

**INQUIRY INTO GRANTING OF CONTRACT NUMBER
OoS17/18-021 BY THE OFFICE OF SPORT**

Organisation: NSW Independent Commission Against Corruption
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The NSW Independent Commission Against Corruption

Submission to the NSW Legislative Council

Public Works Committee inquiry into the granting of contract number OoS17/18-021 by the Office of Sport

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Introduction

The NSW Independent Commission Against Corruption (“the Commission”) thanks the Public Works Committee (“the Committee”) for the invitation to make a submission into its inquiry into the granting of contract number OoS17/18-021 by the Office of Sport.

In this brief submission, the Commission has sought to avoid commenting about the specifics of the OoS17/18-021 contract or its communications with the Office of Sport. Instead, the submission makes general observations about the Commission’s assessment processes and common corruption risks in capex projects.

The Commission welcomes the Committee’s interest in probity-related issues associated with capital works. Capex programs, tendering processes and contract management comprise a significant proportion of corruption allegations investigated by the Commission. Without a sufficient degree of probity built into procurement policies and procedures, there is a strong possibility that actions, errors, or omissions will result in a breach of public sector requirements and may even constitute corrupt conduct. However, not all breaches warrant investigation by the Commission. As explained below, allegations that are assessed as serious or systemic corrupt conduct are prioritised.

OoS17/18-021

The Commission can advise that in May 2020, the Office of Sport made a report under s 11 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) which detailed concerns regarding upgrades to the Sydney International Equestrian Centre. The matter was thoroughly assessed and the Office of Sport responded to the Commission’s detailed assessment enquiries. Based on the information obtained, the Commission decided against commencing an investigation. However, the Commission did offer to provide advice and training and its Corruption Prevention division is now working constructively with the Office of Sport. Other than these brief remarks, the Commission does not propose providing any detail about contract number OoS17/18-021. However, some comments about the Commission’s assessment process are set out below.

About the Commission – how complaints are assessed

Under s 12A of the ICAC Act, the Commission “*is as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct*”. Consequently, the Commission’s assessment process identifies whether the alleged conduct set out in a complaint could be serious or systemic in nature. The size of any potential financial losses or gains and the possibility of criminal conduct relates to seriousness. But other factors go to seriousness such as the degree to which the alleged conduct could breach public trust, damage confidence in public administration or create opportunities for future misconduct.

In addition, the Commission considers related factors including:

- whether the complaint has any substance or presents meaningful investigative leads. Similarly, the Commission considers whether other possibilities, such as maladministration, error or disagreement between disputing parties, is likely to be a better explanation for the alleged conduct
- the age of the alleged conduct, whether any alleged corrupt public officials still work at the agency and whether similar allegations have already been dealt with
- the seniority of the alleged wrongdoers
- whether the Commission’s statutory powers are likely to be required to adequately investigate the matter
- whether the relevant agency has the capacity and will to undertake the investigation itself (which may include by engaging an external specialist)
- whether the matter is currently or about to be the subject of legal action
- whether the police or another relevant agency (such as the Ombudsman, Auditor General, Information and Privacy Commission or Office of Local Government) already has carriage of the matter.

On occasion, a matter is already subject to a government-initiated inquiry, a royal commission, a parliamentary committee inquiry, or call for papers under Standing Order 52

of the Legislative Council. These processes might be taken into consideration as part of the Commission's assessment process.

In addition, if a non-public official has engaged in corrupt conduct, the Commission assesses whether the matter could fall within s 8(2) or 8(2A) of the ICAC Act.

The Commission's own resourcing is also a factor. However, in general terms, where a matter is potentially serious or systemic and no other viable options exist, the Commission's preference is to commence its own investigation. Regrettably, resource constraints mean that some of these investigations take longer to finalise.

The Commission's Assessment Panel process

Twice weekly, the Commission's Assessment Panel is provided with papers analysing each incoming matter. The panel is comprised of the three Commissioners, the CEO and the executive directors of the Investigation, Legal and Corruption Prevention divisions. The panel reviews the papers, which include recommendations about how each matter should be dealt with. If the panel determines that a matter warrants investigation, it is referred to the Investigation Division and classified as a Commission investigation.

Some matters are referred, or referred back to a relevant agency, usually under s 53 of the ICAC Act. Some of these referrals are made "for information" and the agency can determine whether and how to address the matter. Alternatively, the Commission can recommend a particular course of action. Under s 54 of the *ICAC Act*, the Commission can require an agency to undertake its own investigation and report back. However, in many cases, an agency is prepared to commence its own investigation and report its findings, without the Commission having to invoke these statutory powers.

It should also be noted that the Commission's Assessments unit, which prepares the panel's papers, often conducts substantial analysis of a matter. This can include speaking with the complainant, examining the Commission's information holdings, analysing various databases to which the Commission has access, liaising with police and other agencies and gathering open source intelligence. Consequently, it is often the case that substantial fact-finding enquiries have been carried out in respect of matters where the Commission elects not to commence a formal investigation.

Major and minor capital works

The term "capital works" can encompass a wide variety of activities in terms of cost and complexity. Although the figures fluctuate from year to year, the Commission's investigative work typically involves a significant proportion of procurement-related matters, many of which involve capital works.

The Commission's experience is that corrupt conduct is more likely to be identified in minor capital works (including asset maintenance) than major capital projects. The reasons for this include:

- Larger projects tend to involve more robust governance and risk management arrangements. In particular, larger projects are generally approved on the basis of a detailed business case and designated funding. Minor projects often lack a proper business case or needs analysis.
- Similarly, engagements for small projects are often made with little or no due diligence, which create opportunities to engage suppliers that have little relevant experience. On occasion, poor due diligence allows a public official to engage a supplier in which they have a hidden interest.
- Minor capex projects are more likely to be managed by an officer with unilateral control over key decisions. Conversely, duties on larger projects tend to be better segregated.
- Tendering processes, especially if they are open, are usually harder to corrupt than a simple quotation process.
- Larger capital projects are usually completed by established firms with many years of experience and a separation between management and ownership. While such firms are not immune from corrupt conduct, the Commission's experience is that corruption is more common where barriers to entry into the marketplace are low.
- There are many more public officials with financial delegations that allow procurement of minor capital works.

Larger capex projects can of course be adversely affected by corrupt conduct, as well as waste and maladministration. But the Commission's experience is that projects subject to the least oversight are the most vulnerable to corruption.

Other factors associated with corrupt conduct

Direct negotiations

There appears to be a strong correlation between direct negotiations (also known as sole sourcing) and corrupt conduct. Individuals planning to engage in corrupt procurement activity dislike having to compete for government work on a level playing field.

In its work, the Commission often sees false or exaggerated claims about the need for direct negotiations (e.g. a dishonest claim that only one supplier is suitable to perform the work) or attempts to split work into smaller amounts, so as to avoid competition. A real or manufactured sense of urgency is sometimes used as justification to engage in direct negotiations.

Many agencies make use of pre-qualified supplier panels to carry out capital works or associated services. This includes whole-of-government panels and panels formed by the agency itself. These panels often set up so that members can be directly engaged. However, if the process of creating the panel itself is uncompetitive or lacking in probity, corrupt

conduct can ensue. For instance, if an agency official can dishonestly arrange for a close friend's company to be included on a minor works panel, it may be relatively easy to then award contracts to that company without a competitive process.

Conflicts of interest

Many of the Commission's investigations involve conflicts of interest that have been concealed, understated or mismanaged. This is also common in capex-related investigations. Because of this, the Commission has numerous training and corruption prevention resources that assist agencies to manage the risks posed by conflicts of interest.¹

Where an agency has poor controls in relation to areas such as supplier due diligence and segregation of duties, it can be relatively easy for a public official with a financial delegation to engage a supplier in which they, a relative or close associate has a financial interest. This is a feature of many Commission investigations. The situation is aggravated if the agency cannot adequately determine whether the goods and services ordered have been delivered to the required quality and at the agreed price.

Conflicts of interest are fundamentally a principal-agent problem. Consequently, the risks may be elevated in situations when an agency relies on advice from a range of parties that have other commercial interests. In its December 2018 publication, *Corruption and integrity in the NSW public sector: an assessment of current trends*², the Commission noted the following:

Outsourcing is not new. Over several decades, governments have come to rely on the private sector to perform more and more tasks, including the delivery of core services to members of the public. There are, however, some slow-moving trends that have added to the overall risk of corruption.

First, agencies are relying more on outsourced expertise to shape aspects of their broad strategic agenda, which includes their general approach to procurement and contracting. One study of the UK public sector noted the high rate of churn among public servants working on major procurement projects and that, "It is not unusual for external advisers to be the custodians of corporate memory".

Secondly, the individuals performing procurement activities for agencies are themselves increasingly likely to be contractors, or recently recruited from the private sector. Similarly, project managers and contract managers can be contractors. This means, in some cases, a contractor is either exercising or strongly influencing public sector financial delegations (for example, by getting a person with delegations to rubber-stamp their recommendations).

¹ See, for instance, *Managing conflicts of interest in the NSW public sector* (April 2019), available at www.icac.nsw.gov.au.

² Page 51. Available at www.icac.nsw.gov.au.

Contractors also perform tasks such as managing staff, designing internal controls and writing project business cases. One media report on the defence industry referred to a “contractor boom”, where “contractor numbers had risen to the point where it was not unusual in some areas to have only a thin layer of public servants overseeing a project run entirely by contractors”. In NSW, this has presented as a reliance on delivery partners to carry out many public sector infrastructure and ICT projects.

Thirdly, the prevalence of these contracted specialists makes it difficult for agencies to restrict access to confidential information. In part, as the line between public and private sector continues to blur, agencies need to provide contractors with access to internal databases and documentation (or even rely on the contractor to hold the information).

As permanent employees and contractors mix and work together, it becomes administratively complex to determine who is entitled to access internal information. In addition, as contractors obtain greater access to government information, they become targets for cybercrimes that could harm the public sector.

Fourthly, agencies and other subject matter experts have advised the Commission that there is high turnover of staff working in procurement, contract management and project management roles. This leads to a greater reliance on temporary or untrained staff and heavier workloads for remaining officers.

Fifthly, in some areas (for example, ICT and major infrastructure provision) public sector supply chains are expanding overseas. In many ways, this is driven by technological advancements that make it possible for someone to work on a NSW public sector agency project while sitting at a desk in another country. This may gradually expose public sector agencies to the customs of countries with higher levels of corruption.

Conclusion and further information

The Committee’s interest in probity and integrity issues is welcomed. Although the Commission’s practice is not to comment on operational matters, it hopes the foregoing information will assist the Committee.

If the Commission can be of further assistance, please contact Lewis Rangott, Executive Director Corruption Prevention