



# MODEL CLIENT POLICY

## PROPOSAL FOR ALL GOVERNMENT JURISDICTIONS

Consult Australia calls on all political parties to ensure that the governments they lead, or support, will behave ethically, fairly, and honestly in their dealings with the private sector. That is, for them to adopt a Model Client Policy, in line with governments' Model Litigant Policy.



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# ABOUT CONSULT AUSTRALIA



Consult Australia is the industry association representing consulting firms operating in the built and natural environment sectors. These services include design, engineering, architecture, technology, survey, legal and management solutions for individual consumers through to major companies in the private and public sector including local, state and federal governments. We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms with combined revenue exceeding \$40 billion a year.

Some of our member firms include:



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### Association of Consulting Architects

The Association of Consulting Architects (ACA) leads the discussion on business matters in architecture in Australia and is the key body representing architectural employers in Australia.

# EXECUTIVE SUMMARY

Consult Australia calls on all political parties to ensure that the governments they lead, or support, will behave ethically, fairly, and honestly in their dealings with the private sector. That is, for them to adopt a Model Client Policy, in line with governments' Model Litigant Policy.

A 'Model Client' works collaboratively with industry to achieve mutually beneficial outcomes and does not use their market power to the disadvantage of local businesses and their employees.

## The Model

To be a 'Model Client' a government should:

- Operate in good faith and act ethically, fairly, and honestly in all dealings;
- Never use status, power or authority to gain unfair benefit or advantage;
- Undertake appropriate risk assessment, management, and allocation, which allows for innovation and collaboration;
- Avoid undermining the stability of the professional indemnity insurance market, through inappropriate risk allocation;
- Adopt fairness in contracting through proportionate liability and limits on liability;
- Avoid use of non-standard contracts, and variations to standard contracts without clear reasoning;
- Be clear, consistent, transparent, and focused on best for project outcomes in procurement and delivery methodology;
- Engage early and maintain open and constructive communication between all parties, dealing with them equally;
- Foster productive and healthy working relationships throughout the supply chain, recognising the roles of each party;
- Plan and prioritise projects, avoid making assumptions about industry capacity or capability;
- Keep costs of tendering and documentation requirements to a minimum;
- Provide clear, well structured, accurate briefs, and allow reasonable review and response times;
- Settle invoice payments and payment claims on time; and
- Foster a culture of continuous improvement and innovation, through the recognition of procurement skills and training.

Governments across Australia are facing increasing pressure to deliver fit for purpose infrastructure projects on time and on budget. Challenges such as the growth of Australia's population, climate change, sustainability, and the impact on productivity, makes infrastructure development a significant priority across governments.

There has been significant progress in terms of infrastructure governance, through the introduction of Infrastructure Australia. This has led to other jurisdictions restructuring how they plan and assess their future infrastructure needs. An integral part of this is how governments engage with the private sector to deliver their projects, through their procurement processes.

The language used by governments across Australia when referencing their relationship with the private sector regarding project development is very positive, and includes terms such as:

***Partnership, collaboration, fostering innovation, maximising efficiency, reducing costs of tendering, removing disincentives to increase industry participation.***

For example, the NSW Procurement Board, which is responsible for overseeing the procurement of goods and services by and for government agencies, has seven strategic directions:

1. Simplification and reducing red tape for suppliers and agencies
2. Engaging with industry
3. Innovating the approach to government procurement
4. Maximising opportunities for small and medium enterprises to supply to government
5. Providing for strategic and agile procurement practice
6. Establishing procurement category management across government
7. Supporting agencies' procurement functions

The [Public Works and Procurement Act 1912](#) is stated to be:

**The centrepiece of the Government's procurement reforms, which streamline internal government processes and deliver simpler contracts and easier requirements to register for government business. This makes it easier to do business with the NSW Government.<sup>1</sup>**

Given the importance of procurement in the delivery of infrastructure, a number of governments have been reviewing their policies and processes.

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<sup>1</sup> See: <https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-procurement-laws>



## Procurement reviews

Procurement reviews have been conducted by the Commonwealth, New South Wales, and Western Australia, and in 2017 each government responded to these reviews<sup>2,3</sup>. Consult Australia and many other industry groups invested considerable time in putting together submissions to these reviews.

It is disappointing that the issues, which continue to be raised by industry groups including Consult Australia have yet to be addressed through these reviews.

For example, Recommendation 7 of the NSW Legislative Assembly Committee on Transport and Infrastructure Inquiry into the Procurement of Government Infrastructure Projects<sup>4</sup> is that the NSW Government assess whether contracting out of proportionate liability provisions should be prohibited across government contracts. The Committee reported that the NSW Government contracting out of proportionate liability may be preventing stakeholders from entry to procurement, due to the high degree of risk involved.

In its response the NSW Government noted the recommendation and the action arising is for the agencies to report to the Department of Finance, Services and Innovation on the use of the contracting out provisions, to enable an assessment of how frequently these provisions are used and in what circumstances. However, it is clear and common knowledge that the default position across the NSW Government is to contract-out.

The Queensland Government has undertaken an internal review of its procurement practices, focusing on probity and value for money. This was conducted by an interdepartmental committee. The outcome was the launch of a revised Procurement Policy in 2017.<sup>5</sup> Consult Australia welcomes the Queensland Government's commitment under the policy to build procurement capability to ensure better outcomes like improved contract management, better engagement with stakeholders and suppliers, and embracing innovation. In addition, the statement of intent to promote a whole of government approach to procurement, which includes ways of reducing duplication within government and increasing consistency for suppliers is also welcome. However, it is unclear how this will be achieved given that agency departments remain responsible for operating their own procurement procedures.

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<sup>2</sup> See NSW Government response: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2119#tab-governmentresponses>

<sup>3</sup> See Commonwealth Government response: [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Government\\_Procurement/CommProcurementFramework/Government\\_Response](https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Government_Response)

<sup>4</sup> Procurement of government infrastructure projects / Legislative Assembly, Committee on Transport and Infrastructure [Sydney, N.S.W.]: the Committee, 2017. 1 online resource ([51] pages) (Report no. 2/56 Committee on Transport and Infrastructure)

<sup>5</sup> <http://www.hpw.qld.gov.au/Procurement/ProcurementStrategy/Policy/Pages/default.aspx>

Consult Australia has provided submissions into the reviews, which centre around a proposal that government conducts itself as a 'model client', which complements their long-standing obligation to act as a 'model litigant'.

The 'Model Litigant Policy', as it is commonly described, is a Legal Service Direction issued by the Commonwealth Attorney-General. There are similar regimes in Victoria, Queensland, New South Wales, the Australian Capital Territory and the Northern Territory.

The Commonwealth policy sets out obligations, including such things as:

1. Dealing with claims promptly and not causing delay;
2. Making an early assessment of the prospects of a matter;
3. Paying legitimate claims without litigation;
4. Acting consistently in the handling of claims and litigation;
5. Endeavouring to avoid, prevent and limit the scope of litigation including by participating in alternative dispute resolution where appropriate;
6. Keeping the costs of litigation to a minimum by:
  - a. Not requiring the other party to prove a matter the Commonwealth or agency knows to be true;
  - b. Not contesting liability if the real dispute is about quantum;
  - c. Using appropriate methods to resolve litigation including settlement offers or alternative dispute resolution; and
  - d. Ensuring that a person participating in settlement negotiations can settle on behalf of the Commonwealth or agency.
7. Not taking advantage of a claimant who lacks resources;
8. Not relying on technical defences;
9. Not appealing from a decision unless there are reasonable prospects for success or it is otherwise justified in the public interest; and
10. Apologising where the Commonwealth or agency has acted wrongfully or improperly.

## Consult Australia's Model Client Recommendation

Being a 'model client' means working collaboratively with industry on projects, and achieving mutually beneficial outcomes. It formalises governments' intent to do things better by putting clear obligations in place.

Practically, this step will make government a more attractive client for industry to work with, will be a positive force on business confidence, and in turn will attract greater numbers and better quality tenders for work.

This also sets the tone for each project and the individuals involved. Disputes typically arise because of issues arising up-front and behavioural factors<sup>6</sup>.

Consult Australia calls on all political parties to ensure that the governments they lead, or support, will behave ethically, fairly, and honestly in their dealings with the private sector. That is, for them to adopt a Model Client Policy, in line with governments' Model Litigant Policy.

Consult Australia believes that the adoption of a Model Client Policy, across governments would result in significant benefits for governments in their role both as client, and in setting the standard of behaviour for the rest of industry to follow.

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<sup>6</sup> The Cooperative Research Centre for Construction Innovation, Guide to Leading Practice for Dispute Avoidance and Resolution.

# CONSULT AUSTRALIA'S MODEL CLIENT PROPOSAL

## PRINCIPLE 1: RECOGNISING THE ROLES OF EACH PARTY

The means through which professional service consultants are engaged can vary greatly, according to the project at hand and the delivery mechanism used to undertake the project.

It is important to distinguish between professional services firms as 'consultants' and those firms that are typically tasked with building or maintaining a piece of infrastructure, referred to here as 'contractors'.

In seeking to improve the procurement of government infrastructure, it is critically important to recognise the differences and similarities between the roles of a consultant and a contractor.

The different delivery mechanisms used to deliver government infrastructure generally includes:

- **Construct Only** – public sector agencies separately and directly engage designers and contractors;
- **Design and Construct** – public sector agencies engage a contractor, who in turn engages a consultant to undertake design work independent of each other;
- **Managing contractor** – public sector agencies engage a managing contractor, who in turn is responsible for engaging all other parties, including designers and other contractors;
- **Construction Management** – public sector agencies directly engage designers, constructors and other service providers, while taking a project management role themselves;
- **Early Contractor Involvement** – A two stage process, whereby the public sector agency undertakes concept and design work in collaboration with consultants, before a second stage resembling 'design and construct' is used to construct the project;
- **Alliance** – A new entity is formed comprised of the client and service providers, whereby risk and reward is shared and collaboration is encouraged;
- **Public Private Partnership** – A range of structures are used, but essentially a private sector project vehicle is formed to undertake the project (including using the mechanisms described above), with that vehicle then retaining a concession that may own, operate or maintain the infrastructure in return for user charges or a government payment.

Delivery mechanisms play a crucial role in determining risk allocation between the parties, and in turn driving or creating a disincentive for innovation, while also driving the behaviour of the parties as they interact and work together to develop a project.

The majority of project delivery mechanisms are ultimately a complex web of contractual relationships, project risk and reward are often allocated according to the respective levels of bargaining power, rather than with the most appropriate party.

Professional service firms are often presented with contracts treating them as though they are constructors, despite different legal standards for their work, and different models of doing business (for example, contractors generally take on a project and work to earn a profit, whereas consultants charge a fee for their service).

It is of vital importance that the appropriate delivery mechanism be used for each project, rather than sticking to a default method that might have been successful (or even partially so) in the past.

Too often Design and Construct is used as a default delivery mechanism by public sector clients, who see the benefits offered by the service providers allocating risk between each other without taking on risk themselves – even where the public sector may be the most-suited to managing certain project risks.

In some cases, the bias towards this mechanism may be simply based on an individual or team's belief in its past success, even though that may have occurred under very different circumstances.

A better approach is for an unbiased consideration of the project's requirements and the objective use of the best suited delivery mechanism.



The Australasian Procurement and Construction Council's Building and Construction Procurement Guide, published jointly with Austroads in 2014<sup>7</sup>, can be used as the model to underpin this principle.

Nevertheless, the issues raised above regarding the importance of selecting the appropriate delivery mechanism, and its impact on project success, need to be made.

## PRINCIPLE 2: PLANNING AND PRIORITISATION OF PROJECTS

In parallel with considering how infrastructure is procured by government, it is important to ensure that the procurement requirements of government are able to be effectively met by industry.

This relates to five principal areas:

- The number and timing of projects
- Project scale, partitioning and interfacing
- Industry capability, skills and workload
- Certainty of project funding
- Long term protection of infrastructure corridors

At present, across many governments there is an unprecedented level of infrastructure procurement with a significant impact on the availability of those skills required to ensure delivery as planned.

As evidence of how quickly the market has heated, expertise in some disciplines is now under pressure with some firms being unable to fill positions quickly enough.

Claims that such additional human resource needs can be readily filled from elsewhere interstate or overseas are only partially correct. An infrastructure boom increases the risk that major projects will be inefficiently procured at the taxpayer's expense.

Governments should ensure there is a consistent long-term pipeline of projects developed and rolled out in consultation with industry.

Efforts to export professional services (often captured within terms such as the 'knowledge economy'), is dependent on professional services firms having sufficient underlying work to sustain their local operations.

A consistent procurement pipeline, underpinned by rigorous planning and prioritisation processes, to develop local capacities when funding is more readily available, means that governments will alleviate the negative pressure placed on the professional services sector during quieter periods. This was an opportunity somewhat missed during the mining boom.

A pipeline of infrastructure projects is of limited value if industry is unaware of its existence or the detail of what will be being procured over time. Limited transparency restricts the ability of firms to undertake workforce planning and reduces the incentive to invest in staff skills and capacities.

Infrastructure planning should be a transparent process undertaken in close consultation with industry, with long term infrastructure plans and pipelines publicly known and available.

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<sup>7</sup> Australasian Procurement and Construction Council and Austroads, Building and Construction Procurement Guide: Principles and Options, [www.apcc.gov.au](http://www.apcc.gov.au), 2014

## PRINCIPLE 3: APPROPRIATE RISK ALLOCATION

The nature of contracting and project delivery has changed greatly over the past 30 years. Three decades ago, public sector clients employed more internal expertise. They were therefore better informed and experienced as organisations, with a clearer understanding of engineering risk, a healthier appetite for risk management, and a greater ability to document and clearly define their projects.

In short, in the past risk was borne by the public sector as part of their day-to-day operations.

This is no longer the case and with 'traditional' contracting, particularly in the public sector, risks began to manifest themselves in the form of variation claims being made against the client. The extent of these claims and the response to them by the public sector indicated an intolerance of what appeared to be uncontrolled risk outcomes being borne by government.

Conventional contracting has more recently, in some cases, been replaced by equity and partnership investment including Build Own Operate (BOO), Build Own Operate Transfer (BOOT) and other types of Public Private Partnership (PPP) schemes. Public sector risk allocation policies in such schemes tend to move risk away from the government.

In other cases, more collaborative approaches have developed leading to 'Alliance' projects, where the risks and rewards of the project are shared.

The various relationship models for the delivery of professional consulting services generally fall into one of the following broad categories:

- a) The firm is contracted directly to the owner as the owner's consultant for the provision of their professional services;
- b) The firm is sub-contracted to the owner's contractor who is the client for the provision of their professional services;
- c) The firm works in a joint venture, consortium or equity partnership with the owner or owner's contractor for the provision of their professional services; or
- d) The firm works in joint venture partnership with another consulting firm for the provision of their professional services.

In addition, private investors now have a more 'arms length' involvement in their infrastructure investments. Large institutional financial investors (such as superannuation funds) allocate their funds to low risk and low volatility investments which means that they are unprepared to knowingly carry risk themselves.

The result of all of the above changes is that there has been a shift of many project and risk responsibilities from public sector client organisations to construction companies who then contractually pass the risk on to professional services firms. This is based on the (often false) presumption that these consultants are better able to understand and are most-suited to manage those risks; or simply because of a stronger bargaining position.

Some public and private sector clients are using their market power to adopt a position that presents systemic risks to the economy and business confidence. When acting as a purchaser, government entities hold significant market power, therefore it is important that their conduct demonstrates Model Client behaviour. This is particularly important given the application of the Competition and Consumer Act to government procurement remains unresolved<sup>8</sup>.

It is important here to highlight that technical capability and risk (e.g. is something designed correctly) is different from project risk. A firm's commercial capability to cover that risk (e.g. having sufficient assets or capital) is driven by the extent to which the firm has control of the risk.

A similar position is often adopted by the financial institutions and contractors, reinforcing a culture of inappropriate risk allocation where the burden is placed on professional services firms.

This culture can make a wide range of consultants liable for the entirety of the losses associated with the project, including in some instances, economic loss which a court may not normally ascribe to professional liability.

This may have been a reluctantly tolerated business practice in the past when insurance costs were moderate and availability relatively unrestricted.

Today, and particularly in tougher insurance environments, this inappropriate transfer of risk drives the cost and availability of professional indemnity insurance beyond the capacity of some consulting firms to afford, obtain, and retain cover over the often long-life of the liability exposure.

As a result, some professional services firms now choose to avoid government and public sector work where a poor procurement culture persists (such as the contracting out of proportionate liability legislation).

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<sup>8</sup> [Application of the Australian Consumer Law to Government Commercial Activities](#), Justice John Griffiths September 2016



Consultants, whose financial benefit from projects is a fraction of that derived by the client and contractor, are the contractual party who are least able to sustain the high costs and resulting increased exposure to inappropriate uninsured liabilities. Nevertheless, they often bear an onerous share of costs and risks because they have the least bargaining power – especially when compared to that of governments.

Our experience is that on projects where all the risk is allocated to one party, there is less incentive for the parties to work together to properly identify and effectively manage project risks. In particular, it allows one party to easily 'pass the buck' when they could have managed a risk, as contractually it is no longer their responsibility.

When risk is properly assessed and more fairly allocated, a more collaborative approach is taken as each party has an interest in seeing the risks properly dealt with, and risks are allocated to those best placed to do something about them.

This in turn leads to better project outcomes, including better and more efficient delivery of the deliverables, as well as reduced disputation and consequentially a better experience for all participants.

Best practice risk management sees the parties work together in identifying possible risks and solutions to manage them.

Less desirable practices are generally focused on one party offloading responsibility to another and considering the risk has been managed, when in actual fact it has not (and indeed may be allocated to a party unable to manage that risk).

This approach also focuses on what might happen in litigation after a risk eventuates, including seeking out the 'deep pockets' of certain firms or individuals, rather than preventing the risk from eventuating in the first place.

Poor risk allocation is also a deterrent for innovation. While an innovative solution or design might not be appropriate for every piece of infrastructure, innovation can offer ways of saving money and/or maximising project outcomes and user experiences.

However, placing onerous risk onto the consultant or designer will often result in them over-engineering their design to make doubly sure that a risk does not eventuate, and constrain innovation.

“The Deloitte Access Economics report commissioned by Consult Australia, *The Economic Benefits of Better Procurement*<sup>9</sup>, found that firms often respond to onerous risk by either pricing it into their bid, or deciding not to bid on a particular project, which in turn drives up price by reducing competitive pressure. The report found that savings of about 5.4 per cent could be made through better risk sharing and other improved practices.”

Successive reports have established that a greater investment of resources in the conceptualisation, scoping and design of a project will ultimately yield a better project outcome, and may even save money over the life of the project. Inappropriate risk allocation reduces the incentive for professional services firms to do this.

Certain public sector agencies have over time developed a reputation for using onerous contracts and procurement processes. Accordingly, many private sector service providers are reluctant to tender for work with that agency, knowing that it will be less collaborative and a riskier job. Ultimately, this should concern any agency seeking the best solutions to their projects, including the best possible designs. Reduced competition in the market will result in less choice, higher fees, and poorer value for money outcomes.

## PRINCIPLE 4: FAIRNESS IN CONTRACTING

As outlined under Principle 3 ‘Risk Allocation’, too often project risk is allocated according to bargaining power rather than ability to manage risk.

Contracts are offered on a ‘take it or leave it’ basis, with little ability to negotiate around onerous terms which a service provider might not be able to meet or that place unreasonable stress on their business. Sometimes firms may be forced to enter into such unfair contracts because they are unable to walk away from a project for commercial reasons, even though it might place their business at risk, while in other situations, firms may not even be aware of the legal implications of certain contract terms, leading to reduced risk transparency.

Where this manifests in construction contracts, a number of undesirable outcomes may result. While public sector agencies may pass on risk under the (illusory) impression that they are protecting the taxpayer, their actions may actually serve to drive up prices, increase delays, and potentially invalidate the very insurance cover professional services firms rely on for their protection.

At a contractual level, professional services firms face a range of problematic issues, including but not limited to the following.

- **Excessive use of non-standard contracts and clause variations**

Firms are spending an increasing amount of unnecessary time on contract negotiation, management and litigation resulting from a large number of projects needlessly avoiding the use of standard documents such as Australian Standard 4122-2010 General Conditions of Contract for Consultants.

- **Onerous risk allocation through indemnities**

A contractual indemnity requires one party to take responsibility for any loss that might be suffered by another party that they are indemnifying, even if that loss was caused by that other party’s own actions. This can be further exacerbated through third party indemnities.

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<sup>9</sup> See: <http://www.consultaaustralia.com.au/docs/default-source/infrastructure/better-procurement/dae---consult-australia-final-report-050215--96-pages.pdf>

Generally, professional indemnity insurance will only cover consultants for loss resulting from their own acts or omissions. Broad indemnities, or those not relying on the fault of the insured party, are highly problematic because they often fail to align to actual risks or available insurance policies.

■ **Disproportionate allocation of liability**

Under the Proportionate Liability Legislation, liability is allocated to the parties according to their contribution to the loss. However, in some jurisdictions public sector clients ‘contract-out’ of proportionate liability, meaning that each party may be responsible for a much larger share of any loss than they were responsible for, which coupled with the use of broad warranty and indemnity clauses extends liability to the consultant beyond that which they are able to either control or insure against.

■ **The illusion of unlimited liability**

A contractual limit on liability set with reference to a thorough risk assessment allows business to properly insure their work and provide certainty for themselves and their clients.

*“A rigid application of unlimited contractual liability is an oppressive approach to contracting and risk allocation because it can require a consultant to place its whole business at risk for one government contract.” Tony Horan, LLB, BA (Hons)<sup>10</sup>*

As liability is always limited to a defendant’s assets, and their ability to pay for any loss realised, unlimited liability is illusory and referring to it in contracts encourages poor risk management, as well as disincentivising settlement in the event of a dispute.

■ **Inappropriate standards of care**

The appropriate standard of care for a professional services firm is the common law test of ‘reasonableness,’ with this determined by looking at what a similarly experienced professional consultant would do. This reflects the fact that consultants provide a professional opinion rather than a tangible item, as all professional service providers do (lawyers, accountants etc).

However, often the standard of care in consultant contracts will fail to understand this, and use ‘fitness for purpose’ warranties, which are appropriate for contractors, but not consultants.

Another inappropriate standard of care often used calls for an ‘expert standard of care’. In both cases, a risk is created that the consultant’s work might not be covered by their insurance as warranties and expert standards of care cannot be effectively judged under reasonableness comparisons.

■ **Consequential loss and liquidated damages**

These clauses typically impose penalties on consultants for delays. However, when delays are beyond the control of the consultant, this is problematic and unfair as insurance will not cover eventualities beyond which a consultant has no control.

■ **Unreasonable insurance requirements**

Contracts might set an unreasonable level of insurance cover or limit the ability of an insurer to defend claims on behalf of the insured by limiting their right of subrogation (the right for an insurer to pursue a third party that caused an insurance loss to the insured). In other cases, clients have demanded to see an insurance policy (which is commercial in confidence information), or be named on a professional indemnity policy inappropriately. This can present significant risks including the potential to be unable to make a claim under such a policy.

■ **Termination for convenience**

Terminating a professional services contract for convenience (without reason) is not something to be done lightly or without compensation for expenses incurred, as clients will incur reputational damage and the practice can present a real sovereign risk.

■ **Reliance to third parties**

Increasingly, consultants are being required to allow third parties, who are not parties to the contract, to rely on the consultant’s professional services provided under contract with their client.

Third parties may include other government departments, financiers or other contractors engaged to carry out services on the project. It is generally not made clear who these third parties are and why they require reliance on the consultant’s deliverables given there doesn’t appear to be any bona fide rationale for doing so (other than to increase the number of plaintiffs in the event of a dispute).

In the absence of a contractual relationship with third parties, the consultant’s liability for its services is extended beyond the limitations in the contract.

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<sup>10</sup> Horan, T., Memorandum of Advice: Uncapped liability for consultants under Guidelines for the Limitation of Liability of Suppliers, Consultants and Contractors, 2013, 4(d)



#### ■ Independent verification

In our experience, it is common for the contractual obligations of independent verifiers to be ambiguous and in conflict with the independent verifier requirements in other project documents. This makes it difficult to determine what the role of the independent verifier is.

Coupled with often onerous terms in these contracts (e.g. unlimited liability, indemnities not tied to the consultant's errors or omissions and higher standards of care) this ambiguity increases the contractual risks and decreases industry's willingness to undertake independent verification work. It also increases bid/project costs.

#### ■ Client supplied information

Increasingly consultants are being asked to accept liability for client supplied information even though they have no real ability to verify / check the validity of that information e.g. factual geotechnical site investigation reports, ground survey's, conditions of existing assets. This is particularly onerous in circumstances where the consult is not given access to the site.

Onerous contracting is more likely to lead to disputation, as well as lengthier negotiations in the initial phase. Should a risk be realised and liability eventuate, an onerous contract means there will be less incentive for the parties to settle instead of pursuing costly litigation.

The cost of lengthy negotiations and managing an onerous contract, or indeed the cost of disputation and litigation is significant. A 2009 study by the Cooperative Research Centre for Construction Innovation<sup>11</sup> found the cost of disputation to be worth around \$7 billion in that year in Australia, adding around 6 per cent to the overall cost of work done. In addition, delays to project delivery could be reduced by 7 per cent through better procurement, according to *The Economic Benefits of Better Procurement* report.

Onerous and unfair terms such as these should be prohibited from use in government contracts. Governments should adopt a more appropriate approach to risk allocation and liability management. Setting an appropriate limit of liability allows business to properly insure themselves, and makes government a more attractive client to do business with.

This Principle, within the Model, would prohibit the use of such clauses in contracts for consulting services, and prohibit government agencies from using their market power to introduce such terms.

Fairness in contracting also means ensuring that clients respect the payment terms set out in the contract, and invoices/ payment claims. The Australian Small Business and Family Enterprise Ombudsman Inquiry into Payment Times and Practices<sup>12</sup> found that late payment is a perennial problem for businesses in Australia.

Survey evidence conducted as part of the Inquiry indicated that despite the existence of government prompt payment policies some agencies continue to pay late. Over 20% of survey respondents noted that some Australian, state and territory government departments always or frequently paid late<sup>13</sup>. Feedback from the Consult Australia membership indicates that this is a problem across all sizes of business engaged by government agencies, it is not only an issue for small business. Therefore, the inclusion of timely payment must also be part of the Model.

<sup>11</sup> Cooperative Research Centre for Construction Innovation, Guide to Leading Practice for Dispute Avoidance and Resolution, [www.construction-innovation.info](http://www.construction-innovation.info), 2009, p8

<sup>12</sup> Australian Small Business and Family Enterprise Ombudsman Inquiry into Payment Times and Practices, Report published April 2017

<sup>13</sup> Australian Small Business and Family Enterprise Ombudsman Inquiry into Payment Times and Practices, Report published April 2017, page 10.

## PRINCIPLE 5: ACCESSIBILITY AND AFFORDABILITY OF PROFESSIONAL INDEMNITY INSURANCE

What appears to be little understood is that the types of contractual clauses set out above lead to a range of risks and increased insurance premiums that are ultimately passed back to the client and taxpayers through increased fees or a lack of competitive bids.

It also appears that the circumstances surrounding the introduction of proportionate liability has not been held within the institutional memory of government procurement agencies. Joint and several liability entitles a successful plaintiff to recover its entire loss from any defendant regardless of that defendant's share of responsibility. Prior to the introduction of Proportionate Liability Legislation this approach resulted in professional service providers with "deep pockets" (i.e. holding professional indemnity insurance policies) being targeted in negligence proceedings. This led to the well documented insurance crisis in 2001, when the HIH Group collapsed.

Affordability and accessibility of professional indemnity insurance is critical because unlike other parties involved in infrastructure development, professional service firms are generally an asset poor class of business, with a majority being small and medium enterprises.

Like other professional groups, they provide intellectual services (as opposed to a tangible good), they depend on professional indemnity insurance to cover their common law liability.

Indeed, consulting firms generally take out broad ranging and often expensive insurance policies to cover liabilities arising from their work, and to protect their business and personal assets. For professional services firms, the professional indemnity insurance premium is one of their largest expenses.

**“As a general rule, professional indemnity insurance only covers consultants for loss arising out of their errors or omissions. Where a consultant has entered into a contract that takes on risk beyond their common law position, insurance will typically not respond in the event of a claim pertaining to such extended liability.”**

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In situations where such a contract has been entered into, and a loss results, consultants must then meet any liabilities without insurance, from their personal assets. Where the consultant has insufficient personal assets (often the case given the asset-poor nature of most professional services firms) or have isolated them, then the loss will ultimately sit with the client – the government and taxpayers.

It is particularly important to note that where a contract forces onerous risk onto a particular party, some businesses will be unaware that the contract in question might not be covered by their insurance, which in itself is an undesirable outcome. Some parties will take the risk by undertaking the work, knowing that they're not fully insured, while others will deem the risk of proceeding uninsured as too great, and will take the decision not to bid for the project in question.

In recent contracts, requirements for professional indemnity insurance and public liability insurance amounts are unreasonably high and bear little relationship to the risk profile of the project. This has the effect of increasing costs for consultants when bidding for projects in order to increase the amount of insurance they hold. This again reduces competition because few consultants are able to absorb the cost given that attempts to pass on the additional cost to the potential client renders their bid unattractive.

The Australian Procurement and Construction Council's Professional Indemnity Insurance Guidelines<sup>14</sup> in the Building and Construction Industry sets out advice on this issue for government agencies.

<sup>14</sup> See: [http://www.apcc.gov.au/ALLAPCC/APCC%20PUB\\_Professional%20Indemnity%20Insurance%20Guidelines.pdf](http://www.apcc.gov.au/ALLAPCC/APCC%20PUB_Professional%20Indemnity%20Insurance%20Guidelines.pdf)

## PRINCIPLE 6: ADOPTION OF STANDARD CONTRACTS

The use of standard contracts fairly negotiated between industry and government, with input from relevant stakeholders, reduces the need for costly legal review or negotiations. Such contracts give all parties the comfort of knowing that risk and reward is allocated fairly to avoid many of the negative outcomes described above.

This was the driver behind the development of the Australian Standard Conditions for Consultants AS4122-2010. The negotiation of AS4122-2010 was developed by government and industry representatives who invested significant resources. The objective was to negotiate and agree a fair and balanced contract that would reduce the need for bespoke contracts, and achieve significant cost savings by reducing the need for protracted contract negotiations.

AS4122-2010 has been adopted to some extent, but has yet to achieve its full potential. Regrettably an issue frequently encountered with the use of standard contracts, like AS4122-2010 is the attachment of special conditions. Where agencies do attach special conditions, they need to be aware that they are undermining the benefits of using a standard contract. This is because it re-introduces the need for extended negotiation of the new terms.

While we acknowledge that standard contracts will not be appropriate on all projects (such as, for example, unique major infrastructure projects), we strongly recommend that government agencies use standard contracts on an 'if not, why not' basis, whereby the public service is required to use them unless there is an appropriate reason not to do so that is explained to their industry partners and recorded publicly.

In terms of a Model Client Policy, the standardisation of contractual terms, should be the requirement across governments, through the adoption of AS4122-2010.

## PRINCIPLE 7: ADOPTION OF PROPORTIONATE LIABILITY

In response to the insurance crisis of 2001, a package of reforms including Proportionate Liability Legislation was enacted to replace the doctrine of 'joint and several' liability. Under this old regime, multiple parties may have contributed to the loss suffered by a plaintiff, but any one of them could have been held liable for the total loss, and be required to bear the full cost irrespective of their individual contribution to the loss.

Proportionate liability was introduced on the principle that any loss is divided among the parties according to their share of responsibility, as determined by a court.

This equitable approach ensures that the liability falls on the party(ies) that are at fault. It was introduced to maintain stability in the insurance market, stopping plaintiffs from suing only the party deemed to have the deepest pockets (i.e. the ones holding professional indemnity insurance).

While part of a national reform that sought to deliver a consistent approach, when the legislation was implemented at a state-level, a crucial difference emerged between the jurisdictions. While Queensland expressly prohibited the practice of 'contracting out' of the legislation, other jurisdictions for example, New South Wales, Western Australia and Tasmania allow it (the remaining jurisdictions' legislation are silent on the issue).

Ensuring that all the parties retain their rights under the Proportionate Liability Legislation will keep the cost of insurance down and maintain stability of access to professional indemnity insurance for professionals.

The persistence of contracting out of proportionate liability creates a significant systemic risk to the procurement of the professional services required to deliver government infrastructure. It also perpetuates a culture of poor risk management resulting in governments:

- Paying higher fees for professional services
- Forcing many businesses to pay expensive additional insurance premiums, if available
- Reducing competition from firms unable to obtain or afford insurance
- Creating a situation where some firms proceed without insurance, often unknowingly
- Reinforcing a culture of poor risk and contractor management, and of inappropriate offloading of risk
- Unnecessarily exposing the economy to future tightening in local and global insurance markets





As standard professional indemnity insurance will not extend cover where a consultant has contracted out of the relevant Proportionate Liability Legislation.

In recent years some policy extensions have been made available to provide cover to the consultant, but these are problematic:

- The additional premiums are expensive, at up to 25 per cent additional cost<sup>15</sup> on top of an already costly insurance premium. It is no surprise that the cost of such an extension to the policy would be significant, given the additional risk that the consultant has acquired.
- The policy extensions aren't universally available, and smaller businesses in particular are often unable to obtain them.
- The policy extensions available now may not be available when the insurance market hardens. Thus, future claims made against current projects may not be insured, and often with little awareness that this is the case.
- Only 20 per cent of our industry have insurance cover for contracting out of proportionate liability, as found by the Deloitte Access Economics Study, while a further 36 per cent were unsure whether their policy covered contracting out.

A broader issue also exists in industry being unaware of contracting out of proportionate liability and its implications. The Deloitte Access Economics study, *The Economic Benefits of Better Procurement*, found that a large proportion (38%) of our industry was unsure whether they were contracting out of proportionate liability, given that its standard wording in contracts is often highly technical in nature (ie. "Part 4 of the Civil Liability Act does not apply"). If a claim does arise, the business in question will only become aware of the implications once it is too late.

Allowing contracting out of proportionate liability undermines very intention of the policy reform. The original intent of the proportionate liability reform was to ensure that professional indemnity insurance remained affordable and available for industries such as ours that rely heavily on it. At the time of the HIH collapse, around 30 of Consult Australia's largest member firms were simply unable to obtain insurance. Should insurance not be available on commercial terms, a significant negative impact will be felt, not just by clients of industries that rely on it, but also on the broader economy.

Contracting out of proportionate liability is predicated on making litigation easier for a plaintiff rather than focusing upfront on driving better project outcomes, including better management of risk and preventing a liability from occurring in the first place. Anecdotal evidence has shown that in jurisdictions where proportionate liability is applied (and not contracted out of), it achieves better project outcomes, and creates a significant incentive for the parties to settle any dispute ahead of litigation.

In the past, there has been a concerted effort to achieve a uniform national position, which would see all Australian jurisdictions' legislation prohibit contracting out of proportionate liability. This position was supported by expert advice presented to the Standing Committee on Law and Justice (previously the Standing Committee of Attorneys General).<sup>16</sup>

In October 2013, draft legislation was released to remove contracting out, although the draft contained loopholes that would have been used to bypass the reform. In NSW, for example, the NSW Government consulted extensively on that draft proposal, but never reported back following the consultation, and no legislative reform has been enacted.

Given the lack of impetus for a national legislative change, it is essential that government agencies adhere to a Model Client Policy that would prohibit contracting out.

<sup>15</sup> Deloitte Access Economics, op. cit.

<sup>16</sup> Horan, T., *Proportionate Liability: Towards National Consistency*, DLA Phillips Fox, September 2007; and Em Prof Davis, J L R, *Proportionate Liability: Proposals to Achieve National Uniformity*, Australian National University, 2008.

## PRINCIPLE 8: QUALITY OF DOCUMENTATION

Together with risk management, the quality of project documentation is the other major roadblock in the push for better procurement. When project documentation does not meet the required standard, it frequently becomes a major project risk in itself, leading to disputation, increased prices, or decisions for firms not to tender for certain projects.

Project documentation includes the scope of works, which sets out the client's requirement for the project. While the scoping of each project will vary on a case by case basis, there are several components that are generally common to all projects.

They include:

- Outlining the broad objectives of the client to be realised through the project;
- Specific project requirements, such as functional outcomes or benchmarks to meet the broad objectives;
- Background information, including specific project risks;
- Contractual method for delivering the project.

There are many paths taken by clients to develop an initial concept into a scope, although these processes are not always clear to the service providers who then must rely on the resulting scope documentation.

What is clear is that the best quality scopes have:

- A greater level of input from a wide range of stakeholders (ideally including service providers such as consultants and contractors);
- Realistic timeframes and budgets;
- Provide an appropriate amount of background detail; and
- Tailor the procurement process (including risk and delivery method) to the circumstances of the project.

The level of clarity in the scope should flow through to the delivery model and appropriate risk allocation, if this is done correctly it will encourage greater project innovation. If not done correctly poor project scopes lead to confusion and wasted efforts by all parties, and a greater likelihood of disputes and litigation.

The key issues with project documentation highlighted in our procurement studies include the following:

### **Unclear objectives and early engagement**

Unclear project objectives are a challenge for tenderers in putting a bid together, because it is not clear what the client wants. Clearly defined objectives should be a minimum requirement in any scope.

In some cases, scoping documents are deliberately vague and are used by clients to clarify what it is they want, in the hope that a consultant will challenge the information provided i.e. "you have asked for X, but don't you really want Y instead?" This issue creates significant risk for consultants because they are having to predict the client's needs. It also increases the risk of 'scope creep' as the client's requirements evolve. Consultants must choose whether to respond by pricing that risk into their bids, or submitting a non-conforming proposal, or choosing not to bid at all.

The Deloitte Access Economics study found unclear project objectives to be one of the most commonly occurring problems with procurement, with 37 per cent of projects being affected by this issue. Furthermore, only 20 per cent of bidders continue their work without adding a price premium, deciding not to bid, or submitting a potentially non-conforming bid.

It is accepted that the level of detail required in the scope will vary by project, and in some cases leaving aspects of a project brief open can encourage innovation by testing the creativity of bidders. If this is the case it is imperative this must be a deliberate element of the scope, and identified in the scoping documents as such. It must not be used as an argument to justify planning oversights.

It is recommended that this issue could be addressed by early engagement with industry to collect their feedback on the proposed project, or even to engage a consultant to reverse-engineer a project brief, on the understanding that they are then unable to further tender for its work.

Under this arrangement, they would test out a range of assumptions, and use their technical knowledge to flesh out project objectives before it goes to market.

## **Explain “why”**

Often lacking is an explanation why the client has taken a certain direction with a project, whether it be the choice of procurement, project delivery method, choice of contractual terms, the scope, etc.

There is a need for greater dialogue between the parties, and consultants should be encouraged to raise questions, issues and concerns up front, and government clients required to respond. Greater dialogue will lead to greater consideration of the issues, and ultimately lead to better project outcomes. It will also increase collaboration between the parties, increasing each side’s understanding of the other’s perspective. For our industry in particular, it will help consultants’ understanding of what it is the client wants from the project.

## **Inadequate or unverified background information**

Background information to a project is often included in project documentation, but it is common for public sector clients to refuse to verify any of that information. This is particularly a problem where the information is inadequate, requiring duplication and over-servicing by consultants participating in the tender process.

Examples of background information may include a geotechnical survey of land a building is to be built on, background financial data, or an environmental impact statement. The accuracy of this information is essential, as any inaccuracies might mean a design is unusable. The refusal to allow bidders to rely on that information means that each bidder individually needs to duplicate that work.

The cost of verifying background information was found by the Economic Benefits of Better Procurement Practices by Deloitte Access Economics study to be \$41,800 per firm, per bid on average. Given that in many cases, designs are based on that background information, this is a gross inefficiency. Furthermore, a 2005 report published by the Queensland Division of Engineers Australia<sup>17</sup>, found that between 60 per cent and 90 per cent of variations are due to poor documentation, with the ultimate cost to public sector clients totalling billions of dollars.

Government verifying brief information, and even going so far as to hold the original provider of that information responsible for its accuracy, could remove a major inefficiency of the procurement process.

## **Form-based scope development**

A standardised, form-based approach to developing the scoping document may be problematic, as it runs the risk of developing the scoping document for the sake of producing the document, rather than accurately assessing the project needs. The best scopes are developed specifically for a particular project, and acknowledge project requirements and risks unique to that site, the relevant set of stakeholders, and the desired final outcome.

Our industry reports being presented with scoping documents that in some cases weren’t even updated from previous projects (corridor preservation or traffic studies have been referred to as examples).

## **Inclusion of unnecessary items**

Linked to the previous concern is the inclusion of unnecessary requirements in the scoping documents. For example, certain skills may be listed, which are not appropriate for the project at hand, or other requirements for the project may be prescribed when they are not necessary.

Requiring that a successful bidder meets requirements that are unnecessary will deter firms from competing for tenders, and again has an adverse impact on cost and innovation.

## **Mistakes in briefing documents**

Our members have regularly reported receiving project briefs that appear not to have been reviewed for accuracy or where additional information released has been difficult to access. Some examples reported by members that reflect each of the issues discussed include<sup>18</sup>:

- The re-issue of an entire project brief by a government agency, but without track changes, making it extremely difficult and time consuming for tenderers to ascertain where the changes have been made, and the implications for a tender already underway;
- Project briefs that do not correctly refer to known industry standards;
- Project briefs in a ‘state of flux’ evolving throughout the tender period with additional information catering to changing client demands;

<sup>17</sup> Engineers Australia Queensland Division and Queensland Construction Industry Forum, Getting It Right – The First Time, [www.qcif.com.au](http://www.qcif.com.au), 2005

<sup>18</sup> Some examples drawn from: Consult Australia, QLD Government Procurement Review: Response to issues Paper, [www.consultaustralia.com.au](http://www.consultaustralia.com.au), November 2012

- Tender advertisements referring to published information that is not available online;
- Addenda being issued, sometimes the day before a tender deadline, with no time extension;
- References to parts of a project that are not actually relevant to the project being tendered;
- Project briefs that refer to construction phase services for projects where there is no need for such services;
- Increased demands for building information modelling (BIM) without associated increases in time to prepare such requirements.

In the circumstances cited above, quality assurance has not been correctly administered and, in part, the costs of quality assurance have effectively been passed to the consultant where they choose to engage with the tender and raise issues of concern.

The time and costs associated with this process are substantial, and will either detract from resources spent on the preparation of the tender, or increase costs to the client and consultant alike.

Ultimately however, of greater concern to the taxpayer, is the ongoing unmanaged risks to governments that arise in the absence of robust quality assurance.

## PRINCIPLE 9: SUPPORTING INNOVATION

Innovation has the potential to save a client money, mitigate risk, or deliver a better project outcome. Public sector agencies are historically risk averse, which means they might not be as open to innovative solutions as they should be. The *Economic Benefits of Better Procurement Practices* report found that public sector agencies were generally reluctant to allow innovative solutions before a project commenced, with the major reasons cited being probity concerns, fears of negative budget impacts and delivery mechanism.

Innovation also needs careful consideration when developing a project brief. It is important that clients select the appropriate projects how, where and why innovative solutions could be used. For example, mature technology might be more appropriate for a large infrastructure project, such as a highway or hospital, whereas more novel projects are a good candidate for untried innovative solutions.

The Deloitte Access Economics report, together with *Better Buying, Better Outcomes* canvassed some ideas for encouraging innovation to the benefit of public sector clients. One element of doing so is to accept the potential for failure, either by quarantining a portion of funds for innovative projects, or to work collaboratively with the consultant to manage the risks in play.

**“The extent to which innovation can be introduced into a project will be determined by the consultant’s review of the scope of works, risk management process, contract terms and conditions, and the delivery model. A scope with clearly defined parameters for innovation, as well as delivery models that share risk and support collaboration, is more likely to result in innovation.”**

Clients who recognise the potential cost-saving benefits of innovation and seek them out, should be aware of this when developing their project documentation and delivery model. Again, early consultation with industry will lead to project briefs that better account for the needs of consulting firms. This will lead to healthier competition in the resulting bidding process, and greater collaboration throughout.

## PRINCIPLE 10: REDUCING THE COST OF BIDDING FOR WORK

Our industry frequently contends that bidding for work is expensive, often to the point of being prohibitive. While the tender phase of a project is important for clients to evaluate the range of project solutions on offer, and use competitive pressures to achieve the best value for money, the nature of bid processes could be improved to reduce the costs that are passed on to clients and ultimately the taxpayer.

We would like to draw attention to previous Consult Australia reports<sup>19</sup>, which have cited the 1996 study by the Office of Building Asset and Building Policy in Victoria, which compiled some examples of bidding costs, including:

- For a \$320,000 public facility, one tender submission by an architectural consultant cost \$9,000 to prepare. 102 tenders were submitted. If each tender cost the same amount, potentially \$918,000 would have been spent on the preparation of submissions by tenderers and the total cost of tendering equated to almost 3 times the project value.
- For another public facility, the client found that tender bid prices were too high so made minor changes to the tender documents and re-tendered the projects. The client was effectively bid-shopping, but this required the tenderers to put in extra work.
- For a \$5-6million project a consultant spent \$100,000 to prepare a bid. The successful bid was awarded a contract worth \$180,000, meaning that the consultant only received \$80,000 for the project and the rest covered their tender costs. The unsuccessful tenderers did not recoup any costs.

Consult Australia members have regularly reported that that these figures remain relevant today and are not by any means unusual.

As well as the cost of the time spent putting a bid together, other expenses might include the cost of the intellectual property included, or the resources required to test any background information. Administrative hurdles (red-tape) are also fairly common through the tender process, as bidders are asked the same question multiple times through the different stages of a single tender, which can be costly to duplicate.

Bid documentation is required to address the bidder's compliance with a range of competencies, which may ultimately have little bearing in determining the final awarding of the contract. Meanwhile, some consultants report having been subject to tender processes that required them to "almost do the whole job" in the bid phase, but without the reward of a fee in return.

Certain client behaviours further drive these expenses. For example, shortlisting has the potential to help save costs, but this purpose is defeated if too many bidders are shortlisted, as they continue to incur costs associated with their bid, which ultimately have to be met (e.g. recouped through other tenders for which they are successful).

Consultants also report being asked questions that are completely irrelevant to the work at hand, as the client is using a tick-box form approach to procurement. Other factors, such as the requirement for bids to be fully compliant, or undue complexity of the tender process, or lack of clarity surrounding project risk, also impact on the cost of tendering.

Our industry recognises that the cost of bidding for work is the price of doing business, but we ask that clients respect and consider the cost imposed on businesses through their approaches. For example, not calling for bids on projects simply to make up numbers, when there's already a preferred supplier, including at the second stage of a two-stage process. A 'quick no' is preferable to a slow one, which is especially true in our industry.

Client recognition of the cost of tendering is at the core of any solution to this issue. Clients rely on a viable consulting industry, and short-term costs to the industry have a longer-term impact. By understanding the various costs that go into preparing a bid for work, clients can reduce the cost to industry by better focusing the questions they ask, and reducing duplication through the bid process.

The selection process could also be structured to prevent keeping bids alive when they have no realistic prospect of success. Reimbursing unsuccessful bids in return for the use of (part or all of) their intellectual property should also be considered.

While government clients rightly ask industry to demonstrate that they meet certain competencies, a centralised database or even a pre-qualification scheme would be preferable to bidders filling out the same forms on multiple occasions. In their report on public infrastructure, the Productivity Commission recognised that the bulk of bid content was comprised of this type of paperwork, rather than proposals relating to the project at hand, which could usefully differentiate the bidding firms<sup>20</sup>.

Any move to reduce the need for this compliance activity represents a significant opportunity for government to save on the cost of bidding, while also supporting industry.

The vast majority of tender documentation is not used to differentiate bidders, but to ask bidders to verify that they meet a range of competencies that might be relevant to the project at hand. This practice is a major driver behind the high cost of bidding for work, which could be reduced through streamlined compliance processes, which could take the form of a central register of competencies held by various firms and individuals, in line with pre-qualification requirements.

<sup>19</sup> See [www.consultaustralia.com.au/Home/Advocacy](http://www.consultaustralia.com.au/Home/Advocacy)

<sup>20</sup> Productivity Commission, Public Infrastructure, Inquiry Report No. 71, Canberra, 2014

## PRINCIPLE 11: BETTER DECISION MAKING

One aspect of procurement often overlooked when policy makers consider areas for possible reform is the quality and nature of decision making.

The type of decisions relating to the procurement of government infrastructure generally fit into a small number of categories:

- Decisions around which project to undertake,
- Decisions around project specifications, and
- Decisions around selecting the winning bid(s) to work on the project.

While the first of these decisions is generally beyond the scope a 'model client' policy, nevertheless we would like to take the opportunity to highlight the importance of independent advice to government based on expert opinion to optimise the quality of these decisions.

Consult Australia has welcomed the establishment of independent infrastructure bodies, that have been set up in some jurisdictions, to make recommendations regarding project prioritisation.

In terms of decisions around project specifications, some important and competing considerations will determine which project the government agency responsible will select.

As the system of infrastructure development currently operates, there is great focus placed on time and budget considerations. These are often used as indicators of project success by Cabinet, individual ministers, and the public service, and indeed are important factors in a project's success. However, they should not be pursued at the expense of the project meeting its original aims. If a project fails to meet the original aims, it will not be a good use of taxpayers' money, and will likely require costly upgrades at an earlier time than might otherwise have been required.

Furthermore, the discussion around whether to focus on cost or value set out below, with regard to bid decisions, also applies to project specifications overall.

### Whole of life considerations

Consideration of 'whole of life' factors is an important element that should be considered in any decisions around project specifications. Often, infrastructure is built to specifications without sufficient consideration of future demand and alternative uses (known as 'future proofing'), meaning it reaches capacity, or the end of its useful life, earlier than might otherwise occur.

In contrast to infrastructure procurement today, when the Sydney Harbour Bridge was opened in 1932 it had the capacity to allow every car in the state to drive it, simultaneously providing rail and tram access, with the capacity to also accommodate a future Northern Beaches Railway.

In other instances, the 'whole of life' specifications may not refer to the capacity of infrastructure, but to the cost of operating, maintaining, and even decommissioning that infrastructure. It is important that such elements are factored into any decision making for the procurement of government infrastructure.

The term 'gold plating' is a negative political and technical assessment that commonly refers to the notion of building infrastructure to a greater specification than is required, often in response to taking whole of life considerations too far and beyond simply achieving a better value outcome through appropriate future proofing.

However, the charge of gold plating our infrastructure is more complicated than its proponents might suggest. Designing a project to a specification that allows for 'future proofing' may in some circumstances be regarded as gold plating an asset, and in other situations as a prudent move to save money and disruption over the whole life of that item of infrastructure.

Innovation and relying on professional expertise are important aspects of this debate. In announcing a project, ministers often talk about innovation being involved in the final design, but the officials responsible for delivering that project are more likely to be concerned with overcoming risk related issues, reflecting a disconnect between the political decision makers and those on the ground in the public service responsible for delivering the project.

This suggests that the whole concept of gold plating may be problematic due to an inability to distinguish the necessary from the unnecessary and to effectively communicate this publicly.

Government agencies should be able to make the determination as to whether the additional value of an innovative solution, or a future proofed project design, is worth the additional cost and is appropriate for the project at hand, taking into account the cost of rectification or expansion at a later date. Some consultants however report that their clients ask for the best possible product when releasing their proposed scope, but without the willingness to pay for it. In other words, there is a desire for the highest standard product, but without the corresponding willingness to devote the appropriate resources to achieving it.

The concept of gold plating however may not even go as far as the question of innovation or best practice. Simply doing the job to an appropriate standard may be considered 'gold plating' by some commentators, especially when factoring in the whole of life considerations discussed above.

We acknowledge that an increase in future proofing comes at an additional upfront cost. However, this in turn will have its own opportunity cost, in that it cannot be spent on other projects, or may lead to a project being rejected at the initial planning stage. Nevertheless, coming back later to upgrade existing infrastructure will invariably cost significantly more than if the project had been built to its optimal specification in the first instance.

Ultimately, these competing considerations need to at least be considered by government, if not reconciled. Considering future use of an item of infrastructure, and whether it is worth constructing that infrastructure to a greater specification to save money over the long term is an important decision that must be made.

We believe that 'whole of life' costs, which ensure appropriate consideration for future demand, later stage expansion, alternative uses, maintenance, operational and decommissioning costs, be a factor in the 'model client' policy.

### **Procurement teams**

The composition and competency of a procurement team is a critical element in delivering on the expectations set by government policy and within organisations. Teams should have a mix of practical, legal and procurement experience. This ensures that procurement teams have the relevant skill set to cover the various tasks that they'll face. We acknowledge that this does occur already amongst many government agencies, but it is still not universal, which it should be.

### **Bid selection**

The third category of decision making mentioned above is the decision around which bidder to select, and the rationale for doing so. One of the major issues faced here is whether a government agency should prioritise cost or value in selecting the winning bid.

Consult Australia has long advocated selecting best value bids, rather than simply the lowest cost.

Selecting just the cheapest bid invariably takes a short-term approach to the planning and procurement of government infrastructure, and potentially creates risks where the lower priced bid has saved money by ignoring or being unaware of certain risks or other factors related to the project. Often, a cheaper bid will end up costing more than a rival bid that was more expensive at the initial stage, as variations are added to the project, which steadily increase its cost.

From a client's perspective, the public service should understand their projects and their associated risks, and have an idea of the amount that an optimal bid will be made at. In turn, they should ask questions of any bid that deviates too far from this amount.

Bids that come in too low will likely have not accounted for some risks, and bids that come in too expensive may have a less efficient solution to managing those risks. While some clients already eliminate the cheapest bids from consideration, measuring bids against an optimal cost will support more informed decision making.

Suggestions as to the process of finding the best value bid are also worth consideration. Consult Australia has long advocated for the use of a 'two envelope' system: separating price and non-price information, evaluating each bid according to their ability to perform the work, before then moving to price considerations for those bids with the ability to perform the required tasks.

Consultants report an undue emphasis on price in tender selection rather than capacity to deliver, their experience, or value for money. Assessment criteria focuses too much on requiring detailed information on costings and hours budgeted, rather than a qualitative assessment of deliverables. Given that financial information is much easier to assess, this suggests either an unwillingness to set aside an appropriate amount of time and resources to assess the other elements, or a lack of confidence and experience to conduct the assessment competently.

In addition, consultants regularly report frustration at the lack of clarity around bid selection criteria. In *Better Buying, Better Outcomes*, our industry reported that clients weren't always open or able to tell them about the framework for selection or the selection criteria, including the relative weighting of each item throughout the tender phase.

On some occasions, they reported that the weightings changed after bids were submitted, which left some firms at a disadvantage.

These issues have the potential to waste the time and resources putting together a bid that didn't address the right issues, and or focused on less important aspects of the client's decisions.

Greater transparency around the selection criteria in the tender process is frequently requested as a means to ensure that firms only bid for work appropriate to them, and that they have proper awareness of what to address in their bids.

Tied-in with transparent selection criteria and weightings is the idea that unsuccessful bids should get honest and meaningful feedback. We acknowledge that this may create an additional administrative burden for agencies in the short term, but it has the potential to lead to savings over the longer term by improving accountability and probity, and in turn will drive improved decision making.

One particular challenge is how public sector agencies address non-conforming bids (those that do not align with requirements). Too often non-conforming bids are excluded from a tender process automatically, even when their non-conformity raises an important issue(s) the client should address. In particular, some consultants have reported experiencing problems when bids were submitted through portals, which have no flexibility to accept a non-conforming bid.

Where the public sector client provides an incomplete brief, consultants are challenged as to whether they should second guess what they actually wanted, or respond to the brief with any errors factored in.

Clearly a better project outcome will eventuate when a non-conforming bid is considered that addresses the actual issue, but it does raise probity concerns towards other bidders who weren't aware they could do this.

Apart from improving the quality of project briefs, the solution to this issue lies in allowing bidders to challenge the assumptions in a brief where appropriate, and to address the associated probity concerns by adopting a policy making it clear that this is allowed.

While the 2014 *Scope for Improvement Report*<sup>21</sup> identified the automatic rejection of non-conforming bids as a source of rising costs and inefficiency, this practice also has the potential to bypass any quality control element of the tender process. Although some guidelines would be required, considering non-conforming bids under certain circumstances could allow for errors in the scope to be identified, or for more innovative solutions to come forward that might save clients' money through the procurement process.

## PRINCIPLE 12: ADDRESSING THE UNDERLYING CAUSES

In our experience, there are significant underlying issues with government procurement that need addressing. If not addressed any changes to procurement policy will be limited in their ability to achieve positive reform. These issues need to be adopted to support the 'Model Client' Policy.

### Procurement skills

As part of the trend towards government outsourcing over the last few decades, a critical and ongoing shortage of staff with the relevant skills in procurement at all levels of government has arisen. Where previously in-house engineers at the Public Works Department may have undertaken the project or done design work internally, now private sector providers are contracted to do that work. A natural consequence is that certain skills which existed within an agency are now less prevalent.

An erosion in the skills base of the public sector means that the standard of procurement and value for money outcomes are reduced, while some responsibility for procurement has shifted to the contractors. This is demonstrated in our members' ongoing concerns in relation to:

- Poor quality tender and project scope documentation,
- Poor risk management, and
- Poor quality contractual terms and conditions and undue reliance on external legal advice.

This issue is increasingly of concern to state and territory governments, and one that has generally been recognised. It is incumbent upon governments to take some responsibility for public sector procurement skills, as a small investment that could yield significant returns over the long term.

The Australasian Procurement and Construction Council (APCC) as part of their guide, *Developing the Government Procurement Professional* acknowledge that:

*"Until now, procurement professionalism in Australia has not been clearly recognised or defined. Public procurement too often is undertaken without professional support which results in sub-optimal value for money decisions and unnecessary high prices being paid for goods and services."*<sup>22</sup>

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<sup>21</sup> Ashurst Australia, op. cit., p43 Page 31 of 36

<sup>22</sup> Australian Procurement and Construction Council, *Developing the Government Procurement Profession*, [www.apcc.gov.au](http://www.apcc.gov.au), 2006, p3





Consult Australia believes that a concerted, whole of government focus on procurement skills would benefit those agencies responsible for procuring consulting services. To this end, we have promoted the concept of a Centre for Procurement Excellence, tasked with skills training and development for public sector procurement professionals, and sharing best practice between agencies. This would include training for new procurement officers, as well as ongoing training for those already in procurement roles.

The creation of this concept is not without precedent. Already, the United Kingdom Government has created a Commissioning Academy that has broadly the same mandate in terms of sharing best practice and improving procurement skills. Given the reluctance of government to create new agencies, a Centre for Procurement Excellence could easily sit within an existing agency established to support the development of infrastructure or procurement skills.

### Public sector culture



The culture in which procurement decisions are made is also a vital factor in project delivery. In our experience, the government agencies are very conservative in their approach to procurement. While at one level, this is appropriate for those guarding the public's interests, including the appropriate spending of their taxes, it is also an approach that can be problematic when not properly applied. In particular, it is an inflexible approach, which fails to consider new opportunities to do things better.

There is a common presumption within the public service that because something has 'worked well' in the past, that it will work well in the future. When suggesting procurement reform, one of our main challenges has been overcoming institutional inertia – asking agencies, and key procurement officials within them, to consider alternative approaches is met with indifference, unless there are obvious and significant project failures that can be used as justification for change.

This approach inherently makes government slow to adapt to new ways of doing things. Clients who only ever procure infrastructure in a particular way will be unaware that they could have achieved better value for money doing things differently. Indeed, project success often occurs in spite of poor procurement, provided that project risks do not eventuate, which is a testament to the quality of the industry in Australia.

In the course of the *Better Buying, Better Outcomes* study, a senior public servant offered the observation that, "in the public service, you're rewarded for not stuffing up, rather than for getting it right."

This culture is driven by a series of accountability measures connected with our political system, placing the entire apparatus of government on the defensive. Generally, Consult Australia's experience is that ministers and the senior leadership of public sector agencies purport to be committed to best practice procurement.



The challenge is that individual contract managers are generally the people responsible for managing the procurement practices around a specific project, and are also the people most acutely aware of the ramifications for them if things go wrong. This means that they have little incentive to try new things. Indeed, through the public sector culture they are actively discouraged from attempting newer and better ways of procuring infrastructure, and are given little in the way of protection to specifically encourage them to do so.

The outcome of this culture is that opportunities for innovation and achieving better outcomes are lost, and approaches to risk and liability are reflexive rather than proactive.

A better approach would re-focus relevant personnel towards achieving successful project outcomes, meaning greater engagement, collaboration, and transparency with industry. It also requires, at a senior level, providing support for officials doing things differently. This may be achieved through a whole of government approach to infrastructure planning and development.

The suggestion has been made that procurement performance indicators should be used for agency CEOs and Department Secretaries to overcome the problem that many agency heads say the right things about procurement to industry, but are not backed up by the actions of individual project managers.

This would ultimately serve to improve procurement by offering a significant incentive for agency heads to offer protection or encouragement to individual procurement managers to try new and better ways of doing things.

## CONTACT

We would be happy to discuss the recommendations in this submission. Please contact Megan Motto, Chief Executive at [megan@consultaustalia.com.au](mailto:megan@consultaustalia.com.au) or Nicola Grayson, Director of Policy and Government Relations [nicola@consultaustalia.com.au](mailto:nicola@consultaustalia.com.au) or call 02 8252 6700.





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