

Secretary,
Statutory Authorities Review Committee
Parliament House
GPO Box 572
ADELAIDE SA 5001

**Submission to the South Australian Parliamentary Inquiry
into the State Procurement Board**

Civil Contractors Federation and Civil Contracting

The Civil Contractors Federation (South Australia) (CCF SA) welcomes the opportunity to make a submission addressing the publicised Terms of Reference. The CCF's submission focus is on the observations and concerns from the perspective of the Civil Construction Industry in SA as a whole. The CCF SA has earned its reputation as the leading advocate for the Civil Construction Industry in SA by continuing to provide fearless and apolitical submissions to Government Ministers and Opposition Members alike.

CCF SA is the peak employer body (Industry Association) representing, promoting and protecting companies with business interests in the Civil Construction Industry. CCF SA boasts a growing membership of 600 companies, which in turn employ up to 30,000 South Australians. In South Australian terms, the CCF SA is a large industry association.

The Civil Contracting Industry is defined as the sector responsible for the construction and maintenance of South Australia's infrastructure, including roads, bridges, pipelines, drainage, ports and utilities. Civil Contractors also play a vital role in the residential and commercial building construction industry by providing earthmoving and land development services, including the provision of power, water, gas and communication networks.

South Australia's prosperity is dependent upon functional, efficient and cost effective civil infrastructure. Healthy, well-functioning and productive countries depend on infrastructure that civil contractors construct and maintain. Infrastructure is a smart investment for government and the community: it is an asset that increases the productivity of the economy, both now and into the future – and can make South Australia more competitive internationally. In essence the civil construction sector is a primary economic driver building South Australia day in day out, giving us all the lifestyle we enjoy.

Relationship between large and small to medium-size businesses participating in government procurement

It is acknowledged that large publicly funded civil construction projects usually require large contractors. Scale and expertise is important in the execution of many large publicly funded and other civil construction projects. South Australia has the benefit of a number of large civil construction firms, most with a national footprint. Nothing in this submission is designed to diminish the value or importance of the larger contractor. A healthy free market economy requires contractors of all sizes, large and small, working together, or with or for one another, on fair and reasonable terms.

There must always be the capacity for the smaller contractor to grow (to employ more people, to purchase more plant and equipment, to increase investment in SA). There will always be a requirement for sub-contractors of all sizes to work for a larger contractor. Should difficulties present, their resolution can become problematic when one is larger and better resourced than another. *The CCF SA believes (and recommends) that many of these difficulties could be prevented if Government adopted a standard form sub-contracting contract required to be used by all Head Contractors undertaking government work using sub-contractors. Such a document would ensure that subcontracting terms and conditions are common to all Head Contractors undertaking government projects, and that the terms and conditions of the sub-contract are regarded as fair and reasonable by the Government. For the resolution of difficulties between a sub-contractor and the head contractor, an avenue of direct communication between the sub-contractor and the client (Government) would be useful. The current 'arms-length' relationship can make it difficult for the smaller sub-contractor to negotiate a reasonable outcome.*

Government procurement practice that disadvantages small and medium-size business

South Australia (SA) is dominated by small to medium size enterprises (SMEs), companies and other businesses. SMEs collectively are the largest employer in SA. They are also the larger organisations and employers of the future. It is therefore important that government procurement processes do not create unnecessary barriers which deter SMEs from competing for contracts nor inhibit them when tendering or from growing or gaining experience.

For example, "ease of dealing with one large contractor" as a relevant factor in procurement policy should be abandoned. Any suggestion that such an approach leads to competition and efficiency should be rejected. Such an approach clearly stifles open and fair competition. Such an approach should be seen for what it is. It makes a procurement officer's role easier (less tenders to consider, less questions to answer, less parties to deal with) but plays absolutely no part in ensuring value for money in the expenditure of public money.

The stated position of the previous and current State Government is to support SME businesses including SME civil contractors. Notwithstanding the good work of the Minister for Small Business (in the former state government), the Industry Advocate, and the Commissioner for Small Business, the position of the government or its agencies did not always translate into policy or effective policy.

By way of example, the last year of the previous state government saw the progressive bundling of civil construction capital, maintenance and other projects (by the primary construction agency of the state the Department of Planning Transport and Infrastructure (DPTI) into larger and larger contracts which by definition were more attractive and more accessible to larger contractors. Many believed that over time projects would become beyond the reach of SME civil contractors, and that the direct client/provider relationship between DPTI and the SME civil contractor would be diminished. It is reasonable to suggest that over time this would have resulted in a state dominated by sub-contractors beholden to a handful of large contractors - for work. SA would have been the poorer for this. We are pleased that the current state government has decided that the bundling of work will cease and is to follow a process of disaggregation.

SA Water has a procurement arrangement for their not insignificant annual spend that is largely

directed at a few large contractors which have the benefit of long term contracts (framework agreements which specify a range of works and other activities). This work is either self-performed and or sub-contracted to smaller sub-contractors at the discretion of the head contractor. SA Water has a deplorably low level of investment in SME contractors directly. There is very little monitoring or auditing of the subcontracting arrangements initiated by a head contractor. SME contractors undertaking work for a SA Water head contractor are completely exposed to price and other pressures. SA Water as the major state owned water utility is very well placed to have a highly targeted procurement program that very deliberately supports, promotes and encourages SME contractors. The significant potential for jobs and business growth and economic stimulus through SA Water procurement targeted at SME contractors is not being realised.

Targeting State procurement to support and encourage small and medium-size business

Government policy reforms to make public procurement more accessible to SMEs are critical. Put simply, its time to boost the small end of town. *The CCF SA recommends that the state government develops a policy that is very deliberately designed to make government work available to SME businesses, and that government agencies are compelled to comply with such a policy.*

The CCF SA recommends the expansion of the powers of the Small Business Commissioner and/or the Industry Advocate to progress reform, identify and eliminate barriers to SMEs doing business in the public sector. This would reinforce the government's commitment to SMEs. Reforms must be streamlined and designed to be incorporated into existing procurement and industry participation policies, and utilise the efficient structure and capabilities of the Office of the Industry Advocate.

The CCF SA recommends that the following be incorporated into a state government SME procurement policy to apply to all state government departments, public authorities and local councils. We suggest that an SME for the purpose of this recommendation is a business employing up to 100 people.

- *Where possible, projects should be disaggregated.*
- *SME spend target: Forty percent (40%) of the government capital and other works budget each financial year to be awarded to SMEs either singularly, or in a consortium or joint venture with other SMEs. (State Government Capital works budget for the next four years is \$12 billion). Investment in the SME sector of this magnitude (40% of this figure) would be a significant targeted economic and job creating stimulus. This spend target to be subject to audit by the Auditor General.*
- *SME spend target: For projects in excess of \$10 million, 30% of the works is to be awarded (sub-contracted) to SME contractors. Government contracts to require this of their client (Head Contractor). This spend target to be subject to audit by the Auditor General.*
- *SME spend target: For projects between \$1 million and \$10 million, 60% of the works to be awarded (sub-contracted) to SME contractors. Government contracts to require this of their client (Head Contractor). This spend target to be subject to audit by the Auditor General.*
- *SME spend target: All projects below \$2 million are to be awarded directly to SMEs.*
- *There should be no bank guarantee requirements on projects under \$2 million. Maximum bank guarantee provision in contract over \$2 million should be 2-2.5% of the contract sum. It should be noted that in many cases DPTI are requesting dollar-for-dollar bank guarantees when SME contractors are completing DPTI work via a private developer.*
- *Formal prequalification requirements for projects below \$500,000 to be abolished. The prequalification system currently in use in DPTI creates artificial barriers to companies wishing to grow capacity or gain experience in larger projects. The current system locks companies out of designated projects because they don't have the experience. The required experience and expertise is impossible to gain under the current system. Larger contractors with a national footprint have the experience because they have access to bigger projects interstate.*
- *If prequalification requirements continue, government agencies are to be required to take into consideration in the awarding of a contract, factors relevant to the subject matter of the*

procurement must be proportionate (e.g. safety, financial, insurance, quality). Any pre-qualification requirements to tendering should be open, simple, clear, relevant, proportionate and objective. Prequalification criteria should be enabling, not restrictive.

- A contractual requirement to make payment within 30 days, or pay interest on the outstanding monies to be required. Government agencies to publish statistics showing the proportion of invoices paid in accordance with these obligations; the total amount of liability to pay interest which arose during the year; the total amount of interest actually paid in discharge of any such liability. These figures must be published annually in the agency annual report, and a return submitted to the Commissioner for Small Business.
- SMEs to be registered on the Industry Capability Network (ICN) and have entered the industry/sector in which they operate to be directly notified of any contract opportunity which may be of interest to them.
- Allow and encourage innovative solutions from SMEs.
- All government tenders to include the relevant designs and specifications. Government tenders should include clear designs and specifications. Restricting construction contracts to "design and construct" necessarily removes SMEs who do not have in-house design capabilities from the tender process, thereby reducing competition. Design and Construct projects should be avoided as far as practicable. If design of civil works is outsourced by government departments and agencies (such as DPTI) design contracts should be put for tender. When the preferred design is settled, then clear designs and specifications with appropriate risk allocation should be put for tender for construction.
- Where possible, contract requirements / frameworks agreements to be broken down into smaller 'lots', for which SMEs can more easily tender. There must be particular oversight of DPTI and SA Water in this area.
- Bidder conferences following the issuing of tender documents to be held to explain the requirements and the procurement process, and allow potential tenderers to ask any clarification question.
- Unsolicited bids from SMEs or the identification of sub-contracting opportunities to be permitted.
- SMEs to have the option of registering their capacity, background, qualifications and experience on a data base and be issued with a unique identifier that can be noted on tender documentation. This will reduce the time, cost and duplication and the necessity to submit the same often voluminous information over and over again to the same and different government agencies. The SME's information on the register can be updated from time to time. Government agencies can access the register as part of the tender evaluation process. Tenders ideally should focus on key risks, cost being one of them.
- All government agencies and statutory authorities to use simplified, fit for purpose and harmonised template tendering documentation that is as concise as possible and written in plain English.
- All government agencies and statutory authorities to have a principal procurement officer who should be familiar with all good governance and procurement policies as well as issues facing SMEs which restrict or tend to restrict open competition from the private sector and SMEs.
- SME consortium bids to be evaluated as a whole, taking into account the roles and responsibilities of consortium members, and the risks and guarantees/indemnities associated with the consortium's constitution.
- Full details of tender evaluation scores to be provided to unsuccessful tenderers for contracts with the offer of the opportunity for a verbal debrief.
- Tenders attractive to international companies may specify the requirement to use designated local SME subcontractors and/or those included on the ICN register.
- Up-front and staged payments to be allowed to assist SMEs with their cash flow or assist them in making the initial investment required to deliver the contract
- Procurement processes to be as SME-friendly as possible, including through training and guidance delivered by staff involved in procuring goods, services and works
- 'Meet the Buyer' events designed for SMEs to be a requirement.
- Bidders' Conferences following the issuing of tender documents to be held in order to allow SMEs to network and discuss potential joint bids and/or subcontracting opportunities.

State Procurement Board

The CCF SA recommends that the policies established by the State Procurement Board (SPB) should be listed, refined and updated. Policies should be published by the Department of Treasury and Finance and apply across all of government, including local government.

The SPB is not an appropriate body for ensuring compliance with procurement policies. Compliance with procurement policies should be the responsibility of a procurement officer, CEO, relevant Minister, and with oversight by the Industry Advocate, and subject to audit by the Auditor-General.

The CCF SA raises the following and somewhat rhetorical questions for the SAR Committee's consideration: -

- Given the SPB's powers in s12(1)(e) of the Act, namely *to investigate and keep under review levels of compliance with the Board's procurement policies, principles, guidelines, standards and directions*, how many investigations have been undertaken by the SPB since its inception?
- What if any role or investigation did the SPB have or undertake in relation to DPTI's announced preferences for aggregation of civil contract works? What form did any investigation take?
- What, if any, role or investigation did the SPB have or undertake in relation to DPTI's preference of letting of design and construct contracts with minimal design detail?
- What and who would undertake an SPB investigation and what is the extent and form of any SPB investigation – inquiry inviting public submission, private investigation, independent, taking evidence? etc.
- What regulations apply to SPB investigations?

CCF SA recommends that the Office of the Industry Advocate be the more appropriate body to investigate compliance with updated procurement policies under s6 (1) (b) of the Industry Advocate Act 2017. The SPB should be wound up and the State Procurement Act and Regulations should be repealed. Whilst the Act and the SPB was the mechanism which was adopted in 2004 to develop government-wide policy, the SPB is not an appropriate body to oversee policy rationalisation, or compliance. Best Practice Procurement Policy should apply across all levels of government and any public authority.

Inherent limits in the Act, namely excluding local government, and excluding construction projects over \$150,000 from procurement policy have no rational basis when billions of dollars have been and are being spent by federal, state and local governments and when local SMEs are demanding an opportunity to compete.

Once procurement policy is established, compliance ought to be the primary responsibility of the procurement officer, the CEO, and the relevant Minister. Whilst the Auditor-General and ICAC should clearly retain powers of official audit and investigations, the Office of the Industry Advocate (leaner and more efficient than the SPB and with an Industry Participation focus) should have the power and role to investigate issues raised by the Industry in relation to the content and application of procurement policies as those policies (or the failure to properly and fairly apply them) affect Industry.

Government procurement in competition with private business

The CCF SA recommends that in only limited circumstances should a government body or local council undertake or engage in direct competition with private sector business. SA is a free market economy and there is already far too much government intervention in the economy, which as a result, is distorted, resulting in low jobs growth and a slow economy (compared with other states). Unless there is a market failure or public good not being satisfied there is no role for government, beyond that of a regulator. If a government body, including local councils, seek to secure in-house supply of services, when such services are also offered by SMEs operating in a competitive market, a revised, updated and robust competitive neutrality policy ought to be applied as part of government's procurement policies. Independent oversight and/or audit of a government body or council's internal competitive neutrality processes must occur.

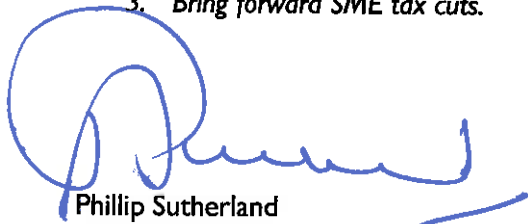
Councils

Despite fleeting references to, or any actual application of the principle of competitive neutrality in procurement, government bodies, particularly local councils, simply do not offer value for money when compared to services offered by SMEs operating in a competitive market. The fact that some councils can and do contract the majority of their civil works to the private sector, whereas other councils maintain vast fleets of under-used and over-subsidised plant and facilities, is indicative of a failure of any current competitive neutrality policy.

Other Matters

The CCF SA recommends that the SA State Government encourages and supports Federal Government initiatives to:

- 1. Improve the resolution of SME tax disputes with the Australian Taxation Office in a streamlined, simplified, and much less punitive fashion.*
- 2. Establish mechanisms to give SMEs access to business capital other than from traditional sources. This would include a government-endorsed financial vehicle for SMEs similar to that operating in Canada and Britain.*
- 3. Bring forward SME tax cuts.*



Phillip Sutherland
Chief Executive Officer
Civil Contractors Federation – South Australia

October 2018