

Submission
No 21

**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: Consult Australia

Date Received: 19 January 2024



January 2024

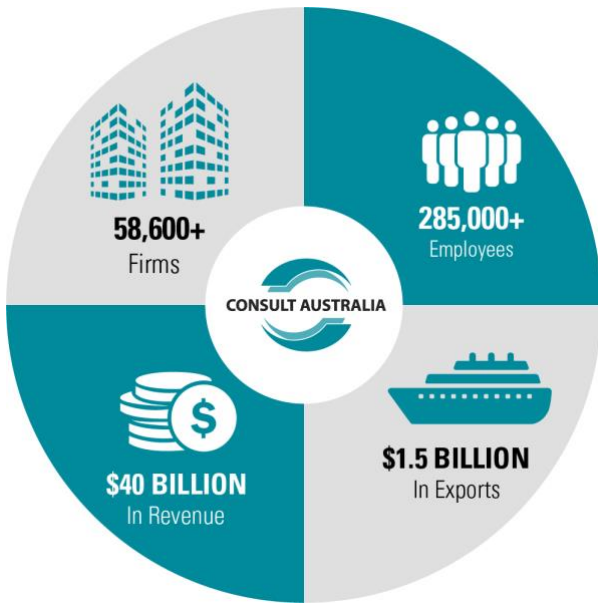
**Procurement practices of
government agencies in NSW and its
impact on the social development of
the people of NSW**

STANDING COMMITTEE ON SOCIAL ISSUES

Consult Australia

Postal Address: GPO Box 56, Sydney NSW 2001
Email: info@consultaustalia.com.au

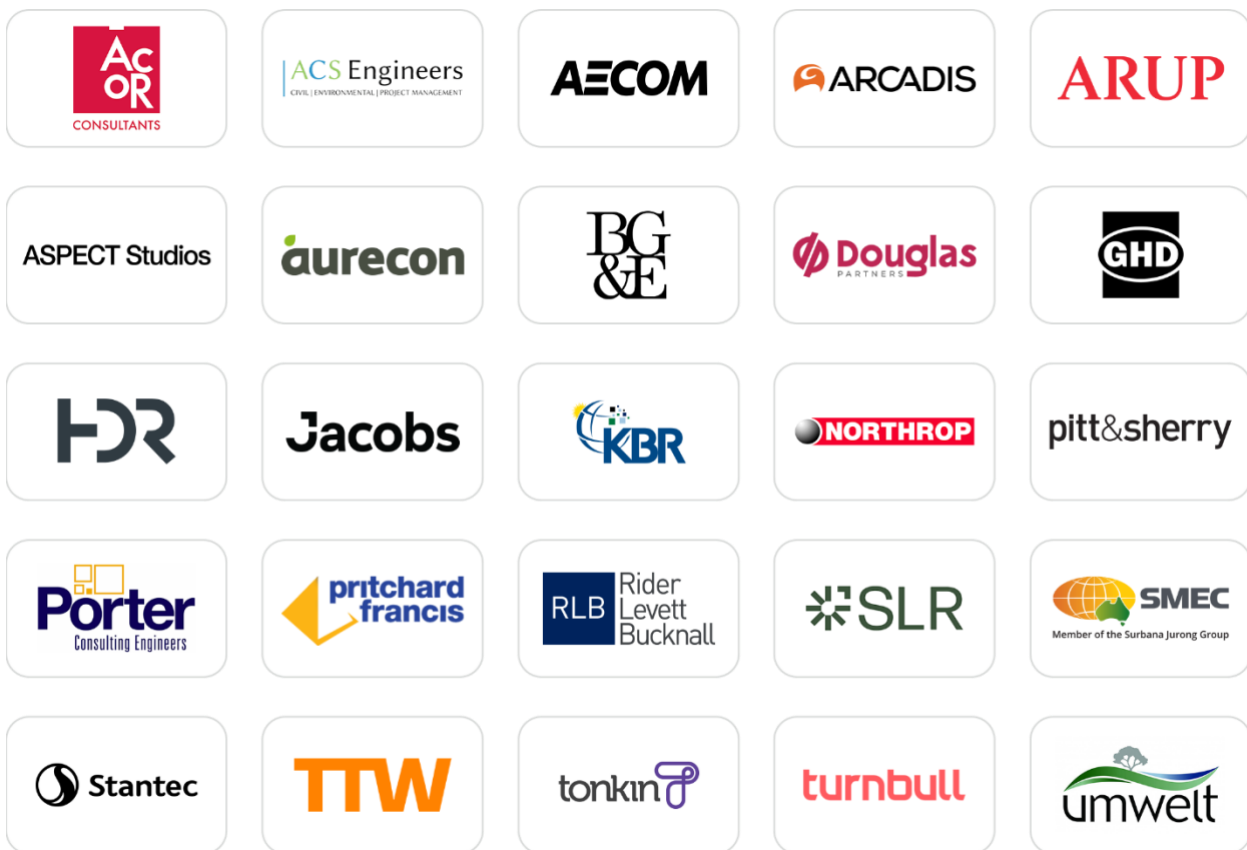
Tel: 02 8252 6700
Web: consultaustalia.com.au



ABOUT US

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia’s top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

Our members include:



A full membership list is available at: <https://www.consultaustralia.com.au/home/about-us/members>

EXECUTIVE SUMMARY

Consult Australia welcomes the opportunity to contribute to the inquiry by the NSW Standing Committee on Social Issues into the procurement practices of government agencies in NSW and its impact on the social development of the people of NSW.

Central to the better delivery of outcomes for the people of NSW is the quality of government infrastructure and built environment projects. From roads to rail, hospitals to schools, the successful delivery of outcomes for the community can only be achieved through best practice procurement. When we see community expectations not being met on these vital assets, the root cause is often the approach to procurement at the earliest stages of the entire process – even from the earliest options stage.

Consult Australia has been calling for reform for many years to unlock greater **productivity** for the sector and the economy, improve the retention of our **people**, and restore balance to the contractual relationships across **procurement** supply chains.

Back in 2015 Consult Australia commissioned Deloitte Access Economics to quantify the costs associated with sub-optimal procurement practices. The findings showed that with improvements in briefs, delivery models and contracts, the following efficiencies can be gained:

- 5.4% reduction in the costs of projects
- 7% reduction in delays to projects
- 7% uplift in the quality of projects.

With little change having been made in the intervening years, there is likely a case for these gains to be exponentially higher now.

The NSW government has the opportunity to lead the way on innovative projects that prioritise social impact and value while also achieving value through the spend of public money. To do this, Consult Australia recommends:

1. The NSW Government to invest more time in **early involvement**, including:
 - conduct early industry briefings
 - move away from the 'non-conforming bid' mindset that dissuades bidders from delivering increased social value
 - recognise the commercial nature of the market and use that to drive innovation.
2. NSW Government contracts should foster **collaborative relationships** rather than combative ones by:
 - ensuring that insurance obligations and limits are reasonable and appropriate
 - always including liability caps at an express monetary value (in the aggregate) with limited carve outs
 - guaranteeing proportionate liability in professional services contracts on government projects
 - aligning all contract provisions with the actual risk of the government.
3. The NSW Government, when reviewing procurement practices and settings should meaningfully **engage industry in reform co-design**.

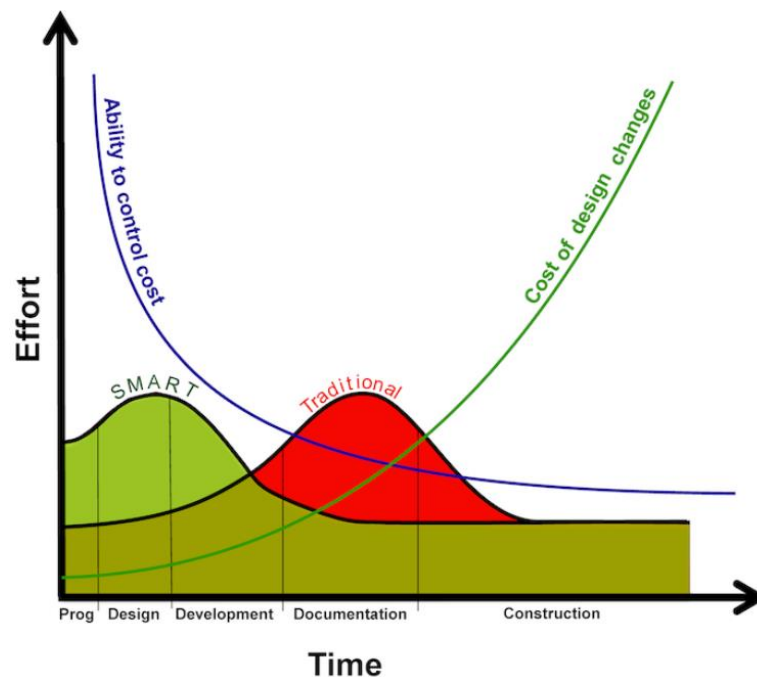
RECOMMENDATIONS FOR REFORM

Consult Australia's recommendations for reform focus on improving the procurement practices of NSW government agencies to improve the social development of the people of the NSW. There is a significant opportunity here, given the experience of our members as crucial suppliers on projects that help grow, move and sustain communities, from designing world class schools, sustainable transport and hospitals.

For many years Consult Australia has advocated for reform that embraces **early involvement** and **collaborative relationships** including through contracting with a fair and balanced risk allocation. These concepts underpin Consult Australia's [Model Client Policy](#), the idea that government clients should set the tone from the top, akin to the ideal behaviours set out in the model litigant policy. Too often when NSW government undertakes reform, it forgets to meaningfully **engage industry in reform co-design** and therefore misses significant productivity uplift.

Early involvement

The [MacLeamy Curve](#) (below) illustrates how investment early in the design process, including pre-design optimises the design and that correcting mistakes early is easier and more cost effective (see the 'smart' green curve). In contrast, putting peak effort in later during documentation and construction phases is more challenging, costly and is more likely to lead to disputes (see the 'traditional' red curve).



This simple illustration shows the benefits of an integrated design process.¹ Unfortunately, in NSW more projects follow the traditional red curve. Early involvement of design professionals includes industry briefings, tender processes, scope of projects, and contract negotiations with a focus on fair and balanced contract terms and appropriate risk allocation.

¹ This diagram was first used in a paper by the United States of America Architectural/Engineering Productivity Committee in 2004. The Committee was comprised of representatives from the architectural, engineering, construction, building management, operations, technology and building products industries.

As Infrastructure Australia highlighted in their [2021 Australian Infrastructure Plan](#):

Research shows that successful projects are supported by clear problem definition, scope and design, and improved transparency in risk identification and management. If these are evident when the project is commercially awarded, it will deliver better outcomes. These benefits are well-documented in multiple Auditor-General reports on infrastructure project outcomes conducted across Australia. Broader research shows projects employing these practices will be 24% more predictable with costs, 30% more likely to generate greater customer satisfaction, and more likely to be delivered within faster and more predictable timelines.

Members have advised that they are dissuaded from providing innovation on NSW projects when bidding because they are concerned any deviation will be considered a 'non-conforming bid'.

Consult Australia recommends that the NSW government moves away from the current 'non-conforming bid' mindset, where any deviation by bidders is left unconsidered. With more early involvement of the supply chain in the pre-design phase, the NSW government would be positively positioned as an interested investor. Early involvement enables detailed understanding of desired project outcomes and can facilitate innovation.

Recommendation

1. The NSW Government to invest more time in early engagement, including:
 - conduct early industry briefings
 - move away from the 'non-conforming bid' mindset that dissuades bidders from delivering increased social value
 - recognise the commercial nature of the market and use that to drive innovation.

Collaborative relationships

Unfortunately, the construction industry in Australia is marred by unnecessarily high levels of disputation. To counter this persistent problem all parties need to collaborate. The NSW government can lead the way by fostering collaborative relationships through procurement processes and contracting.

Insurance

Too many burdensome insurance requirements currently exist in NSW government contracts:

- *Unreasonable policy obligations* – examples include clauses requiring clients to approving the designer business' insurance policy and/or see full copies of insurance. These types of obligations are not only unreasonable but also often unable to be met. For example, insurance policies are commercial in-confidence between the insurer and the insured so cannot be shared).
- *Inappropriate insurance limits* – examples include significant high limits such as \$10m professional indemnity insurance that do not reflect the risk of the supplied services and/or what is available in the market to such businesses.

Consult Australia's advocacy on insurance matters is supported by the Insurance Council of Australia that says that 'over protection' is a significant issue to be addressed in government contracts. We urge the NSW government to also consider the recent report by Business NSW, [Insurance at the speed of business](#), which demonstrates that while the average PI claim was \$250k, the typical insurance coverage sought by business was \$20m. This discrepancy is driven in part by the burdensome insurance requirements set by government clients.

Limit of liability

The concept of a limit of liability recognises the risk/reward balance between the parties. Importantly a limit of liability is an acknowledgement that consulting businesses typically have limited tangible assets, noting that the value of the business lies in the skill and professionalism of the people they employ and the intellectual property they produce.

A requirement for unlimited liability might seem attractive to government on the face of it. In reality, once a consultant's insurance and assets are exhausted, any unmet liability falls back to the client because the consultant will have no option but to close the business. This is undesirable not only for the client, but also for the people working in that organisation, the other businesses that have contracts in place with that consulting business (e.g. other clients, sub-consultants, suppliers), and the economy more broadly.

Limiting the liability of consultants through the terms of the contract ensures that there is agreement between the consultant and principal about the risks and levels of liability that both parties may be exposed to. In assessing this the parties can:

- agree an amount that provides both with some surety as to their level of exposure
- avoid duplication of contingency funds to cover the same potential risk event
- avoid unnecessarily inflating the cost of the project
- better reflect the risk/reward profile of the project.

Limitation of liability carve outs should not be included in contract drafting because they typically negate the value of the clause as they seek to undermine the operation of the limit. Examples of carve outs that should **not** be permitted:

- Carve out for indemnities provided under the contract
- Third party claims
- Property damage
- Loss of use of property
- Consequential loss
- Insurance proceeds.

Proportionate liability

Proportionate liability is a statutory right, which ensures that a party is only liable in damages for the proportion of the suffered loss that is attributable to that party. It only applies to financial harm and economic loss, not to cases involving personal injury or death. Proportionate liability was introduced nationally through state and territory civil liability legislation to improve the availability and affordability of professional indemnity (PI) insurance in Australia following the insurance crisis of 2001 when the insurer HIH collapsed.²

The key policy objective of proportionate liability – helping to ensure that PI insurance is available, affordable and dependable – is undermined if design and engineering consultants are required by a client to contract out of the proportionate liability legislation.

These reforms were positively received by local and international insurers. Anecdotal evidence indicates these measures have assisted in improving the allocation of capital to Australian PI insurers. However, insurers have also indicated that if the application of proportionate liability can be by-passed contractually the insurance market will price and allocate capital to Australian PI risk as if proportionate liability does not apply.

² 2015 Treasury Briefing, '[Aftermath of the HIH collapse](#)'.

Under the *Civil Liability Act 2022* (NSW) it is permissible to contract out of proportionate liability, and it is more common than not for NSW government contracts to contract out of proportionate liability.

To realise the intent of the civil liability reforms and to bring balance back to the market, especially as it related to the availability and affordability of PI for consulting designers and engineers, Consult Australia advocates for preserving proportionate liability in all professional services contracts.

Risk

All projects carry a certain amount of risk. Every project is different and comes with both inherent and unique challenges. It is important that the NSW government recognise this and acknowledge and account for these risks. Consult Australia recommends that risk assessment is undertaken on all projects and should be an integral part of the procurement process. A straight pass through of risk to contractors/consultants does not equate to risk management and gives project owners a false sense of security.

It also does not demonstrate a balance between risk and reward for each party involved in the project. For example, consultants are appointed to advise and assist their client to deliver a project. A consultant's fee will only be a small proportion of the total project cost – on major projects this can be typically 5% of the total project cost. Therefore, there is a significant imbalance between risk and reward if consultants are required to carry unlimited liability for all loss/damage connected to the project, typically driven through the inclusion of indemnity and warranty clauses in the contractual terms and conditions.

Project owners should instead undertake a risk assessment process to better understand and apportion risk appropriately, acknowledging they also carry ownership of risk.

All government contract clauses should be broad enough to cover the risk to the government. Too often very broad clauses are drafted and included in government contracts that are unnecessary to protect the interests of the public purse. For example, Consult Australia recommends that instead of broad consequential loss provisions, government clients assess what losses need to be protected against (such as loss of use of the final project caused by the consultant) and cover just those consequential losses.

Recommendation

2. NSW Government contracts should foster collaborative relationships rather than combative ones by:
 - ensure that insurance obligations and limits are reasonable and appropriate
 - always including liability caps at an express monetary value (in the aggregate) with limited carve outs
 - guarantee proportionate liability in professional services contracts on government projects
 - align all contract provisions with the actual risk of the government.

Engage industry in reform co-design

As an industry association, Consult Australia has knowledge of local business needs, workforce training and capacity needs, diversity and inclusion challenges faced by businesses, and the needs of small and medium-sized businesses.

When reviewing procurement processes, documentation and contracts, government should see industry associations as a resource to utilise, not a burden. Too often reforms are passed through government, often with engagement with suppliers but rarely with considered engagement with industry associations.

For example, Consult Australia members often ask us to assist them when new panel arrangements are proposed by government, and we effectively have to 'push our way in' to give government the benefit of our whole of industry view. It would be better for all if government agencies proactively engaged with us early in the process. This will likely result in less angst from individual suppliers but also a smoother process with suppliers as the 'big ticket items' have already been explored with industry associations.

By involving industry associations early, we will have the background to the changes and be able to assist in communicating the changes and the reasons behind them and therefore assist building business capability.

Recommendation:

3. NSW Government procurement practices should include involvement of industry associations early in any re-design or reform practices as well as any release of new material.

Whole of government procurement reforms – a positive step forward

Consult Australia supports whole of government procurement reforms which enables industry involvement from the small businesses through to global firms. Consult Australia welcomes the opportunity to collaborate with the NSW government on changes for the betterment of all. The work of NSW Treasury is a particular example of positive whole of government procurement reforms, and we commend NSW Treasury for their work. Further, we welcome ongoing collaboration between industry and NSW Treasury, as well as TfNSW on streamlined standardised contracts, to continue the positive collaboration between industry and government.

CONTACT

We would welcome any opportunity to further discuss the issues raised in this submission.



02 8252 6700



[linkedin.com/company/consult-australia](https://www.linkedin.com/company/consult-australia)



info@consultaaustralia.com.au



[consultaaustralia.com.au](https://www.consultaaustralia.com.au)