

Submission
No 3

**INQUIRY INTO PROCUREMENT PRACTICES OF
GOVERNMENT AGENCIES IN NEW SOUTH WALES AND
ITS IMPACT ON THE SOCIAL DEVELOPMENT OF THE
PEOPLE OF NEW SOUTH WALES**

Organisation: NSW Small Business Commissioner

Date Received: 8 January 2024



Standing Committee on Social Issues
NSW Legislative Council
6 Macquarie Street
Sydney, NSW, 2000

Dear Ms Kaine

Thank you for the opportunity to provide feedback to the parliamentary inquiry into the procurement practices of Government agencies in NSW and the impact on the social development of the people of NSW.

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy, and affordable dispute resolution services across NSW. The Commission's role includes:

- Encouraging Government agencies and larger businesses to enter productive working relationships with small businesses.
- Facilitating and encouraging the fair treatment of small businesses.
- Promoting a fair operating environment in which small businesses can flourish.

There are approximately 850,000 small businesses in NSW, comprising 97 per cent of all NSW businesses. The NSW small business sector contributes \$465.3 billion to annual sales and service income. NSW small businesses play a vital role in the NSW economy through the unique products and services they offer and the 1.7 million people they employ in the private sector. The NSW Government should support local small business procurement, not only to support a vibrant small business sector, but more importantly to ensure a diverse and competitive market which is crucial for achieving the best value for NSW taxpayers.

Recent changes are welcome

The NSW Government purchases approximately \$40 billion worth of goods and services annually. Of this, the NSW Government spends approximately \$9 billion on goods and services obtained from 46,000 small and medium enterprises (SMEs).

The Commission is supportive of the Ministerial Direction to increase the direct procurement threshold from \$150,000 to \$250,000. This change will benefit both small businesses and the NSW Government. It will provide small businesses with greater opportunities while simultaneously enabling Government to harness the expertise of businesses, investing in jobs and growth in NSW.

The Commission also supports the adoption of a proposal previously recommended by the Commission to no longer require small businesses to submit proof of insurance when they tender. Proof of insurance will instead only be required when a contract is awarded. The Commission is supportive of this change, preventing small businesses bearing the costs of insurance with no guarantee of winning work.

Ongoing NSW Government procurement commitments include lifting the proportion of government expenditure through procurement with small business from 12 per cent currently to 20 per cent by 2026

and 30 per cent by 2030. Other commitments include enabling small businesses to pre-qualify as suppliers through a single form and offering simple contracts for all whole-of-government prequalification schemes, with contract rollout for key goods and services programs to occur by the end of 2024. The NSW Government is committed to prioritising small businesses for local projects through the introduction of a local supplier element to tender weightings.

Insights from the selling to Government program

The Commission is often contacted by small businesses seeking advice and support to supply to government. In 2021 the Commission conducted a survey: *Small Business Selling to the NSW Government Survey*, which highlighted many of the challenges small businesses face with procuring to government.¹

The Commission launched the [Selling to Government Program](#) and suite of resources in October 2021 in response to small business challenges identified by the June 2021 survey. In February 2023, the Commission adapted these resources to develop the 'Winning Business' training module, providing guidance to business owners new to business or contracting. The Commission's training and educational resources offer help to small businesses to qualify as government suppliers and compete for contracts successfully. These resources cover improving tendering skills for local council and private sector contracts.

Despite the recent announcements and commitments, there are still many areas where improvements could be made to support small businesses with procurement. The complexity and inconsistency in current arrangements erode the confidence of small and medium enterprises in government procurement processes.

Prequalification schemes

Small businesses often report prequalification scheme registration processes as being complex, costly and time consuming. Many small businesses invest time registering for pre-qualification schemes but never receive opportunities to tender. Since small business operators are time-poor, often spending more time working in their business than on their business, this represents a significant challenge.

NSW Government procurement practices appear inconsistent across agencies. This can create confusion and limit small business awareness of relevant opportunities. Suppliers have also reported that information provided for one prequalification scheme does not necessarily carry over and they must apply separately for each scheme. In some cases, unnecessary information (such as ISOs) is being sought at this stage. The Commission is also aware of cases where small businesses are unable to apply for a particular prequalification scheme because it is at capacity and not open to new suppliers.

Consolidation of works packages in construction

The Commission has received representations from the civil contracting industry raising concerns with a decline in the number of works packages for smaller projects namely the \$0 - \$50million and \$50 - \$100 million. It has been asserted that agencies responsible for delivering construction projects within the NSW Government have in recent years sought to group works packages the result being a reduction in the number of direct contracting opportunities for small and medium sized enterprises.

¹ The survey conducted by the Commission, was sent to over 13,000 small businesses registered on the Procurement NSW Supplier Hub and received 411 responses. Results were used to inform subsequent policy and programs but have not been publicly released.

Panel contracts and conflicts of interest

Panel contracts are designed to provide benefits to both Government agencies and suppliers. They may reduce red tape and lower costs of doing business with Government, simplify terms and conditions, provide the ability to apply for inclusion in a scheme at any time and categorise business opportunities by region and category.

However, once small business suppliers are on schemes and panel contracts, there is no guarantee of work. There is a perception among small business suppliers that work is offered to larger suppliers and those already known to Government departments.

Policy issues

SME and Regional Procurement Policy

The 2021 SME and Regional Procurement Policy Review recommended the NSW Government simplify and align policies, including policy thresholds, to increase understanding and compliance. It was also recommended the NSW Government increase knowledge and confidence in policy initiatives and elements amongst suppliers. However, agencies continue to have different procurement requirements, thresholds, and policies, which suppliers may find confusing.

Care is needed to ensure definitions of 'small business' and 'regional business' are not exploited by large businesses and international companies. If not appropriately targeted, policy objectives may be undermined, preventing small businesses from securing government contracts.

Further, while procurement targets may aim to drive system-level and cultural changes to ensure small businesses have fair opportunities to participate, they may nonetheless give prospective small business suppliers the impression they will be favoured in the procurement process, whereas factors such as value for money is ultimately prioritised. For this reason there needs to be clear and transparent communication when engaging small businesses.

The Commission is also aware of concerns there is a disconnect between the key commitments of the policy and the lived experience of small businesses, potentially owing to a lack of awareness and application of the policy within government agencies. A culture of risk aversion and reluctance to change existing practices can unfairly disadvantage small businesses and reduce the pool of suppliers.

Faster Payment Terms Policy (FPT policy)

In addition to the challenges with applying and securing procurement opportunities, registered small businesses who supply to in-scope government agencies must be paid within 5 business days for goods and services up to the value of \$1 million.

The Commission has previously identified concerns relating to the payment of invoices that are not processed through use of a government purchase card (PCard). While use of PCards facilitate prompt payment and have supported more timely payment to small business suppliers, those relying on other payment methods (such as when using purchase order systems) also expect to be paid promptly and in accordance with the FPT policy. For this reason, the Commission strongly supports recommendations

from the [review of the FPT policy](#) to target 80 per cent compliance for purchase orders and payments not eligible for PCard within two years.²

An additional issue is that many project and finance officers are not aware of, or familiar with the Faster Payment Terms policy requirements. There is a need for appropriate Government training and supporting educational material in order to increase awareness and compliance by the relevant project and finance officers. There is also a need for finance systems and processes within each government agency to 'catch up' and comply with the policy.

Advanced notice and greater awareness of opportunities and support services available

Small businesses are seeking advanced notice and greater awareness of procurement opportunities. This includes any SME exemptions or support available, such as procurement training resources.

Results from the Commission's *Small Business Selling to the NSW Government Survey* noted low levels of awareness of the NSW Government policies in place to support small business. Results also revealed only 28 per cent of SMEs were aware of the regional and SME preferencing. Survey respondents reported difficulty with finding resources and information on procurement opportunities as well as on navigating procurement systems. Many respondents said there was no pre-tender briefing the last time they elected to tender.

SMEs are unable to capitalise on opportunities designed to maximise their participation or utilise support services available if they are unaware of them. Existing government services should be promoted by procuring agencies. The Procurement Specialist Advisory Service, funded by the NSW Government under the Service for Business, Business Connect program, offers SMEs access to experienced advisors, training, and resources relevant to their needs. Advisors can provide confidential advice to SMEs across all industries in NSW. This service may be underused if SMEs are uninformed about its existence.

Greater transparency and enhanced feedback from Government departments

Small businesses are seeking greater transparency and enhanced feedback from NSW Government agencies through pre and post tender briefings, which can provide useful advice as well as closure to SMEs. The timing of pre and post tender briefings are key to the usefulness of guidance and feedback provided.

In some cases, agencies do not provide feedback on why bids had been unsuccessful, and do not provide references for work done despite references being required.

Plain English terms, limited length and complexity of tender application processes and contracts

Small businesses are seeking plain English terms and conditions, limited length, and complexity of tender application processes. There was a strong theme in the Commission's survey results of the tendering process being difficult and costly, with SMEs perceiving they had only a limited chance of being successful, making the process a futile exercise.

The survey found that certain requirements are onerous, excessive, and unnecessary, with the same information being requested numerous times in the process. The duplicative and burdensome perception of the process may render it unappealing for time-poor small businesses.

² Recommendation 5.1 of the Faster Payment Terms Review.

Feedback indicates a need for a one-stop-shop for selling to NSW Government, with uniformity across agency tender documents. It may be simpler and less time-consuming for suppliers to provide their information once. Currently, procurement processes are perceived as complicated due to challenges with navigating different systems and requirements. There are multiple systems including Supplier Hub, ProcurePoint, Buy.NSW and agency websites which are inconsistent and disjointed.

Another key finding from the Commission's survey was standard procurement contracts are often long and complex. They may contain unfair clauses for small businesses including warranties and indemnities that shift liability to SMEs regardless of fault and have excessive or uncapped liability clauses. The Commission is aware of alleged instances of multiple smaller contracts being combined to reach a higher value, such that more onerous procurement rules and requirements apply.

ISO requirements

ISO requirements aim to ensure that procurement activities are conducted in a manner that is systematic, reliable, and efficient, guaranteeing quality and adherence to regulatory demands. However, ISO certification is a significant barrier to small business participation in terms of cost and capacity. Respondents to the Commission's survey (19 per cent) claimed the ISO requirements for registering for a prequalification scheme were unexpected or unreasonable. A number (8 per cent) of respondents reported that ISO requirements for tendering to the NSW Government were unexpected or unreasonable.

Some ISO requirements are being implemented without notice or transition, which has resulted in some small businesses being excluded from tendering opportunities. To encourage SME participation and limit barriers to tendering, there could be greater recognition of equivalent Australian Standards and professional association standards.

Government procurement culture

The culture of risk aversion in Government procurement can be very disadvantageous for SMEs. Whole-of-government contracts and agency procurement arrangements can unintentionally limit opportunities for small business. The Commission discourages monopolisation of contracts as this can limit opportunities for small businesses.

There is also a culture across government for assessing suppliers by value for money and compliance with relevant policies and regulation including labour laws, without considering the value of SME participation.

'Value for money' may also be interpreted as 'lowest cost,' disadvantaging small businesses which are unable to compete with large companies on offering the lowest price. This may occur in circumstances when small businesses would otherwise be competitive if broader 'value for money' criteria were used. Procurement officers are not always knowledgeable about the procurement process and SME-specific policies or commitments.

A 2022 Australian Small Business and Family Enterprise Ombudsman (ASBFEO) [issues paper](#)³ also relayed stakeholders concerns about the levels of education and training provided to procurement officers. Consultations conducted by ASBFEO indicate a preference toward large or familiar businesses, with SMEs encouraged to participate in supply chains with large businesses. Consistent training,

³ Review of the implementation of the 1 July 2022 changes to the Commonwealth Procurement Rules Issues Paper - August 2023

information and support for procurement officers may better equip buyers to make educated decisions and provide accurate advice to sellers.

Small business stakeholders have further raised concerns of practices relating to awarding large contracts for projects with multiple constituent parts or combining multi-year services. In some cases, smaller entities are unable to meaningfully participate in these procurement opportunities. Unless doing so can be justified as delivering value for money or achieving other strategic objectives, this practice may not be in the public interest.

The Commission encourages NSW Government procurement practices to provide more opportunities for SMEs to supply to Government. This includes supporting capacity-building for small business suppliers, making supplying to Government simple, hearing small business concerns, and increasing the participation rates of small businesses.

If you require further information, please contact my Executive Officer

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission

Date: 21/12/23