



14th July 2021

The House of Representatives Standing Committee on
Infrastructure, Transport and Cities

Parliament House

CANBERRA ACT 2600

Via: ITC.reps@aph.gov.au

Dear Members of the Standing Committee

Inquiry into procurement practices for government-funded infrastructure

The Queensland Major Contractors Association (QMCA) represents the major contractors in the QLD infrastructure construction market. The construction sector that the QMCA represents accounts for close to 250,000 people and contributes \$27.3B to the state's economy.

We join with many other industry bodies in making a submission to this taskforce. The QMCA believe that there are three key areas of procurement reform needed in Australia:

1. Consistency across jurisdictional areas
2. Collaborative contracting to reduce and eliminate the adversarial approach to project delivery
3. Governments using procurement to mandate industrial relations outcomes

The objective of procurement should be to deliver infrastructure safely, efficiently and effectively and provide value for money for the investment. To achieve this though we need to have a healthy infrastructure delivery sector, with the ability for companies to grow in capability and capacity to deliver the required infrastructure investment.

Consistency

The vast majority of construction contractors and indeed engineering firms work nationally, spanning across the state borders. Whilst we acknowledge that each state government is responsible for their procurement, particularly of federally funded

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projects, there is a great discrepancy between the various jurisdictions in terms of approach and a significant lack of consistency. This adds to the cost of doing business and impacts on industry efficiency.

In NSW the government in 2018 developed a 10 point commitment to the construction sector focussed on key elements such as:

- Collaborative contracting
- Reducing the cost of tendering
- Appropriate risk apportionment
- Rewarding good performance on projects
- Bid cost contribution

This has recently been reinforced with a memo from the Premier to all agencies regarding procurement practices.

In Victoria there are various approaches by different agencies and authorities. Of late the MRPV panel model has been attracting attention and is recognised as a good model for collaboration and industry capability strengthening and growth. Equally the alliances used on RPV and LXRA projects have delivered similar outcomes and there are various different sized companies partnering to deliver the outcomes desired.

WA uses alliances quite extensively. QLD, whilst once a leader in collaborative procurement has languished behind many of the other states in recent times.

The Department of transport and Main Roads (TMR), as the largest procurer of infrastructure delivery within the state has a set of standard contract forms, however two are predominantly used- Construct Only (CO) and Collaborative Project Agreements (CPA). These contracts can then be used with various forms of procurement including standard tendering, Early Tenderer Involvement (ETI) and Early Contractor Involvement (ECI). Other departments and agencies however use alternative contract forms and approaches.

This patchwork of different approaches across QLD and nationally adds to the cost of tendering and presents a barrier of entry to companies wishing to grow and develop nationally.

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Collaborative Contracting

The industry has been calling for a less adversarial approach to procurement and delivery of infrastructure for some time. Far too much effort, time and cost is invested into “protecting ones own patch” through procurement and delivery models that attempt to shift as much risk as possible to the contracting sector; whilst requiring contractors to provide lump sum pricing in a competitive bidding process over a typical 4 week tender period. This of course only leads to problems in the delivery phase as clients who have overseen project development for a considerable period of time then expect contractors to understand, appreciate and scope and price the risk that they are being asked to carry in a 4 week period. What could go wrong.....

This approach to procurement and contracting where construction contractors are asked to take on more and more risk hampers contractors ability to grow, develop and invest in its employees, as only companies with cash reserves to carry these risks are able to then deliver the projects. In the construction sector companies do not have significant cash reserves, nor do many carry significant assets on their balance sheet as there are healthy sub-contractors and suppliers with the necessary plant and equipment and plant and equipment needs change for each unique project.

Therefore procurement approaches that require the delivery parties to carry an inordinate amount of risk and this constrains the ability for smaller companies either in the Tier 2 or 3 space the ability to take on larger projects and grow; it in effect constrains the market.

Collaborative contracting can take many forms; however the use of collaborative contracting approaches through the procurement phase can deliver significant benefits to clients and contractors alike. Collaboration through early tenderer involvement (ETI), Early contractor involvement (ECI) or simply a two stage process where one or two parties works exclusively with the client in a collaborative procurement phase to de risk the project and develop approaches to delivery and a price for delivery are vitally important to the sustainability of the industry.

Collaborative contracting procurement significantly reduces the adversarial positions on standard contract approaches and delivers final project costs much closer to the estimated or tendered price than traditionally tendered project procurement. This is essentially due to the fact that there is better alignment between the contractor and the client on all major issues associated with the project including risk (identification,

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assignment and management and pricing), external issues and stakeholders. It also allows people to focus on delivering the elements of the projects for which their expertise was brought into the project- i.e. ensuring that engineers are focused on construction methods rather than contractual claims

Collaborative contracting and procurement also enables smaller companies the ability to be involved and compete on projects as the effective barriers to entry are reduced, particularly as risk can and is managed in a more balanced way between the relevant parties.

The QMCA, along with many other industry bodies has called for collaborative contracting for a long time. DTMR in QLD are currently working with the QMCA on a collaborative contracting model that can be used in QLD for transport projects. This is to be commended; however it is important that other agencies embrace this model and approach. Consistency will reduce the cost of doing business in QLD as well.

It maybe a step too far to think that all the states could develop a consistent approach to collaborative contracting and procurement, however the adoption of this approach will lead to a less adversarial approach to business, less disputes, greater sustainability for employment and businesses and a more stable and productive workforce; as well as the mental health advantages for all people involved.

Governments using procurement to mandate industrial relations outcomes

In 2018 the Queensland Government first announced a Best Practice Principals (BPP) for the construction and maintenance sector in QLD. Whilst good intentioned in theory, the BPP was focussed on achieving social outcomes such as capacity and capability strengthening of local sub-contractors and suppliers through project procurement and delivery as well as increased apprenticeships, traineeships and indigenous and local employment.

The BPP was further expanded to include certain rates and conditions for projects and job classifications across the building sector. This was driven by a strong union influence over the current QLD Government and direct input into policy development. The contracting sector was then “requested” to apply the BPP to certain designated projects and cascade the requirements with their sub-contractors and suppliers. This resulted in significant cost increases on projects it was applied to – the Townsville Stadium, was the first project that it was applied on and it added a further \$48m to the project cost (~25%).

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The BPP has since been further reshaped, through external IR influences, into the Best Practice Industry Conditions (BPIC) which is now being applied and prescribed by the QLD Government through procurement of “BPP projects”, which are determined by the Minister for Procurement. The BPIC itself contains very prescriptive working conditions and clauses as well as dictating the pay rates for different job classifications that would be applied; these clauses, conditions and wage rates fare exceed existing legal enterprise agreements (EA’s) that all contractors have with their workforces.

Fundamentally, the clauses contained in the BPIC represent a pattern enterprise agreement containing highly restrictive, impractical and costly provisions which would impede the long term viability and growth of the construction industry in Queensland. It is vitally important to the viability of all companies involved in the infrastructure industry (be it head contractors, suppliers or subcontractors), that they retain the flexibility and ability to implement appropriate legally compliant industrial instruments, including enterprise agreements, and to develop collaborative work practices which reflect the needs of their enterprises and their employees. The BPIC intends to override existing EA’s or at least to sit as a side agreement to an existing legitimate EA. Either way the BPIC represents a significant “disruptor” with serious concerning implications.

The QMCA and its members are of the view (and backed by legal opinion) that the implementation of the BPICs would open contractors to the very high risk that they are in contravention of the Building Code 2016 as well as provisions within the Fair Work Act.

The QLD Government has gone further with the latest proposed prequalification system where they have mandated that BPIC’s must be applied by the contractors on BPP projects. The prequalification questionnaire (effectively a shortlisting) requires the contractor and its nominated sub-contractors, suppliers and other parties including engineers to commit to implementing the BPIC on the project. This approach puts the contracting sector on a collision course with the QLD state government and the ABCC as to be considered to secure project work with QLD a contractor is effectively being asked to contravene provisions of the Fair Work Act and the Building Code.

The fundamentals behind BPIC are to entrench union conditions and agreements as the only standard in QLD. The BPIC approach creates a barrier to entry to many

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smaller firms being able to grow. Many of the Tier 2 and 3 firms often do not have the IR systems and capability to deal with unions as they have EA's direct with their own workforce.

The QMCA, along with many other industry bodies such as ACA, CCF and AiGroup, maintain the position that the concept of BPIC's is not appropriate, unnecessary and should be abandoned. The BPIC's simply do not reflect anything remotely like 'best practice' in terms of conditions to operate construction sites efficiently, effectively and safely. Arguably the prescriptive clauses contained within BPIC represent a total departure from Civil Infrastructure delivery arrangements that have been used extensively and historically by civil contractors both in Queensland and nationally.

Recently the BPIC has been introduced as part of the procurement of the Centenary Bridge upgrade project in Brisbane as well as being applied retrospectively through procurement processes on a number of other projects; drawing out the award and adding time and cost and uncertainty into the project outcomes.

Governments cannot and should not get involved in the IR landscape unless it is in relation to their own employees. Government intervention in the IR landscape through mandation of industrial relations outcomes via the procurement process distorts the market as only those that comply with the QLD Government's view of "IR best practice" would be considered to win projects.

Contractors and subcontractors must retain the flexibility and ability to implement appropriate enterprise agreements and work practices which reflect the needs of their enterprises. It is not appropriate for the Queensland Government to impose pattern outcomes on contractors or subcontractors.

Contractors, subcontractors and suppliers should not be excluded from, or disadvantaged in, tender processes because they are operating under their existing, approved and lawful enterprise agreements that they have reached with their employees (and often with their representatives).

Nor should contractors, subcontractors and suppliers be coerced into varying their legal enterprise agreements, or enter into new agreements, in order to carry out work on Queensland Government projects. These existing enterprise agreements are often national in their application and enable companies to operate across state borders efficiently and standardised.

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This approach by the QLD Government to effectively mandate union agreements as the preferred agreement that can be considered as part of the procurement process restricts the field of parties that can bid, can afford to bid or risk bidding (in relation to compliance with the Building Code).

The QMCA, along with other industry organisations, expresses serious concerns regarding this proposed system and approach. It places contractors and subcontractors in an unenviable position of knowingly contravening Commonwealth legislation and codes that govern the building and construction industry, to attain Queensland Government project work. This is untenable and unreasonable. The Queensland Government should not be asking industry to bear this risk, particularly introducing this through the procurement process.

The QMCA and its members respectively request that the inquiry investigate these significant issues in procurement.

Regards

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