



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON ESTIMATES 2024-2025

Ms Nicole Lawder MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
Miss Laura Nuttall MLA

**ANSWER TO QUESTION TAKEN ON NOTICE
DURING PUBLIC HEARINGS**

Asked by: Ms Elizabeth Lee MLA

Addressed to: Minister for Climate Action

Reference: Uncorrected Hansard Transcript [Page 81-83]

In relation to: Big Canberra Battery Project Milestones

Hearing Date: 24 July 2024

QTON lodgement date: 24 July 2024

Answer Due Date: 30 July 2024

MS LEE: Okay, so going through the contract, there are also other terms that are confidential and that we do not have access to, including—and I want to go to the project milestones. Why are they confidential?

Mr Osborne: I think it was—Lara, you might be able to colour this in—but I think it was in response to a request from the counterpart.

Ms Lloyd: Yes, that is right. We went through the normal process of requesting—well, ECU Energy had the opportunity to look through the content and identify issues or clauses that they would like redacted, but there was, again, support from Procurement ACT to have a look at the clauses that they had suggested and to weigh them up against what conditions are in the Act in terms of what we are allowed to redact and what we need to disclose.

So there was that level of assessment as to whether or not it was, you know, it should be redacted. So there was consultation on whether or not it needed to be disclosed or whether or not it could be redacted. So what has been redacted in the project agreement is considered commercially in confidence information on ECU's side.

MS LEE: Including a project milestone on a contract that is specifically with the ACT Government?

Ms Lloyd: I think broadly speaking, there are some sort of milestones that we can absolutely talk about today. There might be some very specific milestones that might be redacted in

the contract, which might have been redacted. I cannot recall exactly why, but ECU Energy are needing to negotiate lots of construction contracts and other contracts with various sub-consultants and parties since signing the project agreement, and potentially if there is sort of granular detail on milestones available, that might compromise their bargaining position with those subcontractors. That could be one reason why they have indicated that particular milestones would be redacted.

MS LEE: Okay, so if I take it to page 3 of the agreement where it actually sets out the project milestones, which is Clause 3.2, because you talked about the granular—

Ms Lloyd: Yes.

MS LEE: But we are talking about six—six, I suppose, milestones, if you like, in this contract. I do not know how granular they have to be but, I mean, six milestones, that seem pretty broad and every single one of them has got confidential text in terms of timeframe. Is that the norm?

Ms Lloyd: I do not actually have that contract in front of me, so I cannot sort of see what milestones are redacted but—

MS LEE: All right. I will go through that. So—

Ms Lloyd: Yes.

MS LEE: —One, obtaining respect of the project, a development approval pursuant to the planning act and if required approval pursuant to the Environmental Protection and Biodiversity Conservation Act 1999 Commonwealth, each in accordance with Clause 13.1. Two, obtaining an offer from the relevant network service provider to connect the facility to the network at a connection point. Three, execution of the construction contracts. Four, execution of a contract for provision of long-term operation and maintenance services to the facility with an experienced and qualified third-party contractor. Five, BCB, which is what the part is, obtaining all material approvals, excluding approvals in item one above, required to develop and commence construction of the project. Six, achievement of financial close.

Are they the kinds of granular milestones that you would need to keep confidential?

Mr Osborne: Yes, so if I may, I think some—well one of them is in the past, so the development application has been approved. So that is the—that was the first milestone I think you mentioned—

MS LEE: That is not the point though. My point is that it was kept confidential.

Mr Osborne: Sorry, I was just mentioning that for completeness. The particularly sensitive milestones in there from the perspective mentioned earlier would be three, four and six. I do not think there would necessarily be any reason why we could not colour in the other ones. But we would need to obviously consult with the counterparty.

MS LEE: So—

THE CHAIR: Can I just ask, is that—are you continuing on with those six milestones?

MS LEE: Yes. I just wanted to just close that off—

THE CHAIR: Okay. May as well finish that before I move on, yes.

MS LEE: Yes. So just in terms of then in project milestones, are there any other government contracts where project milestones have been kept confidential, every single aspect?

Mr Barr: They could well be. They could well be. I do not have them immediately at hand. I am not about to authorise a search of 100,000 contracts. But what advise we can provide in relation to precedent, we will. But if the thrust of the questions are that the government cannot engage in commercial and sensitive negotiations, then we are going to be a great deal of difficulty procuring a whole range of goods and services.

MS LEE: Please do not presume what my thrust is. My thrust is that this is a big project. This is a lot of—millions of taxpayer dollars. And seemingly there are lots of clauses that are confidential, including what one would assume would be quite in the public interest on project milestones. I mean, I am just trying to get to why that might be the case and why the—I understand that Eku requested it, but why did the ACT agree to it?

Mr Barr: I will seek information in relation to our legal position on this matter and come back to the committee.

MS LEE: Thank you. And just finally, just in terms of there has been a lot of reference to the procurement—the board having looked at it and given advice. Are you able to table that advice for the committee?

Mr Barr: I will again take legal advice on that matter if it does not prejudice this or any future procurement, then I will be happy to share that. But if it does, then I will not be in a position to do so.

MS LEE: But you will let the committee know?

Mr Barr: Indeed, yes.

Mr Barr: The answer to the Member's question is as follows:

Eku Energy identified that publishing this information could reduce their ability to negotiate fair contracts with suppliers, subcontractors and other entities. The consequences for non-compliance with the contract can be significant, and subcontractors may seek to leverage this, expecting that as the due date approaches, Eku Energy may be forced to accept terms that are to their disadvantage, and which could also disadvantage the Territory under the terms of the Revenue Sharing arrangement.

The Procurement delegate, upon considering this request from Eku Energy, agreed that the information should be redacted.

Eku Energy have now stated that due to the advanced state of the project, this information is no longer commercially sensitive. Please find the information in the excerpt of 3.2 Project Milestones below. Note that 'Sunset Date' in the second column is the latest date by which a milestone must occur.

In this instance, there is no impediment to the release of the Government Procurement Board (GPB) advice. It is included at Attachment A to this answer. The advice was used to further refine the Request for Expression of Interest (REOI) and Request for Proposal (RFP) documentation.

All feedback from GPB at REOI and RFP stages were taken on by the procurement team, and a number of changes were made, including clarifying and providing additional detail as recommended by GPB. The procurement team considered the 5 per cent weighting for social and environmental in light of GPB's feedback that consideration should be given to whether this weighting level was appropriate, but concluded that the 5 per cent weighting was sufficient, noting a range of mandatory social and environmental requirements that were required, and that the 5 per cent weighting was for actions above and beyond the mandatory actions.

3.2 Project Milestones

(a) The Project Milestones and the corresponding Project Milestone Sunset Dates are as follows:

#	Project Milestones	Project Milestone Sunset Date
1.	Obtaining, in respect of the Project: (a) a development approval pursuant to the Planning Act; and (b) (if required) approval pursuant to the Environment Protection and Biodiversity Conservation Act 1999 (Cth) each in accordance with clause 13.1 ("Approvals").	30 November 2024
2.	Obtaining an offer from the relevant Network Service Provider to connect the Facility to the Network at the Connection Point.	1 June 2025
3.	Execution of the Construction Contracts.	1 June 2025
4.	Execution of a contract for provision of long-term operation and maintenance services to the Facility with an experienced and qualified third-party contractor.	1 June 2025
5.	BCB Co obtaining all material Approvals (excluding Approvals in item 1 above) required to develop and commence construction of the Project.	30 June 2025
6.	Achievement of Financial Close (" Financial Close Project Milestone ").	30 June 2025

Approved for circulation to the Select Committee on Estimates 2024-2025

Signature: 

Date: **30.7.24**

By the Minister for Climate Action, Chief Minister

Advice from Government Procurement Board for delivery of the Procurement for the Big Canberra Battery

Prior to the release of the Request for Expression of Interest, the Government Procurement Board provided the following feedback:

The Board provided recommendations for the procurement team to consider.	
No.	Board's Comment or Recommendation
1	Exploring different procurement models such as Early Contractor Engagement or a Public Private Partnership to leverage opportunities.
2	Documentation to market includes information on how consultation with the community and the National Capital Authority will take place.
3	Documentation to market to clarify how the ACT Government expects any arrangement to operate e.g., profit sharing percentages.
4	Clarify in the documentation how this procurement is targeting a potential market failure, e.g., it might be difficult for the market to obtain upfront investment for these new technologies.
5	Risk Plan is revised to: a) Include detail on technology risks (including technology changing over time), and finance and liquidity risks. b) Undertake a probity risk assessment (currently missing from the documentation).

Prior to the release of the Request for Proposals, the Government Procurement Board provided the following feedback:

The Board **noted** proponents had taken on feedback from previous consultation.

The Board **reviewed** this procurement proposal and provided the following advice for the proponents' consideration:

- **Recommend** revising the procurement documentation to provide clarity and detail regarding the range of battery power accepted in proposals, to ensure probity and expand the market outreach.
- **Recommend** clarifying in the documentation the mandatory social and environmental elements of the procurement and consider if 5% weighted social and environmental criteria is sufficient.
- Given the complexity of the evaluation of the procurement and potential for broad range of proposals, **recommend** revising the non-weighted evaluation criteria to provide greater detail and robust documentation on how each proposal will be weighted and evaluated, and to explain to Tenderers application of the 'Portfolio based Value for Money Assessment'.
- **Recommend** ensuring the weighted evaluation criteria provides sufficient detail to suppliers on what is being evaluated and that there are no overlaps between criterion on what is being evaluated.

Attachment A (QTON No. 052)

- **Recommend** adding COVID-19 and related issues, as well as planning approvals to risk management plan.