

Inquiry into procurement practices for government-funded infrastructure

Submission to the House of Representatives Standing
Committee on Infrastructure, Transport and Cities
July, 21, 2021

Introduction

About us

ACCI is Australia's largest most representative organisation of small businesses in Australia. ACCI represents over 80 national industry associations and all state and territory chambers of commerce. Our members are mostly SMEs spread across industries throughout all parts of Australia. ACCI is also the only peak body with influence and engagement on the international stage. ACCI is the unique Australian industry association member of the ICC, IOE, BIAC to the OECD, CACCI, CAPE and represents Australian employers at the UN and WTO.

Executive summary

ACCI welcomes the opportunity to comment on the House of Representatives Standing Committee on Infrastructure, Transport and Cities inquiry into procurement practices for government-funded infrastructure. With the accumulation of large amounts of public debt by the Commonwealth and state and territory governments due to the COVID-19 pandemic, it has become more important than ever that decision-making for public investment is independent, market-focused, evidence-based and well-targeted at priority projects. It is equally important that procurement policies for government-funded infrastructure projects are designed in a way that delivers value-for-money, innovation and is inclusive and productivity driven.

Procurement policy reform has the potential to unlock greater productivity in the economy. Our members have identified unnecessarily complex and lengthy procurement procedures that lead to undesirable contracting behaviours that add significant cost and time to major projects. Greater consideration for the whole-of-life of the project at the initial stages may result in a modest cost increase at the start of the project but saves much greater cost later.

Our majority SME members have faced barriers to participation, particularly on large infrastructure projects. There are several significant productivity gains to be had in every phase of the infrastructure project from, pre-tendering tendering and contracting right through to project delivery and post-completion. To ensure that fast-tracked projects are released to market faster it is

necessary to streamline complex and lengthy procurement processes including pre-qualification barriers for SMEs.

Overall, elements of current government procurement policy and practice are inefficient, adding unnecessarily to the cost of infrastructure. This includes cases where government clients have unclear project objectives, select inappropriate project delivery models, fail to guarantee the accuracy of information in project briefs and manage risks inefficiently through contract clauses, such as by contracting out of proportionate liability. This is compounded by the state of the industry, with significant skill shortages, exacerbated by limited access to skilled migration due to the ongoing COVID-19 pandemic with no easy or quick win impacting the industry's confidence to deliver a growing pipeline of infrastructure (and related) projects. This in turn may impact Australia's economic recovery efforts.

There are best practice examples to be borrowed from Defence contracts including the long-established process of publishing its standard suite of contracts through the Defence Estate Quality Management System (DEQMS), and a focus on driving collaborative relationships with industry and transparency in payment times down the supply chain. Throughout we make a total of 23 recommendations to government.

Terms of reference

ACCI's submissions addresses the following terms of reference:

- challenges and opportunities with existing procurement practices, including frameworks, standards, rules and norms, and intersections between tiers of government and the private sector
- challenges and opportunities to enhance Australia's sovereign industry capability, including for Australian owned businesses
- Lessons from other Australian jurisdictions and other portfolio areas, including Defence's industry capability approaches
- alternative procurement models, including reference to international examples.

Challenges and opportunities with existing procurement practices

Challenges

The intersections between tiers of government

Infrastructure investment is not solely a Commonwealth responsibility. Most major infrastructure projects are jointly funded by the Commonwealth and the states and territories (typically 80:20), and administered by the States and Territories. To deliver cost effective and efficient infrastructure investment and consistent procurement practices, the Commonwealth must work cooperatively with the States and Territories, through National Cabinet Reform Committee on Infrastructure.

Unclear project objectives

Unclear project objectives are the largest driver of direct price premiums of major infrastructure projects. A study by Deloitte shows that unclear project objectives are encountered by firms for 37%

of public sector request for proposals (RFPs). ¹The primary data collected for the study indicates that firms add premiums to the price of their proposals for public sector built-environment projects in response to unclear project objectives, clauses for contracting out of proportionate liability and a number of other onerous contract terms. Using a bottom-up calculation process, Deloitte has estimated that these factors account for additional project prices in the order of 3.6%. And approximately 12% of projects have higher prices due to unclear project objectives. This creates a cumulative increase in infrastructure project costs in the order of several billions of dollars.

Some of the drivers of unclear project objectives that have been identified include difficulty of planning prior to cabinet approval, distinctions between end users and stakeholders for different infrastructure types and cultural differences between agencies in their approach to industry engagement. Price premiums and lack of competition associated with poor scoping was not frequently recognised by government but continues to be an issue.

The Deloitte study also finds that it can be challenging for agencies to engage fully with end-user groups before a project has received official cabinet approval. This can contribute to a situation where a project is inadequately scoped, due to a mismatch between the needs of the end user and the objectives of the agency. If not resolved prior to going to market, this political barrier can then flow through the efficiency of the procurement process.

There may also be a natural tendency for greater end-user involvement in the delivery of certain types of public infrastructure, driven by differences in the level of conflict between end-users and other stakeholders. For example, a road project is likely to be more complex and have broader stakeholder impacts, beyond the benefits accrued by end-users, compared to the construction of a school and this can impact the ability of governments to define project objectives with clarity from the outset.

There are also differences in the way that agencies engage with industry throughout procurement. The culture within a procuring agency can have significant influence on whether a supervisory or co-operative approach is taken in project scoping stages.

Culture and expertise in government

Undertaking a successful procurement requires a mixture of expertise. Governments should consider restructuring procurement teams to encourage better collaboration amongst key players. This requires legal experts that understand contracting, insurance specialists, practitioners with project experience and procurement experts that can properly evaluate value-for-money and appropriately tailor procurement practices, contracts and delivery models to the objectives of the project.

Inconsistent use of standard form contracts

Government agencies generally rely on the Australian Standard General Conditions of Contract (AS4122), however amendments of the Australian Standard made by governments can lead to sub-optimal risk management from an economic perspective. The inclusion of clauses seeking to transfer risk to the private sector has led to premiums and drives up overall costs. The inefficient

¹ <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-the-procurement-balancing-act-170215.pdf>

allocation and management of risk in procurement (contracts) is a significant inhibitor, that leads to increased costs, delays and excludes the participation of smaller-sized businesses.

Where standard form contracts are used, all parties have clarity to the liability framework. The benefit of using standard form contracts is that it eliminates time spent negotiating novel clauses and drafting. The use of standard form contracts also ensure that clients have full transparency of contracting arrangements down the supply chain. The use of standard form contracts can increase market participation as small businesses are more likely to sign an AS4122 rather than a novel contract. This also drives better behaviours as the focus is on moving to project delivery rather than lengthy and costly disputation of novel clauses and liability frameworks. Greater cooperation of all tiers of government across jurisdictions could help to improve the use of contract clauses in procurement.

Work health and safety laws

The tapestry of work health and safety laws across state jurisdictions is a core concern for members delivering infrastructure projects. While efforts to ensure worker health and safety and the use of conforming products is important, recent efforts have failed to capture the cost-benefits of mandating the use of certain types of products and materials and safety mandates. Governments should steer clear from setting boundaries on the use of certain products where there is not a strong case for doing so as this impacts and stifles innovation in product design and delivery. Further, there needs to be education and awareness raising via the use of guidance material rather than black letter law in the case of WH&S requirements. By reducing the complexity of WH&S laws across state level jurisdictions, a greater number of businesses are able to compete on national infrastructure projects.

Opportunities

Pre-tendering

Successful pre-tendering industry engagement forums go beyond agencies sharing the future pipeline of work and extend to knowledge-sharing between government and industry. By harnessing industry expertise, agencies can make best decisions on the risks, procurement model and contracting model for each project. The benefits of this include increasing access to industry expertise through the project pipeline, understanding the capacity and capability in the market and having the best chance to receive conforming bids. It also allows any concerns about the project delivery program, procurement methods and commercial matters to be addressed pre-tender, identifying early the projects that best suit their capability and capacity and allocating resources and effort on a manageable number of tenders. The benefit of engaging early in this way reduces time and budget over-runs.

Early contractor involvement (ECI)

The benefits of ECI are better gained through better utilisation of industry expertise to ensure tender materials have a clear scope so all bidding parties are aligned, as well as facilitating competitive tendering. This also allows industry to be on an equal footing at bidding stage, being able to provide more accurate bids given the clear scope in tender materials and through increased collaboration between consultants and contracts, ECI allows the contractor to contribute to the design of the project.

The benefits of engaging a consultant to develop tender materials are also necessary to manage budgetary and cost matters. Having an independent review of project costs allows clients to assess overall position and the cost risk-allocation at all stages of the project. This increases trust and collaboration given the transparent approach.

Fit-for-purpose contracting model

The selection of contract model can have a significant impact on the project outcome and the behaviour of parties to the contract. A key focus should be trust and collaboration as the tool is often used to guide business relationships. Best case examples demonstrate that early contractor involvement (ECI) and ensuring the position of the main consultant is equal to the contractor are most successful in embedding collaborative relationships. The benefits of this are that it embeds the right behaviours from the start, giving parties the tools to be collaborative, increasing transparency for both designer and contractor engagement and allowing for a better balance to managing risks and promoting innovation throughout the project.

Key performance measures and incentives

Key performance measures and incentives drive improved behaviour and increase the likelihood of performance indicators being achieved. This is a superior approach when compared in contrast to punitive measures that act to penalise suboptimal behaviours.

Improve data governance standards and access

Investment in technology can deliver significant benefits from parties using technology to store information, design and innovative solutions. As projects become larger and more complex digital engineering instruments and central digital information portals have become increasingly necessary. Restricting data access to a limited scope can stifle innovation and inhibit efficiency. Enhancing data access can lead to improved transparency and drive innovation for current and future projects. The collection of relevant data can also be used to inform future project planning. By documenting learnings from the project, industry can better anticipate the risks and issues for future projects.

Key Recommendations

- 1 - Work with states, territories and local government through National Cabinet Reform Committee on Infrastructure, to more effectively identify and deliver cost effective, efficient and consistent procurement solutions across all tiers of government.
- 2 – Set up Government procurement teams that have a mixture of expertise in practical, legal, insurance and previous procurement experience, acting to enhance value-for-money evaluation and appropriately tailoring procurement processes, contracts and delivery models to the objectives of a project.
- 3 – Consider allocating greater resources towards project specification by setting out project objectives clearly, in order to reduce time and resources on contracting.
- 4 – All tiers of Government to work collaboratively on identifying whether it intends to use clauses to cover their losses or to actively mitigate risks by removing contract clauses that do not stake up.

5 – Develop and apply limited liability guidelines to assist agencies, thereby ensuring that liability clauses do not add unnecessarily to project costs. Such guidelines should simplify the process of setting liability caps, while taking into account variations in market practice, project size, risk and the size of the supplier.

6 – Allocate greater resources to verify the accuracy of information provided in a request for tender, rather than transferring the costs of that work to all bidders, creating duplication.

7 – Implement more efficient and streamlined compliance requirements, particularly where the information provided by firms is rarely a differentiating feature of the successful tender such as standard form agreements or submissions of compliance documentation as part of pre-qualification schemes.

8 – Apply continual evaluation and adaption of procurement frameworks to encourage innovation. Be open to non-conforming bids, new delivery models, early market sounding options and continue to provide opportunities for unsolicited proposals.

9 – Provide incentives to state and territory governments and local councils to adopt new developments in auction design that enable packaging of bidding for contracts, to increase competition by enabling a larger number of smaller contractors to bid for projects.

10 – Improve pre-tender industry engagement by increasing transparency and knowledge-sharing on risk, procurement and contracting and allow tender documents and budgetary and cost matters to be managed by an expert to drive down overall and long-term project costs.

11 – Adopt fit-for-purpose contracting models best suited to the project, considering the ECI.

12 – Adopt the use of standard form contracts to improve clarity to the liability framework, lift the participation of small businesses, and reduce the risk of lengthy and costly disputation of novel clauses and liability frameworks.

13 – Implement key performance measures and incentives whilst steering from punitive measures and increase data governance and access to industry to drive collaboration and innovation.

14 – Improve data governance standards and access to drive innovation and future cost-saving solutions.

Challenges and opportunities to enhance Australia's sovereign industry capability

Reducing high barriers of entry for small business

Small and medium enterprises (SMEs) face barriers which are rarely dealt with. With the pressure COVID-19 is putting on people and the economy, these matters become the focus of much needed

action and redress. We encourage government to consider procurement frameworks to be developed and designed with small business friendly processes in mind. The building and construction industry is hugely dominated by small business and we need to ensure that procurement frameworks are more accessible for small business. There is also a need to develop SMEs ability to tender for contracts, particularly first-timers, as this drives competition and improves participation.

New techniques in auction design such as that being developed at the Centre for Market Design at Melbourne University to enable business and the market to determine the optimum allocation of packages of work.² These techniques provide scope to break tendering processes into a number of smaller components, enabling contractors to make a number of bids for different components of a project. This will increase competition by widening the pool of contractors able to bid on projects and reduce delays in the commencement and completion of projects. The adoption of these new techniques offers the opportunity to reduce costs, to improve the efficiency of delivery of major infrastructure projects.

Enhancing collaboration

The domestic construction industry is not a fast adopter of new technologies, techniques and materials. Innovation is constrained by the diversity of stakeholders involved and their divergent interests and objectives. With global, national and regional targets, the built environment industry is required to meet the increasing demands for liveable communities', carbon neutrality, reduced water use, and continually develop more efficient and sustainable resources. Construction and design organisations face challenges competing for skilled and experienced staff that have the capability for new design, construction and materials development in order to meet the targets set by international, national and regional governments.

As large projects are broken into multiple programs of work there is an opportunity to ensure that all parties across the entire project can collaborate and share. Greater collaboration across the infrastructure ecosystem allows for greater exploration of innovation, increases the potential to share resources, and drives better behaviours.

Protectionist policies in procurement

Government procurement that aims to favour local suppliers in the domestic market can introduce market distortions that limit choices, increase prices, and undermine economic efficiency. Increased competition from foreign suppliers for government procurement contracts can put downward pressure on costs for goods and services, giving taxpayers value for money, and provide access to goods and services that can improve the quality of government services, all the while encouraging better allocation of resources across the economy. Government must avoid protectionist policies that discriminate against the most competitive and productive infrastructure project solution.

For some time, the international trade community has worked to bring government procurement under multilateral trade disciplines. Australia became the 48th member of the World Trade Organisation (WTO) [Agreement on Government Procurement \(GPA\)](#) when the [Agreement entered into force](#) in Australia on 5 May 2019. The Agreement provides greater opportunities for Australian businesses of all sizes, reciprocal, legally binding access to the government procurement markets of

² <https://fbe.unimelb.edu.au/cmd/partnerships/our-partners>

the 47 current GPA members worth approximately A\$2.5 trillion each year. Membership of the GPA will continue to grow, opening up more markets to which Australian exporters will enjoy access. Under the GPA, Australian exporters of goods and services benefit from a level playing field in global government procurement markets, with businesses enjoying significantly expanded access to be able to bid for government procurement opportunities internationally. Details of the opportunities for Australian businesses to participate in the GPA's A\$2.5 trillion market are available on the [WTO e-GPA portal](#) and this is actively encouraged to our members. Government must act to encourage greater business participation in global procurement opportunities, in particular, where local business and industries have a competitive advantage. Opening up SMEs to the global community has much greater economic benefits to local firms and industries than discriminatory protectionist policies.

Key Recommendations

15 – Consider embedding small business participation targets in large infrastructure projects by simplifying and streamlining tender processes.

16 – Adopt new techniques in auction design such as that currently being developed by the Centre for Market Design at Melbourne University to enable the market to determine the optimum allocation of packages of work.

17 – Drive efforts for greater levels of collaboration to enhance the exploration of innovative solutions to complex design and delivery projects.

18 – Avoid protectionist policies that discriminate against the most competitive and productive infrastructure project solution.

19 – Encourage where possible, local business participation in the A\$2.5 trillion global procurement market.

Lessons from other Australian jurisdictions and other portfolio areas

Federal Department exemplar

The Department of Defence has a long established process of publishing its standard suite of contracts through [DEQMS \(Defence Estate Quality Management System\)](#). Defence publishes standard contracts for the supply chain, to be very clear of its expectations even where a supplier may be at arms-length to Defence. DEQMS includes; Head Contract, Managing Contractor Contract, Design Services Contract, Project Management/Contract Administration contract. This transparent approach should be standard across all government procurement, as it is public money being spent.

The Defence Infrastructure Division has allocated considerable effort in reviewing procurement practices and contracts. The Division has a collaborative relationship with industry (contractors and consultants) and have taken on board industry concerns about constraints and barriers. For

example, Defence Infrastructure Division participates in quarterly collaborative forums with consultants and contractors (managed by Consult Australia) to enhance the collaborative relationship between industry and Defence. This has led to Defence-implemented changes that seek to balance the needs of industry but still protect the interests of the Commonwealth. The Department of Defence has also placed significant emphasis on ensuring transparency down the supply chain in order to improve payment times.

Payment times and e-invoicing

We applaud recent efforts by government to reduce payment times for small business. The federal and state governments have all moved to faster payment times for goods and services provided by small businesses. The NSW government has implemented the benchmark for payment times for small business services. The NSW framework should be adopted nationally as part of consistent procurement practices in infrastructure. Registered small businesses that supply to in-scope government departments are now paid within five business days of central payment departments receiving a correctly rendered invoice for goods or services up the value of \$1 million. Payments up to \$10,000 can also be paid instantly.

Further efforts being made in the national e-invoicing rollout will also deliver substantial productivity gains across the economy. Around 90% of SME invoices are currently processed manually using paper or emailing of PDFs. According to the ATO, Australian small businesses are collectively owed \$26 billion in unpaid invoices at any one time. E-invoicing is the direct exchange of invoices between buyers' and suppliers' systems. The benefits of e-invoicing particularly for SMEs are many, including:

- reduced costs and inefficiencies associated with manual processing
- fewer errors and lost invoices causing unnecessary delays in getting paid
- automatically loaded for real-time information to help make decisions
- in-built security, making more secure email, and reducing risks of ransomware attacks
- eliminates paper and requires less energy, resources and physical space

We encourage Government to expedite a transition to e-invoicing and embed it as part of a nationally consistent procurement practice for infrastructure projects. We anticipate that payment times will continue to improve with the implementation and rollout of e-invoicing over the coming years.

Key recommendations

20 – Implement a nationally consistent and transparent standard suite of contracts such as that implemented by the DEQMS and enhance the use of standard form contracts for the entire supply chain, to increase transparency and expectations.

21 – Continue to improve payment times by adopting a national benchmark for SMEs and deliver e-invoicing infrastructure to reduce compliance burden of paper and PDF payment trails.

Alternative procurement models

Infrastructure bonds

Public infrastructure can capture broad benefits, including economic, social and environmental, that make it attractive to investors seeking long term investments with particular characteristics. With impaired government balance sheets due to the COVID-19 response, there is a compelling argument for government to fund investment in public infrastructure through securitised borrowing in the form of infrastructure bonds rather than through general purpose borrowing.

Infrastructure bonds would facilitate private sector investment, providing opportunities for a range of investor types from individuals to large funds. Investors such as superannuation and pension funds, insurance companies and sovereign wealth funds would find these bonds an attractive vehicle to increase their investment in Australian infrastructure. There is considerable scope to leverage the sector's \$2.7 trillion to invest in public infrastructure to support the government's policy priorities for economic growth and increased productivity.

Key recommendations

22 – Explore alternative funding models to enhance private sector participation in large infrastructure projects

23 – Explore the use of infrastructure bonds to facilitate private sector investment that provide opportunities for a range of investor types from individuals to large funds

Conclusion

We present 23 recommendations to enhance procurement practices with the aim of delivering greater levels of efficiency, productivity and participation of SMEs. Overall there are several elements of current government procurement practices that are inefficient, adding unnecessarily to the cost of infrastructure. There are several challenges and opportunities of existing government procurement practices that need further attention particularly the use of standard form contracts and better allocating risk. We highlight the success of recent reviews in procurement policy by the Department of Defence and encourage the use of alternative funding models.

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