

Eugene F Collins Presentation Construction Contracts and the Green Agenda – how are the Contracts likely to respond?



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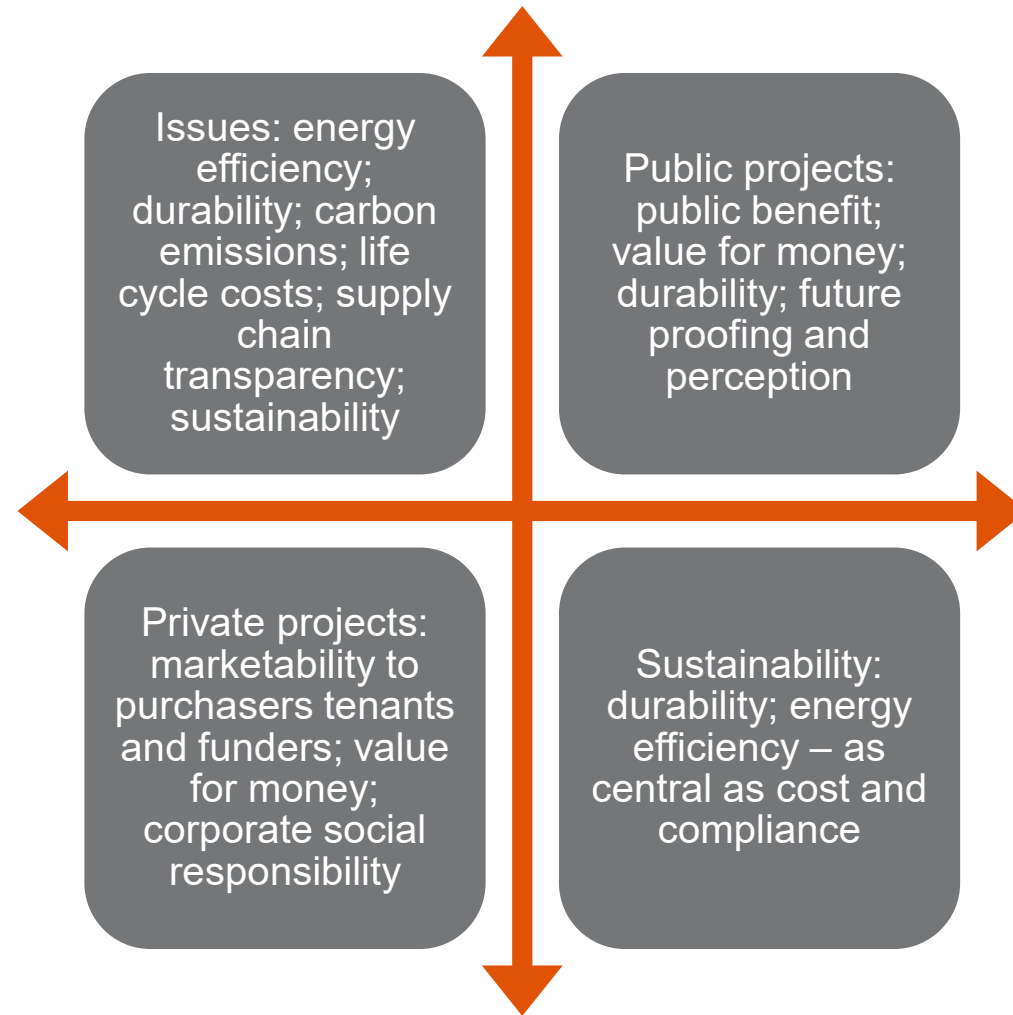
Siobhan Kenny
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Tuesday 15 June 2021

Introduction

- 1 There is nothing new in the concept of Green Development or Green Public Procurement
- 2 EU Directives and Regulations implementing them in Ireland; National legislation; Building Control Regulation and Building Regulations
- 3 Agencies: EPA & SEAI
- 4 Successive governments – policies, protocols, consultations and programmes.
- 5 Programme for Government 2020

New – urgency and priority



Agenda defined through formulation of Requirements for both Design Team and Contractor

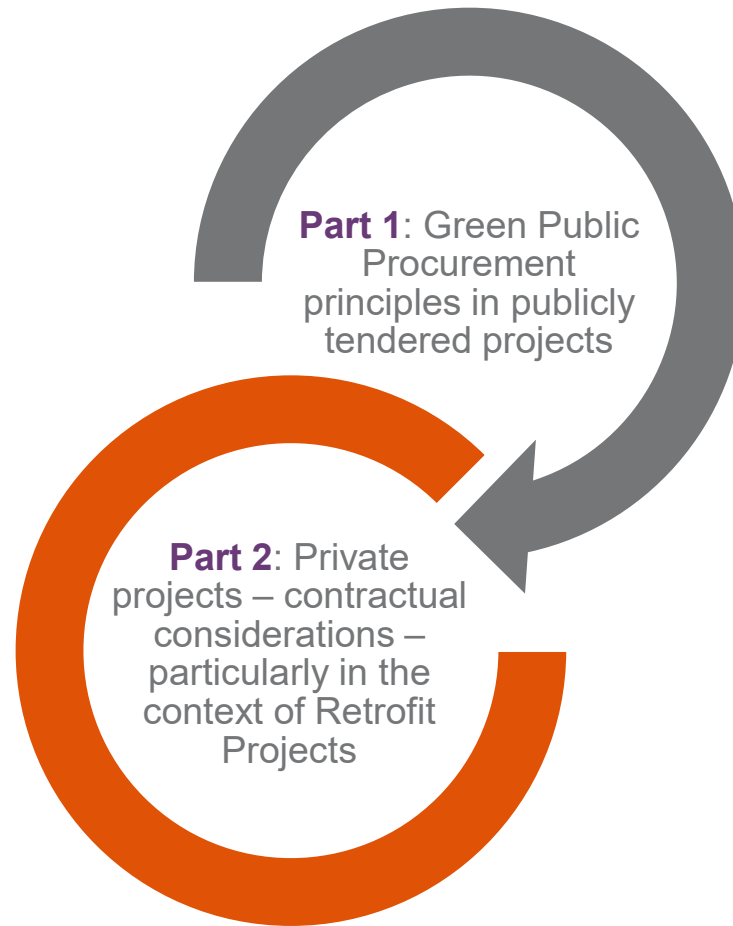
Public

- Employer's Requirements appended to unamendable forms of appointment and contract

Private

- Contract Documents – including Drawings, Specifications et al, appended to bespoke Contract – usually standard from amended

How are the Contracts Responding to the Green Agenda



Public Procurement and the Green Agenda

Siobhan Kenny | Associate

Green Public Procurement ('GPP')

'a process whereby...authorities meet their needs for goods, services, works and utilities by choosing solutions that have a reduced impact on the environment throughout their life cycle, as compared to other alternative solutions'.

European Commission document published in 2016

Programme for Government 2020 – Green principles and agenda enshrined – application of GPP principles in all public procurement from 2023 onwards

Circular 20/2019 – DPER

- Applies to all Government Departments
- Applies to goods and services contracts
- Instructions:

Apply Green criteria in relevant processes – subject to guidance from Department of Communications, Climate Action and Environment and budget

Incorporate GPP measures into planning and reporting cycles

- Programme for Government indicates instruction will be rolled out to all public authorities
- Every stage in the procurement process offers opportunities to take green issues into account

GPP Measures and Procurement Process



Considered by CIF – ‘CIF Guidance to Supporting Green Construction’



Different phases set out – and opportunities considered

GPP measures – the first opportunity to apply

The Business Case – formulated through – scoping; consideration of public benefit; potential cost; timing; leading to the formulation of a project plan to be approved by Government Department or funding authority

First opportunity to apply GPP principles at a high level:

01

**Demolish and
reconstruct or
retrofit and
update?**

02

**Energy efficiency
requirements?**

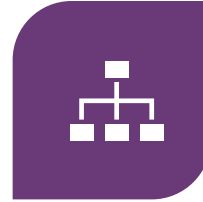
03

**MEAT; Price; Life
Cycle costs and
durability?**

Design Team



**Design Team
selection and
appointment**



**Business Case approved
– choose the Team**



**Selection criteria – will include
experience and expertise in similar
projects – including GPP elements of the
project identified**



**GPP measures –
demonstrate suitable
technical expertise**



**Ability to exclude
inexperience from
consideration**



**Award criteria –
enhanced expertise in
delivery of GPP items
can be rewarded**



**2014 EU Directives – fully
supportive of inclusion of
environmental considerations in
selection and award criteria**

Choose the method of procurement

GPP considerations



Restricted procedure for complex technical projects: pre-qualification to exclude inexperience?



Framework for multi-location project: selection criteria might include GPP considerations re transportation and movement between works locations?



Open procedure: selection criteria might include evidence of established Environmental Management systems?

Works Requirements for the Building – develop with the Design Team

Potential GPP requirements



Energy efficiency standards; insulation; durability; materials selection and requirements re transparency and sourcing; product selection, warranties and performance guarantees; life cycle costs; compliance with relevant standards and regulations; labelling and traceability



Requirements for testing, commissioning and demonstrable meeting of Performance requirements



Post completion requirements with regard to performance

Selection and Award Criteria: Potential GPP measures

Selection/Exclusion Criteria

- Experience and expertise in similar projects
- Environmental Management Strategy
- Waste Management and Disposal Strategy

Assessment Stage: reward enhanced GPP measures

- Use of renewable energy
- Locally sourced materials/workforce
- Strategy for spoil disposal
- KPI achievement strategy

Procurement rules apply

- **Caveat:** Public Procurement – Full visibility and transparency required to allow each potential bidder equal opportunity – all details must be included in ITT
- **The next steps:** ITT published, bids submitted; bids assessed, contract awarded, standstill period expired – Works commence



Award the Contract

The Contract - standard form PWC Contract



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graph TD; A[The Contract - standard form PWC Contract] --> B[Works Requirements for the Building as developed with the Design Team, and as appended to the ITT]; B --> C[Contractor's obligation – to deliver the Works as described in the Works Requirements and in accordance with the provisions of the Contract];
```

Works Requirements for the Building as developed with the Design Team, and as appended to the ITT

Contractor's obligation – to deliver the Works as described in the Works Requirements and in accordance with the provisions of the Contract

The Contract provides



**Section 8
Quality, Testing
& Defects**



**Opportunity: GPP measures in
monitoring/checking to ensure
compliance with Contractual
standards specified**



**Section 4
Management**



**Opportunity: use Change
Orders, Works Proposals or
Value Engineering Proposals
for GPP measures**

Completion and Post-Completion

Completion of the Works and Handover

- Opportunity to ensure that implementation of GPP measures has been achieved through receipt and review of all compliance documentation, testing and commissioning reports; product warranties and guarantees in respect of each such measure and requirement – all as provided for in the Works Requirements

Post completion – Defects Liability period

- Opportunity to test and verify compliance with performance specifications in respect of delivery of GPP measures and, in default of achievement of required standards to hold Contractor accountable

Construction Contracts & the Green Agenda

Margaret Austin | Partner

Legal Context

Climate Action and Low Carbon Development (Amendment) Bill 2021



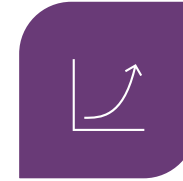
Climate Action Plan
2019



Built environment
accounts for 12.7% of
greenhouse gases in
2017



Buildings 70%
reliant on fossil
fuels



Approximately
23,000 retrofits
to date



Homes use 7% more
energy than EU
average and emit
58% more CO₂



80% of homes
assessed have
a BER C rating
or lower



Recognition that
significant retrofitting
required to reduce
emissions



Install 400,000
heat pumps



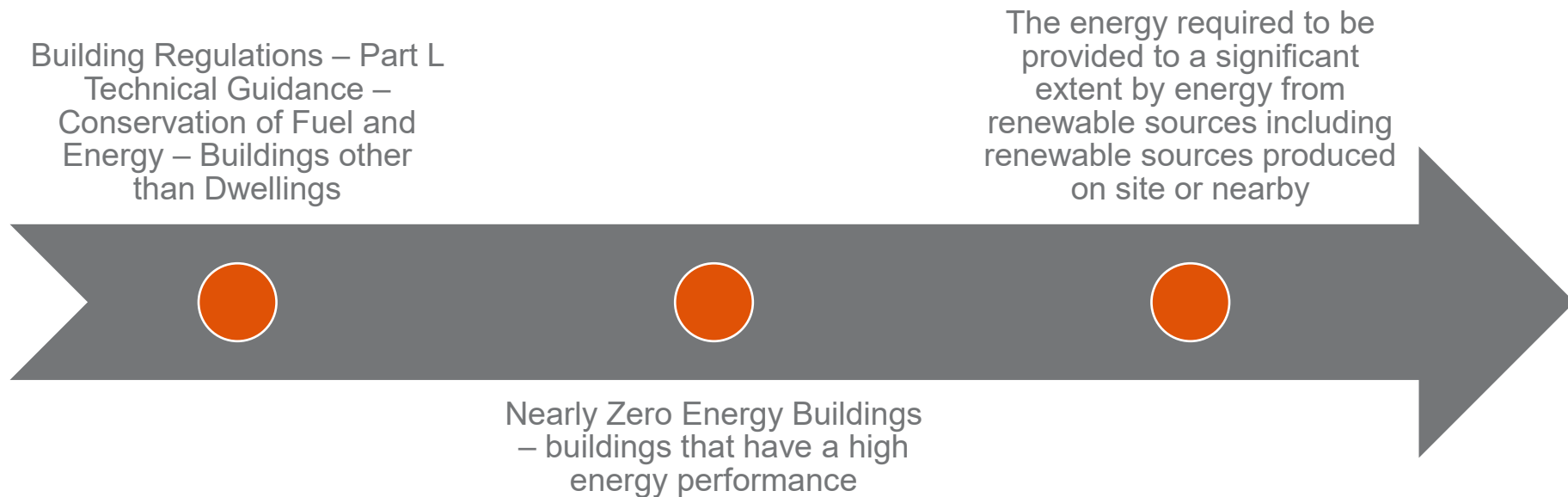
Scaling up retrofitting –
delivery structure for
retrofitting – area based
scale approach



Target 500,000
building
retrofits

Legislative Context

EU Energy Performance of Buildings Directive (2018/844) EU



Construction Contracts and the Green Agenda

- Retrofit and renovation Projects in the Private Sector
- Greater flexibility in Contract Documents
- Planning and Design stages
- Define objectives
 - BREEAM, LEED, energy performance requirements
- Lifecycle cost requirements, durability, energy, efficiency, fitness for purpose
- Energy Performance Contracts (EPC) and Energy Performance Related Payments (EPRP), Energy Service Company (ESCO)
- Guarantee that product will perform in a way that will improve energy performance
 - Pre-specified and measurable improvement in energy efficiency
 - Percentage of payment contingent on performance
- Incorporate requirements in tender documents and contract

Retrofit and Renovation Projects

- Site survey
- Condition survey and risk assessment – risk allocation
- Stripping out of plant and equipment, removal of construction and demolition waste
- Removal of hazardous materials and waste
- Protocols for removal and storage of hazardous materials / waste pending removal
- Parties responsible:
 - contract amendments re “*producer*” and “*holder*” of “*waste*”
 - evidence of disposal in accordance with the Waste Management Acts
- specific regulatory regimes for specific waste types
- Asbestos – Safety Health and Welfare at Work (Exposure to Asbestos) Regulations 2006-2010
- Evidence of compliance

Retrofitting and Renovation



Plan for access in live building



Liaison with landlord / landlord consent / licence for works



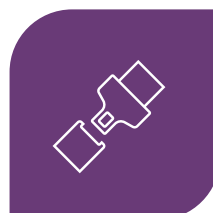
Areas for builders compound and storage of waste materials



Insurance issues in retrofitting works in live building



Access and egress



Health and safety requirements



Nuisance, noise, smoke, dust, obstructions, adjacent third party properties

Existing Structures and Insurances

- Building Contract and clauses on **existing structures**: “Clause 26 of standard RIAI form of Contract”
- Where works involve **alteration or extension**, then existing structures and contents are risk of the Employer in respect of certain perils
- **Contractor's indemnity** where contents of existing structure is not the property of the Employer
- **Non-negligence** insurance?
- Employer **insurances** and Contractor cover
- Importance of **liaison** with insurance brokers for various parties to ensure full cover



Practical Completion Requirements



Regulatory compliance – BER
Certificates, BCAR
requirements



Operation and Maintenance
Manuals



Commissioning and Testing
Regime



Post Practical Completion
requirements – re
performance of efficiency
measures, enhanced
retention



Commissioning Certificates



Training, Handover and User
Guidance



Product Warranties

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