

Submission
No 32

**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: National Electrical and Communications Association (NECA)
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Procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales

NECA SUBMISSION

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Introduction

In October 2023, the NSW Government announced an Upper House Inquiry into procurement practices of government agencies and its impact on the social development of the people of NSW.

As the peak industry body for Australia's electrical and communications industry, the National Electrical and Communications Association (NECA) has assessed the Terms of Reference and drafted the following submission on behalf of industry for consideration.

Terms of Reference include:

That the Standing Committee on Social Issues inquire into and report on the procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales, and in particular:

(a) the current state of procurement by New South Wales government agencies, in particular:

- (i) the value of procurement, through whole of government or agency procurement arrangements
- (ii) the policies, schemes and contracts of all categories that New South Wales government agencies procure, including labour
- (iii) the number of whole of government procurement arrangements available to New South Wales government agencies
- (iv) the application of the New South Wales Procurement Policy Framework and the devolved nature of the responsibilities and obligations of New South Wales government agencies under the framework
- (v) the value/volume of New South Wales government agencies procurement undertaken outside of whole of government procurement arrangements
- (vi) the accreditation program for goods and services procurement and construction procurement

(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

(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

(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

(e) 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
- (ii) value for money

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(iii) social, economic and labour market outcomes

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

(v) innovation

(vi) subcontracting arrangements

(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

(ii) record keeping arrangements for procurement activities

(iii) Agency annual self-reports and outcome reports

(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

- (h) procurement best practice to encourage ethical conduct and promote social development in other jurisdictions, both nationally and internationally
- (i) any other related matters.

Background

NECA is the peak body for Australia's electrical and communications industry, which employs 344,370 people and turns over more than \$82bn annually.

We represent over 6,500 businesses across Australia and 2,500 in NSW, performing works including the design, installation, and maintenance of electrical and electronic equipment in the defence, construction, mining, air conditioning, refrigeration, manufacturing, communications, and renewable energy sectors.

NECA also plays an integral role in the development of the next generation of Australia's electrical and communications tradespeople, contractors and sub-contractors. Through its associated Group Training Organisations (GTOs) and Registered Training Organisations (RTOs), NECA offers employment and trade training to some 4,800 apprentices nationally.

We represent the interests of electrical and communication businesses to all levels of government and in regulatory, legislative and industry development forums. Our members make an essential economic contribution to the NSW economy – connecting businesses, homes, and infrastructure – encouraging investment, improving reliability and energy security, and delivering affordable, environmentally sustainable outcomes.

Response

It is important to note the Federal Ombudsman is undertaking a review on how Australian businesses participate in Commonwealth procurement practices. The findings will consider the impacts on the implementation of the Federal Government's *Buy Australia Plan*.

NECA on behalf of its members, provided a comprehensive submission to the Federal Ombudsman on procurement practices and the specific areas of concern. This advice provided has also been included in this submission, specifically tailored to NSW small businesses and contract practices when engaging with NSW government agencies.

Small businesses constitute a significant portion of the NSW economy, contributing to job creation and innovation. However, accessing NSW government agency tenders can be a difficult and daunting task for small businesses due to various barriers. This submission advocates for the improvement of access to NSW Government procurement and tender opportunities for small businesses and subcontractors, emphasising the need for a fair and inclusive procurement process that promotes competition, transparency, and economic growth – specifically security of payment practices and unfair contract terms.

NSW procurement challenges include complex procedures, limited resources, lack of information, financial constraints, policy misinterpretations and a perception of bias towards larger enterprises. Therefore, it is imperative to address these barriers and create a level playing field that enables small businesses to compete.

Streamlining Procedures:

The NSW Government should focus on streamlining procurement procedures to reduce complexity and administrative burden. Simplifying the documentation requirements, establishing standardised processes, and providing user-friendly online platforms can significantly enhance small business participation. Furthermore, regular review and improvement of procurement guidelines and regulations can ensure they remain relevant and efficient.

Enhancing Information Accessibility:

To facilitate small business engagement, the federal government should enhance the availability and accessibility of information related to procurement and tender opportunities. Establishing a centralised online portal that provides comprehensive information, including upcoming tenders, eligibility criteria, evaluation processes, and contract terms can help small businesses make informed decisions and plan their participation effectively.

Promoting Capacity Building:

Small businesses often lack the expertise and resources to navigate complex procurement processes. The NSW Government needs to invest in capacity-building initiatives that provide training, mentoring, and guidance to help small businesses understand and meet the requirements of government tenders. By enhancing their knowledge and skills, small businesses can compete more effectively and deliver quality goods and services.

Implementing Set-Aside Programs:

The NSW Government should consider implementing set-aside programs that allocate a certain percentage of procurement contracts exclusively for small businesses. This approach has been successful in various countries, allowing small businesses to secure government contracts without facing competition from larger enterprises. Set-aside programs can promote diversity, foster innovation, and drive economic growth by providing small businesses with increased opportunities.

Encouraging Collaboration and Subcontracting:

To facilitate small business participation in NSW Government tenders, Government should encourage principal contractors to collaborate with small businesses as subcontractors. This approach promotes partnerships, increases the likelihood of small business participation, and allows them to leverage the expertise and resources of larger firms. By actively promoting subcontracting opportunities, the government can foster a more inclusive procurement ecosystem.

Ensuring Transparency and Fairness:

Transparency and fairness are fundamental principles in government procurement. The NSW Government should establish clear evaluation criteria, ensure objective decision-making processes, and implement robust oversight mechanisms. Small businesses should have confidence in the fairness of the procurement process, which can be achieved through regular audits, independent reviews, and public reporting of contract awards. Transparency promotes trust and encourages small businesses to participate actively.

Evaluating and Monitoring Outcomes:

Regular evaluation and monitoring of the outcomes and impact of initiatives aimed at improving small business access to government procurement are essential. The NSW Government should collect data on the participation of small businesses, assess their success rates, and identify any ongoing challenges. This information can help refine policies and strategies, ensuring continuous improvement and addressing emerging issues.

Financial Capabilities:

One of the biggest barriers for small business is the difficulty in accessing affordable finance. Most small business lending is secured against personal assets, often the family home. For those small business owners who do not own a home, or for others that need additional finance for their businesses to grow, accessing finance can be difficult. Late payment for goods and

services supplied to Government and large businesses have a major impact on cash flow for a small business and can put undue stress on both the business and individual. A regulated payment framework may also assist, but only if a workable approach can be identified which does not overburden business with red tape.

Unfair contracts terms:

Additionally, NECA wishes to highlight our concerns with unfair contracts and contractual arrangements which subcontractors must accept when dealing with head contractors on significant government procurement projects.

Unfair contract terms are often included in agreements for subcontractors and as an advocate for fair business practices, NECA on behalf of its members believe it is crucial to address this matter to ensure a level playing field and protect the rights of subcontractors.

Unfair contract terms can have significant negative consequences for subcontractors, both economically and legally. NECA wishes to highlight and outline some common examples of unfair contract terms that are frequently encountered in subcontracting agreements:

1. Unreasonable Risk Allocation
2. Unbalanced Indemnification Clauses
3. Lack of Transparency
4. Provisions concerning Delays to projects and delay costs
5. Lack of Remedy and Security of Payments

The presence of unfair contract terms within subcontracting agreements undermines the principles of fair competition, collaboration, and equitable treatment of all parties involved. It not only hampers the ability of subcontractors to operate efficiently but also inhibits economic growth and innovation within the industry.

It is essential to acknowledge that government contracts often involve complex and large-scale projects, requiring the involvement of multiple subcontractors.

While it is understandable that the government aims to establish efficient and cost-effective processes by awarding contracts to head contractors, it is crucial to ensure that favourable terms granted to head contractors do not unfairly disadvantage subcontractors and must cascade to the subcontractor in full.

Therefore, it is essentially that government procurement policy ensures head contracts only proportionally distribute the risk to subcontractors where the subcontractor has direct control of those risks.

The NSW Government should use their role as the client, to make it a contractual requirement that back-to-back contracts are provided down the contractual chain and to ensure that where it has been found by an adjudicator or court that risk has disproportionately spread, that the clauses causing that outcome are void.

Independent scrutiny

In the context of State Government procurement in New South Wales, a fair and equitable approach should be taken in evaluating seeking contracts. To ensure transparency and fairness, it is proposed that when these entities engage in discussions regarding their contracts with subcontractors, the details of these deliberations should undergo thorough scrutiny by relevant Industry Associations. This process will serve as a crucial checkpoint to ensure that contractual agreements are just, transparent, and in compliance with industry standards. The collaboration between big businesses, subcontractors, and Industry Associations will foster a climate of trust and integrity in the procurement landscape, contributing to the overall health and sustainability of business relationships.

Furthermore, it is recommended that the State Government establishes a formal mechanism allowing Industry Associations to petition and bring attention to instances where unfair contracts are being deployed. This avenue will provide a structured platform for Industry Associations to voice concerns and communicate instances of inequitable practices in government procurement. By fostering open communication channels, the government can proactively address and rectify any perceived injustices, reinforcing a commitment to ethical business practices and ensuring a level playing field for all stakeholders involved in state procurement initiatives.

In conclusion, while it is reasonable for head contractors to receive certain benefits in government contracts, it is crucial to strike a balance that does not unfairly disadvantage subcontractors who may undertake at times eighty five percent (85%) of the actual physical

work. By legislating fair and favourable terms for subcontractors, the NSW Government can foster competition, economic growth, collaboration, and adherence to ethical and legal standards. This approach creates a more inclusive and sustainable contracting environment that benefits all stakeholders, including consumers involved in government projects.

NECA seeks to work constructively with the NSW Government on this important task. To arrange NECA's further participation or should you wish to discuss any matter relating to the submission, please contact Lauren O'Keefe, Policy and Advocacy Manager on
or

Yours sincerely

Oliver Judd
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