

Foreign Affairs, Defence and Trade References Committee

Impact of Defence Training Activities and Facilities on Rural and Regional Communities – 8 June 2017

ANSWER TO QUESTION ON NOTICE

Department of Defence

Topic: Comparison between civil and Defence – civil contracts

Question reference number: 4

Senator: Fawcett

Type of question: asked on Thursday, 8 June 2017, Hansard page 28

Date set by the committee for the return of answer: 27 June 2017

Question:

Senator FAWCETT: Sorry to interrupt, but I am just really conscious of time. Perhaps I could ask you, if you could—to try not to create huge amounts of extra work; I am not asking you to write War and Peace—perhaps on notice to come back to the committee and give us an indication of why you believe there is that difference in the size of paperwork between civil and defence-civil contracts.

Answer:

Defence's Construction Contracts

As there is no one contract which fits all construction projects, Defence has developed a Suite of Construction Contracts (the Suite) to give it the flexibility to select the most appropriate contract for a specific project.

The three most commonly used contracts for major construction projects are the Design Services Contract, the Head Contract and the Managing Contractor Contract. Other standard form contracts, such as the Standards Australia contracts, do not address Commonwealth-specific contracting requirements.

The Suite also includes a Short Form Consultancy Agreement, a Minor Works Contract, and a Medium Works Contracts for construction projects that are less complex in nature.

Details of these contracts and other supporting information are available to industry through the Defence Estate and Quality Management System internet site at www.defence.gov.au/estatemangement.

In particular, the following Defence Estate and Quality Management System links provide details with respect to:

- The Contracts Manual that can be found at:
www.defence.gov.au/estatemangement/Support/SuiteContracts/Manual/index.htm
- The Design Services Contract that can be found at:
www.defence.gov.au/estatemangement/Support/SuiteContracts/dscontract.asp
- The Head Contract that can be found at:
www.defence.gov.au/estatemangement/Support/SuiteContracts/HeadContract.asp
- The Managing Contractor Contract that can be found at:
www.defence.gov.au/estatemangement/Support/SuiteContracts/mccontract.asp

Selection of the most appropriate contract is facilitated through deliberate planning that considers the size, nature and complexity of the project, and a formal assessment of the risks and subsequent mitigation strategies to achieve the required scope of works and associated levels of compliance (e.g. safety, security, resilience, etc.) within an overall budget and schedule.

Although this approach to construction contracting is longstanding within Defence (with the Suite having been introduced in 1992), it is consistent with the more recent First Principles Review's conclusion that the 'One Defence' organisation needs to become a 'Smart Buyer', central to which is a new decision-making framework which enables Defence to identify project risks and use that risk analysis to develop tailored project execution strategies.

Over the last decade the size, nature, complexity and interdependencies, and hence risks, of the construction projects being delivered by Defence have increased significantly from approximately 40 projects valued at \$4 billion in 2006-07 (with an in-year expenditure of approximately \$600 million) to approximately 160 projects valued at \$16 billion in 2016-17 (with an in year expenditure of approximately \$1.5 billion).

Currently, Defence has 123 major construction contracts in place, of which 67 (or 55 per cent) are Head Contracts and 56 (or 45 per cent) are Managing Contractor Contracts.

In response to industry wide payment issues, Defence has amended its Managing Contractor contract to require payment of sub-contractors from the Managing Contractor Trust Account within two business days of Defence paying the approved amount into the Trust Account. Defence is considering further changes to its Suite of Facilities Contracts to introduce similar terms that flow through all subcontracting levels.

Defence's Design Services Contract, Head Contract and Managing Contractor Contract have each been structured so that they can be used for either a one or two stage tender process. The one stage tender process involves the issuing of Request for Tender Documents to the open market, whereas, the two stage tender process involves the issuing of an Invitation to Register Interest to the open market followed by Request for Tender Documents.

The purpose of the Invitation to Register Interest stage is to seek an indication from industry for the purposes of:

- identifying potential contractors or consultants who are interested in bidding;
- enabling applicants to pre-qualify for the tender process;
- determining which applicants are not going to be able to provide a conforming and/or a compliant tender; and
- enabling Defence to compile a shortlist of applicants from whom it wishes to request a tender.

Once Defence has received Invitation to Register Interest responses, it evaluates them and then compiles a shortlist of applicants from whom it will request a tender. Defence will then seek tenders from the shortlisted applicants by issuing a Request for Tender, including the Tender Documents.

The Tender Documents are in five parts, comprising:

- Part 1 - Tender Conditions;
- Part 2 - Tender Particulars;
- Part 3 - Tender Form;
- Part 4 - Tender Schedules; and
- Part 5 - Conditions of Contract.

A tenderer is responsible for completing the Tender Schedules and returning them as part of its tender submission.

There are a number of Tender Schedules required under the Design Services Contract, Head Contract and Managing Contractor Contract, which are outlined below. Some of the Tender Schedules are common to each of the contracts while others are specific to a particular contract.

- Detailed Contractor's Activity Proposal:
 - The tenderer is requested to complete each item in the Detailed Contractor's Activity Proposal to demonstrate the tenderer's understanding of what the contract requires and all material aspects of the way in which the tenderer proposes to perform the contractor's activities or the services which could distinguish its approach from other tenderers.
 - Although a tenderer under a Head Contract is not requested to submit a Detailed Contractor's Activity Proposal, it is requested to prepare Project Plans, such as a Construction and Environment Management Plan and a Site Safety Management Plan.
- Current Capacity and Capability - The tenderer is requested to provide detailed information as to its current workload, resources and a list of consultants and / or sub-contractors from whom the tenderer recommends that tenders be obtained.
- Previous Performance - The tenderer is requested to provide details of its past performance in respect of projects of different values and all projects completed in the last 12 months. The purpose of this tender schedule is to assess the credibility and capability of the tenderer by reference to its previous performance.
- Tenderer's Financial Details - The tenderer is requested to provide details of its financial standing to enable Defence to assess the tenderer's financial viability and capability to undertake the project. Depending on the type and size of the

company (or partnership or other legal entity), the tenderer is requested to provide copies of its financial reports and such other information as identified in the Tender Particulars.

- Remuneration – The tender is requested to provide details on various aspects of the tendered contract sum and / or prices. If tenders are sought on a schedule of rates (or remeasurement) basis, then the outline schedule of rates needs to be included to allow the tenderer to identify the rates it needs to submit for the relevant components of the work. Defence may also request that the tenderer provide a cost schedule as part of its tender. Such a cost schedule would ultimately form part of the contract if the tenderer's tender is successful, and is to be used for the purposes of assisting the valuation of variations. Under this Tender Schedule an outline of any proposed progress payments is also requested.
- Programming - Tenderers are requested to submit a program showing its order of work, periods for carrying out all design (if applicable), documentation and construction activities, including off-site activities, key dates including milestones, and the percentage of time against activities each of the tenderer's proposed key people would be dedicated to the contractor's activities or services.
- Tenderer's Insurance Details - Tenderers are requested to provide details of the insurances which they have or will put in place for the purposes of their insurance obligations under the contract. The types of insurances are:
 - workers' compensation insurance and employees liability insurance;
 - construction risks insurance;
 - public liability insurance; and
 - professional indemnity or errors and omissions insurance.
- Statutory Declaration - The purpose of this statutory declaration is to obtain an acknowledgement by the tenderer that it:
 - has carried out the tender process in a proper and fair manner, including by acknowledging that it has not engaged in any collusive tendering or cover bidding;
 - will not provide any benefit or financial advantage to an industry association in respect of the tender; and
 - has not entered into any arrangement with other tenderers that the successful tenderer would pay any money or provide any other benefit or financial advantage to unsuccessful tenderers for the tender.
- Miscellaneous Contract Particulars - There are a number of miscellaneous items which tenderers are requested to tender and which will ultimately form part of the contract (by being included in the Contract Particulars). The purpose of this schedule is therefore to enable the tenderer to provide details of such miscellaneous matters to be inserted into the Contract Particulars when the contract is signed by the parties.
- Alternative Proposal - If a tenderer wishes to provide an alternative proposal in respect of any aspect of the Contractor's Activities or Services, it must insert details of that alternative proposal in the relevant tender schedule. However, in order for that alternative to be considered, the tenderer must also provide a fully conforming tender.

- Local Industry Capability Plan - On 31 August 2017, the then Minister for Defence, Senator the Hon Marise Payne, announced a pilot program to trial a Local Industry Capability Plan for facilities and infrastructure projects. The results of this pilot will inform a Local Industry Capability Policy to be announced in 2018.
- Under this pilot program, Defence will seek information from construction contractors during the tender process to explain how they have engaged with local industry in providing their tendered solution, and how local industry will specifically be involved in delivering the project.
- Concurrently with the pilot program, Defence has amended its standard Suite of Facilities Contracts to include the Local Industry Capability Plan tender schedule for all future construction projects. The inclusion of this tender schedule does not significantly increase the amount of information to be provided at tender.

Recent changes to the Commonwealth Procurement Rules, which came into effect on 1 March 2017, now also require that:

- tenderers demonstrate compliance with applicable Australian standards;
- officials make reasonable enquiries into a tenderer's compliance with relevant regulations, in particular, new labour regulations that came into effect on 2 December 2016 under Building Code 2016, occupational health and safety, and environmental impacts; and
- officials consider the broader benefit to the Australian economy for procurements above \$4 million in value, consistent with Australia's national and international agreements, including free trade agreements.

These recent changes to Commonwealth Procurement Rules have been implemented in Defence through the Defence procurement policy framework, and in particular the new Defence Procurement Policy Manual. The Commonwealth Procurement Rules changes have also been effected through changes to Defence's tendering and contracting templates.

With respect to the new labour regulations, Building Code 2016 (the Code) applies to all building and construction work where the Government has direct financial and administrative involvement. This applies irrespective of the total value of the project. The Code sets out the Government's expected standards for all building industry participants involved in Commonwealth funded construction projects, and seeks to leverage Commonwealth funding to ensure building work is carried out fairly, efficiently and productively, for the benefit of all building industry participants and for the benefit of the Australian Economy as a whole. Also of note:

- Under the legislation passed in early December 2016, existing contractors had a transition period of two years to amend their Enterprise Bargaining Agreements to ensure their Enterprise Bargaining Agreements comply with new Federal fitness-for-work and entry rules. However, on 16 February 2017 amendments to the Code were approved through Parliament that brought forward the expiry of the exemption to the Code regarding Enterprise Bargaining Agreements from 29 November 2018 to 31 August 2017.
- Compliance with the Code is a matter for industry; however, from a contractual perspective it will mean that if a contractor is not compliant and it submits a tender for Commonwealth construction services post-31 August 2017, Defence will not be able to award them a contract.
- All interested contractors seeking to contract directly with Defence are encouraged to visit www.abcc.gov.au for details of compliance with the Code.

With respect to occupational health and safety regulations, where the cost of construction services is more than \$4 million, and directly funded by the Government, contractors must also be an 'accredited builder' in accordance with the requirements of the Office of the Federal Safety Commissioner. All interested contractors seeking to contract directly with Defence are encouraged to visit www.fsc.gov.au/sites/FSC for details of accreditation.

With respect to the new Commonwealth Procurement Rules requirement to consider the broader benefit to the Australian economy for procurements above \$4 million in value, updates to construction services tendering and contracting templates have included this requirement and will be considered as part of the value for money assessment. Also of note, Defence is reviewing how principles relating to Australian industry involvement and economic benefit assessment could be applied more consistently across materiel and non-materiel procurements of \$4 million and above, including addressing local industry activities.