



# SUBMISSION

Inquiry into the procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales

*The Upper House Standing Committee on Social Issues*

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**CIVIL CONTRACTORS  
FEDERATION**

*The Voice of the Industry*



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CCF NSW acknowledges that Aboriginal and Torres Strait Islander peoples are the First Peoples and Traditional Custodians of Australia, and the oldest continuing culture in human history. We pay respect to Elders past and present. We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to Country and acknowledge their continuing custodianship of the land, seas and sky.

# Inquiry into the procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales

## 1. Introduction

The Civil Contractors Federation NSW (CCF NSW) is pleased to provide this submission to the NSW Legislative Council Standing Committee on Social Issues in response to its *Inquiry into the procurement practices of government agencies in NSW and its impact on the social development of the people of NSW*.

This submission has been endorsed by the CCF NSW Government Procurement Advisory Group and remains in draft form until approved by the CCF NSW Board. Any revisions made by the Board will be forwarded in due course.

## 2. About CCF NSW

CCF NSW is the peak body for the civil construction industry in NSW. We represent 400 civil construction and maintenance businesses in NSW – from large multinational companies to single owner-operator businesses. Almost 50% of our members are based in regional NSW. CCF is the only organisation in Australia charged with representing all employers in the civil industry, under the *Fair Work (Registered Organisation) Act 2009*.

Often called the ‘horizontal’ construction industry, the civil construction industry is crucial to the delivery and maintenance of every NSW government infrastructure project in our state – from the largest to the smallest.

We help build and maintain the state’s roads and bridges; tunnels and railways; schools and hospitals; housing, water and electricity projects; disaster recovery works and more. Our industry trains and employs local people to deliver these projects, making us a proud and vital economic and social contributor to NSW.

## 3. Opening

This submission outlines the **construction procurement practices** of government agencies in NSW as experienced by the civil construction industry.

The NSW Government's role in the procurement and delivery of public infrastructure, and its ability to strengthen (or contract) the industry and public value through construction procurement is extremely powerful.

Investment and procurement are the government’s primary levers for influence.

While the first lever, investment, is being used effectively with the Minns Government's commendable \$116.5 billion infrastructure commitment in the 2023 NSW State Budget, the second lever, procurement, poses a formidable challenge requiring swift, strategic intervention. We are at a tipping point, requiring concerted efforts to address chronic obstacles in state government procurement if we are to meet the state’s infrastructure needs and strengthen the construction industry in NSW.

Amid sustained infrastructure investment, an impending energy transition, housing delivery challenges and civil construction workforce shortages, the NSW Government can no longer rely on the procurement practices of the past to deliver the infrastructure of the future.

Key procurement issues faced by the civil construction sector include unfair risk allocation, inadequate quality of tender information, tight timelines for tender responses, burdensome tender conditions, deviations from standard form contracts, exposure to negative cash flows, and more (see Table 1.1). These issues not only jeopardise the sustainability of the construction industry in NSW but also escalate project costs for the government, hindering the realisation of maximum public value through efficient infrastructure investment and procurement.

Additionally, this submission refers to **all state government entities rather than only agencies** (the latter is narrowly defined by the NSW Government including in its procurement framework).

CCF NSW submits a key barrier to effective procurement practices, both current and for future reform, is the inconsistency and complexity across all NSW government entities. This is exacerbated by the long-standing practice where 'special' state bodies such as state-owned corporations (SOCs) and other commercial businesses are permitted to use bespoke procurement arrangements despite being among the largest procurers of infrastructure in NSW (for example, Sydney Water, Water NSW, Hunter Water, SydneyMetro, EnergyCo, Essential Energy, Landcom, Land and Housing Corporation etc).

These exceptions must no longer persist if we are to genuinely overcome the barriers to effective infrastructure procurement in NSW and realise the full public benefits that infrastructure delivery is designed to achieve.

CCF NSW urges the Committee and NSW Government to broaden the definition of state government agencies/entities. This is crucial for a holistic approach to address the deep-rooted and pervasive issues in construction procurement in NSW. The shift is essential to move beyond solely preventing cost overruns and prioritise delivering public infrastructure that maximises the best public value.

Further, CCF NSW strongly recommends the NSW Government redefines its construction procurement goals to **prioritise best public value over traditional value for money, which is usually interpreted as lowest cost**. This new definition should emphasise the creation of assets fostering job growth, job security, upskilling NSW workers, and sustaining or expanding the State's civil construction industry as part of best value.

These two definitional changes are central to driving an overhaul of the current procurement framework, policies and practices across all government entities in NSW.

**This submission makes 23 recommendations** to address long-standing issues that hamper infrastructure procurement, delivery and value creation in NSW. CCF NSW looks forward to working collaboratively with the NSW Government and others in industry to address these challenges for the benefit of the people of NSW.

## KEY ISSUES IN NSW CONSTRUCTION PROCUREMENT

POLICY LEVEL	PRE CONTRACTING STAGE	CONTRACT STAGE	CONTRACT ADMINISTRATION	POST-CONTRACT
Definition of value for money means lowest price wins, not best public value	Poor quality of information provided at tender	Unfair risk allocation	Unfair decisions regarding claims	Undue delays in returning security payments to contractors
Increasing compliance requirements and red tape is a competitive disadvantage for smaller contractors	Inadequate time for tender response	Absence of capped liability provision	Delayed administration of claims	Little post contract evaluation and action
No mandated use of standard form contracts	Onerous and complex tender conditions	Undue exposure to consequential loss	Lack of authority and/or skills to administer construction contracts	Government agencies self-report with little monitoring improvements
Lack of pipeline visibility and certainty	Focus on price competition (i.e. lowest cost wins not best value)	Exposure to negative cash flows	Lack of explanation and transparency regarding claim decisions	Contractor Performance (good or bad) does not influence their ability to win next tender
Commercial state entities (e.g. SOCs) use custom arrangements yet same issues	Inability to recoup bid costs when government entities change approach	Narrow entitlement to recoup additional costs incurred during project	Inconsistent behaviour across government in administering contracts	
Government entities inherently lack impartiality as a client	Unfair risk allocation	Unduly harsh security/bond provisions and delays returning bonds		
	Bundling projects limits opportunities for tier 2-3 contractors	Lack of incentive mechanisms (punitive focus)		
		Deviations from standard form contracts		

Table 1.1 Key issues experienced by civil contractors in NSW Government construction procurement.

## 4. Summary of recommendations

CCF NSW urges the Standing Committee to recommend that the NSW Government adopts the following mandates:

1. **Standardised Construction Contracts (Mandated):** Work with industry (all tiers) to **develop and enforce the use of standard form construction contracts** for all projects undertaken or funded by state government entities and mandate their use.
2. **Universal Adoption:** Ensure all government agencies and entities within NSW, including state-owned corporations and other state entities involved in construction procurement, strictly adhere to the **use of standard form construction contracts as written**.
3. **Standardised Construction Subcontracts:** Just as the NSW Government requires many Head Contract clauses to be passed down to Subcontractors to minimise risk to government, require those fairer risk allocation clauses to be passed down to subcontractors in the form of standard construction subcontracts.
4. **Red Tape Reduction:** Work with industry to remove unnecessary red tape and establish that no additions or changes to tendering requirements can be made without a corresponding removal of existing requirements.
5. **Fair Risk Allocation:** Develop, with industry, a comprehensive set of principles for risk allocation to ensure risk is assigned to the party best equipped to manage it. Mandate the use of these principles across all construction projects procured by state entities.
6. **Best Public Value Procurement:** Redefine construction procurement goals, prioritising best public value over traditional value for money, which is usually interpreted as lowest cost at tender. Emphasise the creation of assets fostering job growth, job security, upskilling NSW workers, and sustaining or expanding our civil construction industry as part of best value.
7. **Collaborative Tender Documentation and Minimum Standards:** Collaborate with the wider industry to establish a minimum adequate standard of tender documentation.
8. **Information Requirements:** Impose minimum and adequate information requirements on government clients during the tender process, covering scoping, geotechnical and other reports, risk identification and allocation, budget, and programming.
9. **Right to Rely:** Ensure that commitments made and information provided during the tender process must be legally binding on both parties and form an integral part of the contract.
10. **Early Contractor Involvement:** Implement Early Contractor Involvement for complex projects by engaging shortlisted contractors in the design phase to enhance tender documentation quality through input on constructability and design issues.
11. **Incentivise Excellence:** Introduce incentives for tenderers who go above and beyond the specified requirements, promoting greater public benefit and encouraging exemplary performance.
12. **Comprehensive Forward Pipeline for all NSW Government Construction Contracts:** Consolidate and improve the Transport for NSW Projects Pipeline to establish a single, live forward pipeline displaying construction contracts across all state entities, for all projects with a project value of \$5 million upwards, to enable industry planning and resourcing, and better overall value for NSW.
13. **Certainty in Timelines:** State and adhere to clear procurement timelines to provide certainty in planning and workforce allocation.

14. **Reasonable Response Time:** Allow a standardised response time of minimum 6-10 weeks for contractors to respond to NSW Government tenders, with the possibility of qualifiers for smaller or straightforward projects.
15. **Empowered Contract Administration Managers:** Ensure that Contract Administration Managers possess the necessary skills and delegation of authority to resolve issues directly and effectively, minimising the need for internal escalation and contract disputes.
16. **Consistent Contract Administration:** Develop a set of principles with the wider industry for consistent behaviour and administration of contracts, building on existing guides as a starting point.
17. **Prompt Claim Assessment:** Adhere strictly to time periods specified in contracts for the prompt assessment and decision of claims, enhancing efficiency and fairness.
18. **Defects Liability Period and Bonds:** Cap the Defects Liability Period at 12 months and introduce a staged release of bonds, allowing contractors to bid on other projects without unnecessary financial constraints. Specifically, 50% of a bond amount should be returned on practical completion, and the remainder at 12 months post completion (50% + 50%). If a DLP must extend beyond 12 months, only 25% should be withheld after 12 months (50% + 25% + 25%).
19. **Positive Cash Flow Mandate:** Mandate positive cash flow on state-funded projects, particularly in areas where pre-purchasing equipment is necessary.
20. **Independent Oversight of NSW Government Procurement:** Appoint an impartial Procurement Advocate to lift the procurement capabilities of NSW and achieve maximum public value.
21. **Contractor Performance Influence:** Allow good contractor performance on a current job to positively influence their ability to secure the next job, simplifying processes and cutting unnecessary red tape.
22. **Contracting Opportunities for Contractors of All Sizes:** Ensure contracting opportunities are accessible for contractors of all sizes, fostering industry growth, job creation and growing public sector capability, to unlock public benefits. Avoid project bundling.
23. **Broaden Industry Engagement for Construction Procurement Reforms:** The NSW government should extend its collaborative efforts beyond tier 1 contractors and more actively engage with tier 2 and 3 contractors at the early stages. This ensures a balanced and inclusive approach, capturing diverse insights and expertise across all tiers of the industry.

## 5. NSW Government's role and influence in construction procurement

The NSW Government holds a pivotal role in construction procurement, shaping the landscape through various means. It:

- is the primary policy maker and regulator
- is the largest procurer of infrastructure projects in the state
- influences industry behaviour through established procurement practices
- signals priorities and endorsing appropriate commercial conduct through its actions

Given its substantial market influence, the state's policy frameworks, procedures, and the behaviour of individuals across the procurement life cycle carry immense weight. These factors not only determine the success of specific projects but also signal the government's core values.

The NSW government's approach to procurement reveals its priorities, such as whether it prioritises lowest cost or best public value, welcomes innovation, values fairness and sustainability, and maximises economic and social value for the people of NSW.

CCF NSW strongly supports the government's use of procurement as a lever to drive positive change in the industry.

However, government's substantial policy and purchasing power, if not correctly applied, can lead to adverse outcomes, particularly affecting smaller and regional construction companies in the civil construction industry. For NSW to flourish and meet its infrastructure demands, the civil construction industry must thrive, or at the very least, not be disadvantaged by the practices of its biggest client.

CCF NSW commends the NSW Government's record infrastructure investment of \$116.5 billion, a responsible policy decision given the multiplier effect of infrastructure spending on economic activity. This record investment has the potential to unlock greater economic and social benefits through a commitment to reforming the construction procurement approach.

## 6. We largely know the problems that need solving

The issues and need for reform in government infrastructure procurement are well known.

It is imperative to comprehensively address the challenges now, for NSW to fulfill its commitment to build and maintain the infrastructure our growing state needs.

Numerous NSW Government reviews, reports and guidelines have been produced in recent years to help address these issues in government infrastructure procurement including:

- *Action Plan: A ten-point commitment to the construction sector* (June 2018)
- *Progress Report: A ten-point commitment to the construction sector* (June 2020)
- *Procurement Policy Framework* (February 2021)
- *Framework for Establishing Effective Project Procurement for the NSW Infrastructure program* (June 2021)
- NSW Premier's Memorandum *M2021-10 Procurement for Large, Complex Infrastructure* (June 2021)
- Construction Leadership Forum *Practice Notes* (referred to in the NSW Procurement Policy Framework)
- *Progress Report: A ten-point commitment to the construction sector* (2021)
- *Commercial Principles for Infrastructure Projects* (2022)



- Department of Premier and Cabinet Circular *C2020-22 Timely Information on Infrastructure Projects – A Guide* (2022)
- *M2022-06 Information on Infrastructure Projects Guide*
- *Progress Report: A ten-point commitment to the construction sector* (2022)
- *2023 Strategic Infrastructure Review into priorities for the NSW infrastructure pipeline* (2023)
- New contract framework for NSW Government agencies when buying infrastructure advisory services (2023)
- NSW Government Women in Construction Program including new reporting requirements for women in trade and non-traditional roles for all NSW Government infrastructure projects over \$10 million
- NSW Minister for Domestic Manufacturing and Government Procurement appointed “to drive the return to domestic manufacturing and building things here again, using government procurement power to boost local jobs” (September 2023)
- NSW Government’s *Progress Report: A ten-point commitment to the construction sector* (December 2023)

While recent guides about construction procurement include some necessary reforms, they are not widely understood or adopted.

Additionally, contractors commonly find that public sector employees lack the expertise for effective construction procurement and contract management, hindering the application of guidelines and practice notes.

Incremental refinements to existing procurement approaches such as guides, Premier’s memorandums, practice notes, and reports such as those listed above are ineffective.

The NSW Government must move beyond these gradual adjustments and advice and actively commit to transformative change to achieve the best public value from its infrastructure investments.

### **6.1 Need for greater industry engagement with tier 2 contractors and below**

While recognising commendable efforts by entities such as Transport for NSW and Infrastructure NSW in enhancing construction procurement, progress has been limited, predominantly focused on mega-projects. To achieve substantial improvements, a more comprehensive plan is essential, encompassing all government entities and projects. CCF NSW advocates for more proactive government engagement with the broader construction industry at an earlier stage to actively drive the necessary reforms.

To date, the NSW government's focus on construction procurement reform has largely centred on extensive collaboration with the tier 1 construction industry, who represent the largest multinational players in the sector, through forums like the Construction Industry Leadership Forum (CILF or CLF).

While the initiatives stemming from this engagement are well-intentioned, the perspectives of tier 1 contractors are naturally shaped by their dealings with the NSW Government at the mega-projects level and the substantial company resources at their disposal.

The NSW government must also recognise that conditions set at the head contract level, often established by tier 1 contractors engaged in major government projects, are typically passed down to every subcontractor without negotiation. This “take it or leave it” approach often places subcontractors in a position where they bear unacceptable risks.

The experiences and requirements of tier 2 contractors and those below them vary significantly, given their involvement in diverse government projects—from contributing to metro station construction and road widening, to rebuilding school infrastructure and upgrading the state's water assets. Unless there is equitable engagement and consideration for the tier 2 and 3 construction industry from the outset, there is a risk of overlooking significant issues and opportunities.

**Recommendation: Broaden Industry Engagement for Construction Reforms:** The NSW government should extend its collaborative efforts beyond tier 1 contractors and more actively engage with tier 2 and 3 contractors at the early stages. This ensures a balanced and inclusive approach, capturing diverse insights and expertise across all tiers of the industry.

## 7. Key issues in construction procurement

This section describes the issues commonly raised by the civil construction industry.

### 7.1 Focus on value for money, not best public value

Despite the incorporation of non-price criteria in all construction contracts, the reality is the contractor offering the lowest bid ultimately secures government work. This tendency is attributed to the well-intentioned belief among public sector employees that obtaining the lowest-priced contract and tightly controlling additional costs, even by rejecting straightforward claims against contracts, constitutes the best value for taxpayer dollars.

This is false economy as it fails to appreciate the following opportunities of government infrastructure investment:

- whole of life benefits and value (not just contract price)
- whole of project benefits
- opportunity for innovation
- delivery of social outcomes
- opportunity to uplift industry capability and participation including local, regional and smaller contracting businesses
- opportunity to promote industry sustainability, job security and job creation in construction
- opportunity to grow more diverse industry participation including from women, Indigenous businesses and social enterprises.

The current fixation on lowest price could be overcome if the NSW Government clearly defined that the goal of construction procurement was best public value, and defining what that looked like.

This new definition would be central to the overhaul of the current procurement framework, policies and practices across all government entities.

**Recommendation: Best Public Value Procurement:** Redefine construction procurement goals, prioritising best public value over traditional value for money, which is usually interpreted as lowest cost. Emphasise the creation of assets fostering job growth, job security, upskilling NSW workers, and sustaining or expanding the State's civil construction industry as part of best value.

**Recommendation: Incentivise Excellence:** Introduce incentives for tenderers who go above and beyond the specified requirements, promoting greater public benefit and encouraging exemplary performance.

## 7.2 Inadequate tender documentation and information

Contractors report that poor documentation and inadequate information provided at the tendering stage highlights, and causes, significant issues in government infrastructure projects.

These issues increase costs and time for all parties, and constrain the economic, social and whole-of-life benefits that could be achieved by effective end-to-end construction procurement practices.

Key issues with government tender documentation include:

- **Poor understanding of project interface risks, market capability** and subsequent **lack of early market engagement** results in government **selecting inappropriate procurement methods** for projects.
- **Projects with inadequate planning, scope, and design** force bidders to redo costly design work for accurate quoting, leading to increased bid costs for all companies and higher overall project expenses for the government. This results in contractors using their expertise for work that should have been completed, rather than contributing value to project outcomes.
- **Inadequate documentation for accurate bidding:** Essential reports, such as geotechnical and engineering reports, subsurface risk documentation, and risk assessments, are either missing or inaccurate. Both contractors and project owners should be able to depend on the information presented during the tender process to formulate their bids. However, relying on the information currently provided exposes contractors to extensive financial and safety risks. Each contractor often spends \$10k or more on each report they redo or prepare, noting these reports should be standard inclusions in works packages released. Inadequate tender documentation is perceived by contractors as a reflection of a government procurement culture that encourages the shifting of risks and costs onto the industry. Additionally, it highlights a deficiency in project management capabilities in government.
- **Poor risk identification, assessment and allocation:** this is the single biggest issue for contractors. Project risks are consistently misidentified or inaccurately assessed, plus risks which should be borne by the client are inappropriately shifted to the contractor. This issue is explored further in the next point (7.3).

**Recommendation: Collaborative Tender Documentation and Minimum Standards:** Collaborate with the wider industry to establish a minimum adequate standard of tender documentation. This would improve clarity and consistency in the tendering process.

**Recommendation: Right to Rely:** Ensure that commitments made and information provided during the tender process must be legally binding on both parties and form an integral part of the contract.

**Recommendation: Standardised Construction Contracts:** Develop and enforce the use of standard form construction contracts without any qualifications, departures, or schedules for all projects undertaken or funded by state government entities. These contracts must be developed with industry including tier 2 and 3 contractors.

**Recommendation: Standardised Construction Subcontracts:** Just as the NSW Government requires many Head Contract clauses to be passed down to Subcontractors to minimise risk to government, require those fairer risk allocation clauses to be passed down to subcontractors in the form of standard construction subcontracts.

**Recommendation: Early Contractor Involvement:** Implement Early Contractor Involvement for complex projects by engaging shortlisted contractors in the design phase to enhance tender documentation quality through input on constructability and design issues.

### 7.3 Unfair allocation of risk

Unfair allocation of risk in the procurement of construction projects is the foremost concern for civil contractors and represents the most critical risk to project delivery for all parties.

Government clients are aiming for a 'not to exceed price' approach, fostering a mindset of 'transferring all the risk.'

Civil contractors report that the current practice of risk allocation has reached absurd levels, poses an unsustainable burden on the civil construction industry and demands immediate attention.

Risk identification and assessment in government construction projects are not only deficient, but risks are also being imposed on contractors which are impossible for them to manage. Project risks, especially subsurface risks, should be shouldered by the party most capable of controlling that risk.

This principle of capability-based risk is supported by Infrastructure NSW in its *Action Plan: A ten-point commitment to the construction sector* (June 2018) however it is not widely understood or used. Nor is it mandated.

Risks in construction procurement include subsurface risks, latent conditions, environmental risks, interface risks, uncapped liability, asbestos, unknown services, costs of prolonged delays in documentation and more. CCF NSW members cite myriad examples of government projects released to the market which required contractors to bear unreasonable and unquantifiable risk.

#### **Example 1 - Requiring contractors to take unquantifiable risk**

For instance, in a remediation project undertaken by a government entity, the initial market communication indicated an unspecified level of contamination at the project site. The extent of contamination had not been precisely defined, with estimates ranging from 3 to 10 meters deep, resulting in a significant pricing uncertainty. Although the government entity, as the client, assumed the risk associated with disposing of the contaminated material, the contractor was burdened with assessing excavation volumes, site overheads methodology, and various other factors, including the potential costs of designing and constructing temporary retaining structures along the site boundary. Notably, the client deliberately excluded this "latent condition" from the contract, recognising its elevated financial risk.

It is unreasonable for a government client to expect a contractor to bear the financial burden of uncertainties that the client knows cannot be accurately quantified during the tender bid submission. A client adopting a "best public value" perspective, rather than focusing solely on securing the lowest contract price, would have either explicitly included such uncertainties as latent conditions or opted for a "schedule of rates" contract. In the latter approach, the client collaborates with the contractor to identify the actual costs of the work, compensating the contractor with an hourly rate for the services rendered.

The current strategy of transferring all risks to the contractor poses a threat to the local construction industry, potentially leading to financial instability. Moreover, there is a risk of escalating overall project and social costs if risks such as contaminated materials are not effectively managed. Adopting a more collaborative and transparent approach would contribute to industry sustainability and better public value in government construction projects.

## Example 2 - not using standard form contracts

The NSW Government's standard form general construction contract, GC21, is often cited by contractors as a more balanced approach to risk allocation, however they are rarely used as written. Agencies using these contracts routinely add departures and attach schedules to these contracts which mean they are vastly different to originally intended. This practice must stop and the contract must be used as written – and mandated.

Research indicates that tough risk allocation by government add increases the costs of government infrastructure projects from anywhere between 15% and 50%.<sup>1</sup>

The same research found that:

- a more balanced risk allocation in relation to subcontracts can reduce costs by 5% with a further 5% savings in more efficient contract administration which results from the more balanced risk allocation
- tough risk allocation gives rise to more disputes at the end of the project and this adds at least 10% to project cost (and sometimes up to 50%).

**Recommendation: Fair Risk Allocation:** Develop, with industry, a comprehensive set of principles for risk allocation to ensure risk is assigned to the party best equipped to manage it. Mandate the use of these principles across all construction projects procured by State entities.

**Recommendation: Standardised Construction Subcontracts:** Just as the NSW Government requires many Head Contract clauses to be passed down to Subcontractors to minimise risk to government, require those fairer risk allocation clauses to be passed down to subcontractors in the form of standard construction subcontracts.

## 7.4 Inadequate time to prepare tender responses

A minimum of 6-10 weeks should be provided to allow the market to respond to construction tenders released by government.

Preparing a tender response requires significant human and financial resources and the less time contractors have to prepare a response, the more costly it becomes and the less likely all parties get the best outcome.

Government entities spend many months or years planning major infrastructure works so it is illogical to provide short tender response periods of say, 3-4 weeks, for contractors to complete the complex technical assessments and estimations required to submit an accurate tender proposal.

To prepare a tender response, contractors must assemble and buy in specialist resources to undertake a thorough assessment of all aspects of the project. These resources typically include estimators, engineers, utility specialists, project managers, construction managers and many others.

Generally speaking, it costs contractors 1% of the total cost of the project to prepare their bid. Therefore, a contractor must outlay \$100k to bid for a \$10million project that they have a 1 in 3 chance of winning (if it is a selective tender process).

<sup>1</sup> Sharkey, J., Greenham, P., Bell, M., Jovic, W., Korolkova, J. & Hu, D. (2020). The Health of the Australian Construction Industry. Melbourne Law School. <https://minerva-access.unimelb.edu.au/items/03f74c7e-f19d-5cfd-98a6-f016487e3e74>

The less time contractors have to prepare a tender response, the more they have to spend to rush consultant reports, pull staff off other infrastructure jobs, and the less time they have to innovate or suggest better ways of achieving the project aims at less cost to government.

Inadequate tender response times are exacerbated when contractors are provided with deficient information required to complete their proposal.

Contractors highlight that when they ask questions of government clients during the tender phase, the responses are far too slow and insufficient. This indicates a gap in the government client's understanding of project details and the crucial role of effective procurement management in project delivery.

In addition to specifying 6-10 weeks as a standard tender response time, the challenge of tight timeframes could be alleviated by the mandated use of standard form contracts, across all government entities, and the specification of minimum document requirements for government tenders.

Implementing these measures, alongside the establishment of a comprehensive forward pipeline for all government infrastructure tenders exceeding \$5 million, would bring about the consistency and certainty essential for efficiently allocating resources and developing high quality tender proposals. This, in turn, would reduce the overall time and cost burdens for all stakeholders, enabling both industry and government to concentrate on achieving the optimal project outcome for the people of NSW. Such a framework would foster greater innovation, collaboration, and enhance the realisation of public benefits in infrastructure procurement and delivery.

The Transport for NSW Transport Infrastructure Projects Pipeline and the Infrastructure NSW Pipeline Portal are good starting points, and CCF NSW commends these agencies for developing these initiatives in response to industry feedback.

These forward pipeline tools are currently very high level and, to be effective for industry, CCF NSW recommends they are consolidated into a single, live platform, with more granularity and accuracy, and that they are required to include all projects from \$5 million upwards. Further, the platform should be expanded to be a NSW government-wide forward pipeline for construction procurement.

**Recommendation: Reasonable Response Time:** Allow a standardised response time of minimum 6-10 weeks for contractors to respond to NSW Government tenders, with the possibility of qualifiers for smaller or straightforward projects.

**Recommendation: Comprehensive Forward Pipeline: Consolidate and improve the Transport for NSW Projects Pipeline** to establish a single, live forward pipeline displaying construction contracts across **all state entities**, for all projects with a project value of \$5 million upwards, to enable industry resource planning.

**Recommendation: Certainty in Timelines:** State and adhere to clear procurement timelines to provide certainty in planning and resource allocation.

## 7.5 Exclusion of commercial state government infrastructure entities (eg SOCs)

A group of state infrastructure entities has consistently been granted the leeway to sidestep NSW Government directives, including those related to procurement. Nonetheless, contractors encounter remarkably similar hurdles in procurement matters, mirroring their experiences with state agencies, and resulting in comparable consequences and opportunities for the people of NSW.

These entities include Sydney Metro, EnergyCo, Water NSW, Sydney Water, Hunter Water, Landcom, Land and Housing Corporation, Essential Energy and others.

Established by successive governments under legislation, these state infrastructure entities operate independently and are mandated to perform "at least as efficiently as the private sector." Reporting to independent Boards, Treasury, and a portfolio minister, they are entrusted with the responsibility of constructing and maintaining some of the state's most critical infrastructure assets.

The prevailing view in Government and these entities is that they can bypass overall Government procurement directives, contending that the "end consumer pays" for their infrastructure projects, not the taxpayer. They are distanced as "out-of-State-Budget" entities.

This perspective is flawed as it overlooks the fact that the end consumers are, in reality, the taxpayers of NSW. They are the ones purchasing the products delivered through infrastructure investments, such as electricity and water, Metro services, and land and housing.

Despite falling outside Government procurement arrangements, civil contracting businesses engaged by these entities face the same challenges as those encountered with other government agencies. Consequently, the recommendations put forth for other state agencies should be enforced for these commercial entities as well.

An additional challenge for contractors working with state owned organisations, particularly utilities, is having to manage significant negative cash flow during their projects.

The contractual terms require civil contractors to pre purchase infrastructure for the project, yet they cannot recover the costs until the equipment is installed. Due to global markets, the procurement of equipment must occur months in advance. When state entities delay payments through questioning legitimate claims or altering the project scope, it places considerable and unwarranted pressure on contractors, irrespective of their size.

A number of the commercial state entities have arrangements with contractors, resembling panel agreements, where contractors accept a low margin in return for a guaranteed annual volume of work. Unfortunately, the committed annual workload from these state entities often falls short, yet contractors are still expected to maintain the same low margin. This creates a disincentive for contractors to innovate or exceed expectations, as they are already operating at a financial disadvantage.

**Recommendation: Universal Adoption:** Ensure that all government agencies and entities within NSW, including state-owned corporations and other state entities involved in construction procurement, strictly adhere to the use of standard form construction contracts as written.

**Recommendation: Positive Cash Flow Mandate:** Mandate positive cash flow on state-funded projects, particularly in areas where pre-purchasing equipment is necessary.

## 7.6 Excessive red tape a competitive disadvantage for smaller civil contractors

Excessive and ever-increasing compliance requirements increase tendering costs and complexity for civil contractors, and are a barrier that excludes smaller businesses from participating in tenders. The construction industry is already grappling with high levels of regulation and complexity.

While contractors encounter growing compliance demands for government projects, there is a conspicuous lack of removal of unnecessary requirements. Different agencies stipulate varying requirements in their procurement documentation and contracts, prompting contractors to question the tangible benefits achieved. If these requirements do not yield significant advantages, they should be removed.

An example is that Transport for NSW requires contractors undertaking work on its assets to be authorised under its Technically Assured Organisation (TAO) scheme and to maintain this status.

Though the intent behind the scheme is sound, contractors express frustration with the onerous documentation requirements. A source of discontent for those with TAO status is the ongoing obligation to self-assess their capabilities and submit updated documentation to Transport for NSW, even within tender proposals. Members of CCF NSW highlight the need to hire staff specifically for the administrative demands of the TAO scheme and question the necessity of the self-assessment process and associated documentation, particularly for contractors regularly engaged with Transport for NSW.

Conversely, civil contractors who do not have TAO status but seek it, report that the onerous administrative requirements make it extremely difficult to be admitted to the scheme.

Medium to small civil construction companies report that the onerous and varied compliance requirements imposed by different NSW government entities are a barrier to doing business with the State. In an industry grappling with workforce shortages, these businesses simply cannot allocate the necessary staff and financial resources to undertake the extensive tender documentation and specifications, especially when the likelihood of securing the work is only around 1 in 3 chances or less.

**Recommendation Red Tape Reduction:** Work with industry to remove unnecessary red tape and establish that no additions or changes to tendering requirements can be made without a corresponding removal of existing requirements.

**Recommendation: Standardised Construction Contracts:** Develop and enforce the use of standard form construction contracts without any qualifications, departures, or schedules for all projects undertaken or funded by state government entities. These contracts must be developed with industry including tier 2 and 3 contractors.

**Recommendation: Contractor Performance Influence:** Allow good contractor performance on a current job to positively influence their ability to secure the next job, simplifying processes and cutting unnecessary red tape.



## 7.7 Lack of opportunities for smaller contractors

Government construction tenders are increasingly being bundled into larger packages in the belief it is administratively simpler for government. This is shortsighted as it severely limits the opportunities for tier 2, 3 and 4 civil construction businesses in NSW to maintain and grow their capability at a time when industry capacity and workforce shortages are critical.

Government should ensure tenders are available for all sizes of construction businesses to help strengthen our home-grown civil construction industry, provide greater job security for civil construction workers and grow the much-needed skills pipeline.

This approach would also improve the capability of public sector employees in construction procurement and contract management. It would give government employees experience managing projects of all sizes and allow interaction with the industry across all tiers. This would help government develop a better understanding of the market, allowing them to better scope, package, target and deliver procurement and infrastructure projects.

**Recommendation: Contracting Opportunities for Contractors of All Sizes:** Ensure contracting opportunities are accessible for contractors of all sizes, fostering industry growth, job creation, and growing public sector capability, to unlock public benefits. Avoid project bundling.

## 7.8 Lack of expertise and delegation of authority

Many challenges faced by contractors seem to emanate from a lack of procurement and contract management capability within the public sector. This deficiency not only contributes to issues such as inadequate documentation and unfair risk allocation, it results in unwarranted tension and delays in managing contracts after signing. This capability gap also hinders contractors from being reimbursed for legitimate claims against contracts.

CCF NSW members have reported significant delays by government entities in addressing even straightforward claims against their contracts. Contractors believe these entities excessively rely on dispute mechanisms to avoid decision-making and accountability. Contractors note that public sector contract managers often lack the authority to respond to their claims, requiring referrals to more senior staff or commercial teams with limited knowledge of the project. The delays in assessing claims are prolonged, and contractors' perception is that there is a default response of denial, driven by agencies' fear of exceeding budget. Contractors assert that agencies encourage them to dispute these decisions, viewing it as a tactic to dissuade contractors from pursuing claims for smaller amounts given disputes are costly for contractors. These routinely denied claims accumulate, leaving contractors burdened with costs they were rightfully entitled to be reimbursed for.

**Recommendation: Empowered Contract Administration Managers:** Ensure that Contract Administration Managers possess the necessary skills and delegation of authority to resolve issues directly and effectively, minimising the need for internal escalation and disputes.

**Recommendation: Consistent Contract Administration:** Develop a set of principles with the wider industry for consistent behaviour and administration of contracts, building on existing guides as a starting point.

**Recommendation: Prompt Claim Assessment:** Adhere strictly to time periods specified in contracts for the prompt assessment and decision of claims, enhancing efficiency and fairness.

## 7.9 Undue withholding of security payments and long defect liability periods

Contractors engaged by government to deliver infrastructure programs report the timely return of bond payments post completion is a significant issue affecting their ability to tender for more work.

In construction, a bond payment refers to a performance bond or a payment bond. These bonds are financial instruments that provide a form of guarantee for the project owner, in this case the NSW Government, ensuring that the contractor fulfills their contractual obligations.

Typically, contractors are required to provide a bond that is 5% of the project cost. This means bonds are typically worth millions of dollars.

The contract stipulates how bonds are returned or released. The conditions for bond release vary, but common scenarios in construction include:

- successful completion
- project acceptance
- payment of subcontractors and suppliers
- end of defects liability periods

Contractors secure these bonds from banks or the bond market and provide them to clients. The bonding market in Australia is small and tightening, making it more difficult for contractors to get bonding.

Contractors report that NSW Government clients are extending the bond period for up to several years after a project is completed, meaning contractors have their cash tied up with the government long after they have finished a job. The bond market has limits on the levels of bonding it will release to each contractor so when contractors exceed their bond limit or bank guarantee, they cannot bid for new work because they don't have the bonding to provide a new client. This jeopardises the job security of their workforce who need to be allocated work, as well as the sustainability of businesses and the industry.

Relatedly, members report that Defect Liability Periods (DLPs) are being extended unreasonably in government contracts.

CCF NSW members assert that bonds can and should be repaid as soon as possible and DLPs should not extend beyond 12 months. Contractors strongly believe any significant defect would be evident within that period.

CCF NSW members believe a staged release of bonds is more reasonable than withholding the entire amount for sometimes a minor defect. If a DLP period *did* need to extend beyond 12 months, only 25% of the bond amount should be withheld for that period, to free up contractor resourcing to undertake other projects.

**Recommendation: Defects Liability Period and Bonds:** Cap the Defects Liability Period at 12 months and introduce a staged release of bonds, allowing contractors to bid on other projects without unnecessary financial constraints. Specifically, 50% of a bond amount should be returned on practical completion, and the remainder at 12 months post completion (50% + 50%). If a DLP must extend beyond 12 months, only 25% should be withheld after 12 months (50% + 25% + 25%).

## 7.10 Other procurement issues at the contract stage

### i. Undue exposure to consequential loss

Contractors report government clients regularly change the project scope and conditions significantly, and the contractor bears the costs.

### ii. Narrow entitlement to recoup additional costs incurred during the project

### iii. Lack of incentive mechanisms in contracting – (there is a punitive focus)

### iv. Inability of contractor performance to influence their ability to win the next job

Contractors' performance (good or bad) should be a legitimate criteria for winning (or not) a new job for a government client, and provide for a more streamlined and simplified procurement and contracting process.

## 7.11 Lack of impartiality

Section 5 of this submission outlined the government's influential role as the major client of the civil construction industry as well as the regulator and policy maker.

This makes impartial assessment of the effectiveness of government procurement and contract administration challenging for all. There is no single project champion in NSW, who can independently determine the best overall return based on the project objectives.

CCF NSW members report that the current approach to government procurement in NSW results in a price-based contract negotiation and delivery approach to infrastructure projects, where government entities' primary approach to contract negotiation and management is to secure the lowest contract price possible, to resist even black-and-white claims against the contract, and to refuse suggestions by the contractor that would improve overall project outcomes because it may go over the initial contract price (which seems to then become the overall project budget). Little or no consideration is given to the whole of life benefits of projects.

South Australia appoints an independent Industry Advocate and introduced the *SA Industry Advocate Act (2017)* to promote better infrastructure procurement outcomes including: government expenditure that results in economic development for South Australia; the economic development of the steel industry and other strategically important industries for South Australia and capable South Australian businesses being given full, fair and reasonable opportunity to participate in government contracts.

The Advocate assists both SA government and industry in understanding best practice procurement and acts as an independent knowledge broker and knowledge centre. While CCF NSW does not support all elements of this model, the concept of an independent procurement champion is worth considering for NSW, including the need for corresponding legislation.

Members report there appears to be little post contract evaluation and improvement within government. Contractors report the same issues are experienced time and again. Agencies appear to self-report to NSW Procurement, within Treasury, however there appears to be little statewide focus on capability uplift nor is there an apparent mechanism to share learnings other than adding to the proliferation of reports, practice notes and other documentation already guiding procurement.

**Recommendation: Independent oversight of NSW government procurement:** Appoint an impartial Procurement Advocate to lift the procurement capabilities of NSW and achieve maximum public value.

## 8. Conclusion

The primary objective of the NSW government at all stages of construction procurement should be the enduring public value (benefit) of the investment, which includes sustaining and creating local jobs and economic growth by ensuring a viable civil construction industry.

The current procurement practices of the NSW Government in construction not only escalate the total cost of projects but also fall short in delivering the comprehensive public value achievable. This shortcoming is rooted in a fixation on project cost, compounded by deficient scoping, incomplete documentation, unjust risk allocation, poor contract administration, unwarranted claim refusals, protracted delays, and a lack of robust evaluation and learning activities.

The construction procurement practices of the past simply do not support the delivery of our current and future infrastructure requirements. We have reached a tipping point where significant change is needed.

CCF NSW hopes this Inquiry will be the much-needed circuit breaker for government and industry to buy and build better in NSW. We greatly appreciate the opportunity to contribute to this Inquiry on behalf of almost 400 civil contractor employers in NSW, and would welcome the opportunity to provide further input to the Committee.

CCF NSW congratulates the NSW Government on holding this important Inquiry and looks forward to working collaboratively with the government to help transform procurement practices for the benefit of NSW.


## 9. Contact

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