

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Budget Estimates 2011-2012**

Outcome 2 - Schools

DEEWR Question No.EW0467_12

Senator Mason asked on 2/06/2011, Hansard page 25.

Question

South Wales Government Procurement Contract

Mr Kovacic: We are trying to get a copy of the actual agreements, because it is a New South Wales government procurement contract, and trying to get a better handle on that, but at this stage I am not aware that we have got advice— Ms Paul: In terms of what is inside the contract in this regard. Senator MASON: In terms of the arrangements that— Ms Paul: Whether it opens them up to liability? Senator MASON: To liability, yes. Ms Paul: Yes, sure. Mr Kovacic: I will take it on notice and we will seek advice from the New South Wales state officials, if I can put it that way, as to the implications of that, given that it is certainly a clause that is reflected in the contract. Senator MASON: It is interesting, the distinction between it is a mechanism for payment as opposed to a clause that allows liability. Senator Chris Evans: We want to be a bit careful; as Ms Paul said, she cannot answer that. Senator MASON: No, I am not suggesting it is corrupt. Senator Chris Evans: Until we know (1) it is a contract of the New South Wales government and (2) legal advice as to the impact of these clauses, I think we would be flashing well outside the off stump in terms of who is at the table. We are trying to give you a general idea but the rest we will take on notice. The bottom line in terms of your interest is that the interventions were helpful and got a good result in terms of the New South Wales contractors; in terms of the Catholic education system, those interventions were not able to impact on that matter. What has occurred is obviously a question for the Catholic education system.

Answer

The New South Wales Government, BER Integrated Program Office (BER IPO) provides the following response:

The NSW Government adheres to the NSW Government Procurement Guidelines which are published on the NSW Treasury website. The NSW Department of Education and Communities created a one off specific contract, through the NSW Department of Public Works, to contract for Managing Contractors for the Primary Schools for the 21st Century Program. Within this contract, Managing Contractors were obliged to follow the GC 21 conditions (NSW standard construction contract for projects valued at more than \$1 million) and the NSW Government Procurement Guidelines.

A specific part of the contract was that payments were only made by the BER IPO to Managing Contractors where statutory declarations were provided that all their sub-

contractors were paid their contractual entitlements. The contract also required the MCs to apply the same reflective clause between the Managing Contractors and their sub-contractors. Statutory declarations were required from sub-contractors before Managing Contractors would make payments.

The Managing Contractors established their own system including procurement methodology and contracts to match the head contract with the BER IPO and include how they met the NSW Procurement Guidelines.

Each Managing Contractor was required to conform to NSW Government tendering requirements for each project or package of projects and their conformance was audited on each specific phase of the tendering process.

These phases include:

- the planning of the tender
- request for tender documents
- submission, receipt and opening of tenders
- tender evaluation, clarifications and negotiations
- post-tender announcements, debriefing and the award of the contract.

The primary purpose of the audit programs conducted was to ensure that each contract was awarded as the result of an equitable and fair process and to establish whether there were any probity concerns over the award of a tender.

The termination Clause 77 is as follows.

GC21 (Edition 1) General Conditions of Contract

Termination

77 Termination for Contractor's Default or Insolvency

1. The Principal may terminate the Contractor's employment under the Contract for Contractor's Default or Contractor's Insolvency by giving notice, as set out in this clause 77.
2. In the case of Contractor's Default, the Principal must first give notice to the Contractor that it has 7 days after the notice is given to the Contractor to remedy the Contractor's Default.
3. If the Contractor fails to give the Principal a notice containing clear evidence that it has remedied a Contractor's Default, or fails to propose steps reasonably acceptable to the Principal to remedy the Contractor's Default, the Principal may give the Contractor a notice terminating its employment under the Contract.
4. Nothing in this clause 77 affects or negates the Principal's common law rights to terminate or for damages.
If a right to terminate exists at common law, a notice to terminate at common law may be given without first giving notice to remedy a default.
5. In the case of Contractor's Insolvency, the Principal may give the Contractor a notice terminating its employment under the Contract.
6. If the Principal terminates the Contractor's employment under this clause 77, it may at its sole discretion, employ others to complete the Works and all the following will then apply:
 1. The Contractor must leave the Site as soon as reasonably practicable

and remove all Temporary Work and Materials it has brought onto the Site, but must leave any Temporary Work and Materials required by the Principal to have the Works completed.

2. The Contractor must assign to the Principal the Contractor's rights and benefits in all its contracts concerning the Works, warranties and unconditional undertakings, bank guarantees, insurance bonds, other security of a similar nature or purpose and retention held by the Contractor, with effect from the date of termination of its employment under the Contract.
3. The Contractor must consent to a novation to the Principal or its nominee of all Subcontracts and its other contracts concerning the Works, as required by the Principal and must procure at the time of entering into each Subcontract and other contracts, the consent in writing of all of its Subcontractors, Suppliers and Consultants to the novation. The Principal may at any time make payments and may deduct, withhold or set-off any amounts to be paid under the novated contracts from amounts otherwise payable to the Contractor or from any Undertakings given on the Contractor's behalf.
4. The Contractor must do everything and sign all documents necessary to give effect to this clause 77, and it irrevocably appoints the Principal as its attorney to do this in its name if it fails to do so.
5. If, on Completion, the cost to the Principal of completing the Works exceeds the amount that would have been paid to the Contractor to complete them, taking into account any Prepayments, then the difference will be a debt due by the Contractor to the Principal.
6. The Principal may make provisional assessments of the amounts payable to the Principal under clause 77.6.5 and may demand them under the Undertakings.