Consultation Paper

WA Debarment Regime

SUBMISSION TO WESTERN AUSTRALIAN DEPARTMENT OF FINANCE

JULY 2020

ABOUT US

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering. Our industry comprises some 48,000 businesses across Australia, ranging from sole practitioners through to some of Australia's top 500 companies, providing solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry is a job creator for the Australian economy, directly employing 240,000 people. The services we provide unlock many more jobs across the construction industry and the broader community.

Some of our member firms include:

INTRODUCTORY REMARKS

Consult Australia welcomes the opportunity to provide this response to the Western Australian Debarment Regime Consultation Paper. We understand this is one part of a broader suite of procurement reforms to be undertaken by the Western Australian Government.

Procurement is an area ripe for reform that has the potential to unlock significant productivity. As the state, federal and world economies strive to recover from the impacts of COVID-19 it is vital that we focus on reforms that deliver productivity gains. The *Consult Australia COVID-19 Pulse Survey* (undertaken and published in early June 2020) indicates that two-thirds of our member businesses are experiencing a reduction in work from COVID-19. The survey also revealed that 56% of members anticipate that competition across the industry will become tighter over the next six months. Any regulatory impost on industry should therefore be carefully weighed against the public benefit.

We commend the Western Australian Government on tackling both sides of the procurement equation – exploring the responsibilities of both government clients as well as suppliers. It is vital that parties understand their own obligations and what they can expect from the other party. There should also be clear processes to address any issues parties have with the behaviour of the other party. This includes full transparency of any investigation or assessment process and full transparency of findings. It would be unfair for example if debarred suppliers were made public but there was no way for the market to know if a government agency had breached procurement rules. We look forward to engaging with the government on the responsibilities and obligations of government clients but note that this consultation focusses on the responsibilities of suppliers, more particularly the proposed Debarment Regime.

The proposed Debarment Regime is novel to Australia. We note that the Debarment Regime will apply to all suppliers of goods and services to the government – it therefore needs to cover a significantly broad range of businesses from sole traders through to multi-national business. From those supplying stationary to those delivering multi-million-dollar infrastructure projects.

In this submission we have provided comments on the practicality of the Debarment Regime given the commercial realities faced by the consulting sector and indicated where improvements could be made. There are many ambiguities in the practical operation of the regime, and in several areas we suggest a narrowing of the ambit of the regime as it is too broad and will have significant adverse implications on businesses without a justifiable public benefit. We have significant concerns about the suspension of suppliers during an inquiry and the review mechanisms open to suppliers that have had a debarment decision made against them.

PART 1 – GENERAL

No comment at this stage.

PART 2 – DEPARTMENT CEO

Part 2 of the proposed Debarment Regime sets out the role and responsibilities of the Department CEO, including the power to conduct inquiries.

Clause 4.1

As discussed below under Part 5, Consult Australia does not agree with suspension of a supplier during investigation on potential debarment. Therefore, we suggest that clause 4.1 be amended to remove references to suspension decisions.

Recommendation: Remove clause 4.1(b) 'making suspension decision'.

Clause 4.2

Consult Australia notes that the Debarment Regime only allows the Department CEO to initiate an inquiry, either on their own initiative or on request from a State Agency. We submit that external parties should be permitted to raise concerns directly through the regime to promote the ethical practice businesses involved in government procurement. For example, industry associations such as Consult Australia should be permitted to raise concerns on behalf of the industry.

Recommendation: Amend clause 4.2 to allow a third party to request an inquiry by the Department CEO.

PART 3 – WHEN A SUPPLIER CAN BE DEBARRED?

Part 3 of the proposed Debarment Regime sets out when a supplier can be debarred including the causes for debarment and the matters the Department CEO should have regard to when considering debarment of a supplier. Debarment is a serious matter and will likely have significant consequences for any relevant business. Consult Australia is comforted by the extensive list of public interest elements that must be taken into consideration prior to a decision being made under this Part. We do have concerns about some of the causes given the commercial realities our members face.

Clause 5.3

Consult Australia supports consideration of how the business has dealt with the conduct of concern to ensure that it does not become a systemic issue – for example at clauses 5.3(b), (d) and (f). We are unsure that clause 5.3(i) is an appropriate inclusion as it focusses on the behaviour of individuals within a business rather than the business which is subject to the debarment.

We endorse ethical business governance for our members and consider that executive leadership is a defining factor in organisational behaviour. Systemic concerns in procurement will generally be a function of leadership of an organisation and therefore the matters at clause 5.3 should focus on the supplier as a business.

Recommendation: Remove clause 5.3(i).

Clause 6.2(a)

Under clause 6 of the Debarment Regime the causes for debarment are either 'Category A' or 'Category B'. 'Category A' causes are set out in clause 6.2 and include where penalties have been imposed, either criminal convictions against of civil penalties.

The regime places a burden on suppliers to conduct background criminal checks on senior officers, because the regime covers conduct in the three years preceding the debarment decision. There is a potential that a supplier could be debarred because they employed a senior officer who in the past three years, while working for a different supplier was convicted or had a civil penalty imposed under one of the Category A listed provisions. Considering the broad definition of 'senior officer' at clause 18.2 this will be a significant additional burden on businesses. We suggest the definition of 'senior officer' be limited to the ASIC defined

'Director and Officer' which means Board Directors (if any), the CEO and CFO. Conduct of less senior staff can be captured under supplier conduct. This is discussed further under clause 18.2.

We have concerns about the inclusion of 'false or misleading representations' under the Australian Consumer Law being captured, but support that they only be captured where a conviction or imposition of a civil penalty has occurred. The Debarment Regime should not make it possible for a supplier to face disbarment where another company has alleged misleading and deceptive conduct.

We also note that a conviction for serious environmental harm under Western Australia's primary piece of environmental legislation is not included in the list.

Recommendation:

- *To minimise unnecessary burden on industry, ensure this only applies to ASIC definition of 'Director and Officer' rather than the currently broad definition of 'senior officer' at clause 18.2.*
- *Ensure that, in respect of misleading and deceptive conduct, only successful ACCC cases against suppliers for misleading and deceptive conduct are captured.*
- *Include conviction of serious environmental harm (as defined by Section 3A of the Environmental Protection Act 1986) to the list of Category A offences.*

Clause 6.2(c)

Under clause 6.2(c) of the Debarment Regime, a supplier can be debarred if it or a senior officer has in the past three years made an admission to the commission of an offence to which clause 6.2(a) relates.

Consult Australia is concerned that 'made an admission' could be read as applying when a supplier settles a claim – despite not having the allegations proved. We are unsure in what other context an admission would be made but no conviction would be recorded. This should be made clear before such a clause is introduced.

Recommendation: Remove clause 6.2(c) as it poses an unnecessary risk for businesses to be captured that settled claims where allegations were not proved.

Clause 6.3(a)

The causes under clause 6.3(a), the 'Category B' causes, do not require a penalty to be imposed for the conduct to be captured. It is enough that the supplier or a senior officer has 'engaged' in the relevant conduct.

Consult Australia is concerned by the broad and open nature of interpretation that may occur against Category B. By not being related to the imposition of a penalty, how would a supplier or senior officer be found to have 'engaged' in the conduct?

In legal disputes it can be alleged that a supplier engaged in certain conduct – but even where such claims are settled there is no finding about whether the conduct occurred. Under clause 6.3(a) there is a potential that the presence of a settled claim will indicate that the supplier 'engaged' in such conduct. The Debarment Regime should not make it possible for a supplier to face disbarment where another company has alleged certain conduct. This can be mitigated by narrowing the ambit of the Category B causes to where a government agency has conducted an inquiry and determined that such conduct occurred.

By not being related to the imposition of a penalty, it will be very difficult for suppliers to mitigate their risk in respect of senior officers as a background criminal check will be unlikely to reveal such conduct. As suggested above it will be easier if it is limited to where a government agency has conducted an inquiry and determined that such conduct occurred and in respect of senior officers there is public record of that finding that the supplier can rely on. As with clause 6.2(a) it is vital that the regime narrow the definition of 'senior officer'.

Consult Australia is concerned about the 'use of unfair contract terms' cause – especially in the current regulatory environment where government contracts are not captured by the Australian Consumer Law and there is significant back-to-back use of government contracts by suppliers with subcontractors. Once again, to mitigate this, the clause could be amended only capture instances where a government agency has conducted an inquiry and determined that such conduct occurred.

Recommendation: Amend clause 6.3(a) to read:

> *(a) the Supplier or a Senior Officer of the Supplier has, in the three years preceding the Debarment decision, been found by a relevant government agency to have engaged in the following conduct: [added text is underlined]*

Clause 6.3(b)

Clause 6.3(b) provides a broad power to debar a supplier. Consult Australia is concerned about the broad and open nature of this clause and how it may be applied in practice. It should be removed unless the government can provide clarity on the types of conduct sought to be captured. It will also be vital to ensure that guidance documents are prepared to provide transparency on how the clause will be provided. Those guidelines should be made public.

Recommendation:

- *Remove clause 6.3(b), or in the alternative:*
- *Clarify the conduct to be captured; and*
- *Ensure that guidance documents are prepared on the application of the clause; and*
- *Ensure guidance documents are made public to increase transparency and certainty.*

Clause 6.3(c)(iii)

Clause 6.3(c)(iii) provides that a cause for disbarment may arise where the supplier or a senior officer failed or refused to comply with a request from the Department CEO for information or documents. We believe this is too broad a power and should be limited to 'reasonable' requests and refusals. That is, the Department CEO can only make reasonable requests. Further, suppliers and senior officers cannot be debarred for failing or refusing where they have a reasonable excuse. As with clause 6.2(a) it is vital that the regime narrow the definition of 'senior officer'.

Recommendation: Amend clause 6.3(c)(iii) to read:

> *(iii) the Supplier or a Senior Officer of the Supplier has failed or refused, without reasonable excuse, to comply with a request from the Department CEO for reasonably necessary information or documents relating to an inquiry by the Department CEO. [added text is underlined]*

PART 4 – INQUIRY

Part 4 of the proposed Debarment Regime sets out the inquiry mechanisms including the notice to comment, notification of decisions and the consequences of a debarment decision.

Clause 8.1

This clause provides that 'prior to making a debarment decision' the Department CEO must issue a written notice to the supplier that it is conducting an inquory. There is no timing requirement on this notice. Consult Australia suggests that the Department CEO must notify the supplier within 7 calendar days of commencing an inquiry. The supplier should have full transparency of such inquiries, even if the inquiry does not proceed to a debarment decision.

Recommendation: Amend clause 8.1 to require the Department CEO to notify the supplier within 7 calendar days of commencing an inquiry.

Clause 8.2

This clause outlines that a supplier has an opportunity to make submissions to the Department CEO on receipt of a notice outlining that a debarment decision is being considered. The submission is due 'within the time specified in the notice'.

Due to the importance of these decisions on the business, the open nature of the timeframe for response is a concern. The rules should outline the minimum timeframe that the Department CEO must provide the supplier to respond. This will ensure a fair and transparent process from the outset. The timeframe should also allow for reasonable extensions when made prior to the decision deadline.

Recommendation: Amend clause 8.2 to read:

> *The Supplier may make submissions to the Department CEO in relation to the proposed decision within the time specified in the notice. The Department CEO must provide:*
>
> *(a) at least 42 calendar days to the supplier to make its submission; and*
>
> *(b) an opportunity for the supplier to request a reasonable extension of time.*

Clause 9.2(c)

This clause establishes that once the Department CEO makes a debarment decision, they must notify the supplier of its rights of review or appeal. The remainder of the Debarment Regime does not set out the rights of review or appeal – which is a glaring omission. The debarment of a supplier will have a significant impact on that supplier and could lead to job losses. Therefore, a clearly articulated process for review and appeal is necessary in the regime. Consult Australia urges such appeals and reviews to be conducted by an independent third-party that is not the Department CEO.

Further, a supplier should not be disbarred or appear on the public register until after all appeals and reviews are complete.

Recommendation: Ensure there is a clearly articulated process for review and appeal of a debarment decision to an independent third-party. Ensure the supplier is not debarred and does not appear on the public register of disbarred suppliers while a review or appeal is on-foot.

Clause 10.1

This clause lists the activities a supplier is precluded from once a debarment decision is made. The list does not provide enough certainty and clarity to the industry on what should happen if one supplier in the supply chain is disbarred. In the construction industry there are numerous suppliers involved on a single project, so the debarment of one supplier can have significant impacts on other suppliers. Further clarity is needed on the obligations of other suppliers where a debarment occurs.

For example, Clause 10.1(b) provides that a supplier who has been debarred will not be eligible to tender for subcontracts where the head contract is with a government client. Does this mean industry will now be responsible for ensuring they are not contracting with a debarred supplier? Are there penalties for a supplier who (knowingly or unknowingly) engages a debarred supplier as a subcontractor? The regime is silent about this. We note this creates an additional administrative burden on the supply chain in vetting subcontractors for compliance with this regime.

Industry need more clarity on what their obligations are where there are current contracts in place (clause 10.1(d) is the only paragraph that refers to current contracts). For example, where a supplier is a subcontractor to the debarred supplier or are subcontracting the debarred supplier. Is the head contractor required to terminate the subcontract with the now-debarred subcontractor? What happens to the subcontractor if it is the head contractor that is disbarred?

We are concerned about project cost and time overruns due to clause 10.1(d) which states that the debarred supplier will be precluded from extending the duration or scope of the contract without approval of the Department CEO. This could add significant cost and time delays to projects as changes to scope are common in consulting/advisory work. Seeking approval from the Department CEO will have significant impact on state projects. It is recommended that this provision be removed.

Recommendation:

- *Provide more industry certainty on the responsibilities of the debarred supplier's supply chain – including for current contracts and for future endeavours.*
- *Remove clause 10.1(d) as it will have unnecessary adverse impacts on project cost and time in respect of consulting and advisory services.*

Clause 10.2

This clause gives a state agency the right to terminate a contract with a debarred supplier. This provision does not provide enough certainty and clarity to the industry on what will happen to the remainder of the suppliers in the supply chain. In the construction industry there are numerous suppliers involved in a single project, so the termination of a contract between one supplier and the state can have significant impacts on other suppliers.

Recommendation: Provide industry more certainty on the impact of such decisions on the rest of the supply chain.

Clause 10.3

Consult Australia supports clause 10.3 that will allow the Department CEO to award a government contract to a supplier while a debarment decision is in effect. However, there is a concern about how this will work so as to not undermine the system. It will be important to ensure transparency of any such decision including what 'exceptional circumstances' exist and why it is in the 'public interest' to make that decision. For example, if the debarred supplier is the only local supplier but there are other suppliers in the state or country that can do the work, this might not meet the requirements. The public and industry must have confidence in the decisions of the Department CEO and therefore such decisions and reasons for decision must be publicly available.

Recommendation: Amend clause 10.3 to ensure the decision and reasons for decision to award a contract to a debarred supplier be publicly available.

Clause 10.5

This clause sets out the information of disbarred suppliers that will be on a public register. The concluding note advises that where a debarment decision is stayed by the terms of a supplier undertaking, the CEO has a discretion whether or not to include the supplier in the public register.

Consult Australia urges a single clear and consistent rule for all suppliers with a supplier undertaking in place. We are of the view that where the Department CEO has stayed a debarment decision (because of the supplier's positive actions in agreeing to an undertaking) the supplier should not be listed on the public register of disbarred suppliers. Alternatively, the WA Government should create a sperate section of the register for all supplier undertakings to ensure market and consumer transparency of such arrangements.

Recommendation: Amend clause 10.5 to ensure a consistent rule for all suppliers with a supplier undertaking – either no such supplier should be listed on the public register or all such suppliers be listed on a separate section of the register that makes clear an undertaking is in place and the contents of that undertaking.

PART 5 – SUSPENSION

Consult Australia holds grave concerns regarding the suspension of a supplier while an inquiry is underway. This may have significant implications for a supplier who has yet to be determined to be unfit to be awarded government contracts and may result in unnecessary financial hardship on a business. Furthermore, the suspension period can be for up to a period of 18 months while an investigation is underway leaving suppliers under significant financial duress for an extended period. This is a significant issue as the state, Australia and the global economies strive to recover from the impact of COVID-19.

Recommendation: Remove 'Part 5 – Suspension' from the Debarment Regime. We do not support suspension while an investigation is underway into a supplier under the Debarment Regime.

If Part 5 is retained, the industry will need more clarity and certainty on their obligations. As with disbarment, there must be a clearly articulated process for seeking review or appealing the suspension decision. The review or appeal must be heard by an independent third party, not the Department CEO.

Further clarity is need on what happen to the rest of a suspended supplier's supply chain. For example, if a supplier has been suspended and is not eligible to tender for subcontracts will other suppliers be responsible for ensuring they are not contracting with a suspended supplier? Are there penalties for a supplier who (knowingly or unknowingly) engages a suspended supplier as a subcontractor? The regime is silent about this. We note this creates an additional administrative burden on the supply chain in vetting subcontractors for compliance with this regime.

Also, we note what appears to be a typographical error in clause 11.1(b). The following phrasing may provide more clarity:

> …the Department CEO is satisfied that suspension is in the public interest [underlining additional word].

PART 6 – SUPPLIER UNDERTAKING

Consult Australia supports the opportunity for a supplier and the Department CEO to enter a supplier undertaking at any time after the making of a debarment decision. As we do not support a suspension while a potential debarment is under investigation, we recommend Part 6 be amended to reflect that supplier undertakings only apply after a debarment decision.

Recommendation: Amend Part 6 so that supplier undertakings only apply where a debarment decision has been made and if Part 5 is removed take out all references to suspension in this Part 6. If Part 5 remains, the supplier should not be suspended if there is a supplier undertaking in place.

PART 7 – AFFILIATES

A fundamental element of ensuring ethical behaviour of suppliers is ensuring that an unethical supplier will not dissolve and become a new entity after a debarment decision is made by the Department CEO. Therefore, Consult Australia supports the concept that the Debarment Regime, subject to certain modifications, will apply to an affiliate of a supplier. However, we have concerns about how affiliates are characterised in the regime as it fails to take into account the commercial arrangements consultants find themselves in. For example, state agencies often request consultants to form alliances with contractors to deliver major projects – that situation is not contemplated in the regime. We propose that Part 7 be reviewed, and exemptions are made for certain commercial arrangements, such as those used in the construction industry for the delivery of major projects.

Recommendation: Review Part 7 and insert an exemption for certain commercial arrangements, such as those in the construction industry for the delivery of major projects.

Clause 14.1(a)

This clause provides that a person is an affiliate of a supplier if, directly or indirectly, either one controls of has the power to control the other. In the construction industry this sort of arrangement could appear in a standard contract where a supplier can direct another supplier to do certain things – but does not have the power to control the supplier's business. Further, where there is an alliance, multiple suppliers come together as a single entity to deliver a project. It is unclear how this provision would apply to such a situation. We believe an affiliate should be a person with a direct link to a supplier and the power of control flows in one direction.

Recommendation: Amend 14.1(a) to only apply to a direct relationship to a person who is an affiliate of a supplier where the power of control relates to the power to control the supplier's business and flows in one direction.

Clause 14.1(b)

This clause provides that a person is an affiliate of a supplier if, directly or indirectly, a third party controls or has the power to control both. It is unclear how this provision applies to the construction industry where various suppliers are contracted to the state agency who has the power to direct suppliers to do certain things but does not have the power to control the supplier companies.

Recommendation: Amend 14.1(b) to make clear how or if it applies to the construction industry and/or situations where the government is the third party.

Clause 14.1(c)

This clause provides that a person is an affiliate of a supplier if, directly or indirectly, they have a senior officer in common. We do not support this on the current broad definition of 'senior officer'. Even if the definition was restricted to the ASIC definition of 'Director and Officer' it does not work for Board members – as Board members can hold multiple board positions without those different entities being affiliates.

Recommendation: Remove clause 14.1(c) as it has unnecessary consequences.

Clause 14.2

This clause provides that a person may be an affiliate of a supplier even if that person or supplier no longer exist. We are concerned by the phrasing of clause 14.2, we believe that the affiliate status should cease if a person no longer exists.

Recommendation: Remove clause 14.2.

Clause 15

As stated above, Consult Australia believes that suspension should not be included in the Debarment Regime and this should be removed from clause 15 if the decision is taken to remove Part 5.

Recommendation: Remove all references to suspension from Part 7 (if Part 5 is removed).

PART 8 – RECONSIDERATION WHERE CHANGE OF CIRCUMSTANCES

Consult Australia supports the ability for a reconsideration of a debarment decision if a material change or new information arises. As stated above, we do not support the suspension aspect of the Debarment Regime and therefore we recommend Part 8 should be updated to reflect this.

Recommendation: Remove all references to suspension from Part 8 if Part 5 is removed.

PART 10 – DEFINITIONS

This Part sets out the definitions applicable to the Debarment Regime.

Clause 18.2

Under clause 18.2 the definition of 'senior officer' is significantly broad and would capture officers not involved in the tendered work. The broad definition will lead to significant burden on the supplier in terms of background checks and other measures to mitigate risk under this Debarment Regime. As the regime applies to suppliers as businesses, it is more appropriate that the regime focusses on the business rather than individual employees. The policies and procedures of the business as well as the leadership of the business should be of most concern to the government.

For those reasons we suggest the definition of 'senior officer' be limited to the ASIC defined 'Director and Officer' which means Board Directors (if any), CEO and CFO. Conduct of less senior staff can be captured under supplier conduct.

Recommendation: Amend the definition of 'senior officer' under clause 18.2 to be consistent with ASIC defined 'Director and Officer'.

CONTACT

We would welcome the opportunity to further discuss the issues raised in this submission. To do so, please contact:

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