



INQUIRY INTO THE COMMONWEALTH PROCUREMENT FRAMEWORK

**SUBMISSION TO THE JOINT SELECT COMMITTEE ON GOVERNMENT
PROCUREMENT**

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Consult Australia
Level 6, 50 Clarence Street
Sydney NSW 2000
P. 02 9922 4711
F. 02 9957 2484
E. info@consultaustalia.com.au
W. www.consultaustalia.com.au

ABOUT CONSULT AUSTRALIA

Consult Australia is the industry association that represents the business interests of consulting firms operating in the built and natural environment.

Our member firms' services include, but are not limited to design; architecture; technology; planning, engineering; surveying; stakeholder engagement and project management.

We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms. Collectively, our industry is estimated to employ over 240,000 people, and generate combined revenue exceeding \$40 billion a year

Approximately 40 per cent of our industry's work is undertaken for public sector clients, and our member firms have played vital roles in the creation of some of Australia's iconic public infrastructure, including road, rail, hospital, airport, educational facilities, water and energy utilities, justice, aged care, sports stadia, and urban renewal projects. Procurement of government infrastructure is therefore an issue of particular importance to Consult Australia, as well as the firms and wider industry we represent.

EXECUTIVE SUMMARY

Consult Australia is pleased to provide comments in response to the Joint Select Committee on Government Procurement - Inquiry into the Commonwealth Procurement Framework. Consult Australia's submission considers both the Commonwealth Procurement Framework and the Changes to the Commonwealth Procurement Rules, which came into force on 1 March 2017, (CPR17).

In this context Consult Australia's recommendations focus on opportunities to plan and deliver the infrastructure for the future with a focus on maximising value for money outcomes and productivity benefits of the taxpayer.

Consult Australia makes a number of recommendations, as listed in our submission, for the more efficient and equitable operation of the Commonwealth Procurement Framework and related procurement matters.

Further, Consult Australia in general terms supports the changes to the Commonwealth Procurement Rules and makes recommendations to assist a more business-supportive purchasing culture and allow Australian firms to be better able to compete on the world stage, on a level playing field,

The primary objective of procurement we contend should be to achieve the highest level of efficiency and value for money in government purchasing.

Consult Australia would contend that the best way to use procurement to assist Australian business to compete is not to make the procurement process more onerous with more layers of requirements and supply chain liability, but to refresh and modernise procurement such that project proponents, financiers, contractors, consultants and subcontractors are incentivised to work collaboratively for best project outcomes, rather than adversarially.

Consult Australia does not support prescriptive definitions of economic benefit, nor support quotas or weightings in the procurement process. Each project and value for money requirements should be considered on their merits.

A. THE COMMONWEALTH PROCUREMENT FRAMEWORK AND RELATED MATTERS

At a time when public finances are stretched, better procurement offers government the chance to build more for less, achieving better project outcomes with fewer delays. It also makes government agencies a

more desirable client for industry to do business with, which in turn will lead to more firms competing to provide their services to government.

[Around \\$43 billion](#) is invested in public infrastructure each year. Around 53% is procured from the private sector, and professional services contribute almost 20% to the overall value of projects.

The 2015 report, [The Economic Benefits of Better Procurement](#), written by Deloitte Access Economics on behalf of Consult Australia, found a 5.4% saving could be achieved through better procurement, together with a 7% reduction in delays and a further 7% improvement in the quality of the project (where quantifiable). Together with the supplementary Consult Australia report, [Better Buying, Better Outcomes](#), several issues in procurement are highlighted as being key opportunities for reform: If implemented, government has the opportunity to achieve economic benefits of around [\\$5.1 billion](#) in additional GDP between 2015 and 2030 (real \$2014).

Project Briefs

Project briefs are frequently unclear or inadequately thought out. This creates risks for industry partners, who aren't sure what the client wants, and they respond by either pricing that risk into their bid or deciding not to bid for the project, thereby reducing competition.

Similarly, background information vital to a project is often unclear or unverified, and this was found to cost \$41,800 per firm, per bid – a cost that is ultimately passed on to the client.

Risk Allocation

While at face value it might seem a prudent move by public sector agencies to offload project risk to their industry partners, this common practice can bring about a range of less desirable consequences.

The practice of offloading risk according to bargaining power rather than the appropriateness of individual parties to manage that risk automatically (this includes the practice in some states of contracting out of proportionate liability obligations), means that risks won't be properly managed. It also means that professional indemnity insurance may not respond to claims made. It is important that the laws across Australia be harmonised regarding contracting out of proportionate liability and the practice of contracting out be prohibited in each jurisdiction.

While firms may respond to this practice by taking a commercial risk, many enter into contracts unaware of the insurance implications of doing so, while other firms respond either by pricing that risk into their bid, or deciding not to bid for work.

All of the private sector responses to this issue point to projects costing more, having delays, and less desirable project outcomes being realised.

Innovation

Many professional services firms reported that public sector clients weren't always open to innovative ideas when proposing solutions to projects, despite the possibility of that innovative idea saving money, or driving the existing funding to allow for a better project outcome.

While probity concerns are a major impediment to innovation, other factors inhibiting innovation include a lack of understanding around the budget impact, or risk transfer pushing designers to over-engineer their design. Better procurement can drive greater innovation, which in turn will save money and lead to better project outcomes.

Reducing Bid Costs

Several reports, including those released by Consult Australia, have found that the cost of bidding for work can be prohibitive, and represents a major inefficiency in the development of infrastructure. There are two major drivers behind unnecessarily high bid costs: Firstly, firms are often put in a situation of being shortlisted for a project when only one bidder has a realistic chance of success. Being "strung along"

adds to the cost of bidding, when a quick “no” would be preferable. Secondly, in the course of bidding, firms are required to demonstrate a wide range of competencies through compliance checks. When the final bid is submitted, these checks regularly comprise a substantial proportion of their bid documents, when compared to their proposal as to how they actually plan to go about the work.

Firms know that the cost of bidding is the cost of business, but ask that their partners respect this fact in designing their processes – and avoid unnecessarily asking them to incur extra costs, that ultimately will impact on the client.

Delivering More for Less:

Consult Australia proposes a number of recommendations to improve procurement, to the advantage of industry and government alike.

- 1. Government commits to being a “model client,” in line with its commitment to be a model litigant.**
- 2. Government must invest in the skills of its procurement professionals. We have previously suggested the establishment of a Centre for Procurement Excellence to develop public sector procurement skills. A Commissioning Academy exists in the UK for exactly this purpose.**
- 3. Early engagement and collaboration with industry, so that government can understand what’s possible, and where risks lie. This includes developing better briefs and reallocating resources to the front end of a project.**
- 4. Government agencies should be prepared to explain why they are following a particular procurement practice. This allows for service providers to better understand the needs of their client, and increases empathy. It also forces clients to examine whether a particular practice is really necessary, given that it may cost them more.**
- 5. Agency heads accountable for the procurement performance of their agency, to provide cover for contract managers reluctant to try newer and better ways of doing things.**
- 6. Streamline compliance processes, perhaps through a central register of competencies, to reduce bid costs.**
- 7. Verify brief information by public sector clients.**
- 8. Develop and apply limited liability guidelines to provide industry with certainty.**
- 9. Ensure the right mix of skills exists on procurement teams.**
- 10. Government should be aware of the implications of onerous risk allocation/ shifting – and remove those clauses that don’t stack up.**

A Procurement Centre of Excellence

Establishing an independent Procurement Centre of Excellence to develop and implement best practice procurement and deliver value for money.

Consult Australia recommends establishing an independent Procurement Centre of Excellence to develop and implement best practice procurement and deliver value for money. With large amounts of public funds being spent on infrastructure, it is incumbent on governments to ensure they get maximum value for money through the procurement process. To buy wisely you need wise buyers: there are substantial opportunities for governments and business to share expertise, and identify and deliver solutions that improve productivity and value for money across the procurement process.

Consult Australia Submission to the Joint Select Committee on Government Procurement-Inquiry into the Commonwealth Procurement Framework

The Australian Government spent nearly \$42 billion across some 82,000 contracts each valued over \$10,000 in 2011-12. A one per cent efficiency dividend would equate to nearly half a billion dollars in savings. Including the value of procurement across 6 states, 2 territories and around 560 local governments: the opportunities to translate these savings into new infrastructure, hospital beds, police and other essential government services are substantial.

To overcome persistent deficiencies in procurement skills and practices, we recommend a whole of government approach supporting the establishment of an Australian Centre for Procurement Excellence, building on the work of the Australasian Procurement and Construction Council (APCC). The recent February 2017 New South Wales Parliament Legislative Assembly Committee on Transport and Infrastructure Report on Procurement of Government Infrastructure Projects listed as its first recommendation:

'The Committee recommends that the NSW Government investigate whether it should establish a centre of procurement excellence to assist agencies with, amongst other things:

- consistent procurement practices across government;
- improving the skills and capacity of the NSW Government;
- maintaining best practice in procurement processes; and
- sharing procurement lessons learned from projects across government.'

We recommend:

Consult Australia recommends a Procurement Centre of Excellence expand the APCC's role and remit, broadening government engagement and building on work across jurisdictions considering efficiencies in procurement. The Centre would be tasked with building a stronger relationship between government and business and supporting best practice procurement in Australia at all levels of government. The Centre should:

- be established as independent of government;
- build stronger linkages between government and with industry sectors;
- provide transparent expert advice to all levels of government; and
- develop guidelines, build capability and improve standards.

The Board of the Centre for Procurement Excellence should include equal levels of representation from industry and government. The Council of Australian Governments (COAG) in collaboration with appropriate business groups should lead a Government & Business Procurement Summit to build the mandate supporting the establishment of the Procurement Centre of Excellence. The Summit should:

- highlight opportunities across all sectors to share expertise, increase productivity and
- deliver savings and efficiencies through better procurement;
- identify key stakeholders, determine the terms of reference and appropriate governance supporting the Procurement Centre of Excellence.

B. CHANGES TO THE COMMONWEALTH PROCUREMENT RULES

Government procurement is a significant component of commercial activity in many market-oriented economies around the world, including Australia. According to the Committee Chair Nick Xenophon the Australian Commonwealth Government Procurement is over \$59B annually (media release 22.2.17). International free trade agreements have also opened significant international procurement markets, which have added substantially to the value of procurement for many Australian businesses.

The key component of the Commonwealth Procurement Framework is the Commonwealth Procurement Rules (CPR). The core rule of the CPRs is value for money. Consult Australia supports this objective.

Value for money

On many occasions cost and the allocation of risk are the primary drivers of procurement decisions and in doing so simply creates a “race to the bottom” where other qualifications are not given due consideration. This can result in more contract defaults, poor performance and an overall decrease in the quality of goods and services provided.

Value-for-money is one of the primary objectives of procurement under the CPR's. Government is responsible for achieving the best possible outcome in both financial and non-financial terms in a timely and efficient manner, commensurate with the nature of the purchase.

Best value-for-money is achieved by applying cost-effective purchasing approaches to deliver the best overall result for money spent – not merely the selection of the lowest price.

Where the cheapest bid is accepted for a project, analysis is needed as to why that bid is cheaper than others. Sometimes it may have failed to take into account an important risk, whose treatment will lead to that option costing more than a rival bid, once project variations are factored into the final price. In other cases, only the cost of construction is taken into account, ignoring the cost of running or maintaining the infrastructure. Another pitfall is that policy makers choose the cheapest of several options to build, which may have inadequate specifications, and requires an upgrade shortly after, which also costs more than building to the more appropriate specification in the first place.

In each of these three situations, better decisions about procurement are made when projects and bids are made with consideration to “whole of life” factors. It follows therefore, that government should take a “whole of life” approach to procurement decisions and bid evaluation as a means to provide a value for money selection.

Assessment of value-for-money should thus include the cost of tendering, the initial cost of purchase, service, support, warranty, operating costs, anticipated maintenance and repair and disposal or removal of the product at the end of its useful life.

Value-for-money means considering a range of factors in making a procurement decision, and we contend entails a shift away from price as the critical or major factor driving decision making.

Value-for-money can include measures of broader economic benefit to Government, such as employment, investment and industry development. There must also be a broader measure of value when spending is measured across the total spend of Government.

For example, tender costs, compliance burdens and risk shifting onto business will be ultimately borne through higher tender prices. This must be minimised to increase the value and improve the experience for business. Value for money must be considered over the life of a project.

Where a head contractor bids a tender price below market rate there is also a risk that this loss of profit will be recouped by underpaying or not paying subcontractors. This may even place some sub-contractors at financial risk and it can also raise potential for contract variations to head contracts that may have been avoided with a prudent review of tender pricing.

Alternatively, this behaviour encourages litigation post project to recover costs and boost margins. This can have enormous direct and indirect consequences for industry. A [2009 CRC for Construction Innovation report](#) found that disputation cost the Australian Construction Industry \$7B pa.

Creating a better value-for-money environment often involves an open communication with current or potential suppliers with purchasing decisions based on strong partnerships and by developing long-term healthy relationships with reputable contractors, consultants and suppliers.

CPR 4.4 states achieving value for money is the core rule of the CPRs. *Officials* responsible for a *procurement* **must** be satisfied, after reasonable enquires, that the *procurement* achieves a value for money outcome. *Procurements* should:

- a. encourage competition and be non-discriminatory;
- b. use *public resources* in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
- c. facilitate accountable and transparent decision making;
- d. encourage appropriate engagement with risk; and
- e. be commensurate with the scale and scope of the business requirement.

When conducting a procurement, an *official* **must** (CPR 4.5) consider the relevant financial and non-financial costs and benefits of each *submission* including, but not limited to:

- a. the quality of the *goods* and services;
- b. fitness for purpose of the proposal;
- c. the *potential supplier's* relevant experience and performance history;
- d. flexibility of the proposal (including innovation and adaptability over the lifecycle of the *procurement*);
- e. environmental sustainability of the proposed *goods* and services (such as energy efficiency and environmental impact); and
- f. whole-of-life costs.

Consultants and value for money

Procurement with consultants is particularly complex making the determination of value for money perhaps more difficult. Contracts for services can be distinguished from contracts for goods. Unlike a definable good, with services, every project is unique – a prototype developed for the unique circumstances of the design required. Consulting services often also involve fragmented supply chains with relationships changing and contracts often being novated.

Contracts and the management of risk are also key concerns of consultants and onerous contracts with the shifting of risk to consultants from government may result in increased insurance premiums, inappropriate risk allocation, exposure to unwittingly uninsured parties, lack of choice due to smaller professional parties being unable to compete for work and increased contract negotiation and management costs,

The diversity of consulting firms is also a distinguishing factor of this sector. Consult Australia's members vary from small, single disciplinary, privately owned, to larger multidisciplinary, global private and public companies. The barriers and impediments to business participating in tenders, or providing innovative bids, can undermine value-for-money for example some smaller member consultants with a presence in only one, or few states in Australia, are often precluded from government tenders and this should be reconsidered by government. This can be compared to large national/international private sector clients who take the time and effort to select the best consultants for each project in each state as they understand the value this brings to them.

As is typical with professional service firms in the digital era, Consult Australia's larger international member firms have significant skilled resources and often provide services in locations nationally and internationally, where the particular packet of unique skills are available and provide greatest value for money.

Thus the primary objective of procurement with consultants or otherwise we contend should be to achieve the highest level of efficiency and value for money in government purchasing. Initiatives to achieve environmental, economic or social objectives should only be pursued through government purchasing processes, provided they provide value for money and do not increase regulatory and compliance burdens for Australian businesses.

Changes to CPRs

Australian Standards

Under new paragraph 10.10 of the CPRs, if an Australian standard applies to the goods or services being procured:

- tenderer responses must demonstrate the capability to meet that Australian standard; and
- contracts must contain evidence of the applicable standard.

Consult Australia makes the following observations.

Current government procurement practices associated with professional services in the built environment either unnecessarily add to the cost of doing business, or run counter to government policy aimed at delivering best-practice procurement and facilitating insurance markets. For example, the lack of standardisation of fair and efficient contract terms, procurement guidelines and risk allocation across government departments and agencies sees gross inefficiencies, increased costs and lost time to negotiation and disputation across all parties. Such practices ignore good risk management and see the parties responsible assume unknown risks where insurance is not available to cover the liabilities sought. Such behaviours distort the terms on which firms compete for work, and expose all parties to the possibility of project failure, unforeseen costs and poor value for money outcomes.

AS4122-2010

Consult Australia particularly supports and endorses the use of standard contract AS4122-2010 for government departments and agencies engaging with consultants. This contract has already received strong support by various governments /agencies nationally, and accounts for the concerns that our members frequently raise in contracting with government. Government agencies should act as model clients and utilise standard contracts such as AS4122: General Conditions of Contract for Consultants. However, the practice of the standard contracts being extended with special conditions, added by government negotiators, should cease. In some cases, the standard contract is more than doubled in length due to the addition of the special conditions.

Compliance with relevant regulations and/or regulatory requirements

Under new paragraph 10.18 of the CPRs, officials "must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks". Examples provided refer to "labour regulations, including ethical employment practices", OH&S and environmental impacts

Consult Australia is generally supportive of this change provided there is a level playing field across state and international jurisdictions.

We would contend that in our sector, complex contract arrangements and fragmented supply chains can lead to such requirements causing overly onerous regulatory burdens.

Considering the economic benefit of the procurement to the Australian economy

Under paragraph 10.30 of the CPRs, for procurements over \$4 million in value, Commonwealth officials are required to "consider the economic benefit of the procurement to the Australian economy". New paragraph 10.31 acknowledges that this policy "operates within the context of" the various international trade agreements to which Australia is a signatory.

However, under paragraph 10.35 Unless a *relevant entity* determines that it is not in the public interest to award a *contract*, it **must** award a *contract* to the *tenderer* that the *relevant entity* has determined:

- a. satisfies the *conditions for participation*;
- b. is fully capable of undertaking the *contract*, and
- c. will provide the best value for money, in accordance with the essential requirements and *evaluation criteria* specified in the *approach to market* and *request documentation*.

Consult Australia seeks clarification how new paragraph 10.30:

- fits with the overarching requirement in clause 10.35 to award the contract to the tenderer that provides the "best value for money"; and
- will actually operate in practice "within the context of" free trade.

Consult Australia is generally supportive of the consideration of economic benefit, if it is in the context of value for money.

In addition, Consult Australia is concerned about a level playing field across state and international jurisdictions.

Recommendations

To assist a more business-supportive purchasing culture and allow Australian firms to be better able to compete on the world stage, on a level playing, the following principles should be applied:

- **A broader and more comprehensive interpretation of value for money, should result in both direct and indirect benefits for Australian firms competing in a global marketplace.**
- **Australian tenderers should not be disadvantaged due to inconsistent regulatory, risk, or contractual differences across jurisdictions**
- **The regulatory burden on Australian companies should be reduced, including red tape and the lowering of Australian business taxes**

Further, Consult Australia proposes several recommendations to improve procurement, to the advantage of industry and government alike.

- **Government commits to being a "model client," in line with its commitment to be a model litigant.**
- **Government must invest in the skills of its procurement professionals. We have previously suggested the establishment of a Centre for Procurement Excellence to develop public sector procurement skills. A Commissioning Academy exists in the UK for exactly this purpose.**
- **Early engagement and collaboration with industry, so that government can understand what's possible, and where risks lie. This includes developing better briefs and reallocating resources to the front end of a project.**
- **Government agencies should be prepared to explain why they are following a particular procurement practice. This allows for service providers to better understand the needs of their client, and increases empathy. It also forces clients to examine whether a particular practice is really necessary, given that it may cost them more.**

- **Agency heads accountable for the procurement performance of their agency, to provide cover for contract managers reluctant to try newer and better ways of doing things.**
- **Streamline compliance processes, perhaps through a central register of competencies, to reduce bid costs.**
- **Verify brief information by public sector clients.**
- **Develop and apply limited liability guidelines to provide industry with certainty.**
- **Ensure the right mix of skills exists on procurement teams.**
- **Government should be aware of the implications of onerous risk allocation/ shifting – and remove those clauses that don't stack up.**

Summary

We look forward to continuing the discussion on procurement and to that end if you require any further information please contact Chris Drummer, Associate Director Government and Industry Affairs chris@consultaaustralia.com.au or Ryan Bondar, Associate Director of Policy & Government Relations ryan@consultaaustralia.com.au phone 02 8252 6700.

Yours sincerely



Megan Motto

Chief Executive