

Submission
No 57

**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: Australian Workers' Union

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NSW Parliament Inquiry: Procurement practices of government agencies in NSW

Submission of The Australian Workers' Union NSW Branch

April 2024

Introduction

The Australian Workers' Union (AWU) is one of Australia's largest unions. We represent around 20,000 workers in New South Wales and around 72,000 nationally. While ours is a highly diverse union, many of our members work in industries where government is one of the most important consumers, or which rely heavily on government purchasing downstream. In particular, our members in civil construction deliver the roads, railways and new energy infrastructure that our cities and regions depend on. All such activity depends on building materials. We are also the union for metallurgy and materials manufacturing, with our members found at the steel mills, asphalt and cement plants and aluminium smelters that underpin our built environment. These and other building products start their lives as raw materials. There, too, the AWU is well represented, with substantial membership in mining as well as forestry.

We therefore welcome NSW Parliament's inquiry into the procurement practices of government agencies in NSW. We believe the \$40 billion that New South Wales spends on procurement every year - equivalent to over 5% of Gross State Product – is a powerful yet sorely underutilised tool of government. These monies can and should be directed in a manner that furthers the state's economic, strategic and social wellbeing. While such an approach is often said to run contrary to the imperative that public procurement deliver best value, these objectives should be seen as operating in harmony.

Indeed, NSW and other Australian jurisdictions have long relied on an unduly narrow concept of 'value for money' in administering public procurement. Formally, the NSW Government's *Procurement Policy Framework* provides that this term should be construed broadly: "*Value for money is not necessarily the lowest price, nor the highest quality good or service. It requires a balanced assessment of a range of financial and non-financial factors...*"¹ In practice, however, it is the AWU's experience that procurement officers are overwhelmingly swayed by upfront price in arriving at a decision. This is so across the spectrum of goods and services provided to government.

Such a narrow concept of 'value' sells New South Wales – its workers, industries, and ultimately all taxpayers – short. In determining what represents 'value for money', procurement officials should pay genuine regard to factors spanning well beyond upfront cost. Procurement policy should prioritise whole-of-life costs - accounting for factors such as a product's quality, warranty conditions, the availability of after-sales support and risks associated with potential defects. It should also be structured to drive positive outcomes for NSW and Australian workers and businesses (which, in turn, will also support increased spending elsewhere in the local economy, and enhanced taxation revenue). In relation to all of the above, local suppliers will very often present as much more competitive than under the current approach.

The nearly four million tonnes of steel produced in NSW every year provides a fitting example. BIS Shrapnel estimates that for every dollar spent on purchasing domestic steel, a total of \$2.30 of gross output is generated by other domestic industries – that is, manufacturing, iron ore and other mining, professional services, transport, and utilities. Moreover, every \$1 million in increased or retained domestic steel output produces around six direct and ten indirect jobs, as well as significant benefits for government balance sheets in additional tax revenue and avoided welfare expenditure. NSW steel is also produced to exacting Australian standards designed to ensure quality and safety. In stark and alarming contrast, Ai Group estimates that imported steel that fails to meet these standards is very common in Australian construction. A similar pattern of non-compliance is believed to apply across other key building products.²

¹ NSW Government (2022), '*NSW Government Procurement Policy Framework*', p. 9. Available at: https://www.info.buy.nsw.gov.au/__data/assets/pdf_file/0020/1065503/Procurement-Policy-Framework-1.9-April-2022-Full-V1.pdf

² Ai Group (2015), '*Ai Group submission: Australian Senate enquiry into non-conforming building products*'. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=c7d434a8-6107-480f-ac4c-8186ce5a0620&subId=462796>; Australasian Procurement and Construction Council (2015), '*Procurement of construction products: A guide to achieving compliance*', p. 5. Available at: https://9104f275-f216-4fd2-9506-720eb252b4fc.filesusr.com/ugd/473156_54e042e91f914e81a2e55b6a9bbbc301.pdf

More prominent than steel and other building materials are infamous decisions in transport procurement made under the current framework. An excess focus on upfront price led the former NSW Government to import ferries that don't fit under local bridges and trams that cracked when running on local lines. This, plainly, did not amount to good value for money.

The current approach to public procurement also fails to account for increased supply chain risk. Economic shocks such as the COVID-19 pandemic, highly dispersed international supply chains, reduced inventories and evolving regional geopolitics have all placed the ability of Australian buyers to secure strategically critical goods under greater strain. The imperative, plainly, is to restore domestic capacity to produce these products. Government can enable the retention and growth of strategically important manufacturers through public procurement.

However, the long-term trend for local manufacturing capability has also been in the wrong direction. Australia has consistently fallen in rankings reflecting our ability to develop and sell new products domestically, based on a lack of local economic complexity.³ Most recently, critical polyethylene and plastic resin manufacturer Qenos announced the closure of its plant in Banksmeadow. As well as costing hundreds of jobs, this places Australia's capacity to produce important products made from Qenos products, such as water piping and cable insulation, at grave risk. The AWU welcomes recognition by the Minns and Albanese Labor Governments that the degradation of the domestic manufacturing ecosystem must be reversed. Procurement policy reform is crucial to securing and restoring sovereign capability.

Finally, a procurement policy framework that supports local employment and economic development can be a valuable asset to the NSW Government as it seeks to gain and retain social licence for major infrastructure projects. This is particularly so in relation to zero emissions energy developments. That such projects face a major hurdle in relation to social licence is reflected by ongoing attempts by nefarious actors to scupper the Hunter offshore wind area. Put simply, the best path to community buy-in for such projects is through community returns in the form of strong employment and development outcomes. More than a generalised state or national dividend, such projects must drive the creation of quality jobs and economic development in the communities where they are based.

With these principles in mind, the AWU is pleased to provide the following in relation to the inquiry's terms of reference.

'NSW Government procurement practices, in particular its ability to prioritise local content, manufacturing and jobs...'

The procurement practices of the NSW Government do not afford sufficient priority to local jobs, content, and manufacturing – or indeed to other objectives that should inform procurement policy and purchasing decisions. This is not a question of policy design failure leading to unintended consequence, but a reflection of undue focus on upfront cost.

A number of changes are necessary to address this deficiency. Procurement policy should support a holistic approach to value, as well as the advancement of the state's economic, strategic, and social goals, in all NSW Government purchasing.

To this end, NSW procurement policy should explicitly provide that price should always be assessed on a whole-of-life basis, as far as relevant, rather than in relation to upfront cost only. This should be so irrespective of the type and scale of the acquisition, or the purchasing mechanism employed. The policy should further require that all purchasing decisions are guided by the following factors:

- Employment and economic development outcomes for NSW and Australia;
- In relation to goods:

³ See for example the Harvard Economic Complexity Index: Harvard University (2021), '*Country & Product Complexity Rankings*'. Available at: <https://atlas.cid.harvard.edu/rankings>

- The proportion of content manufactured in NSW or Australia (including with reference to inputs to final products); and
- Any implications for sovereign production capability.

Recommendation: NSW procurement policy should provide that a product's price must always be assessed on a whole-of-life basis.

Recommendation: NSW procurement policy should provide that the following factors must inform all purchasing decisions:

- Employment and economic development outcomes for NSW and Australia;
- In relation to goods:
 - The proportion of content manufactured in NSW or Australia; and
 - Any implications for sovereign manufacturing capability.

The AWU accepts that the significance of whole-of-life cost, local employment and economic outcomes, and sovereign capability will vary somewhat according to the nature of a purchase. Plainly, the relevance of each factor will depend to some extent on the characteristics of the product procured, as well as the presence and capability of domestic suppliers.

However, in the case of building materials, compliance with Australian safety standards should be a uniform requirement. The capacity to satisfy this marker of quality is a much a matter of public safety as it is of 'value' or outcomes for the state economy. Procurement policy should make it mandatory that all building materials used in NSW Government projects comply with all relevant standards.

Recommendation: NSW procurement policy should require that all building materials used in government projects comply with all relevant product standards.

In addition, the AWU believes procurement is a potentially powerful tool to empower NSW and Australian workers. Well-designed procurement policy can ensure that government wields its substantial purchasing power to drive safer, more secure, better-paid work throughout its supplier network. At the least, all businesses in receipt of public monies via procurement should be able to demonstrate compliance with industrial relations law, WHS requirements and all other legal obligations to their workforce.

Beyond strict legal requirements, procurement policy should aim to improve the pay, conditions, and incidence of secure employment in the vendor workforce. To this end, the presence of unions in a workplace can serve as a reliable indicator. The existence of a union-negotiated enterprise agreement, as well as a high density of union members in a workplace, strongly correlates with good pay and conditions and a reliance on permanent employment in preference to insecure work.

To improve the quality of work across the NSW Government's vendor network, procurement policy should mandate the following further considerations for all purchases:

- A supplier's history of compliance with industrial relations law, WHS standards and other legal obligations to its workforce;
- The proportion of casual employees and use of labour hire in a supplier's workforce; and
- The union density and existence of an enterprise agreement with the supplier's workforce.

Recommendation: NSW procurement policy should provide that all purchasing decisions must consider a supplier's:

- History of compliance with industrial relations law, WHS standards and other legal obligations to its workforce;
- Use of labour hire and casual employees; and
- Workforce union density and enterprise agreement, if any.

'The evaluation criteria used in tenders and how they are weighted...in particular consideration of local content, value for money, and social economic and labour market outcomes...'

Procurement policy should mandate that the above principles inform, to the extent relevant, all procurement decisions. However, a new tendering model is required to ensure they are reflected in this most important and technical purchasing process.

The AWU submits that NSW should adopt a 'two gate' tendering model similar to that implemented by the ACT and Victorian governments in recent years. The system would require all vendors to demonstrate a commitment to quality, secure employment as a precondition of tender participation. This would be prescribed as a threshold requirement. Once satisfied, suppliers would compete not only on upfront price, but against other key objectives of procurement policy, in the second stage of the process.

The model would broadly function as follows:

- **Stage one – certificate:** All suppliers would be required to obtain a 'quality, secure jobs certificate' before responding to a tender. This certificate would:
 - Verify the existence of an enterprise agreement between the supplier and its workforce, or a willingness to enter into such an agreement;
 - Affirm the supplier's commitment to engaging staff on a permanent basis wherever practicable; and
 - Confirm the supplier's history of compliance with industrial law, WHS standards and other legal obligations to its workforce.

Such certificates would be issued following assessment of a firm by an independent registrar. The registrar, in turn, would be empowered to revoke a supplier's certificate in the event of failure to adhere to the standards against which it was issued. A 'demerit points' system could apply, whereby firms that repeatedly breached the requisite standards would lose their certificate.

- **Stage two - Industry Participation Plan:** In responding to a tender, firms would be required to submit an Industry Participation Plan. This would address the bid's commitment to local job creation

and economic development, as well as to local content sourcing (both in relation to final manufactured products and their inputs) where relevant. It would also address any implications of the bid for sovereign capability.

- **Stage two - price:** Also at stage two, the supplier would provide its bid on price. As far as relevant, this would address whole-of-life costs to the purchasing agency, as opposed to upfront costs only.

A purchasing agency's assessment at stage one would be essentially binary. Any supplier in possession of a certificate would be permitted to proceed to stage two, while any supplier without a certificate would not.

At stage two, the model's evaluation criteria would require the purchasing agency to prescribe an appropriately high weighting to all considerations addressed in the industry participation plan. That is, the successful supplier would be that which demonstrates the most competitive combination of whole-of-life cost and positive local employment and economic development outcomes, together with local content sourcing and capability retention as relevant to the purchase.

Plainly, such a tendering model would be unsuitable in some limited instances – for instance, where an agency was compelled, by the nature of its purchase, to procure from international suppliers. However, it should generally apply whenever a tender's respondents will, or might feasibly, include NSW or Australian-based businesses.

Recommendation: The NSW Government should implement a 'two gate' tendering model. The first stage should require a prospective supplier to demonstrate a commitment to quality, secure employment in its workforce. The second should require it to compete on both whole-of-life cost and local employment and economic outcomes, as well as local content sourcing and capability retention where relevant.

Recommendation: The NSW Government should mandate use of the 'two gate' tendering model wherever respondents may include NSW or Australian-based businesses.

'Current approaches to transparency and accountability of procurement by NSW Government agencies...'

In addition to new guiding principles and a fit-for-purpose tendering model, the NSW Government should modify its approach to transparency and workforce accountability in relation to procurement.

In particular, the AWU acknowledges that the reforms outlined above would require new and enhanced capabilities, as well as a level of cultural change, within the NSW Public Service. A long-term focus on upfront cost as the driving consideration of procurement has created a tendency to dismiss or unduly deprioritise other factors within government, even where current policy provides that they should be considered. Decision-making that requires procurement staff to account for and balance a much wider range of factors in arriving at a decision is also inherently more complex.

This shift is thus likely to present a challenge. The NSW Government should provide training and guidance to all staff engaged in procurement to guide and assist them through policy and procedural change and the government's new expectations for procurement.

Recommendation: The NSW Government should provide all procurement staff with training to guide and assist them through reforms to procurement policy and procedures.

It is also the AWU's experience that major purchases are made with insufficient transparency. The government provides too little information on its procurement decisions to support stakeholders to assess outcomes and adherence to any ostensible purchase criteria beyond upfront cost. To address this information gap, the NSW Government should publish written analyses justifying the selection of suppliers for all major contracts (that is, those valued above a prescribed threshold).

More broadly, improved disclosure around the firms in receipt of government contracts and the nature of those engagements would support greater transparency and accountability for all actors. The state should regularly and periodically publish lists of all suppliers to government. These lists should disclose the types of goods or services provided, the value of those products and the location of relevant operations.

Recommendation: The NSW Government should publish written analyses justifying the selection of suppliers for all major contracts.

Recommendation: The NSW Government should publish lists of all suppliers - disclosing the types of products provided, their value and the suppliers' locations.

'Procurement best practice in other jurisdictions...'

In addition to innovations by the ACT and Victorian government explored above, the AWU suggests the following warrant consideration by the Inquiry in determining how to optimise NSW procurement policy.

Queensland

The Queensland Government adopted its *Queensland Procurement Policy* at the beginning of 2021. Its core principle is "*putting Queenslanders first when securing value for money – recognising that value for money is more than price paid.*"⁴

The policy explicitly includes a local benefits test for all significant procurement, allowing this consideration to be afforded a weighting of up to 30%. This measure intends to maximise opportunities for local suppliers – defined as those operating within 125 kilometres of the region where the procurement is being used.

Queensland's policy also explicitly acknowledges whole-of life cost considerations. Moreover, for all projects valued over \$100 million, as well as other declared projects, the state's 'value for money' assessment must incorporate best practice principles on WHS systems and standards, a commitment to supporting apprentices and trainees, and adherence to industrial relations law.

⁴ Queensland Government (2021), '*Queensland Procurement Policy 2021*', p. 2. Available at: https://www.forgov.qld.gov.au/__data/assets/word_doc/0023/187250/qldprocurementpolicy2021.docx

United States

In 2021, the United States passed its *Build America, Buy America Act*. This prescribes strong preferences for domestic materials for all infrastructure projects funded by the Federal Government. The legislation provides that all steel, iron, construction materials and manufactured products used in such projects must be made in the United States.⁵

In addition, the US *Buy American Act* has been in place since 1933 - and has only been substantially amended four times since it was first enacted. The Act applies to all direct purchases by the Federal Government valued at over US\$3,000, provided the item is for use in the US and reasonably available domestically.⁶ It has been interpreted to mean that at least 50% of a manufactured goods purchase, by final price, must be attributable to American made components.

In determining what constitutes 'American' goods under the *Buy American Act*, the place of mining, manufacturing or production is controlling. The nationality of the supplier is not considered. To illustrate, for steel to be considered 'US-made', all manufacturing processes must be performed domestically, with limited exceptions for specified metallurgical processes and to ensure compliance with multilateral trade obligations.

Other US statutes also impose higher domestic content requirements on indirect purchases (that is, not by Federal government entities, but using federal funds) and on other procurements not covered by the *Buy American Act*.

More information

The AWU is strongly committed to procurement policy that advances the economic, strategic and social wellbeing of NSW while delivering true value for the taxpayer. We would welcome the opportunity to contribute further to the Inquiry and respond to any queries regarding this submission. Please contact Manu Risoldi, Coordinator Policy Strategy & Campaigns, Australian Workers' Union NSW Branch, and

⁵ US Department of Agriculture n.d., '*Build America, Buy American Act*'. Available at: <https://www.rd.usda.gov/build-america-buy-america>

⁶ US Government Accountability Office n.d., '*The Buy American Act*'. Available at: <https://www.gao.gov/products/105519>
