

# Public Sector Tendering And Contracting In New South Wales: Management Options

The New South Wales Legislative Council Standing Committee On State Development has published a Discussion Paper entitled "Public Sector Tendering And Contracting In New South Wales - Capital Works Tendering and Contracting: Management Options".

The Premier had requested the Standing Committee to consider and report to the Legislative Council upon:

"contracting arrangements between the private sector and government, semi-government and local authorities in New South Wales, with a view to recommending any changes to those arrangements that might advance State development and produce a more cost effective contracting system."

In his introduction to this report, The Honourable John Hannaford, MLC, Committee Chairman, noted that:

"The Committee soon learned that the construction industry as a whole was concerned about the increasing numbers of disputes over contracts for public sector projects. The Committee spent a good deal of time studying government construction and its place in the industry generally. This was done by numerous written submissions, presentations, interviews, site inspections and formal hearings."

The Honourable John Hannaford, MLC, also stated:

"The Committee formed the view that previous studies of the problems in public sector construction contracting had been too narrow. This was because they had taken as their starting point the traditional lump sum construction tender. The lump sum tender greatly restricts everything that follows it.

The Committee decided to take as its starting point the need for a more cost effective system, as indicated by its reference from the Premier. This led to the question: can the restrictions on lump sum tendering be removed, while retaining, or even increasing, the integrity of public sector capital works construction?

The Committee is now seeking answers to that question by publishing this Discussion Paper, setting out the main options that have been presented to it in evidence: traditional lump sum tendering, and a revised management system that introduces flexibility with accountability, and cost effectiveness with integrity."

The Chairman further noted that the Committee had not reached firm conclusions about the future direction of tendering and contracting for public sector capital works in New South Wales. In the circumstances of widely differing views about complex matters, the Committee believed that it would have been premature to make recommendations without seeking further views from industry, government and the public.

## The Paper

Much of the Discussion Paper is devoted to a commentary, both descriptive and qualitative, on the present tendering system and traditional contract capital works procurement strategy. On the way through this review, a number of interesting comments and observations are made. These are set out under headings below (for the most part, these headings align with those in the Paper):

## Bills Of Quantities

The Paper states at page 11:

"... Bills of quantities may take some time to prepare and add to the cost of tender documents. They may be a source of later dispute if they contain errors or if the technical specification and drawings are changed after the bill of quantities has been prepared. For these reasons, there has been some attempt to omit bills from tender documents, and to have the bidders prepare their own bills when pricing their tenders."

## Assessing Tenders

The Paper states at pages 13 and 14:

"Almost without exception, construction authorities say that they do not select successful tenderers on the basis of raw lowest cost, but after taking into account such things as the bidders' capacity to complete the project, their previous performance, and their propensity for entering into contractual disputes.

Yet the view in the industry is that an assessment panel of public sector employees, with overriding considerations of accountability in mind, could find it very difficult to recommend the awarding of a contract to other than the lowest bidder, except where that firm was manifestly incapable of completing the project.

There is considerable evidence available from the construction industry to show that tendering firms submit unrealistically low bids, after carefully examining the documentation for errors or omissions that might form the basis for later claims.

Another ploy is to seduce the client organisation into making costly additions by showing them technological advances or attractive features that were not included in the documentation. The consequent claims comprise the successful bidder's profit margin on the project.

When these claims are added to the additional amounts and variations that are envisaged by the contract documents, a situation can be reached where the total payment for the project from the public purse is very much larger than the price that was initially bid and accepted by the panel of experts."

### The Superintendent

From page 15:

"There is conflict and ambivalence in the superintendent's role, particularly when the superintendent or the delegate on site is an employee of the construction authority. There are several ways in which such situations can arise:

- i. Outright conflict occurs when the delegate on site is called upon to resolve a dispute; if the decision is in favour of the delegate's employer, the contractor may suspect favouritism.
- ii. The delegate may be slow to decide such things as claims and requests for extensions of time, owing to a lack of authority, and may refer even some routine matters to headquarters for decision.
- iii. The delegate finds difficulty in resolving different interpretations of the quality requirements in the technical specification, particularly if the interpretations are made by experts from headquarters."

### Resolving Disputes

From page 16:

"... The most significant point, for any examination of the capital works management system, is the view that the lump sum, lowest-conforming-bid tender is likely to increase the number of disputes during construction. This is because, in the view of many people in the industry, the tendering method forces contractors to bid at unrealistically low margins. Variations then have to be made, and these are often seen as the way to make a profit."

### Capital Works Organisations

At page 17:

"... The efforts and procedures of the construction authorities are not necessarily co-ordinated; this is reflected in the different standard conditions of contract that they employ, and variations in their procedures manuals."

### Industry Concerns And Proposals

At page 22, the Paper makes the observation:

"The central concern of many in the industry was summed up in the 1989 annual report of the NSW Public Works Department:

'There is a growing trend towards claims and litigation in the building and construction industry and Public Works has not escaped this.'

The Paper also outlines the content and recommendations involved in industry submissions and reports including:

- improved planning to allow more time for design and documentation;
- changes to project budgeting to guarantee the availability of funds through the construction period;
- changes in the relationships between clients and construction authorities at the design stage;
- greater continuity between project planning and project management;
- great emphasis on improved documentation;
- standardisation of documentation;
- changes to the tendering process including consideration for the costs of tendering and also intellectual property;
- changes in relationships between construction authorities, contractors and subcontractors;
- improved on-site management;
- better communication between contractors and end users;
- reduction in the number of variations;
- faster and more effective resolution of disputes, including greater use of "alternative dispute resolution."

### Lump Sum Tendering

Interestingly, under this heading at page 24, the Paper states:

"The incremental method of improving the system of tendering and contracting for public sector capital works, and the proposals that have flowed from it, resemble the system itself: they follow the approach of "traditional" public administration in concentrating on compliance and what goes into the system ("inputs"), rather than on the results that are produced. The system is complicated by the methods of control that are employed, with construction authorities sometimes acting as intermediaries between client organisations and contractors, and by the resultant problems in planning and communication."

### Public Works And The Private Sector

The Paper notes "construction industry views", including that:

- projects usually only involve incremental improvements and that there is no scope in the

tendering system for radical alternative methods or technologies, unless the tenderer submits an alternative non-conforming bid;

- the designs and specifications often themselves are incremental in nature;
- many government projects are over-designed and over-specified and of a higher standard than necessary or desirable;
- there is too little attention to "buildability";
- little flexibility to adapt to problems, leading to delays, claims and disputes.

At page 32, the Paper states:

"The point is that the lump sum tendering system, with its emphasis on compliance and inputs, carries with it greater potential for misunderstandings, omissions and disputes than do the relatively more direct relationships and flexible practices that are usually found in private sector projects.

Many people in the construction industry believe that the techniques and management systems now employed in the industry are such as to warrant a substantial change in the relationship between the public and the private sectors. Their view is that the large construction firms have the capacity to deliver government projects from the earliest stages of design through to handover. They argue that there is now less need for intermediaries such as the construction authorities to oversee the relationship between client and contracting firms.

In summary, there is a view in the industry that the conditions that gave rise to the present lump sum system of tendering no longer prevail."

### A Revised Procurement System

The Discussion Paper proposes a revised management procurement system to reduce the rigidity and complexity characterised in the orthodox lump sum tendering system.

The Paper proposes that the obvious way forward is design and construct contracting. The Paper describes the likely steps in the process.

The Discussion Paper sets out the likely consequences of this revised approach to capital works procurement, as follows:

- a shift in the focus of capital works construction from compliance to performance and results;
- an enhanced ability to calculate the true full cost of projects;
- greater opportunity for innovations in design and technology, whilst taking into account intellectual property considerations;
- the establishment of different relationships between the client, the construction authority and contractor, with more direct communication, greater emphasis on budgetary control and the satisfaction of client needs;

- an improvement in selection methods from the spurious objectivity of the low bid system and greater emphasis on value for money;
- greater emphasis on assumption of responsibility by the contractor, in conjunction with quality assurance;
- the likely development of consortiums to carry out design and construction.

The Paper suggests that the likely consequences also include a more open and representative system, with comprehensive checks of probity and fairness, with concentration on results.

### Organisational Structure

The Discussion Paper proposes:

- a single Ministry of Construction to oversee all significant public sector construction in NSW, regardless of the agency for which the works are constructed;
- a Capital Works Advisory Council to advise the Minister on all aspects of policy, developments in the construction industry and cost effective changes in construction technology;
- a Capital Works Service comprising core professional, technical and administrative staff to prepare briefs, concept and detailed design in competition with the private sector and to manage the construction of projects where the Service is the successful bidder;
- Capital Works Selection Panels, comprising industry representatives;
- Capital Works Secretariat responsible to the Minister;
- Capital Works Audit Branch; and
- a Joint Parliamentary Committee On Public Works, with the power to consider all substantial public works projects in public hearings prior to construction or, where innovative designs and intellectual property are involved, in closed hearings.

The Discussion Paper notes that this proposal would leave organisations such as the Electricity Commission and the Roads and Traffic Authority free to concentrate on their primary service functions. It is suggested that numbers of the staff from the various present procurement departments and authorities would become members of the Capital Works Service.

The Paper comments that "openness" would be one of the main features of these management proposals.

### The Newsletter Comments

To some extent, the Discussion Paper reflects the recent industry debate about problems evident in current procurement systems and, in part, parallels others' thinking on the topic.

However, the Discussion Paper is unusual in both the stridency of its comments and the radical nature of its

proposals. The key question is whether the recommendations are simplistic and trivialise important issues, or whether the report's proposals involve incisive breakthrough. Will the Discussion Paper be taken seriously?

The answers should become evident in responses to the Discussion Paper and in the Committee's finalisation of its recommendations. It is not appropriate for the Newsletter to presume or propose the answers. However, there are a number of observations which can be made.

Those responsible for the preparation of the Discussion Paper would seem to have attempted to distinguish the wood from the trees and to breakthrough.

There is a general tendency in the industry to respond negatively to change, particularly radical change. Additionally, proposals which are perceived by industry sector groups to constitute a threat to membership or to preferred methods of doing business are often resisted vigorously. At times, the real reasons for resistance are not identified or communicated, but attack mounted on other stated grounds.

It is understood that the proposals may receive opposition and perhaps strident responses from those:

- concerned about change;
- with vested interests in the traditional approach to public sector capital works procurement methods, including the current organisational structures;
- concerned with their ability to respond to the proposals;
- currently employed in procurement authorities and who may feel insecure or threatened by the proposals; and
- those who do not consider that the proposals are in the interests of increased efficiency, or that they are appropriate for all situations.

The test to be applied by the Standing Committee in finalising its proposals, and by the Government in responding, should be that simply of efficiency. If the proposals will enhance efficiency of public sector infrastructure procurement, then they should proceed. If not, then they should be modified, or dropped.

So far as the design and construction proposal is concerned, many might consider that this system would not necessarily be appropriate for all circumstances. The NPWC/NBCC Joint Working Party "No Disputes" Report, commented upon elsewhere in this Issue, suggests that:

- the traditional contract strategy;
- detail design and construction;
- design and construction;
- project management; and
- construction management;

should all be seen as alternative contract strategies and that there is no one strategy that would suit all projects and all clients.

The Joint Working Party's Report also suggests that:

- the traditional contract strategy may be appropriate where the Principal wishes to manage the interface between detailed design/documentation and construction, to maintain a direct relationship with the design consultants and to exercise direct control over the cost, details of construction and the overall quality of the project;
- the traditional contract strategy should not be used for fast tracking;
- detail design and construction may be appropriate where the principal wishes to develop the concept design, but wishes to contract out of the responsibility for the interface between detail design/documentation and construction;
- design and construction may be appropriate where the principal's brief can be properly identified and expressed in objective terms and the principal wishes tenderers or the contractor to develop a suitable concept design and detailed design for the project;
- project management may be appropriate for projects where it is not feasible to obtain lump sum prices for the whole of the works;
- construction management may be appropriate where it is not feasible to obtain viable lump sum prices for the whole of the works, but where the principal wishes to manage the interface between the design team and the construction team and to control cash flow.

Yet, the Discussion Paper proposes only design and construct for all situations. Can it work and is it in the interests of efficiency?

Some may consider that the proposed system will only favour the large contractors, which have an existing design and construct capacity. However, the industry's ability to respond to market opportunities should not be overlooked. One would expect new organisations, joint ventures and relationships to quickly develop.

The proposals would focus on efficiency of both design and construction methods to the advantage of both the clients and we taxpayers.

Significantly, the adversarial problems and claims and disputes which so frequently flow from the traditional contract strategy would be addressed. Claims relating to documentation problems (the most frequent cause of claims and disputes in the industry) would be avoided, as the provision of design/documentation would lie within the contractor's responsibility; thus negating variations (provided the client did not change its requirements) and claims for extensions of time, delay costs and disruption arising out of problems in or late supply of documentation.

The potential for claims and disputes would still exist, but in different ways. Potentially, fundamental problems could occur regarding the satisfaction or otherwise of the design and construct contractor's contractual obligations regarding implementation of the design intent, standards of construction, finishes and fittings and equipment per-

formance. Fitness for purpose disputes are also possible. The consequence of such disputes could be most significant and overshadow present industry disputes in impact.

Consequently, the brief would take on a most significant contractual role; the brief would have to be prepared to a high standard with great consideration and care.

From the experience of design and construction, carefully considered and expressed criteria (including performance requirements) usually do not leave much room for interpretation, avoidance or dispute and place direct obligations on the design and construction contractor by which performance can be measured.

From the client's point of view, selection of those competent to perform these increased obligations would be critical.

Contractors and designers would assume far greater responsibility than under the traditional system and potentially for the fitness for purpose of both design and construction (depending upon the brief and the terms of the contract). The system would favour the competent, but woe to the incompetent.

Despite the potential for negative responses to the Paper and the Joint Working Party's recommendation of horses for courses, there may well be sufficient merit in the (apparently simplistic) proposals to merit, at least, experimentation, if not adoption. It is quite possible that the interests of efficiency would be served by the change proposed. The issues should be properly investigated and considered.

So far as a single construction authority is concerned, once again, the only issue must be that of efficient public sector infrastructure procurement. If efficiency would be served, then the proposals should proceed. Amongst others, questions such as:

- economies of scale;
- diseconomies of scale;
- the avoidance of duplicated resources;
- the efficient utilisation of resources, including re-allocation of particular resources to high-demand activities from time to time;

should be considered.

Of course, one can imagine difficulties in transition, if not the long term, in the forced conglomeration of those from very different backgrounds - the road designers thrown in with building designers, with those responsible for our water systems, public sector housing and so on.

After the review process, if the Standing Committee considers that it should proceed with the current direction of the Discussion Paper, **this** Government may well have the will to make it happen. It is hoped that the debate is rational and informed and that a proper consideration of the issues (particularly whether the proposals would advance efficient procurement) is not diverted by attacks on the Discussion Paper or lobbying.

Developments are awaited with interest, particularly since the outcome of these considerations (and the subsequent experience) could inform the future direction of public sector capital works procurement in this country.

### Further Steps In The Inquiry

The Committee will reach conclusions and decide upon its recommendations, after it has given full consideration to responses to the Discussion Paper.

Written submissions may be made about options for a revised management system to:

The Secretary  
Standing Committee On State Development  
Level 3  
99 Elizabeth St  
Sydney NSW 2000

Presentations may also be made to the Committee at public hearings.

The Committee's report will be tabled in the Legislative Council. The Leader of the Government in the Legislative Council will be required to respond to the report within 6 months.