

## Contracting

### Introduction

- 4.1 The committee's Second Report foreshadowed an examination of the NBN Co's procurement policy and tendering processes.<sup>1</sup> This chapter will address both issues in conjunction with the wider contracting practices of the NBN Co.
- 4.2 The design, construction and maintenance works of these contracting partners must also ensure that a safe and secure network is built. At times, both these issues have been controversial and raised concerns among the public and business sector alike.

### Procurement, Tenders and Contracts

#### Procurement Policies

- 4.3 The National Broadband Network (NBN) is Australia's largest publicly-owned infrastructure project since 1950s. Given the size and volume of the rollout, it is critical that policies be established to ensure quality, effective and economical procurement.
- 4.4 The NBN Co Corporate Plan 2011-2013 states:

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<sup>1</sup> Joint Committee on the National Broadband Network (JCNBN), December 2012, *Review of the Rollout of the National Broadband Network: Second Report*, Parliament of the Commonwealth of Australia, p. 4.

Procurement carries the responsibility for providing the best commercial outcomes from expenditure... Best commercial outcomes are evaluated considering all relevant costs, benefits and risks on a whole of life basis (best value for money, using total cost of ownership).<sup>2</sup>

4.5 According to the Department of Finance and Deregulation, procurement

... begins when an agency has identified a need and decided on its procurement requirement [and] continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services.<sup>3</sup>

4.6 To guide its procurements, the NBN Co developed a Buying Guide and a detailed Procurement Manual which defines the 'practices, procedures and decision-making rules appropriate to its circumstances and commercial imperatives'.<sup>4</sup>

4.7 The NBN Co's Corporate Plan advises that the Manual establishes a formal ten-step sourcing process for 'all major spend requirements [and] provides a detailed audit trail of each procurement initiative'.<sup>5</sup> Neither the Manual nor Buying Guide is publicly available.

4.8 The Corporate Plan 2011-2013 also states:

These commercially-oriented practices differ in some ways from those prescribed for government departments but are consistent with government guidelines.<sup>6</sup>

4.9 Although it is a recipient of public monies, the NBN Co, as a government business enterprise, is not subject to the Commonwealth's Procurement Guidelines.<sup>7</sup> The NBN Co explained:

As a government business enterprise we are not subject to those Commonwealth procurement requirements. That does not mean that we do not voluntarily use them as guidelines, and wherever possible we do use them. Our overriding interest and objective is

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2 NBN Co Limited (NBN Co), *Corporate Plan 2011-2013*, p. 57.

3 Department of Finance and Deregulation, *Commonwealth Procurement Guidelines*, 1 December 2008, para. 2.2.

4 NBN Co, *Corporate Plan 2011-2013*, p. 57.

5 NBN Co, *Corporate Plan 2011-2013*, p. 58.

6 NBN Co, *Corporate Plan 2011-2013*, p. 57.

7 NBN Co, *Submission 15.1*, Answer to Question on Notice No. 13, p. 2.

to get value for money for the Australian government and hence the Australian taxpayer.<sup>8</sup>

- 4.10 The NBN Co stated its Procurement Manual is based on the Commonwealth Procurement Guidelines,<sup>9</sup> and stressed that ‘value for money is ensured through competitive processes [and] transparent and proven procurement methodologies’ as provided in the Procurement Manual.<sup>10</sup> The NBN Co stated:

the company has committed to adhere to the principles of fairness, transparency, competition and value, which are reflected in those guidelines.<sup>11</sup>

- 4.11 Further, as a ‘prescribed authority’, the NBN Co is largely exempt from the *Freedom of Information Act 1982* (Cth), with its exemption covering all documents relating to its commercial activities. In April, the Attorney-General announced the legislated review of the NBN Co’s compliance with its remaining freedom of information obligations.<sup>12</sup> The review will be tabled in Parliament after its anticipated completion date of 30 June 2012.

## Tender Processes

- 4.12 Released in October 2011, the Commonwealth Government Business Enterprise Governance and Oversight Guidelines apply to government business enterprise (GBE) companies such as the NBN Co.<sup>13</sup> However, the NBN Co stated:

There are no formal requirements in the Commonwealth Government Business Enterprise Governance and Oversight Guidelines that require tender outcomes to be published by GBEs.<sup>14</sup>

- 4.13 The Guidelines provide that ‘principal objectives’ for GBE companies include:

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8 Mr Mike Quigley, Chief Executive Officer, NBN Co, Transcript of Evidence, Canberra, 5 July 2011, p. 19.

9 NBN Co, *Submission 15.1*, Answer to Question on Notice No. 13, p. 2.

10 NBN Co, *Submission 2.5*, Answer to Question on Notice No. 9, Second Review of the Joint Committee on the National Broadband Network, p. 15.

11 NBN Co, *Submission 15.1*, Answer to Question on Notice No. 13, p. 2.

12 Roxon N (Attorney-General and Minister for Emergency Management), 2012, *Review of NBN compliance with FOI*, Parliament House, Canberra, media release, 16 April.

13 Commonwealth Authorities and Companies Regulations 1997, reg. 4.

14 NBN Co, *Submission 15.1* Answer to Question on Notice No. 13, p. 2.

- Operate efficiently at minimum costs for a given scale and quality of output; and
  - Price efficiently noting economic forces (level of demand, supply costs and, individual goods and services).<sup>15</sup>
- 4.14 Achieving these objectives requires a level of competition for NBN Co contracts; most frequently in procurements using public monies, this requires an open and competitive tender process.
- 4.15 The NBN Co's 'standard' process of tender evaluation includes ranking responses from respondents on key indicators including:
- quality of project management plans
  - occupational health and safety plans
  - quality processes
  - contractor's experience
  - pricing and
  - contract compliance rates.<sup>16</sup>
- 4.16 Although the NBN Co provides reassurances that the contracts it enters into are value for money and emerge from a competitive environment,<sup>17</sup> it has entered into contracts with companies that were negotiated outside tender processes.
- 4.17 For example, the NBN Co entered into a contract with Silcar after a tender round was reportedly not achieving results. The NBN Co stated:
- It is not uncommon for large telcos to enter into negotiations such as we did. ... We did go out, as I said before, to a broad-ranging open tender process, but it was clear after some months of effort that that was not going to get us where we needed to be in terms of the best value for this project. So we changed approach.<sup>18</sup>
- 4.18 Following direct one-on-one negotiation for a period of eight weeks, a construction contract was concluded between the NBN Co and Silcar for the construction of the fibre network in Queensland, New South Wales

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15 Department of Finance and Deregulation, *Commonwealth Government Business Enterprise Governance and Oversight Guidelines*, October 2011, para 1.8.

16 NBN Co, *Submission 2.5*, Answer to Question on Notice No. 9, JCNBN, Second Review, p. 15.

17 NBN Co, *Submission 2.5*, Answer to Question on Notice No. 9, JCNBN, Second Review, p. 15.

18 Mr Quigley, NBN Co, Transcript of Evidence, Canberra, 5 July 2011, p. 19.

and the Australian Capital Territory.<sup>19</sup> The initial contract is valued at \$380 million, with a possible extension of two years and an additional value of \$740 million.

## Contracts Awarded

4.19 As of May 2012, the total value of awarded contracts is \$9 billion.<sup>20</sup> Table 4.1 shows the key contracts awarded and their value.

## Construction Tenders

4.20 As evidenced in Table 4.1,<sup>21</sup> a major component of the NBN Co's contracting is for construction works. Construction tenders are evaluated by the Construction Steering Committee consisting of: the Chief Executive Officer, Chief Finance Officer, and the Heads of Construction, Operations, Network Technology and Corporate Services together with the Chief Legal Counsel and Chief Procurement Officer.<sup>22</sup>

4.21 The contracts have attracted public debate on the preliminary processes and ongoing progress of the NBN rollout. This section details the initial suspension of the tender process in April 2011 and then, in turn, provides details on the contracts awarded for the fibre, wireless and satellite networks.

## Suspension of Construction Tender Process

4.22 In April 2011, after an 18-month tender process, the NBN Co announced that it was suspending its tender process. The decision to suspend the process was made by the Construction Steering Committee and came after the fourth round.<sup>23</sup>

4.23 In May 2011, Mr Mike Quigley, Chief Executive Officer of the NBN Co stated

I have stated that we will not 'build at any cost'. We understand our obligations to taxpayers to deliver value for money for their tax dollars, so we announced on 1 April that we had suspended

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19 NBN Co, 2011, *NBN Co & Silcar reach agreement to deliver value-for-money fibre rollout*, media release, 1 June.

20 NBN Co, Answer to Question on Notice: Question No 346, Senate Standing Committee on Environment and Communications, Additional Estimates Hearings, February 2012.

21 Values of the awarded contracts were collected from a variety of media releases, reports to parliamentary committees and other public statements.

22 NBN Co, *Submission 2.5*, Answer to Question on Notice No. 17, JCNBN, Second Review, p. 21.

23 NBN Co, *Submission 2.5*, Answer to Question on Notice No. 17, JCNBN, Second Review, p. 21.

the existing construction process and entered into a new process, which is ongoing.<sup>24</sup>

- 4.24 The NBN Co explained that value for money was the main consideration in deciding tenders and stated:

In all these large tenders, you have to make a judgement in the end about whether or not you believe you are achieving value for money. ... We were not satisfied, with the construct we had put in place and the responses that we had, that we were going to get the best outcome, so we changed that process. We suspended that process and moved into another process.<sup>25</sup>

- 4.25 Though the NBN Co's procurement policies are not publicly available nor have been made available to the committee, the NBN Co has stated that its procurement policy did not change after the suspension of the tender process.<sup>26</sup>

- 4.26 After the tender process suspension, the NBN Co altered the request for tender to introduce joint-venture contracting. The round was then reinstated and completed. In October 2011, NBN Co announced that the suspension in construction tenders has caused a delay of 'some months'.<sup>27</sup>

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24 Mr Quigley, NBN Co, Transcript of Evidence, Sydney, 16 May 2011, p. 4.

25 Mr Quigley, NBN Co, Transcript of Evidence, Sydney, 16 May 2011, p. 11.

26 Mr Quigley, NBN Co, Transcript of Evidence, Canberra, 13 October 2011, p. 5.

27 Mr Quigley, NBN Co, Transcript of Evidence, Canberra, 13 October 2011, p. 5.

Table 4.1 Key Contracts Awarded by the NBN Co as at 22 May 2012

Component	Supplier/s	Value
FTTP Solution Providers for Greenfield Areas	Fujitsu Australia	Estimated at over \$100M for the first 12 months
Fibre network construction	Syntheo (SA and NT)	<\$341M for 4 years
	Syntheo (WA)	<\$484M over 4 years
	Transfield (Vic)	<\$395M over 4 years
	Silcar (Qld, NSW, ACT)	<\$1.12B over 4 years
	Visionstream Australia (Tas)	\$300M for 4 years (option to extend)
Wireless Network	Ericsson	<\$1.1B for 10 years
Spectrum licences	AUSTAR	\$120M
Satellites	Space Systems/Loral	\$620M
Interim Satellite Solution	Optus Network Pty Ltd	\$200M (Optus)
End User Technology Services	Fujitsu Australia	<i>Unknown</i> <sup>28</sup>
IT Data Platforms and Infrastructure Stacks	Cisco	\$9.5M over 3 years
Business and Operational Support Systems and Services	IBM Australia	\$200M+ over 3 years
First Release Site Construction	Transfield Services (Minnamurra, NSW)	<i>Unknown</i> *
	Telstra (Brunswick VIC)	<i>Unknown</i> *
	ETSA Utilities (Willunga, SA)	<i>Unknown</i> *
	Silcar Pty Ltd (Armidale, NSW)	<i>Unknown</i> *
Passive Network Hardware	Prysmian	\$300M over 5 years
	Corning	<\$1.2B over 5 years
	Warren & Brown Technologies	<\$100M over 5 years
	TE Connectivity (formerly Tyco Electrics Pty Ltd)	\$400M over 5 years
Design Services for First Release Sites	Bilfinger Berger Services	<i>Unknown</i> *
	Downer EDI Engineering	<i>Unknown</i> *
	Service Stream Communications	<i>Unknown</i> *
	Transfield Services	<i>Unknown</i> *
	Visionstream Australia	<i>Unknown</i> *
	GHD Pty Ltd	<i>Unknown</i> *
	Silcar Pty Ltd	<i>Unknown</i> *
Active Network Equipment	Alcatel-Lucent (GPON and Ethernet Aggregation Equipment)	>\$70 million
	JEP Services A (Optical Transmission Equipment)	<i>Unknown</i> *
Hosting and ERP Platform and Service Integrator	IBM Oracle Australia Accenture	Collectively, contracts valued at \$23M over three years

Source NBN Co, 'Tenders Awarded', [www.nbnco.com.au](http://www.nbnco.com.au), viewed 22 May 2012.

28 Where 'unknown' is indicated, searches on the public record were conducted for this information. This information was not found.

## Fibre

4.27 The Shareholder Ministers' second NBN rollout Performance Report (the Performance Report) states that approximately 88 per cent of the total of NBN construction activity over the next two years has been awarded to contractors.<sup>29</sup> The construction contracts have been awarded as follows:

- Syntheo (Lend Lease Group/Service Stream); for the construction in South Australia (SA), Western Australia (WA) and the Northern Territory (NT):
  - ⇒ covers the design and construction of the fibre optic network in NT and SA over a period of two years, with an option to extend a further two years;
  - ⇒ value of the initial agreement for delivery in SA and NT is approximately \$141 million, with a potential value of up to \$341 million if extended for a further two years;<sup>30</sup> and
  - ⇒ for construction in WA, the initial contract worth \$174 million, with a potential value of up to \$484 million if extended for a further two years.<sup>31</sup>
- Transfield Services for the construction in Victoria:
  - ⇒ an initial 2 year contract with the option to extend for a further two years; and
  - ⇒ initial agreement worth \$133 million, with a potential value of up to \$395 million if extended by a further two years.<sup>32</sup>
- Silcar for the construction in Queensland, New South Wales and the Australian Capital Territory:
  - ⇒ 'represents almost 40 per cent of national construction activity planned over the next two years';<sup>33</sup> and
  - ⇒ initial agreement worth \$380 million over the next two years, with the option of a further two years at an additional value of \$740 million.<sup>34</sup>

29 Shareholder Ministers, 'Performance Report to 31 December 2011', *Submission 12*, p. 10.

30 NBN Co, 2011, *NBN South Australia and Northern Territory construction contracts signed*, media release, 14 November.

31 NBN Co, 2011, *NBN fibre rollout to begin in WA, Vic as construction contracts signed*, media release, 6 September.

32 NBN Co, 2011, *NBN fibre rollout to begin in WA, Vic as construction contracts signed*, media release, 6 September.

33 NBN Co, 2011, *NBN Co & Silcar reach agreement to deliver value-for-money fibre rollout*, media release, 1 June.



- Visionstream Australia Pty Ltd for the construction of the remainder of the fibre network in Tasmania:
  - ⇒ works will construct the network for the remaining 190,000 premises by 2015;
  - ⇒ contract valued at approximately \$220 million over an initial four year period; and
  - ⇒ the contract also includes provisions for ongoing maintenance of the network in Tasmania.<sup>35</sup>

### Fixed Wireless Contracts

- 4.28 On 1 June 2011, the NBN Co announced a ten-year contract with Ericsson for the design, build and operation of the NBN's wireless service. The turnkey contract is worth up to \$1.1 billion and the NBN Co 'intends to assume greater responsibility for construction and operation' of the network.<sup>36</sup>
- 4.29 Both the wireless and satellite services also require the NBN Co to acquire the spectrum licences regulated by the Australian Communications and Media Authority. In February 2011, the NBN Co announced that it had acquired wireless spectrum from AUSTAR that is 'sufficient to meet most of its needs for the fixed-wireless services'. However, the spectrum acquired from AUSTAR, valued at \$120 million<sup>37</sup> does not include the necessary spectrum for Western Australia and the Northern Territory.<sup>38</sup>
- 4.30 The contract with AUSTAR allows NBN Co to acquire the 2.3 GHz (gigahertz) and 3.4 GHz spectrum holdings and includes payments of \$58 million for the subsidiary that holds the spectrum licences, and a further \$62 million for the assignment of this subsidiary's debt.<sup>39</sup>

### Satellite Contracts

- 4.31 In February 2012 the NBN Co announced that contracts for the construction of the space segment of the satellite service had been awarded to Space Systems/Loral. The contract is worth approximately

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34 NBN Co, 2011, *NBN Co & Silcar reach agreement to deliver value-for-money fibre rollout*, media release, 1 June.

35 Shareholder Ministers 'Performance Report to 31 December 2011' *Submission 12*, p. 10.

36 NBN Co, 2011, *NBN Co selects fixed wireless network partner for med-2012 service start*, media release, 1 June.

37 NBN Co, 2011, *NBN Co acquires AUSTAR spectrum for rural and regional network*, media release, 17 February.

38 NBN Co, 2011, *NBN Co selects fixed wireless network partner for med-2012 service start*, media release, 1 June.

39 NBN Co, 2011, *NBN Co acquires AUSTAR spectrum for rural and regional network*, media release, 17 February.

\$620 million and follows a two year procurement process. The contract is part of a total cost of \$2 billion for the NBN Co's satellite service.<sup>40</sup>

- 4.32 Under the contract, 40 personnel will receive training to conduct maintenance on the space segment.<sup>41</sup> It is unclear whether this training will be for NBN personnel or its contractors.
- 4.33 Contracts for the supporting gateway segment (a series of ground stations located around Australia) are yet to be announced. Similarly, the satellite infrastructure installed on individual premises and their future maintenance is currently the subject of an ongoing procurement process.<sup>42</sup>
- 4.34 Further discussion of the satellite service's components and service is included in Chapter 5.

## Other Issues

- 4.35 Throughout its inquiries, other issues regarding the contracting and procurement practices of the NBN Co have been raised. This includes the impact of delays in procurement on the rollout, the transparency of the NBN Co's tender registry, and the awarding of contracts to Australian companies.

## Causes and Costs of Delays

- 4.36 The NBN Co has frequently cited the following reasons for delays incurred in the rollout as projected by its Corporate Plan 2011-2013:
- Suspension of the construction tender round in April 2011;
  - The decision to increase the points of interconnect by the Australian Competition and Consumer Commission; and
  - The protracted negotiation and finalisation of the Telstra Agreement.<sup>43</sup>

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40 NBN Co, 2012, *NBN Co selects Space Systems/Loral for communications satellites*, media release, 8 February.

41 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, Transcript of Evidence, Senate Environment and Communications Legislation Committee, Canberra, 14 February 2012, p. 196.

42 NBN Co, Answers to Question on Notice: Question No 302, Senate Standing Committee on Environment and Communications, Additional Estimates Hearings, February 2012.

43 Mr Quigley, NBN Co, Transcript of Evidence, Canberra, 13 October 2011, pp 4-5.

4.37 Importantly, the NBN Co is incurring contractors' late fees as a result of these delays. At a Senate Estimates hearing in February 2012, the NBN Co stated:

Obviously I cannot say no, we are not going to pay, at some point compensation if we have really delayed contractors. [W]e have tried to build a very good relationship with the construction contractors [and] we have not seen at this point in time any big impact of that, because we try to give them a reasonable amount of notice before they are mobilised. Clearly, in this environment, you are not being as efficient as you could be.<sup>44</sup>

### Online Tender Registry

4.38 The NBN Co website operates as a tender portal where current, closed and awarded tenders are announced and submitted.

4.39 However, this website appears to be so infrequently updated that its information is no longer accurate. This is true of both the 'current' tenders and those tenders that have been formally awarded. As at 22 May 2012, the NBN Co website was advertising a 'current' tender that had a closing date of 30 January 2012.<sup>45</sup>

4.40 The 'awarded' register is also incomplete. In May 2011, the NBN Co stated,

Over the past 18 months we have conducted some 90 tenders involving literally hundreds of companies.<sup>46</sup>

4.41 Many new tenders and contracts have been announced since May 2011, yet very few tender rounds are declared on the NBN Co website. A notable absence from the online register is the \$620 million contract for the satellite service space segment awarded in February 2012.<sup>47</sup>

### Australian Companies

4.42 At the end of the current reporting period, 52 per cent of the NBN Co's activities are using local 'Australian content'. The Performance Report states:

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44 Mr Quigley, NBN Co, Transcript of Evidence, Senate Environment and Communications Legislation Committee, Canberra, 14 February 2012, pp 177-178.

45 NBN Co, 2012, 'RFP: Power Managed Services Partner', <[www.nbnco.com.au](http://www.nbnco.com.au)>, viewed 22 May 2012.

46 Mr Quigley, NBN Co, Transcript of Evidence, Sydney, 16 May 2011, p. 4.

47 NBN Co, 2012, 'Awarded tenders' <[www.nbnco.com.au](http://www.nbnco.com.au)>, viewed 22 May 2012.

Local content is actively promoted as part of NBN Co procurement processes. Certain contracts are inherently local such as construction and network operations. For other contracts, NBN Co has sought to maximise the local content, particularly where local manufacturers are already established. The fibre equipment supply contracts are examples where investment is being made in local production capacity. Local content reached 52 per cent by December 2011. Future Australian construction and operations contracts are expected to increase the value of local content.<sup>48</sup>

4.43 Predominantly, these contracts have been for the premise-infrastructure associated with the NBN rollout such as:

- Internal fibre distribution hubs for apartment blocks and offices;
- Internal cables and patch leads; and
- Wall outlets and devices that will house the connection of the fibre from the street to the outside of premises.<sup>49</sup>

4.44 However, in answers to questions on notice to a Senate Estimates Hearing, the NBN Co updated and clarified this information:

Australian controlled companies have been awarded \$1.6 billion contract value out of \$9 billion total contract value to date, or 18 per cent. It should also be noted that the value of Australian content in all contracts to date is \$4.3 billion.<sup>50</sup>

4.45 On the matter of 'Australian content', the Performance Report stated:

- All services performed in Australia are regarded as 100 [per cent] local content – construction, installation, design, testing and most consulting.
- All equipment substantially manufactured in Australia is counted as 100 [per cent] local content even though a certain small percentage comprises imported components.
- All imported equipment is assigned zero local content even though the contract value may include 10 to 20 [per cent] local services for installation, commissioning and ongoing support.<sup>51</sup>

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48 Shareholder Ministers, 'Performance Report to 31 December 2011', *Submission 12*, pp 12 and 30.

49 Shareholder Ministers, 'Performance Report to 31 December 2011', *Submission 12*, p. 11.

50 NBN Co, Answer to Question on Notice: Question No. 346, Senate Standing Committee on Environment and Communications, Additional Estimates Hearings, February 2012.

51 Shareholder Ministers, 'Performance Report to 31 December 2011', *Submission 12*, p. 30.

## Contracts Awarded to Australian-Controlled Companies

4.46 In November 2011, the NBN Co released the names of Australian companies who had been awarded contracts for the localised equipment in the fibre rollout such as the fibre distribution hubs, the fibre distribution terminals and premises connection devices. Table 4.2 provides details of these contracts.

Table 4.2 Australian Industry Contracts for Provision and Installation of Local Equipment

Supplier	Component	5 year potential value
Corning	Internal fibre distribution hubs Fibre distribution terminals Internal service drop cable Internal multi-fibre cable Network termination unit patch leads Premises cable	\$310m
Optimal/OFS	Premises cable	\$110 m
TE	Premise connection devices Fibre distribution terminals Fibre Collector Distributors	\$105 m
Warren & Brown	Fibre wall outlets	\$60 m
Madison	Premise connection devices	\$30 m
3M	Retro-fit cable pathways	\$20 m
<b>Total</b>		<b>\$635 m</b>

Source NBN Co, 'Equipment contracts awarded to companies with strong local presence', Media Release, 15 November 2011.

4.47 The size of the key contracts awarded raises concerns that the NBN Co procurement process might prevent smaller local companies from submitting proposals as the potential contract combines multiple elements that only large multi-national companies can deliver. When asked if competition and cost-efficiency would be enhanced if contracts were divided into smaller, separate contracts, the NBN Co stated:

Not always; it depends on the nature of the procurement of goods and/or services. Factors to be assessed include the market structure, and the risk that the technical and management resources required to integrate the disparate elements may exceed any gains from attempting to optimise every single element of the purchase.<sup>52</sup>

4.48 The NBN Co requires all contracts over \$20 million to develop Australian Industry Participation (AIP) plans identifying local businesses and how

52 NBN Co, *Submission 15.1*, Answer to Question on Notice No. 13, p. 2.

they will be engaged by the third party. The NBN Co also stated that 'certain contracts include specific requirements for local manufacture of certain equipment such as fibre optic cable after a certain transition period from overseas supply'.<sup>53</sup> The NBN Co did not provide examples of such contracts.

- 4.49 To meet these AIP requirements, the contracting company must engage local supplies or 'demonstrate local production capabilities and activities to the satisfaction of the NBN Co'.<sup>54</sup> For example, Ericsson (the contractor for the construction, operation and maintenance of the wireless network) has engaged local businesses including Netcom and local wireless construction contractors.
- 4.50 AIP plans are not required for construction or installation services which, by their nature, use 100 per cent local content or, contracts for the supply of equipment like satellites which have 'unique global sources'.<sup>55</sup>

## Network Security

- 4.51 The NBN Co is required to consult with law enforcement and security agencies to ensure that national security and resilience considerations are considered in the design and long-term operation of the network.<sup>56</sup> However, the extent to which the security concerns are considered when evaluating tenders is unclear, as is the extent of government involvement.
- 4.52 Government and security agencies do have a role in the evaluation of tendering companies' suitability to provide services under NBN contracts.<sup>57</sup> The NBN Co stated:

NBN Co has been established as a wholly owned Commonwealth company with an independent Board responsible for the day-to-day operations of the company. NBN Co is required to operate on a commercial basis and at arms-length from Government. In accordance with the *Commonwealth Authorities and Companies Act*

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53 NBN Co, Answer to Questions on Notice No 347, Senate Standing Committee on Environment and Communications, Additional Estimates Hearings of February 2012.

54 NBN Co, Answer to Questions on Notice No 349, Senate Standing Committee on Environment and Communications, Additional Estimates Hearings of February 2012.

55 NBN Co, Answer to Questions on Notice No 348, Senate Standing Committee on Environment and Communications, Additional Estimates Hearings of February 2012.

56 Department of Broadband, Communications and the Digital Economy (DBCDE), *Submission 3.3, Answer to Question on Notice No. 7.1, Second Review of the JCNBN*, p. 5.

57 NBN Co, *Submission 15.2, Answer to Question on Notice No. 10*, p. 5.

1997, NBN Co must notify responsible Ministers of significant events. This includes notifying Shareholder Ministers prior to signing significant contracts.<sup>58</sup>

- 4.53 Despite this, the NBN Co does consult with government agencies where contracted works may involve potential security risks. The NBN Co stated:

In those tenders where there is a potential security risk to the network (either through the provision of equipment, software or services), NBN Co consults closely with Government security agencies. There is also an evaluation of successful suppliers as part of the ongoing contract management processes.<sup>59</sup>

- 4.54 As recent examples demonstrate,<sup>60</sup> there are certain works where vulnerabilities in the network could potentially be created or extended as a result of a particular company providing those works. This leads to a broader issue of the security of the network.

- 4.55 The NBN Co gave evidence to the committee's Second Review on the security aspects of the network and stated:

A lot of [cyber] attacks take place at layers that sit above us. We are at layer 2, the Ethernet. We move bits across the network. So what we have to pay close attention to is the security of the equipment, the physical security of the plant. The fact is that it is certainly not as easy to tap into fibre as it is to tap into either copper or a wireless service. We are looking at the physical security of points of interconnect, we are looking at the physical security of the systems that we lay into the ground and of course we are looking at the physical security of buildings.<sup>61</sup>

- 4.56 The NBN Co adopted the Government's Protective Security Policy Framework (developed by the Attorney-General's Department) and the Information Security Manual (issued by the Defence Signals Directorate) to guide the design, construction and maintenance of the network.<sup>62</sup> The NBN Co stated:

These documents provide physical and technical security guidance for networks that are of national security concern. The NBN Co's Security Framework is designed around these standards,

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58 NBN Co, *Submission 15.1*, Answer to Question on Notice No. 13, p. 2.

59 NBN Co, *Submission 15.2*, Answer to Question on Notice No. 10, p. 5.

60 Barker G and Ramli D, 2012, 'China's Huawei banned from NBN' *Australian Financial Review*, 24 March.

61 Mr Quigley, NBN Co, Transcript of Evidence, Sydney, 16 May 2011, p. 11.

62 NBN Co, *Submission 15.2*, Answer to Question on Notice No. 10, p. 5

including annual compliance reporting to [the Attorney-General's Department].<sup>63</sup>

4.57 To guard against potential network vulnerabilities, the NBN Co employed the following preventative strategies: 'certification and accreditation, regular testing, security validation exercises, and a range of technologies'. Although the NBN Co stated that 'any network could potentially be a target for cyber attack', the NBN Co actively engages with relevant government agencies and has

... adopted a strategy that incorporates certification and accreditation, regular testing, security validation exercises and a range of technologies that guard against cyber attack.<sup>64</sup>

## Concluding Comments

### Procurement policies

4.58 It is concerning that the NBN Co's Procurement Manual is not available to the committee. In light of the numerous tender rounds that have been abandoned, it appears that there may be issues of cost-effectiveness and probity with the NBN Co's procurement policies. It is concerning that these policies have not been altered following several abandoned tender rounds.

4.59 It is not known whether the NBN Co has already incurred contractor's late fees nor is it clear if the NBN Co can reasonably negotiate alternatives with its contractors.

4.60 As the NBN Co is not subject to the Commonwealth Procurement Guidelines, the Australian community has no reassurance that the vast procurements associated with the network rollout are cost-effective as would be encouraged in a competitive tendering environment.

4.61 There may be legitimate commercial-in-confidence reasons not to publish the Procurement Manual. Whether directly or indirectly, concerns of commercial-in-confidence material continue to be raised by participants in the information they provide to the committee. Both the First and Second Report noted that limiting the information provided to the committee on

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63 NBN Co, *Submission 15.2*, Answer to Question on Notice No. 10, p. 5.

64 NBN Co, *Submission 15.2*, Answer to Question on Notice No. 10, p. 5.



commercial-in-confidence grounds severely limited its ability to report on its oversight responsibilities to the Parliament.

- 4.62 During the second review, the Department of Broadband Communications and the Digital Economy committed to examining the public interest test to assess whether material is commercial-in-confidence.<sup>65</sup> This advice was neither provided to the committee in its second review nor during the current review period. The committee again requests that this examination takes place.

### Tender Registry

- 4.63 The committee notes that the NBN Co is not formally required to publish its tender outcomes.<sup>66</sup> However, as the NBN Co is currently publishing details of some tender processes, it is appropriate that this register be a complete and up-to-date list.
- 4.64 The committee appreciates that there may be circumstances where the publication of details of awarded contracts may be inappropriate for reasons of commercial sensitivity. However, the significance of the public expenditure points to a need for greater transparency of the NBN Co's contracting practices.
- 4.65 The list of key contracts provided in Table 4.1 is clearly not an exhaustive list of the contract obligations of the NBN Co. The information contained in the table is basic information, but information that is so dispersed in the public record that it is possible that some details have been overlooked in the table's compilation.
- 4.66 Similarly, other than the contracts listed in Table 4.2 totalling \$635 million, the individual value other contracts awarded to Australian companies is unclear.
- 4.67 However, the NBN Co has publicly released information of its awarded contracts which is not reflected in the online register. At the very least, the NBN Co tender registry should be frequently updated to accurately reflect the status and outcomes of its tender processes.

### Network Security

- 4.68 Although a fibre network is comparatively more secure than the existing copper network, there are still questions surrounding how the NBN design, construction and maintenance projects will not expose end-users to risks as a result of potential vulnerabilities. As the 'digital age'

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65 Mr Peter Harris, Secretary, DBCDE, Transcript of Evidence, Sydney, 24 October 2011, p. 12.

66 NBN Co, *Submission 15.1*, Answer to Question on Notice No. 13, p. 2.

progresses, these issues will be of critical importance to the security of data and communications.

### **Recommendation 7**

- 4.69 **The committee recommends the Department of Broadband, Communications and the Digital Economy review its internal processes where the public interest test is used to assess whether material is commercial-in-confidence, and provide details of this review to the committee.**

### **Recommendation 8**

- 4.70 **The committee recommends that, as a matter of urgency, for all future contracts the NBN Co update, and regularly maintain, its tender registry to include the following basic information:**
- **A list of works included in the original request for tenders;**
  - **The dates at which the tender opened, closed and was awarded;**
  - **The name of the awarded company or companies;**
  - **The length of time the services or goods are expected to be completed;**
  - **The value of the contract, or where commercial sensitivities prohibit disclosure, the aggregate value of the contracts;**
  - **The details of any extensions and variations to contracts as well as the value of an extended contract;**
  - **The value and percentage of local content in the awarded contract;**  
**and**
  - **Any other relevant accompanying information.**