

PUBLIC ACCOUNTABILITY COMMITTEE

**INQUIRY INTO THE IMPACT OF THE CBD AND SOUTH EAST LIGHT RAIL
PROJECT**

Responses to Supplementary Questions

Hearing – 4 October 2018

1. Prior to contracts being signed, did Transport for NSW forbid Acciona and other consortium bidders from discussing utility treatments, or anything else, directly with utility owners?

a. If so, why was this discussion forbidden and how was this restriction communicated to Acciona and other bidders?

Response:

None of the consortia tendering for the project, including Connecting Sydney (of which Acciona was a part), were forbidden from communicating with Ausgrid in relation to how changes to utilities owned by Ausgrid might be dealt with as part of the Sydney Light Rail (SLR) Project.

As part of the probity and procurement processes established for the Sydney Light Rail project, tenderers were required to comply with a Probity and Process Deed and the terms of the Request for Proposal (RFP) issued on 7 March 2014. Relevantly:

- a) under the Probity and Process Deed, Connecting Sydney was able to seek written consent from TfNSW to communicate with Ausgrid; and
- b) under the terms of the RFP, TfNSW arranged interactive workshops attended by Connecting Sydney (including Acciona and its utility services consultants, Cardno) and Ausgrid in which Acciona was free to communicate with Ausgrid about requirements for utility services treatment works in respect of Ausgrid assets.

In fact, the consortia tendering for the SLR Project, including Acciona as part of Connecting Sydney, attended meetings and workshops with Ausgrid representatives.

2. How many changes to the scope of the project have been made?

Response:

Modifications and claims on large infrastructure projects are anticipated and are business as usual. These matters are managed in accordance with the Sydney Light Rail Project Deed (SLR Project Deed).

Any commercial arrangements with ALTRAC Light Rail (ALTRAC) are managed with strict confidentiality under the SLR Project Deed.

3. Was the utilities risk on the CBD light rail project vastly misunderstood by the NSW Government?

Response:

No. Transport for NSW (TfNSW) undertook utilities investigations and disclosed the outcome of those investigations to tenderers. TfNSW also disclosed detailed utilities information about Ausgrid pits and other utilities, including detailed surveys, to tenderers (including ALTRAC) during the tender phase of the project. It was transparent to tenderers to what extent utilities investigations have been undertaken or not. The Project Deed contains detailed provisions regarding the allocation of risk for utilities and these provisions were specifically negotiated with the successful tenderer.

4. Does Transport for NSW accept that the contractors working on the CBD light rail have no ability to direct or control utility owners?

Response:

Utility owners with assets within the vicinity of the SLR Project (such as Ausgrid, Jemena and Telstra) are independent legal entities with different ownership structures and shareholding arrangements. As such, neither TfNSW, ALTRAC or any of its contractors is able to direct or control these entities. Under the SLR Project Deed, ALTRAC has a risk sharing mechanism with TfNSW with respect to investigating, protecting, relocating and modifying utility assets and is otherwise responsible for complying with the utility owners' service agreements (including treatment requirements) with respect to their utility assets and services.

5. In May 2015 did Transport for NSW receive advice that Acciona believed that the new Ausgrid guidelines were completely different to what had been developed into schedule F8 and would result in a substantial change to the contract scope?

a. Did this advice also advise that Acciona estimated that this would result in a delay of 865 days and an additional cost of \$426 million?

i. If so, what action did the Transport for NSW take after receiving this advice?

Response:

Please refer to the response provided to Question 8 of the 4 October 2018 hearing, Questions on Notice.

6. Did Transport for NSW ask Acciona to withdraw its letter of May 2015 advising of delays and cost increases to the CBD light rail project?

a. If so, who made this request?

b. Was Tim Reardon aware of the May 2015 advice from Acciona?

Response:

6a. See response to Question 8 of the Questions taken on Notice.

7. What is the most recent completion date that Transport for NSW has received from either ALTRAC or Acciona?

a. On what date was this advice received?

Response:

The September 2018 monthly progress report received from ALTRAC on 9 October 2018 advised a forecast completion date of 29 May 2020.

TfNSW validates each program for compliance with the requirements of the SLR Project Deed.

TfNSW considers the majority of the programs provided by ALTRAC to not be compliant and has rejected the latest program.

Given the extent of the non-compliances, TfNSW has little confidence in the current forecast completion date provided by ALTRAC and continues to work with ALTRAC to see how the program can be improved to achieve an earlier than forecast completion date.

8. How many monthly reports has Transport for NSW received from Acciona or ALTRAC regarding the CBD light rail project?

a. How many of these monthly reports have advised of a delay to the project's completion date?

b. How many of these monthly reports have advised that the completion date will not be March 2019?

Response:

As at the date of this response, TfNSW has received 44 monthly progress reports from ALTRAC. 15 out of 44 monthly reports advised a completion date that is later than 16 March 2019. It is a matter for TfNSW to validate each program provided by ALTRAC for compliance with the contract. TfNSW considers the majority of the programs provided by ALTRAC have not been compliant with the contract and TfNSW has therefore not validated those programs. TfNSW therefore has had little confidence in the forecast completion dates provided by ALTRAC.

9. How many times has Transport for NSW met with Ausgrid to discuss the CBD light rail project this year?

Response:

TfNSW meets regularly with Ausgrid regarding the Sydney Light Rail project. During 2018, they have met on approximately 25 occasions.

10. Has Acciona or ALTRAC withheld any information from Transport for NSW?

Response:

TfNSW is unable to answer this question.

11. How many workshops to develop schedule F8 of the CBD light rail contract were held?

a. How many of these workshops were attended by a representative of Ausgrid?

Response:

The tender process for the SLR Project proceeded in stages which is common practice. Following the Expression of Interest (EOI) stage, TfNSW issued a Request for Proposal (RFP) to shortlisted tenderers on 7 March 2014. Interactive sessions were held with shortlisted tenderers after the RFP was issued in accordance with the relevant protocols under the RFP covering a range of topics, including utilities. Following the nomination of the Preferred Proponent, the Connecting Sydney consortium (now ALTRAC Light Rail), on 23 October 2014, further workshops and meetings were held with the Preferred Proponent leading up to the Project Deed being signed (referred to as the Negotiation Stage).

Prior to being appointed Preferred Proponent, the Connecting Sydney consortium (and/or its relevant contractors) attended at least 11 interactive sessions or workshops specifically related to utilities and utilities risk, of which at least 4 were attended by Ausgrid. The period after appointment of Preferred Proponent is intensive and involves a significant number of meetings and workshops covering a range of topics, including utilities. Connecting Sydney attended at least 50 meetings in that period.

12. Did Transport for NSW require prospective tenderers to sign a probity requirements that said that the tenderers were not allowed to directly talk to or contact any of the utility and other stakeholders?

Response:

Please refer to the response provided for Question 1.

13. When did Transport for NSW become aware that Ausgrid had new guidelines that were different to those set out in F8?

Response:

On 27 February 2015, TfNSW was copied on an email from Ausgrid to an Acciona representative attaching a draft document entitled 'Document No: CSELR-0043- CBD and South East Light Rail: Adjustment Guidelines for Ausgrid New Work Assets Affected by the CSELR' from Ausgrid. TfNSW received the draft document in this form at the same time as Acciona and had neither endorsed nor agreed to the content in the draft document.

14. Has Transport for NSW issued ALTRAC a default notice?

Response:

TfNSW issued two Default Notices to ALTRAC:

1. Notice of Default dated 8 March 2018 regarding ALTRAC's failure to diligently progress the Delivery Activities; and
2. Notice of Default dated 23 March 2018 regarding ALTRAC's failure to diligently progress, failure to report and material breach.

15. In answer to a question from Mr Mookhey at page 42 Mr Troughton said: “I think it is important to understand that what it has cost them and what they are entitled to a far, far different things.”

a. With respect to the SOPA claims brought against Altrac in respect of three modifications which were the subject of questions to Mr Noonan from Mr Mookhey at pages 7 and 8, did the SOPA Adjudicator make any finding regarding Acciona’s entitlement under the contract?

i. If so, was this the first and only time that an independent adjudicator has assessed Acciona’s entitlement under the contract?

ii. What was the adjudicator’s finding with respect to that entitlement?

b. Further to the Security of Payments Proceedings against Altrac did Transport for NSW participate either formally or informally in responding to any of the SOPA claims?

i. If so, which of the three claims did Transport for NSW participate in the response to?

Response:

15.

- a. Under the relevant legislation, the *Building and Construction Industry Security of Payment Act 1999* NSW (the **SOP Act**), an adjudicator makes a determination as to the applicant’s entitlement to a progress payment as claimed in the relevant ‘Payment Claim’. Any such determination is interim and any payment made in accordance with an adjudicator’s determination are made on account. The adjudicator does not and cannot determine the final entitlement to such payment. This leaves any disputes over the amount finally due to be decided separately. Accordingly, this means that the adjudicator’s determination can be reversed in a subsequent Court or other dispute resolution process, which is intended to determine the parties’ rights and liabilities on a final and binding basis.

The adjudicator in the adjudications between the D&C Contractor (including Acciona) and ALTRAC had regard to the D&C Contract. TfNSW is not a party to the D&C Contract and so was not a party to these adjudications, nor is TfNSW bound by the adjudicator’s determinations.

- i. TfNSW cannot comment on any legal or commercial matters between ALTRAC and the D&C Contractor.
- ii. See answers to 15a and also 15a.i. above.
- b. TfNSW provided some requested assistance to ALTRAC on all three adjudications brought by the D&C Contractor against ALTRAC.

16. At page 41 in response to a question from Mr Mookhey Mr Troughton said: “I will not fall into traps that contractors provide commercial programs to benefit themselves commercially.”

a. What were the reasons given for the further two months delay in the project program in the August and September 2018 Progress Reports from Altrac to TfNSW?

b. Did the reports state, as Mr Noonan said in evidence, that the additional two months delay to the critical path of the project was a result of Ausgrid not performing essential works, undergrounding local electricity supplies in Kensington?

c. If this was the reason given in the Report, is it true?

d. How can this be reasonably characterised as a trap provided by the contractor, in this case Altrac and through the contractual chain, their subcontractor Acciona, to provide commercial programs to their commercial benefit?

e. What is the latest advice received regarding the carrying out of the essential works by Ausgrid?

Response:

TfNSW validates each program submitted by ALTRAC for compliance with the requirements of the SLR Project Deed.

TfNSW disputes the accuracy of ALTRAC's current forecasted completion date and has rejected its August and September program showing a forecast Date of Completion of May 2020.

ALTRAC's current delivery program does not comply with the contractual requirements as it contains insufficient information, including about current and planned resourcing and staffing, and also contain unexplained delays and departures made from the previous program.

In relation to the alleged additional delay, which Acciona has attributed to forecast dates for Ausgrid to cut and reconnect power supply (cut overs, which enables Acciona to complete low voltage connections to businesses and homes), TfNSW has rejected this claim on the basis that TfNSW is not liable for this alleged cause of delay. It is ALTRAC's responsibility under the SLR Project Deed (and in turn the responsibility of the D&C Contractor, including Acciona, under the D&C Contract) to liaise with Ausgrid and coordinate Ausgrid's works with their works.

TfNSW also understands that the majority of the cut overs have now been scheduled with Ausgrid for November 2018 and so the forecast impact to the completion date due to these works will not eventuate.

17. In March 2018 Transport Minister stated: "We are not going to tolerate a go-slow so that we write a cheque to hit the accelerator." What evidence does Transport for NSW have that Acciona has been engaged in a "go-slow" on the CBD light rail project?

Response:

TfNSW monitors resourcing and production rates and has ongoing site surveillance to monitor progress, compliance and safety.

18. In a letter dated 22nd March 2018 to Acciona and widely leaked to the media, Transport Minister Andrew Constance stated: “Coming on top of ongoing concerns about the poor quality of your work, your numerous site safety incidents, your ever-dwindling numbers of workers along the route and your unwillingness to provide a meaningful timeline for completing your part of the project, I cannot express strongly enough the NSW Government’s disappointment and exasperation of Acciona’s unacceptable conduct and performance on the project generally.” What evidence does Transport for NSW have to support Minister Constance’s claims of:

a. The poor quality of Acciona’s work?

b. Numerous site safety incidents?

c. Ever-dwindling numbers of workers?

d. An unwillingness to provide a meaningful timeline for completion of Acciona’s part of the project?

Response:

TfNSW monitors resourcing and production rates and has ongoing site surveillance to monitor progress, compliance and safety.

TfNSW has written to ALTRAC on a number of occasions regarding non-compliance, safety concerns and non-conformance of the monthly progress reports.

19. On 10th October 2018 the Minister for Transport, Andrew Constance was quoted as telling the Committee for Economic Development of Australia:

“Of the 817 pole foundations – 481 have been completed and if delivering 100 a month again - this work could be completed by the first quarter of next year. Acciona need to complete five of ten substation buildings to hand over to Alstom to install systems and energise. Again, that work is scheduled to be completed within three months. Acciona has 19 largely pre-fabricated stop structures to install – these are similar to bus stops. So far five have substantially been done.”

How many of these elements of the project have been subject to modifications, design approval delays or changes to the original project design at the direction of Transport for New South Wales?

Response:

Modifications and claims on large infrastructure projects are anticipated and are business as usual. These matters are managed in accordance with the SLR Project Deed.

Any commercial arrangements with ALTRAC are managed with strict confidentiality under the SLR Project Deed.