

14th October 2022

CCF2022-709

Mr Rob Sharp
The Secretary
Transport for New South Wales

By email: Camden.Gilchrist@transport.nsw.gov.au

Dear Mr Sharp,

We write to take up the opportunity to provide feedback on the Productivity Packaging Discussion Paper.

We acknowledge and appreciate Transport for New South Wales' (TfNSW) efforts to improve the procurement process – reform is undoubtedly required. We support the documented desired Objectives (page 4) and the Benefits being pursued (page 5):

“The key objectives of the Productivity Packaging model are:

- *Ensuring competition in the procurement of industry partners*
- *Supporting a sustainable contractor market, including a broad participation of industry partners*
- *Supporting the industry to understand and mitigate risks*
- *Facilitating innovation in project design and delivery*
- *Unlocking a more efficient procurement pathway in a constrained market*
- *Delivering greater cost savings and improved cost certainty.”*

To summarise our position, while we might see that the proposed model may yield the Benefits for Designers and TfNSW, in liaising with our Members, they have expressed considerable concerns that the Benefits may not be realised for Contractors. Moreover, we have doubts the structure of Productivity Packaging as currently drafted will satisfy the Objectives.

We remain committed to working with the NSW Government and TfNSW to improve the procurement arrangements and construct a sustainable, viable civil contracting industry in New South Wales.

Yours sincerely,



David Castledine
Chief Executive Officer

Attachments:

CCF NSW Response dated 14th October 2022 to Productivity Packaging Discussion Paper

Attachment to CCF202-709 14th October 2022

CCF NSW Response to Productivity Packaging Discussion Paper

We acknowledge and appreciate TfNSW's efforts to improve the procurement process – reform is undoubtedly required. We support the documented desired Objectives (p4) and the sought-after Benefits being pursued (p5).

Moreover, we can see that the proposed model may well bring the Benefits for Designers and TfNSW, however, in liaising with our Members, they have considerable concerns that the Benefits may not be realised for contractors. Moreover, we have concerns that the structure of Productivity Packaging as it is currently drafted will not satisfy the Objectives.

Following consultation with our Members, we offer the following comments:

1. If the purpose of this model is to capitalise on Tier 2 to 4 contractors' capacity, then the Shortlists and Thresholds could do more to reflect the industry makeup in this area and to support the critical need to create a sustainable, viable industry. Specifically, the Thresholds can be used to grow commercial maturity of the Tier 2 to 4s by giving them the much-needed Head Contractor experience. And, while we acknowledge the model is not intended for complex projects, the industry supports clarification of the market sizes, to protect bidders of the large projects that are so essential for the State's development. To achieve the Objectives, we recommend a change to the thresholds be made:
 - i. Greater than \$1bn Design & Construct (D&C)
 - ii. \$500m-\$1bn D&C
 - iii. \$250-\$500m either C or D&C
 - iv. \$100-\$250m
 - v. \$50-\$100m
 - vi. \$20-\$50m*
 - vii. \$0-\$20m*

** There is an open discussion occurring as to whether this process should apply at all to small contracts. We will need more time to discuss this with our Members.*
2. The three-phase procurement process is universally seen by our Members as introducing more work for contractors on CO contracts, not less. Further, it is seen as a higher-risk approach. On D&C contracts, the process is seen as stifling innovation and increasing risk for contractors.
3. At present, the shortlist process described in the document is being interpreted by our Members as unfair. Page 8 states: "Two tenderers would be invited from the appropriate shortlist". Page 11 states: "Importantly, if a contractor is invited to tender and decides to opt out of the process once it has commenced, they would move to the bottom of the list". There are two aspects to the concerns raised:
 - i. It should be made very clear that there is an opportunity for a contractor to decline an invitation to join the shortlist within a reasonable period of [TBC with TfNSW] days, and that this decline does NOT impact shortlist position.

- ii. TfNSW's approach in managing the design and Designer is considered very restrictive (Page 7: "There would be preference against having two totally different designs...") in that it limits one of a contractor's most significant commercial advantages – to use innovation by design (see comment below). If that innovation cannot be achieved due to TfNSW's Designer or TfNSW's non-acceptance of the design and a Contractor withdraws or comes second on the shortlist, they should not be penalised for this by losing their place in the shortlist.
4. More work is necessary to clarify the shortlisting impact in the scenario of JVs – the proposed process appears to negatively impact opportunity and will likely discourage JVs:
 - a. The parties to such arrangements are often finalised late in the procurement process;
 - b. Small partners in a JV will be disadvantaged;
 - c. Will a JV that has a proposed partner who is not on the Shortlist be excluded by TfNSW?
5. The document does not explain adequately how a contractor's past performance would impact the shortlist negatively or positively. CCF NSW supports past performance rating, but the one-sentence statement "TfNSW would retain the discretion to not invite a contractor should there be concerns about that contractor's performance" is too vague and needs considerable discussion and expansion. To achieve the Objectives, robust, transparent rules for rising and falling on the shortlist (that are appealable) should be detailed from the outset.
6. There is considerable concern about mandating that the contractor must contractually engage a designer chosen by another party. The TfNSW/Designer/contractor relationship during the selection and delivery process requires further clarity.
7. A single designer working across both shortlisted contractors is concerning, particularly in terms of IP, and is not supported by our Members.
8. The requirement, even on construct-only contracts, for the contractor to remain involved during the lengthy and open-ended (two separate points of concern) process to secure environmental assessment and property acquisition is a significant burden for contractors, and will likely influence their willingness to engage.
9. The proposed tender/bid cost recovery for this extended process is not considered fair or reflective of the 10 Point Action Plan:
 - a. It does not reflect the significant additional cost being carried by the contractor in such a long process;
 - b. It does not reflect the fact that much of the risk on timing is outside the hands of the contractor – it rests with Design, environmental, land acquisition, and TfNSW's own resourcing capacity/capability;
 - c. It does not reflect that contractors may be compelled to withdraw from the process for very valid reasons – such as not agreeing with the Design that TfNSW, the TfNSW Designer, and the other tenderer, have driven.

Consequently, a lack of recovery will discourage contractors from bidding and thus weaken the overarching Objective to encourage and support Tier 2 and 4s in and into the market.

10. A major issue that is expressly ruled out for discussion, but most definitely should be included, is the contracting arrangements. The proliferation of 'bespoke GC21' contracts (and bespoke T and Cs generally) on the types of contracts proposed to be covered in this Paper should be prohibited.