

Allens

101 Collins Street
Melbourne VIC 3000 Australia

GPO Box 1776
Melbourne VIC 3001 Australia

T +61 3 9614 1011
F +61 3 9614 4661
www.allens.com.au

ABN 47 702 595 758

Allens > < Linklaters

13 July 2021

Standing Committee on Infrastructure, Transport
and Cities
PO Box 6021
Parliament House
Canberra ACT 2600

By email: ITC.reps@aph.gov.au

Dear Committee Members

Inquiry into procurement practices for government-funded infrastructure

I am writing in relation to the Committee's inquiry into procurement practices for government-funded infrastructure. I am a partner at Allens and lead the firm's Infrastructure and Transport practice and as a result, have significant experience of government-funded infrastructure procurement.

The commentary below has been arranged by reference to the Terms of Reference for the Inquiry.

1 Existing infrastructure pipelines and related supply requirements

The infrastructure pipeline has become increasingly concentrated in terms of project size, geography and work type. The current pipeline is comprised of 90% transport-related projects, concentrated in Sydney and Melbourne (almost 60% of the projects pipeline). This trend is also reflected in Infrastructure Australia's Priority List.

There is a need for a broader range of projects, in a wider range of geographies, seeking greater benefits for more people. Expanding the pipeline will produce three key benefits:

- build community support for the pipeline and the vision underpinning it;
- increase the market for Tier 2 and Tier 3 contractors (with a view to strengthening the overall market); and
- reduce resource competition between projects (improving value for money).

The pipeline should also respond to outside competition for resources, particularly from the energy and mining sectors where capital developments draw from a common pool of resources.

Recommendation 1: *Coordinate the pipeline to spread the demand for skills and materials, this will minimise concentration risk and create broader opportunities.*

2 Challenges and opportunities with existing procurement practices, including frameworks, standards, rules and norms, and intersections between tiers of government and the private sector

Current procurement practices are geared towards achieving a defensible outcome rather than improved value for money. They rely heavily on:

Our Ref OurReference:981.5672
kynm 515367491v1 981.5672 13.7.2021

Your Ref YourReference

Allens is an independent partnership operating in alliance with Linklaters LLP.

- competitive tension through the procurement process; and
- benchmarking against precedent.

It is important that taxpayers' money is spent wisely. However, an overreliance on the above mechanisms can also produce adverse consequences:

- overly complex, timely and costly tender processes;
- an overemphasis on initial contract price; and
- results in the risk allocation being less responsive to the specific requirements of the project.

The best value offer may not be the cheapest (particularly once the final project costs – allowing for disputes, modifications and public sector costs – are considered). It should be possible to assess competing options without taking a large number of bidders all the way through the procurement process - it is inefficient and compounds capacity issues.

The public sector always retains political risk and ultimate responsibility for public service delivery, so failing to address project specific risks (and hoping the private sector can manage them) is a sub-optimal approach.

Recommendation 2: *The public sector should invest more time upfront to understand individual projects. Looking at how they fit into the broader pipeline, what outcomes might they deliver and the particular risks. This step should be done prior to publicly announcing likely time or cost of the project.*

Recommendation 3: *Include a step in the process to evaluate known project risks. Engage early with prospective private sector counterparties on risk appetite and mitigation. Consider de-risking particular risks (such as utility related risks, contamination or planning) through additional pre-contract work, an early works package or packaging solutions.*

Recommendation 4: *Ensure the risk allocation reflects the project and its particular risks. Selective use of 'standard form' and 'market' as reasons not to engage with the realities of the particular project is counterproductive (as is reopening standard positions unnecessarily).*

Recommendation 5: *Select a preferred bidder for each project once there is a clear front-runner. The additional comfort gained from further testing under competitive tension should be weighed against the additional cost (passed on to be the public by successful participants) and the impact on market capacity of multiple parties continuing to invest in the procurement process.*

3 Challenges and opportunities to enhance Australia's sovereign industry capability, including for Australian owned businesses

Given the increasing size of the pipeline, there is a need to invest in the skills and capacity needed to deliver it. Better trained and more diverse teams deliver stronger outcomes for everyone.

Recommendation 6: *Invest in skills development based on the identified pipeline. Having a clear and reliable pipeline will also facilitate private sector investment.*

4 Lessons from other Australian jurisdictions and other portfolio areas, including Defence's industry capability approaches

The public sector has had success with a range of procurement models. Each model (PPP; D&C; Managing Contractor; Alliance; sole-sourced arrangements etc) has advantages and disadvantages and is better suited to particular circumstances. Modifications to the 'standard models', such as the TOC arrangement on the North East Link PPP, also increase the flexibility of certain models.

Recommendation 7: *Take the learning from other procurement models and match the procurement to the project.*

5 How Australia can balance its international obligations with maximising local content opportunities, including by leveraging foreign direct investment

It should be recognised that the foreign direct investment (and international contracting market) are global markets. Australia's competitiveness in attracting international interest will be measured against alternative markets abroad.

Construction work naturally lends itself to local participation as physical infrastructure exists in place. However, the push to improve efficiency is likely to lead to an increase in pre-fabrication which may allow a greater proportion of work to be undertaken offshore.

Recommendation 8: *Consider opportunities to support pre-fabrication in Australia, particularly where the relevant products may be suitable for export on competitive terms.*

6 Alternative procurement models, including reference to international examples

The public sector should be open to alternative procurement models and recognise and collaborate within Government and with the private sector to navigate current market challenges. For example, current issues include a challenging insurance market, difficulty in bringing expertise into the country and disruption in a particular supply market.

Recently, there has been a noticeable improvement in this area.

Recommendation 9: *Be responsive to the external environment at the time of procurement.*

For completeness, I note that I am a member of the Business Council of Australia's Infrastructure Housing and Construction Working Group and in that capacity I have contributed to the Business Council of Australia's submission to this inquiry.

I would be happy to expand on the above recommendations as required.

Yours sincerely

David Donnelly
Partner
Allens