the longer term.

**Rebecca Rees, Trowers & Hamlins**

**Richard Harral, CABE**

**26 January 2021**