

**Submission
No 26**

PROCUREMENT OF GOVERNMENT INFRASTRUCTURE PROJECTS

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22 February 2016

The Hon. Alister Henskens SC MP
Chair
NSW Legislative Assembly Committee on
Transport & Infrastructure
27 Redleaf Avenue
Wahroonga NSW 2076

Dear Alister

Inquiry into the procurement of government infrastructure projects - Submission

I am writing in response to your letter to my partner Emma Warren on 1 December 2015. I am very happy to set out below our submission on the terms of reference. My apologies in the delay in sending this to you.

As you know, we have been involved in procurement in Australia and Asia. We have also taken account in our submission of the experience of Linklaters in Europe and globally.

1 Gateway Decision Making

We make no submission on this.

2 Best procurement process and documentation

While it is appropriate for the government to strive for the best procurement process and documentation, ultimately this goal is one that is unlikely to be achieved. There will inevitably be tension between:

- (a) giving tenderers adequate time to prepare their tenders versus the speed with which government wishes to proceed to procure;
- (b) standard form processes and contract documentation versus bespoke drafting which is fit for purpose for the particular procurement and project;

3 Standardisation of procurement processes and documentation

This, in our submission, is fundamental to a vastly improved procurement process.

Infrastructure Australia commissioned KPMG 5 years ago to survey the Australian market in relation to standardisation. Our submission at the time, and ultimately the finding of KPMG, was that there was significant market support for project documentation standardisation. At the time the respective Treasuries of NSW and Victoria took fundamentally different views on risk allocation and documentation. The only slight respite in the market was where government happened to use the same law firm across two successive transactions. In those cases market participants were relieved of the burden of having to digest two fundamentally differently drafted documents which in essence said the same thing.

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Allens is an independent partnership operating in alliance with Linklaters LLP.

NSW Treasury has now made significant steps towards standardisation with the issue in late 2015 of a standard PPP project deed. This is commendable. It is a step that has taken by HM Treasury in the UK over 10 years ago. We strongly support any move by government to move to a standard project document which is not altered by each successive law firm retained by government.

Inevitably, bespoke changes to that document will be appropriate on a case by case basis depending on the nature of the project, location of site, etc. However the fundamentals of all infrastructure projects remain the same. All bidders on large projects spend large sums of money and most of that is wasted expenditure, so anything that can be done to simplify the documents and standardise them is a significant and positive step.

In the non PPP market, Government has also made some move towards standardising its D&C contracts with the adoption, of C21 over ten years ago and now GC21. However, it is not clear that is being uniformly used by all agencies for all D&C contracts. Additionally some agencies do have their own bespoke sets of amendments to that document.

Additionally there are other forms of contracts such as supply, supply and install (both of which are particularly relevant in the IT and TMT fields) as well as services contracts. We would encourage government to move to a standardised form of document for those contracts as well.

Standardisation shouldn't be confused with a lack of flexibility. We expect that standardisation will over time will lead to clean bids being lodged by tenderers, however government needs to be mindful that in setting standard documents it should not be improperly seeking to allocate risk to the private sector by denying the prospect of engagement in relation to departures which inevitably will lead to increased risk premiums being added to contract prices and disputes.

An additional area where significant benefits are available is through a standardised procurement process. We are not aware of any efforts having been made by government to do this in NSW and it is a positive step which government could take. We are conscious that it is inevitable that the procurement process will be driven by a range of individual project circumstances such as consumer demand, planning controls, etc.

4 The impact of a federal structure

Standardisation across the States and Territories would be ideal. Infrastructure Australia has issued standard commercial principals, but, with it, State specific departures. Through the Commonwealth's funding arrangements it could drive standardisation though has not sought to do so. Most contractors, banks and advisers operate nationally. No sound reason has ever been advanced for why a single standard cannot be used. Ultimately we still expect this to be a difficult goal to obtain.

5 Methods to minimise cost

The standardisation of procurement processes and documentation will by themselves significantly reduce the cost involved for bidders.

Additional items which should be considered are:

- (a) Consideration being given to limiting the tender deliverables. There are many examples in NSW where the documentation required from bidders is extensive and where much of it is not central to proper tender assessment. Consideration should be given to limiting the extent of materials sought through the tender process but also the level of detail in relation to documents which are to be lodged. It should not be necessary to lodge as part of the tender process documents in the same level of detail (i.e. 100% complete) that might be needed for the signing of the contract or the performance of the project itself.
- (b) Consideration should be given to separate debt competitions for privately financed project tenders. This system is currently used very successfully in England. It is not necessary for

bidders to have banks involved in the phase leading up to bid lodgement. A high level assessment of bids lodged is made (typically) with government having the benefit of input from a financial adviser. Once a preferred bidder is identified, government then goes through a separate debt competition and ultimately pairs the successful contractor with the successful bank group. This reduces the expenditure involved in retaining and dealing with banks and their advisers in the bid phase. While it will require some investment to implement and oversee its success in Australia we believe that it is a process worth examining.

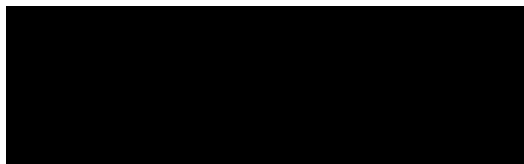
6 Optimal contestability in services

Services contracts need to be let on a fixed price basis for a period of years. That time should be sufficient for a services contractor to ensure a reasonable return but also short enough to allow other competitors in the market. The stewardship maintenance contract used by RMS for the maintenance of roads is an example of that which have been successful in reducing the costs to the State in road maintenance.

The form of contract used also need to safeguard against embedding a monopoly in service provision through unreasonable intellectual property protections or the retention of data and manuals that prevents a level playing field in relation to the retender of such projects. Contracts do need to anticipate later re-tender processes and provide for full access of such information and a transition phase facilitating handover between service providers.

We would be very happy to provide any additional support or information that the committee seeks.

Yours sincerely



Leighton O'Brien
Partner
Allens

