



Australian  
Institute of  
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## **THE IMPACT OF ACT GOVERNMENT TENDERING PRACTICES IN THE BUILDING AND CONSTRUCTION SECTOR (Interactive tendering)**

This submission is made on behalf of the Australian Institute of Architects ACT Chapter, the Master Builders Association of the ACT, the Australian Institute of Landscape Architects ACT Chapter, the Australian Institute of Building and the Canberra Division of Engineers Australia. These organisations collectively represent the ACT construction industry.

In summary, local industry has concerns about the declining use of local firms, in particular, for government projects. We believe a significant reason for this is current government tendering processes. Industry is observing a trend away from Design & Construct delivery, lump sum and Project/Construction Management models towards the Interactive Tendering Process (ITP), particularly on Education and Training Directorate projects. Some industry participants with strong track records of designing and constructing projects for government in the ACT are choosing not to participate in smaller projects with an ITP delivery and this is a loss in competition for the Territory.

The ITP has a number of advantages and disadvantages, however, we believe that this should only be applied to major projects valued at over \$100m where they involve social infrastructure under PPP delivery. We do not believe that the ITP is suitable for projects below that value (small and medium sized projects).

Our concerns are detailed below.

## **1. LOCAL INDUSTRY CONCERNS**

The construction industry has voiced its concerns for some time about existing tendering processes that focus on risk management and cost reduction to the detriment of good design and the development and support of local professions, including architects, landscape architects, engineers, builders and other professionals in the building and construction industry.

We fully support statements made by Government about the value of local business input as a critical element of procurement activities, particularly when looking at value for money criteria. However, we believe that these statements have not been given the prominence in policy and practice that they should receive to ensure an ongoing local design, building and construction industry. We believe that current procurement practices focus almost entirely on price and risk management, which in our view, cannot be the major criteria considered in the procurement process.

Industry believes that value for money can be the primary criterion in selecting the preferred bidder provided that the use of local firms as set out in the draft Industry Participation Policy (ACT IPP) informs the value for money criteria.

We welcome the stated policy objective of including “the broader strategic impact of the contract on the territory’s economy” being considered in the assessment of value for money. Using local suppliers provides broader benefits to the economy. The ACT IPP should be highly influential in the tender selection process, well beyond a check for basic compliance.

A high number of projects are being awarded to interstate companies, which has caused a decline in local participation by the architectural profession, other design professionals, builders and other contractors in the ACT. This has a number of negative effects including interstate firms having pre-existing relationships with interstate contractors, resulting in more work being contracted to interstate personnel and firms to the detriment of the local economy. As well, the under-utilisation of local expertise and experience means that local industry is deskilling and local industry will not be sustainable if this trend continues. This is particularly so for the professions in the ACT, as there is a limited amount of public and private projects to maintain a competitive skills base.

The Australian Institute of Landscape Architects is particularly concerned about the increase in use of interstate landscape architects. ACT practitioners have competed openly with interstate landscape architectural practices for some time, but consider the current procurement practices as trending toward interstate design practices being 'bought in' on local government projects, seemingly by virtue of longstanding relationships with interstate architects and builders, rather than any experience in the ACT context, which would benefit the project and the Territory.

## **2. INTERACTIVE TENDERING**

A positive aspect of an ITP is that it provides an opportunity for an active interface between the ACT government and short-listed tenderers during the tender phase. Individual tenderers have an opportunity to discuss the development of their concepts and designs and to seek clarification and feedback in the context of the output requirements. This opportunity for discussion occurs before tenders are submitted.

An ITP is particularly relevant in social infrastructure projects where there is a high level of interface risk between ACT government operators and private sector infrastructure providers. It can be particularly useful in relation to technical and design issues. For the ACT government, the ITP transfers whole-of-life asset condition risk and fit for purpose risk to the private sector and transfers project design costs to the private sector.

However, there are significant cost increases that are spread across industry and government that are not readily apparent. For instance, the design cost for the project is multiplied by the number of tenders, meaning the total design cost is greater than if the ACT government had prepared a preliminary design at its cost. The ITP can extend the tender preparation time, and for it to be effectively delivered across projects, a 3-4 month tender period may be required with significant lead in and evaluation periods. This can be unreasonable for smaller and medium scale projects.

ITP for smaller scale projects also requires significant involvement from all parties including agency and directorate staff, user staff, maintenance teams and external probity advisors to ensure fairness and commercial in confidence dealings are retained. The unrecoverable cost of this for the tenderers on smaller scale projects is unsustainable.

At present, government is imposing an interactive tender process where the shortlisted teams develop a design over a number of months, without any guarantee of the losing team being fully compensated by government. This is applied to all scales and complexity of projects.

This type of contracting may be appropriate for a multimillion dollar Public Private Partnership arrangement, but should not be used for the scale of projects to which it is currently being applied. It appears that Government is using this as a further means of shedding risk, which results in risk to the person least able to manage it. Risk should only be taken on by those in a position to manage it, and government must retain some risk.

Because government does not have the skills in-house to provide a proper brief, they are therefore looking to the market to provide ideas. However, the design team is being asked to provide ideas at below market cost.

Not all construction firms can afford to pay for the consultancy involvement, especially if that involvement does not win the bid. Because of this, smaller firms are being pushed out by larger firms, as they are not able to absorb the cost of participating in an interactive tender process.

The commercial risk involved in participating in this tendering process without payment is too high for many local firms. Because this tendering process is being applied to small projects as well as large, it is squeezing out the smaller firms from their usual niche of smaller projects.

This situation is limiting local competition and the emergence and success of newer construction businesses and design practices, as only large construction firms and often interstate construction firms can get involved in bidding for these tenders. Ingenuity and innovation in design is being reduced by having only a narrow field of professionals who are able to take the risk, leading to a limited pool of design solutions and potentially stopping real innovation for these projects.

There is a strong focus on cost of construction only. There is a lack of confidence in the tendering process that the local content criteria for professional services are not being insisted on by government.

## **2.1 Work without pay**

There appears to be a lack of understanding about the time and effort that must be expended in the interactive tender process. The process currently requires a significant amount of work, with no guarantee of payment. This is evidenced by the following extract from the Design Construct Maintain (DCM) North Gungahlin P-6 School RFT. The most concerning sections are highlighted.

“13.10 The procurement process for the DCM services will comprise three stages:

- (1) Stage 1 - This REOI briefly describes the Territory’s requirement to allow interested parties to assess their potential level of interest, capacity and any necessary qualifications to deliver the required DCM services.
- (2) Stage 2 - Following receipt and evaluation of Responses to this REOI, the Territory proposes to shortlist Respondents and invite up to three preferred Respondents to respond to a Request for Tender (RFT) which will include an Interactive Tender Process (ITP). While Territory’s preference is to invite up to three preferred respondents only, the Territory reserves the right in its absolute discretion to select a different number of respondents to proceed to Stage 2. Respondents are to note that the RFT stage will include a program of interactive tender sessions/workshops to facilitate the development of high quality, well considered and competitive Tenders, and ultimately deliver better outcomes for the Territory and local community.
- (3) Stage 3 - Following receipt and evaluation of Tenders, the Territory will evaluate Tenders for the purpose of selecting a preferred Tenderer and if determined by the Territory, enter into a contract for the Project. It is anticipated that the preferred Tenderer will be required to obtain the development approval for the Tendered Project design prior to entering into contract.

1.4 Anticipated requirements for Stage 2 RFT

1.4.1 The RFT will include an Interactive Tender Process (ITP) that will likely consist of **fortnightly interactive workshops (ITW’s)** to be facilitated by the Territory. The aim of this process is to allow shortlisted Respondents to engage with stakeholders, approving authorities and users in the development of high quality, well considered and competitive design solutions that meet the output specifications and functional brief.

1.4.2. At the conclusion of the ITW’s, shortlisted Respondents will be required to submit their Tender, including their final fixed lump sum price and accompanying commercial offer.

1.4.3. For the purpose of information to Respondents, at present the deliverables at the RFT submission stage are expected to include:

- (1) **Develop a draft Master plan** for the new Site that will include provision for:
  - the planned P-6 school;
  - specific education infrastructure to support community use, including the general purpose hall and meeting room; and
  - the potential future year 7 to 10 school (master plan only).
- (2) **A design for the buildings and engineering sufficient to meet submission requirements for Development Application (DA) to approving authorities.**
- (3) Submit a Tender for the design, construction and maintenance requirements.

1.4.4. Following evaluation of Tenders, a preferred Tenderer may be selected and **may** be requested to lodge a DA for the proposed P-6 School. The Territory **may** pay the preferred Tenderer a capped payment for design services to proceed with design development whilst the DA is being considered.

1.4.5. It is anticipated that, subject to lodgement of a completed tender, participation in the ITP and associated design of suitable quality, the unsuccessful tenderer(s) in Stage 2 **may** be paid a

*capped fee for tendering and transfer of Intellectual Property (IP) associated with the tender. Details of any such arrangement will be set out in the Stage 2 RFT.”*

As stated in the extract above, in the ITP, the losing 1 or 2 tenderers may be given token compensation, rather than be paid for the full value of their work. In the instance above, the costs of a full consultant and construction team working for a programmed four months during the tender period (required to determine an appropriate design solution) were to be offered around \$100k, but the costs would have been many times that.

As an example, for a \$30m project:

- Total consultant fee 7.25% (3.25% full service architectural and 4.0% for consultant team)
- Stage 2 RFT = Masterplanning plus design of buildings suitable for submission for DA – Concept Design (15% of fee) and Design Development and DA preparation (conservatively 15% of fee)
- $30\% \times 7.25\% \times \$30.0M = \$652,500$

This is standard tight professional fee setting. It does not take into consideration any time that the builder's team may put in (integral to the RFT). It makes the offer of \$100K for the unsuccessful stage 2 tenderer a guarantee of a substantial loss. This is a commercially unviable procurement process.

For the successful architect, this will mean funding the service (to DA stage) to approximately 30% of a total architectural fee. This is a huge investment for a small business to deliver prior to the confidence of having a contract in place. The effect will be that only larger firms with deep pockets and an appetite for risk will be able to participate, or smaller practices will put themselves at a large risk in the hope of being successful. It must also be noted that some firms may fail as a result of accepting this risk.

We believe that Government should be an ethical purchaser and should take pride in benchmarking best practice in procurement. This process displays what we view as unethical conduct.

Professional standards of ethical conduct, no matter what the organisation, contain typical characteristics, including commitments to:

- Behave honourably in all aspects of work and professional activity
- Conduct oneself in such a manner as to maintain trust and confidence in the integrity of the acquisition process

- Avoid “clever” practices intended to take undue advantage of others or the system
- Uphold the organisation’s standards and policies and all relevant legislation
- Avoid conflicts of interest

In our view, it is unethical behaviour to ask design and building professionals to provide services that they are not paid for and to ask that local businesses put themselves at huge financial risk. Section 22 of the *Government Procurement Act 2001*, provides that a territory entity must pursue value for money in undertaking any procurement activity and that in pursuing value for money, the entity must have regard to probity and ethical behaviour.

We believe that the ITP does not comply with this provision when applied to smaller scale procurement (below \$100m in value).

## **2.2 Protection of intellectual property**

We are also highly concerned about the protection of intellectual property (IP) throughout the process. Ideas are the architect’s most valuable commodity, this includes site planning, detail design and functional layouts, and it is unethical for the government to pursue a procurement system that seeks to acquire these ideas at no or little cost. While claims are made that the IP will be protected, it is not possible to protect the unsuccessful design team’s intellectual property – there will inevitably be some cross over.

## **2.3 Impact of the process**

This type of tender arrangement will inevitably preclude many local builders, and designers, meaning that the local economy suffers. The likely long term effect will be that a narrow range of service providers will be interested in this approach. Local expertise will be diminished. Larger national firms will likely become favoured, with less investment in Territory service providers. Government will not necessarily get the best outcome, because many builders and designers have excluded themselves from the process. This reduces competition, reduces the chances of innovation and will reduce quality.

Our chief concerns are that Government has disengaged itself from the design process, and is focussed on cost to the detriment of quality.

The solicitation of design proposals at an EOI stage can create a situation where there is a lack of any meaningful dialogue with end users. This means that design proposals are based on conjecture rather than well-considered design briefs and mutually beneficial dialogue. This then results in much of the design being revisited at considerable cost once a project enters the actual commissioned design phase.

Expectations of unpaid work have resulted in design teams lacking an appropriate breadth of expertise. This can result in a full knowledge base across a range of disciplines being diminished. For example, a complete landscape architectural design proposal often relies on the involvement of such disciplines as accessibility, CPTED, cultural heritage, interpretation, geology, ecology, WSUD, and the like. The trend by tenderers and consultants to minimise their exposure to unpaid work means much of the critical input is either absent or curtailed.

The level of design excellence espoused by government project sponsors becomes increasingly unlikely in such conditions, and architects and landscape architects may become increasingly asked to make determinations on matters beyond their area of business, with reputational – and potentially insurability – implications.

The ‘work without pay’ procurement model seems to have ‘spilt’ into other project types and is being adopted across other areas of government and industry. As an example, the Land Development Agency’s approach to the sale of the Canberra Brickworks site required master planning worth hundreds of thousands of dollars, simply to be considered for the second RFT stage. The extension of the ‘work for no pay’ ethic into land release and joint venture-type projects is of concern.

Even very small capital works projects in the landscape sphere (minor open space upgrades, even public drinking fountains) have been procured by the engagement of landscape contractors who are required to commission the design work as part of their lump sum offer for construction. To add the cost and complexity of ‘Design and Construct’ delivery to such inconsequential projects means that even the marginal returns on being involved almost inevitably convert into financial loss for the designer.

We are aware of private developers adopting a similar ‘competition’ style procurement method, where a number of practices are asked to provide designs to accompany their fee proposal to design. This may or may not be influenced by the Territory’s emerging preference for ‘competition’ style procurements, but places further stress on local business. The exhaustive pre-qualification system required of local industry suppliers to be eligible for commissions seems not apply to the single tendering entity. Each project that is released as a ‘Design & Construct’ or ‘Interactive Tender’ does not require prequalified design professionals. As a result, the cost of prequalification per unit of work increases, and undermines the value and usefulness of the prequalification scheme.

### 3. RECOMMENDATIONS

To address industry's key concerns we recommend government consider the following changes to its procurement models:

- ITP only be considered for Tier 1 projects (of \$100 million and above) where Alliance contracting or PPP delivery systems are used.
- DD&C or traditional lump sum delivery be adopted as the preferred tender process for Tier 2 and 3 projects.
- If multiple teams are to be invited in the early design process, then government must pay fairly for participation up to the DA stage. The process must include a contract with clear agreement regarding the use of the intellectual property of the unsuccessful teams.
- Unsuccessful bidders' fees should not be seen as an answer and treatment for the use of IPT on tier 2 & 3 projects.
- More robust control of the capital works program could support more traditional tendering processes for tier 2 & 3 projects while still providing the best share of risk solutions through the contracting models such as DD&C, DDC&M, 2-Stage GMP, lump sum, MC and Project/Construction management models as examples.

We would welcome further engagements with the ACT government on this issue. We may be contacted via Leanne Hardwicke at the Australian Institute of Architects ACT Chapter on 61212010 or via email at [Leanne.hardwicke@architecture.com.au](mailto:Leanne.hardwicke@architecture.com.au).

Yours sincerely,



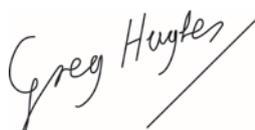
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