

## Queensland Government building contracts

Master Builders appreciates the engagement with the Department of Energy and Public Works on the procurement and delivery of government building contracts. The Practice Note 'managing cost increases and supply constraints' has been gratefully received.

Via our committee processes, we have recently reviewed contractual terms in Queensland Government standard building contracts along with procurement and delivery practices, and having regard to the Practice Note. The following issues are raised for your consideration.

### Escalation

While the 'hyper-escalation' seen earlier in 2022 may have shown signs of stabilising, it is unknown whether the industry will see long-term stability of pricing. Member feedback indicates some materials are still experiencing unpredictable inflation. Supply chain disruptions, shortages of labour and materials and unpredictable pricing appear to be the 'new normal'. Further, given changes in industrial matters, labour rates are difficult to predict.

We acknowledge the Practice Note on managing cost increases and supply constraints references use of provisional sums where an item is identified at time of tender as being subject to unpredictable price changes.

It is encouraging that government is willing to receive tenders where particular elements are able to be adjusted. However, the provisional sum mechanism is not the appropriate mechanism for an increase or decrease in price in specified products or materials. Further information is requested as to the manner in which the Superintendent will value the specified item should it be directed to be carried out, and whether guidance will be provided in this regard.

Further, it is not always possible to predict which items may be subject to unforeseen price increases. Therefore, Master Builders calls for a rise and fall clause be included in building contracts:

- (a) for specified items, as an optional special condition, for contracts with a value over \$2 million, and
- (b) for materials and labour in contracts with an estimated contract period greater than 12 months.

Such a provision would enable fair price adjustment during the contract through a pre-agreed contractual mechanism.

Other measures that can assist with uncertain material pricing include early contractor involvement in design, co-sharing risk associated with innovative alternative design proposals and reimbursement of costs of early ordering of key materials.

### Industrial relations delays

In the Managing Contractor contract, being the form of contract to be used for 'BPIC projects', the ability for the Contractor to claim for delays caused by industrial conditions is limited to "industry-

wide industrial action not caused by the Managing Contractor occurring on or before the Date for Practical Completion".

By contrast, AS4300 contains the wider "industrial conditions" where permitted by the Annexure.

Given the impacts of the Queensland Government's Best Practice Principles (BPPs) and Best Practice Industry Conditions (BPIC), and the prospect of industrial relations action being taken on a government building site which is not 'industry-wide' and also not caused by the Managing Contractor, it is requested the cause of delay in clause 49.3.4(b) of the Managing Contractor contract be broadened to 'industrial conditions not caused by the Managing Contractor occurring on or before the Date for Practical Completion'.

In addition, it is requested the grounds for delay damages in clause 50 extend to industrial matters outside the control of the Managing Contractor.

### Force majeure

In light of the unforeseen events of the COVID-19 pandemic, and the uncertain state of the world we now live in, Master Builders calls for government building contracts to provide for both time and costs for unforeseen events causing delay, that are beyond the reasonable control of the contractor.

For the Managing Contractor contract, a broadening of grounds in clause 49.3.4(a)(v) is requested as well as for clause 50 to apply.

### Indemnities and liability

Contractors should not be required to indemnify the State against any third person claiming costs or expenses in relation to the Queensland Procurement Policy, particularly given the controversial Best Practice Principles and Industry Conditions. Accordingly, clause 21.3.2 of the Managing Contractor contract should be amended.

It is also requested that government include a cap on liability in building contracts. Caps on liability have long been permitted for consultancy services, and it is considered fair and reasonable that head contractors similarly have a cap on liability, correlated to insurance requirements.

### Insurance

Insurance cover is currently difficult to obtain and expensive. This is particularly so for professional indemnity insurance for construction contractors. Feedback from members indicates it is increasingly difficult to obtain PI insurance over \$20 million, and excesses are increasing.

Master Builders requests the Queensland Government review its contractual requirements for insurance (i.e. limits and excesses), including PI insurance, acknowledging the current market.

## Working hours and days

Master Builders appreciates the guidance included in the Practice Note on managing cost increases and supply constraints for government to better plan its building projects. Allowing sufficient time for the project to be completed should result in weekend work being the exception rather than the norm. We also request government consider options for works to be carried out on weekdays where such work would normally be required on a weekend. For example, on brownfield school projects we are advised that certain works are not permitted on a weekday. Additionally, school projects requiring completion ahead of the commencement of the school year is understandable but should be procured with sufficient time to enable completion without compressed schedules.

We request the Queensland Government explore all options to avoid construction workers being required to work six day weeks on government building projects. Given workplace health and safety psychosocial requirements and the importance of worker wellbeing, we are confident industry and government can together solve these issues.

## Tender conditions

### Validity period

Master Builders acknowledges the letter dated 17 August 2022 from the Minister for Public Works and Procurement and welcomes the strategies identified supporting the construction industry.

Our membership has raised an issue in not having a tender validity period in a tender process, as this can lead to lengthy tender periods and process concerns as to the manner in which a preferred tenderer may be able to adjust its tender. In addition to holding prices, tenderers have difficulty keeping tendered personnel allocated to the project for prolonged tender periods. It has also been noted the Code of Tendering AS 4120-1994 requires tender documentation to specify the tender validity period.

Master Builders would prefer a shorter defined period. On reflection, it is understood that government may not be in a position to award a contract within 30 days of an invitation to tender, and accordingly a 60 day tender validity period may be appropriate in the current environment.

Master Builders is keen to continue working with the Department of Energy and Public Works in relation to procurement of government building projects.

### Reliance on information

Where the Principal provides information with tender documentation, such as geotechnical or other site information as a result of investigations carried out by the Principal, the Contractor should be able to rely on that information.

For example, if geotechnical information suggests a particular soil type and another type is actually encountered which would result in additional cost (but not as a latent condition), the contractor should be entitled to a variation.

The alternative is an expectation that all tenderers will carry out their own site investigations which is not a good use of resources, particularly in current circumstances of shortages.

Master Builders requests tender documents set out clearly which information tenderers are permitted to rely upon and that which may not be relied upon.

### Contract administration

Master Builders has received feedback from members that the Managing Contractor form of contract has been the subject of recent amendment negatively impacting the administration of the contract. As an example, we're advised subcontractor variations cannot be managed by the Managing Contractor without Principal involvement, which removes the ability of the Managing Contractor to effectively deliver the project.

The Managing Contractor form of contract has historically been well received by industry and a leading example of collaborative delivery of significant building projects. We acknowledge the advice from the Department that a collaborative approach to contracts is encouraged and expected, and we agree it must be prioritised by principals and industry. The contractual terms do still play an important role in how parties interact in delivering projects.

Master Builders would like to better understand the reason for these changes, and to discuss the impacts on industry, in the hope positive change can be effected.

Master Builders is also keen to work with the Department of Energy and Public Works in relation to policies and guidelines impacting the delivery of capital works projects, including implementation of recommendations following the Queensland Audit Office performance audit report 'Contract management for new infrastructure' May 2022.

### Consistency

Master Builders would also like to discuss how greater consistency of approach can be achieved across all Queensland Government capital works projects.

### Use of AS2124

Master Builders understands Standards Australia is considering ceasing publication of AS2124-1992 on completion of the review of AS4000. Master Builders is keen to discuss with the Department of Energy and Public Works the intended future forms of contract for large 'construct only' and 'design and construct' building projects.

We have also received feedback that some Government agencies or authorities are using AS2124 with special conditions that are different to the standard special conditions published by the Department of Public Works, and including design obligations. We would welcome a further discussion in relation to this.

### Prequalification – BPP projects

Master Builders has previously flagged concerns in relation to the prequalification process for BPP projects, and the process involving the Industry Reference Group (IRG). Concerns were identified during the consultation process for BPP prequalification and since.

The main issues of concern are:

- complexity of process and time taken to prequalify, particularly for subcontractors (for example, the requirement to set out history of past projects, checking the entity's history with multiple regulators and consulting with the IRG prior to making a decision)
- notification to IRG members of the name of prequalified subcontractors
- insufficient subcontractors may be prequalified for BPP projects leaving head contractors exposed to delays and industrial disputes.

Master Builders supports its members having the ability to undertake government building projects and for government requirements to be streamlined and simplified.

Master Builders proposes subcontractors not be required to go through detailed prequalification requirements with the Queensland Government in order to be engaged by a Managing Contractor.

Industry would prefer subcontractors were educated in the requirements of the BPPs and BPICs, and any prequalification could simply be confirmation of ability and willingness to comply with BPICs, without disclosing details of prequalified subcontractors.

### Accountability

While we appreciate the engagement with the Department of Energy and Public Works and looks forward to continued regular engagement we are keen to work on a limited number of measures for government to report against for government building projects. For example:

- the time taken from invitation to tender to contract award
- the number or percentage of projects where weekend work was required
- the time taken to determine variations and claims.