

Submission
No 26

**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**

Name: Name suppressed

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Partially
Confidential

Inquiry into the procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales

My Experience Synopsis

I was employed by NSW Public Works in its various forms from , being a contractor since my retirement in where my experience and knowledge of Project Management, Procurement, Training and Contract Management were utilised. My early career was in providing water and sewerage schemes and the later career in a multitude of areas such as; schools, hospital upgrades, heritage building refurbishment , large scale office fitouts, airports, mine habitation (asbestos mine) relocatable buildings, asset management contracts, emergency management , air-conditioning of schools. More recently reviewing unaccredited construction agencies construction procurement process, writing a guide on how an accredited agency staff might review those plans and drafting the initial emergency response contracts for the North Coast Floods, in obtaining/delivering/installing over 800 temporary relocatable buildings and house inspections before the creation of the temporary North Coast Reconstruction Authority.

Generally my whole career has been in the delivery of assets to the people of NSW with the last as a
Therefore will limit my submission and comments to the rather specific "Construction" related procurement.

My submission focuses on the use of the construction procurement system for works between \$0.5m and \$100m as this in my opinion is where the bulk of contracts are used. Contracts over this amount are rarely undertaken by **uncredited** construction agencies and where agencies generally consider undertaking the works themselves or with the assistance of the other agencies or the private sector . Projects great than this size are generally undertaken by **Accredited** construction agencies and in the main are planned and organised. Please don't let the committee be fooled by the size of the budget that some agencies have. There is a great deal of difference between undertaking a \$1B project to undertaking a \$1m but it sound impressive when you say you have \$4B under way but that is his only 4 or 5 contracts over 2- 4 years and in the main smaller agencies do not do work of that size or duration. The Procurement System for construction is there to assist those agencies who are not accredited.

Enquiry item 1(a) generally

I believe the current devolved Construction Procurement system fails the people of NSW.

The significant areas of failure appear to be:

- no one appears to be responsible for anything
- if there is responsibility there is no accountability
- and there appears to be no consequences for not doing what is required by agencies or suppliers
- No one checks any records for accuracy
- Lateness of information is tolerated (sometimes by greater than 12 months) by the board
- Poor (or any) performance of contractors/consultants is not monitored
 - Therefore, there are no consequences to suppliers for poor performance
 - And no rewards for better than expected performance
- It is extremely difficult to find back up documentation/notes/guidance material on the "buy" web site for construction related matters
 - And if you do find it, the material it has not been updated for over 10 years (or more)
- There is very little consistency in the use of standard documentation and, were it is used, it is modified in such a way to render any consistency as irrelevant or changes the risk profile so dramatically it is cannot be considered a standard government document

What do I perceive as the root cause of this failure?

Fundamentally :

- Failure to actually manage the system.
- By this I mean having staff and systems in place that can actually maintain the system
 - Staff need to have construction related experience
 - There needs to be enough staff to do the work and manage the data
 - Sufficient funding & budget is required
 - Long term committeeman
- The management of the system (and other agencies whether accredited or not) needs to have sufficient gravitas that inaction or failure to comply has consequences
- Suppliers who don't perform need to be informed and if sufficient improvement is not observed, then those supplies need to have consequences applied such removal from lists, reduced opportunities for work or be investigated for braches of the procurement code, laws and.

In short the construction procurement has no direction , no goals, no staff , no budget, a myriad of rules that get in the way and has no way of enforcing requirements.

The analogy I have is; like having speed restrictions on our roads and then relying on self reporting to say when you have exceeded the limit. (who would do that to themselves) Eventually, as there are no consequences, our roads become unsafe, and un usable so people seek out alternatives.

I fear construction procurement is near collapse, not because of what's there is useless, far from it, but because no one seems to be in control. It has just been lumped in with procurement. Buying a road, fire station, remediating a mine site, a cycle way, flood

mitigation scheme, school or hospital is not an over the counter transaction . It requires, knowledge, good systems, trained staff and knowledgeable management . It is not an over the counter transaction, like buying a car, stationary, printers or other premade items.

The committee needs to be aware of how the construction industry actually works in the modern age. Very few companies employ their own tradesman any more. They will employ a management team and or project management team supported by, estimating, accounting, safety, I.T., legal, and other systems related to quality/environmental management etc. This overhead core then engages various sub-contractors to price various components of the project and those sub contractors often have few of their own trades people relying on various much smaller subcontractors. This continues on down the line until the smaller family owned companies, usually trade based, who actual undertake the work. These family owned entities are the ones that employ apprentices directly, not through a trade training school or entity. They work in a specific locality or area (particularly out of the greater Sydney Newcastle Wollongong area. This is where the government can make a big effort in training tradesman. It take 3- 4 years to have an apprentice trained and classified as a tradesman. So any policy has to be targeted at long term goals for at least 6-7 years, and this might produce 4 or 5 cohorts of qualified trades people.

What gives small industry confidence, the likely hood of a pipeline of work over several years (not a guarantee, just confidence in the future) and that they will be paid for the work they have agreed to do regularly and on time ? Confidence is difficult to build but can be related to rhetoric, news stories, government media briefings, industry opinions and general public confidence. I do not have expertise in that field so will not comment other to say government has to actually do what they say they are going to do rather than have media release.

Making sure the family owned businesses get paid their contract value, regularly and on time is big confidence booster. Construction procurement also includes the ongoing management of construction project and that includes meeting contractual obligations and NSW government legislation. Sadly, there seems to be a lack of incentive for government agencies to comply with the Security of Payments act (SOPa) as administrative and agency cash flow policies seem to dictate when payment are made ie they made a the convenience of the payment system rather than in line with the governments" own laws. A Principal (Government agency) has to pay a head contractor within 15 days of receiving a payment claim and a head contractor has to pay a subcontractor within 20 days of the receipt of a payment claim from the subcontractor. Note that a payment claim, under the SOPa d an invoice is not required to be issued by the head contractor to the Principal or from the subcontractor to the head contractor. Agencies seem to have trouble making payment with out an invoice (because of the supply side arrangements) which can delay payments. Agencies delay payments, as they are not able or unwilling to cope with the law under SOPa. Generally this might be less than a week ie with 20- 21 days but can be significantly longer. Most head contractors don't complain as they get paid by the government eventually and it is often more secure than dealing with other parties. However a quick swift and sure payment process that works within the whole industry will greatly improve confidence. Note it is illegal for a Head contractor to say to other parties that the other party will be paid when they are paid. It is my understanding the NSW School Infrastructure will not pay unless they receive an invoice for the amount of the Progress Claim. This create issues when the contractor and the Principal under the contract disagree on the amount to be paid and progress payments a further delayed until an invoice lining up with the Principals valuation appears.

Again no one checks on Agencies payment regimes (and no governmental consequences for failure to meet the requirements) and sadly their does not appear to be practical or pragmatic way to ascertain if the Head Contractor is actually meeting their obligations other than the statements with SOPa that are only really looked at when someone complains and then it is often too late for the subcontractors business to survive . Even if the contractor was to be requested to provide details to the Principal (Government agency) on when a subcontractor made a claim and when it was paid (but not the quantum) The agency is not going to verify this as they are not the policeman and all they will do is forward it to the appropriate location for data collection. Since there appears to be no one monitoring this data it would be as good as useless.

b) the effectiveness of whole of government and agency procurement arrangements, including standing offers, panels and prequalification schemes, in ensuring that suppliers and their subcontractors deliver value for money and comply with relevant policies and regulations, Including labour laws, at the qualification, contract negotiation stage and contract management stages of procurement

Essentially the Policy should be mandate the use of standard government construction contracts unless the agency can demonstrate why the change will benefit the project, This make sit consistent across the whole of government and industry can understand the risk profile

All practitioners s are to be receive training (government and private who consults/contract to agencies) and undertake a refresher every 3 years . This keep standards high and raises the status of procurement practitioners, client side project managers.

(c) current capacity of procurement officials in government agencies to assess suppliers and ensure they, and their subcontractors deliver value for money and comply with relevant policies and regulation, including labour laws, at the qualification or contract stage and throughout the contract management stage

The procurement official themselves are generally aware of the procurement tendering requirements and responsibilities. However there is great lack of knowledge and technical skill on what it is they are buying, the innate risks to both government and supplier taken on with the projects an how to communicate effectively with suppliers. The government seem to have become an un-informed buyer. Because it is un-informed it does not even have the capacity to question the private sector who might be managing on its behalf. As they are uninformed they transfer all the risk to the contractor via design and construct. This is also easier for a private sector project Manager to arrange and mage as it only has to deal with one entity.

I can provide an example where an agency engaged a solicitor to writing a construction contract f(\$60M) for them and heavily modified the standard construction documentation GC21 and placed an inordinate amount of risk onto the tenders and contractors . The agency was seeking accreditation as a construction agency at the time. When asked why the documentation was so heavily modified the agency requested the solicitor to respond. It was clear the agency did not have the knowledge to answer this query and was totally reliant on the solicitor. The solicitor response was more about saying the tender situation would clause the industry to deal with the enhanced risk transfer in a low cost manner as they were competing against others. There was no explanation of the need for the changes and the expected advantages the agency was expected to obtain.

d) any opportunities that may exist for co-regulation, and other incentives to improve labour market governance and enforcement through the procurement process to ensure the process delivers both value for money and social outcomes

Procurement policy should not exist in isolation of what government is doing but there seem to be lack of coordination between agencies involved in construction procurement ie Fair Trading in administering the Security of Payments act , iCare in regard to construction insurance policies and in particular workers compensation premiums, work cover assisting agencies to gain better safety outcomes rather than agencies being fearful contacting work cover. At this time iCare does not how many contracts have been let , Fair Trading does not do an Audit t of contractors on the various government schemes to check for compliance , contractor performance reports go to an in box that is not managed by the NSW procurement and nobody seems to know how many reports to expect, as there is no cross checking between what is tendered, awarded and completed .

Item 1 (e) of the Terms of enquiry

the evaluation criteria used in tenders and how they are weighted in making a decision to award a contract, in particular consideration of:

(i) local content

Free trade agreements tend to over rule these issues at a state level. Cost more to implement and there are not ramifications of any effect if the targets are not met by the supplier or the agency requesting the target. Also the states have agreed that they can buy across borders and will not put tariffs or loading.

Also what is local ?

- ❖ Within the local government council area?
- ❖ Within a state government electorate?
- ❖ Within the state?
- ❖ Within 20 km of the project
- ❖ What happens if the project is within 100 metres of a border? Do you then allow for local on the other side .

Local content is politician speak for making people feel good with little or no way of putting a pragmatic plan into action. Even if you did decide on a contractor who stated they had local content and they did not produce it what would be the ramification and or consequences if they do not meet them. It is almost impossible to enforce and

(ii) value for money

This is usually a hard value number and there is great difficulty in defining the subjective benefits o this. If project is 10% over budget but employed 10 apprentices for two years in a rural area and made an aboriginal business viable, is that value of money and how do you measure that or even find that out sensibly. Unless treasury is able to be convinced the lowest dollar with some warm and fussy feeling is all you will get .ie if some targets are achieved, does treasury allow for the over expenditure, No. So the budget has to be reduced for these other outcomes and the asset is reduced in scope. Most agencies do not allow for the extra dollars required nor does treasury provide it. Again why would an agency reduce its budget unless there was some overarching benefit to the agency . Also if they do not meet

the target that was set do they suffer, does the supplier suffer?. Again no ramifications for the supplier and or agency for not meeting any set target.

Value for money is often tried to be displayed by the use of non priced criteria but some time these are applied in naive and simple ways. For instance the use of criteria such as past experience , safety/ quality/ environmental systems in place for quite simple construction projects, using prequalified contractors from a list that required them all to have these attributes in place. The criteria is meaningless

The value for money could in a lot of cases s just be the cheapest because it is simple and easy project. At other times it could be the project will engage 12 apprentices directly for 12 months or supply emergency housing at extremely short notice so cost is less important when compared to the immediate social outcome.

Agencies often put undue burden on themselves on producing by having priced and non-price criteria just for the sake of it as this seems to provide the image of value for money. I have seen 10% non price and 90 % Price . This clearly would delineate nothing and the non-price had three criteria related to safety and systems. More effort could have been spent on reviewing the tenderer's qualifications to ensure value of money when clearly the tenderer had shifted the risk profile back to the Principal and the reviewers could not see this or even understand that it occurred.

(iii) social, economic and labour market outcomes

Better confidence in the industry will leads to better outcomes including employment. For contracts of less than 2 years duration it is unlikely to have much effect on the desired outcomes of training and our labour market outcomes. There is no certainty for sub contractors. See my comments on giving confidence to the industries sub contractors.

(iv) environmental considerations, such as sustainable sourcing, energy efficiency and waste reduction

These are admiral goals but are too late when it comes to a construction contract as most of the decisions are made at the design stage. Energy efficiency is a design matter not a construction matter. If the design has all these goals within it then the contractor will install those. There may be some efficiencies in the machinery bought but most of it is the design specified.

Sustainable sourcing is difficult when it is bricks and mortar (or the equivalent of) as the again the decision making is before the contract is let. Unless you are aware of the waste streams in the design process you can't minimise them before construction starts.

These three aspects have to be known, thought about and incorporated into the project designs. This requires knowledge and skills and the ability to write a comprehensive meaningful brief to a designer and then it requires someone who can identify and ensure that the designer produces that brief . That skill and knowledge in government is rapidly disappearing or, **has already gone**. The private sector professes this knowledge but in reality there is little client side skills available at the moment. Just have a look of he shortage of client side project managers dealing with the reconstruction of the Northern rivers after the 2022 floods.

You can't buy what is not there, you have to make it yourself sometimes.

(v) innovation

Construction can be innovative space but rarely is it a giant leap forward, it is incremental steps. Innovation need to be long lasting effect on the project and current standard GC21 documentation allows for sharing of that benefit

What does the committee see as innovation in the construction procurement space?

- Digital engineering
- Mandatory use of Electronic construction programs and the monitoring of actual progress
- Artificial intelligence

The work requires physical effort in producing something with some person hands some where . Electronic means or other issues do not stop this aspect of construction work.

(vi) subcontracting arrangements

Please see the comments above in providing support to sub contractors .

(f) current approaches to transparency and accountability of procurement by New South Wales government agencies, in particular:

(i) function and requirements of the New South Wales Government Procurement Board and the New South Wales Procurement Policy Framework

It has functions that it can't perform, even if it wanted to, in the construction procurement area as it has not staff, no money, no budget, and is short on skills It has been rendered useless in the construction space for these reasons, but the systems are good if maintained, so people can use it and penalise/sanction or limit the expenditure of those that don't.

The Construction Leadership Group appears to offer no real answers and is so heavily biased to mega projects instead of the nuts and bolts and the boring work of doing the every day.

(ii) record keeping arrangements for procurement activities

These are non-existent or/and totally un-coordinated in any way. If they do exist there in no staff to review and analyse the trends or take corrective action. See earlier comments in regard to cross referencing and the lack of follow up of poor performance by agencies and suppliers

(iii) Agency annual self-reports and outcome reports

There is no way to verify these and they are often late or not done at all. There seems to be no consequences for lateness or inaction. The board appears toothless.

See earlier comments.

(g) the New South Wales Government's procurement practices, in particular its ability to:

- (i) prioritise local content, local manufacturing, and local jobs
- (ii) improve opportunities for quality training and workforce participation
- (iii) provide opportunities for diversity, inclusion and the participation of disadvantaged groups, including women and minorities
- (iv) support local suppliers, and small and medium enterprises

Please see my earlier comments in regard to these matters

(h) procurement best practice to encourage ethical conduct and promote social development in other jurisdictions, both nationally and internationally

I have not seen deliberate unethical conduct, however I have seen some naivety, inexperience and waste due to lack of knowledge and the performance of work in a mechanical and thoughtless manner ie this is what we did last time so this is what we will do again.

There is no feedback (or very little) from procurement on the success or otherwise on how these policies have improved social outcomes so agencies can see how their piece of the puzzle is contributing to the whole. This needs to be factual and not dressed up if it is not going as planned this needs to be seen so the all agencies can attempt to improve the overall.

Thank you for your time