STANDING COMMITTEE ON PUBLIC ACCOUNTS

Inquiry into ACT Government Procurement

NOVEMBER 2010

Report 13

Committee membership

Ms Caroline Le Couteur MLA	Chair
Mr Brendan Smyth MLA	Deputy Chair
Mr John Hargreaves MLA	Member from 20 November 2009 Mr Hargreaves did not participate in any deliberations regarding the Waste management section (paragraph 3.49–3.57) of this Report.
Ms Joy Burch MLA	Member to 19 November 2009

Secretariat

Secretary:	Andréa Cullen
Inquiry Secretary:	Derek Abbott [16 November 2009 to 14 June 2010]
Administration:	Lydia Chung

Contact information

Telephone:	(02) 6205 0142
Facsimile:	(02) 6205 0432
Post:	GPO Box 1020 CANBERRA ACT 2601
Email:	committees@parliament.act.gov.au
Website:	www.parliament.act.gov.au

Resolution of appointment[1]

The ACT Legislative Assembly appointed the Standing Committee on Public Accounts on 9 December 2008 to:

(1) examine:

  (a) the accounts of the receipts and expenditure of the Australian Capital Territory and its authorities; and

  (b) all reports of the Auditor-General which have been presented to the Assembly;

(2) report to the Assembly any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed;

(3) inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question; and

(4) examine matters relating to economic and business development, small business, tourism, market and regulatory reform, public sector management, taxation and revenue.

[1] ACT Legislative Assembly, *Minutes of Proceedings No. 2*, Tuesday 9 December 2008, pp. 12–13.

Table of contents

RECOMMENDATIONS

RECOMMENDATION 1

1.11 The Committee recommends that the ACT Legislative Assembly's Administration and Procedure Committee examine the Assembly's procedures to devise a process to protect the integrity of the committee system with regard to witnesses and submitters making false or misleading statements under the protection of parliamentary privilege.

RECOMMENDATION 2

2.19 The Committee recommends that the threshold at which agencies are required to seek more than one quotation before proceeding with a purchasing decision, and the threshold at which agencies are required to seek ACT Procurement Solutions' management services for a purchase be aligned.

RECOMMENDATION 3

2.20 The Committee recommends that these thresholds be reviewed and adjusted on a regular basis.

RECOMMENDATION 4

2.30 The Committee recommends that the *Chief Minister's Annual Report Directions* be amended to require agencies to include a statement in their annual reports indicating the number and value of contracts that have been let under an exemption from the Government Procurement Regulation 2007.

RECOMMENDATION 5

2.32 The Committee recommends that the Chief Executive's reasons for exempting a procurement from the requirements of the Government Procurement Regulation 2007 be included with the contract in the Notifiable Contracts Register. This procedure should be consistent with the current processes for dealing with commercially sensitive information.

RECOMMENDATION 6

2.46 The Committee recommends that the ACT Government review the place of independent project managers in the ACT procurement process.

RECOMMENDATION 7

2.52 The Committee recommends that the ACT Government review its procurement system with a view to the suitability of a range of procurement approaches.

RECOMMENDATION 8

3.14 The Committee recommends that ACT Procurement Solutions engage specifically with representatives of micro, small and medium sized businesses to refine procurement processes to ensure that they are accessible to that sector.

RECOMMENDATION 9

3.15 The Committee recommends that ACT Procurement Solutions investigate the viability of adopting the Commonwealth's online tender system or modifying its own system to provide a similar targeted service to users.

RECOMMENDATION 10

3.24 The Committee recommends that ACT Procurement Solutions liaise with peak bodies in the community sector and organise regular briefing sessions on procurement to assist the sector in understanding processes and to give the sector early advice of forthcoming opportunities. ACT Procurement Solutions should also work with purchasing agencies to seek to schedule tenders to avoid significant numbers of tenders falling within limited time periods.

RECOMMENDATION 11

3.26 The Committee recommends that ACT Procurement Solutions, in conjunction with peak bodies in the community sector, investigate the feasibility of greater use of pre-qualification and panel arrangements for procurements involving community sector service providers.

RECOMMENDATION 12

3.42 The Committee recommends that the ACT Government review the legal powers and resources of regulatory bodies such as ACT Workcover and the ACT Long Service Leave Board to ensure that these entities can discharge their responsibilities proactively.

Once completed, the ACT Government should inform the ACT Legislative Assembly of the outcome of the Review.

RECOMMENDATION 13

3.46 The Committee recommends that the ACT Government ensure that regular training is provided for all officers engaged in procurement activities on the latest developments in public sector procurement.

RECOMMENDATION 14

3.57 The Committee notes that ongoing legal action exists and, subject to consideration of that legal action, recommends that the ACT Auditor-General conduct a broad ranging investigation of the allegations raised with regard to Aussie Junk's employment practices and the management of contractual processes for the letting of the leases for the Mugga Lane and Mitchell facilities.

RECOMMENDATION 15

4.32 The Committee recommends that the *Chief Minister's Annual Report Directions* be amended to specify that ACT Government agencies are to report on compliance with sustainable procurement requirements.

RECOMMENDATION 16

4.48 The Committee recommends that ACT Government agencies should be required to select goods, services and works on the basis of triple bottom line impacts. Guidelines should be developed to assess these impacts, including whole-of-life cycle impacts.

RECOMMENDATION 17

4.49 The Committee recommends that the ACT Auditor-General conduct a review of a selection of recent procurements to evaluate the influence that ACT Government sustainability policies are having on the procurement process.

RECOMMENDATION 18

4.50 The Committee recommends that explicit reference to sustainability, expressed in terms similar to those used in section 11 of the *Financial Management Act 1996*, be included in section 22A of the *Government Procurement Act 2001* as matters which must be considered in pursuing "…the best value for money" objective.

RECOMMENDATION 19

4.51 The Committee recommends that the ACT Government ensure that all officers engaged in procurement activities receive training on:

(i) incorporating sustainability considerations into the request for tender development process

(ii) incorporating sustainability considerations into the tender selection process, and

(iii) engaging with suppliers on sustainability issues.

RECOMMENDATION 20

5.24 The Committee recommends that section 22A (3) of the *Government Procurement Act 2001* be amended to include a new subparagraph stating that entities, in making purchasing decisions, must have regard to the potential social benefits that may flow from the decision and the potential of the community sector to deliver a service, or component of a service, being sought by the entity.

RECOMMENDATION 21

5.26 The Committee recommends that the ACT Department of Disability, Housing and Community Services undertake a study of the community sector in the ACT and develop a guide to the type and number of social enterprises operating in the territory. This could include the development of an ACT Register of Social Enterprises.

RECOMMENDATION 22

5.28 The Committee recommends that the *Chief Minister's Annual Report Directions* be amended to include a requirement for reporting entities to include a list of social procurement contracts and agreements entered into by the entity.

RECOMMENDATION 23

5.34 The Committee recommends that ACT Procurement Solutions hold a special information forum on the ACT Government's new social procurement policy commitment, in particular but not restricted to targeting organisations and groups that fall under the gambit of the ACT Council of Social Service.

RECOMMENDATION 24

5.44 The Committee recommends, as a matter of priority, to ensure that appropriate data is captured under the ACT Government's new social procurement policy commitment, that ACT Procurement Solutions should be appropriately resourced to make appropriate adjustments to its current system to monitor and facilitate reporting on social procurement under the new policy commitment.

RECOMMENDATION 25

5.64 The Committee recommends that the ACT Department of Disability, Housing and Community Services, as the lead department in this area, develop methodologies to measure the benefits flowing from social procurement.

1 INTRODUCTION AND CONDUCT OF INQUIRY

Referral of the inquiry

1.1 Under the ACT Legislative Assembly's Standing Orders[2], the Standing Committee on Public Accounts (the Committee) has the power to self refer inquiries and resolved to conduct an inquiry into the Australian Capital Territory's (ACT) Government procurement.[3]

Terms of reference

1.2 The Committee's terms of reference were to inquire into, and report on the following matters:

(1) the pursuit by ACT Government agencies of the 'Procurement principle—value for money', having regard to:

- probity and ethical behaviour
- management of risk
- open and effective competition, and
- optimising whole-of-life costs.

(2) the integration of sustainability considerations that encompass environmental, economic and social aspects throughout procurement processes

(3) agency approaches to procurement training and development activities

(4) the ability of local suppliers to compete for ACT Government

---

[2] In the ACT, the Standing Committees are established by Assembly resolution and governed by standing orders.

[3] 30 April 2009.

procurement opportunities

(5) the effectiveness of recent reforms

(6) impact on tendering organisations, in particular speed, feedback, and finalisation, of government discontinuing the tender process, and

(7) any other relevant matter.

Conduct of the inquiry

Advertisement

1.3 The Committee called for submissions by advertising in the *Canberra Times* on 9 May and 1 July 2009, placing a notice on the ACT Legislative Assembly's website, and by writing to the responsible Minister and other stakeholders.

Submissions

1.4 The Committee received seventeen submissions. The individuals and organisations who lodged submissions are listed at **Appendix A**. Copies of the submissions can be downloaded from the Committee's website.[4]

Public hearings

1.5 Public hearings were held on 4 March, 30 March, 1 April, 27 April, 29 April, and 10 August 2010. Witnesses who appeared before the Committee are listed at **Appendix B**. The Committee's website contains transcripts of the hearings.[5]

1.6 The Committee met on 14 October; 4 and 9 November 2010 to discuss the Chair's draft report, which was adopted on 9 November 2010.

---

[4] <http://www.parliament.act.gov.au/committees/index1.asp?committee=116&inquiry=812>

[5] <http://www.parliament.act.gov.au/committees/index1.asp?committee=116&inquiry=812>

Making a submission or appearing before a committee of the ACT Legislative Assembly

1.7 Serious issues concerning one Canberra based company were raised with the Committee by a witness during its inquiry. That company subsequently wrote to the Committee refuting the claims and outlining the inaccuracies in the witness' evidence. A copy of that correspondence is at **Appendix C**.

1.8 The Committee takes this opportunity to remind all witnesses and submitters of the need to tell the truth when giving evidence at a public hearing or making a written submission to an Assembly committee inquiry.

1.9 Evidence received by Assembly committees as part of public hearings and written submissions are legal proceedings of the ACT Legislative Assembly, protected by parliamentary privilege. This means that witnesses and submitters to an inquiry have certain protections but also responsibilities. It means that witnesses and submitters are protected from certain legal action (such as being sued for defamation) for what they say to a committee. However, it also means that witnesses and submitters have a responsibility to tell the truth and not to make any false or misleading statements.

1.10 The Committee notes that unfortunately the provisions of the *Australian Capital Territory (Self-Government) Act 1988* do not provide for penalties in the form of fines or imprisonment.

RECOMMENDATION 1

1.11 **The Committee recommends that the ACT Legislative Assembly's Administration and Procedure Committee examine the Assembly's procedures to devise a process to protect the integrity of the committee system with regard to witnesses and submitters making false or misleading statements under the protection of parliamentary privilege.**

Structure of the report

1.12 The Committee has not attempted to produce a definitive work on government procurement in the ACT and its terms of reference do not delineate such a task. Instead, the Committee has produced a streamlined report that attempts to examine and reflect on several key themes that became apparent over the course of the inquiry based on the evidence it received.

1.13 Some of the main themes to emerge during the course of the inquiry were:

- There were a number of submissions that raised issues with regard to the integrity of ACT procurement processes.
- That there are unduly onerous and complex tendering processes for small and medium sized businesses.
- Difficulties for community organisations in dealing with tender processes. The shift from grant funding to tendering for service provision has introduced an additional layer of government into established relationships between community sector organisations and departments/agencies which have had direct responsibility for particular services.
- Issues with a range of contracts, mainly in relation to capital works projects, with regard to ensuring employee entitlements were properly met and also ensuring compliance with occupational health and safety (OH&S) requirements.
- Evaluation of sustainability as a factor to be considered in making procurement decisions largely remains within a financial cost paradigm avoiding evaluation of broader environmental and community benefits.
- Social procurement as part of government procurement in the ACT is in a very early and tentative stage.
- At the later stage of the Committee's inquiry, the Government announced a new policy commitment with regard to social procurement. Whilst the Committee welcomes the new policy initiative its outcomes will only be able to be assessed in a number of years' time. The Committee is of the

view that the Government should review the effectiveness of this new policy commitment within a reasonable timeframe.

1.14 The Committee’s report is divided into three parts and covers the following main topics:

Part 1 – Background to the inquiry

- Chapter 1—Introduction and conduct of the inquiry
- Chapter 2—ACT Government procurement framework

Part 2 – Government procurement in the Australian Capital Territory

- Chapter 3—Tendering framework
- Chapter 4—Sustainability considerations
- Chapter 5—Social procurement

Part 3 – Summary and conclusions

- Chapter 6—Committee conclusions

Acknowledgements

1.15 The Committee thanks all those who contributed to its inquiry by making submissions, providing additional information and appearing before it to give evidence.

2 ACT GOVERNMENT PROCUREMENT FRAMEWORK

Public sector procurement

2.1 By way of background, the term procurement originated from the United States (US) literature and is defined as 'selecting those suppliers and dealing in such a way with them, that it enables the organization to implement its market strategy best in the way it has decided to serve end customers' needs'.[6] In the case of public sector procurement, the definition uses the term 'stakeholder' and is thus defined as enabling a public organisation to best serve its stakeholders' interests.[7]

2.2 As a general guide, the ACT Government budgets over $1.2 billion for the acquisition of goods, services and works in any one year. This amount clearly illustrates that public sector procurement forms a significant part of any economy and, in the case of the ACT, constitutes an important part of the Government's expenditure.[8]

2.3 The ACT Auditor-General's performance audit examining government procurement in the ACT reported that:

> In 2004–05, ACT public entities purchased in excess of $1 billion worth of goods, services and works. The Department of Treasury (Treasury) estimates that total expenditure on procurement processes (including contract and project management expenditure) in 2004–05 across the ACT Government is around $23m…[9]

---

[6] Kamann, D.J.F. (1999) 'Purchasing from a network perspective', Inaugural address—University of Groningen, March; Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008) *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education.

[7] Kamann, D.J.F. (1999) 'Purchasing from a network perspective', Inaugural address—University of Groningen, March; Mitchell, R.K., Pyle, B.R., & Wood, D.J. (1997) 'Towards a Theory of Stakeholder Identification & Salience: Defining who and what really counts', *Academy of Management Review*, 22(4), pp. 853–886.

[8] ACT Government Procurement Board, *2004–05 Annual Report*, p. 40.

[9] ACT Auditor-General. (2005) Auditor-General's Report No. 6 of 2005: *Government Procurement*, p. 1.

2.4 In view of the magnitude of these purchases, the ACT Auditor-General commented that:

- efficiency in procurement was essential to good financial management
- the purchasing power of the ACT public sector can have a material impact, and
- the policy decisions and strategies adopted by ACT public sector agencies can influence policy directions in the areas of local industry development, environmental management and social objectives.[10]

The ACT procurement system

2.5 The current structure of government procurement in the ACT emerged in the first decade of self-government. The current structure was informed by a Legislative Assembly Select Committee inquiry into government contracting and procurement processes which reported in 2000.[11] That committee's report found that there was:

> Strong evidence …pointing to a decline of contract and technical expertise within the public sector since devolution and decentralisation, which has led to agencies not being able to act as informed buyers.[12]

2.6 It also drew attention to a trend towards declining accountability for the provision of government services as:

> …devolution and decentralisation of responsibility within bureaucracies are combining with greater use by governments of the private sector in delivering government works and services to threaten the gains made in previous decades towards more open and accountable government.[13]

2.7 Other concerns included perceived lack of fairness and conflict of interest in tendering process, structural bias against small and medium sized businesses, and a general failure to follow proper procurement procedures.

---

[10] ACT Auditor-General. (2005) Auditor-General's Report No. 6 of 2005: *Government Procurement*.

[11] ACT Legislative Assembly, Select Committee on Government Contracting and Procurement Processes in the ACT, July 2000.

[12] *Ibid.*, p. 11.

[13] *Ibid.*, pp. 9–10.

The report quoted, with approval, a witness' comment that, '*[t]*here remains a general problem with compliance with *[the]* guidelines and procedures'.[14]

2.8 Partly in response to that committee's report but also as a result of the problems that had led to the establishment of the Select Committee, the ACT Government was moving towards a set of clearly defined objectives and a more centralised approach to procurement which would seek to ensure a degree of uniformity of practice across government and also develop and maintain in-house expertise in procurement. These objectives were embodied in legislation and administrative action in the following year.

2.9 Procurement by the ACT Government and its agencies is governed by the *Government Procurement Act 2001* (the Act). The Act defines procurement as:

> (a) …the process of acquiring goods, services, works or property by purchase, lease, rental or exchange; and
> (b) includes the process of disposing of goods, works or property including by sale.[15]

2.10 The Act applies to all ACT Government entities as defined in the *Auditor General Act 1996* but excludes certain bodies—the University of Canberra; Territory-owned corporations such as ACTEW and bodies exempted from the Act by regulation.

2.11 The objective of the procurement process is defined as seeking 'value for money' defined as the '…best available procurement outcome'. However that objective is qualified. In pursuing value for money an entity:

> …must have regard to …:
>
> (a) probity and ethical behaviour;
> (b) management of risk;
> (c) open and effective competition;
> (d) optimising whole of life costs;
> (e) anything else prescribed by regulation.[16]

---

[14] ACT Legislative Assembly, Select Committee on Government Contracting and Procurement Processes in the ACT, July 2000, p. 11.

[15] *Government Procurement Act 2001*, s.2A.

[16] *Ibid*., s.22A.

2.12 The Act establishes the Procurement Board (the Board) whose functions are, broadly, to review and advise Ministers and agencies on procurement matters, relating both to actual procurements and proposals for procurement. The Board can act on its own initiative or on referrals either from the Minister or an agency Chief Executive.[17]

2.13 To improve transparency the Act also defines notifiable contracts (those having a value of $20 000 or more) and requires that a public register of such contracts be maintained giving details of the essential features of each contract.[18]

2.14 The Act is supported by the Government Procurement Regulation 2007 (the Regulations) which deals with such matters as the various financial thresholds governing whether and how a procurement process must go to tender; exemptions from quotation and tender requirements and the categories of procurement that must be referred to the Board for consideration.

2.15 The objective of consolidating and developing in-house expertise in procurement led to the creation of ACT Procurement Solutions, within the Department of Territory and Municipal Services. Its function is to:

> … *[provide]* a range of tendering, contract, procurement policy and risk management services and advice to the ACT Government, its agencies and the community.[19]

Since 2005 ACT Procurement Solutions has managed all procurement activities with a value of more than $20 000. ACT Procurement Solutions also provides the secretariat to the Procurement Board.[20]

2.16 ACT Procurement Solutions prepares guides on procurement processes whether above or below the threshold requiring its formal involvement and also provides advice to agencies.

---

[17] *Government Procurement Act 2001*, part 2.

[18] *Ibid.*, part 3.

[19] ACT Government, *Purchasing Guide,* Version 3, May 2009, p. 2.

[20] Note that the Land Development Agency (LDA) is not required to use the services of ACT Procurement Solutions.

2.17 The procurement approach to be adopted is determined by the value of the goods, services or works being purchased. The Regulations establish the following thresholds:

- where the value is less than $25 000 the purchasing entity is required to seek one oral quotation from a supplier
- between $25 000 and $200 000, three written quotations are required, and
- more than $200 000, public tenders must be called.

2.18 The Committee notes the anomaly that procurements to the value of more than $20 000 must be managed by ACT Procurement Solutions, whereas in the interests of administrative simplicity, purchases of less than $25 000 can be undertaken on the basis of one oral quotation. It seems sensible to have the two thresholds aligned so that the requirement to seek more than one quotation and the requirement to involve ACT Procurement Solutions take effect at the same level.

RECOMMENDATION 2

2.19 **The Committee recommends that the threshold at which agencies are required to seek more than one quotation before proceeding with a purchasing decision, and the threshold at which agencies are required to seek ACT Procurement Solutions' management services for a purchase be aligned.**

RECOMMENDATION 3

2.20 **The Committee recommends that these thresholds be reviewed and adjusted on a regular basis.**

2.21 The Committee is aware that the threshold determining what is a notifiable contract (refer to paragraph 2.13) is also $20 000. The Committee believes that that threshold should not be varied because a sample of contracts entered into on the basis of one oral quotation should be published in the contracts register as a discipline to ensure that agencies follow proper procedures with such purchases.

2.22 To ensure that high standards in procurement practices are maintained a number of categories of procurement must be referred to the Procurement Board for review. These are procurements of:

- $5 million or more by administrative units, as defined by the Auditor General's Act
- $1 million or more for other territory entities, and
- $1 million or more for acquisitions of Information and Communication Technology that involve some system design; and $1 million for disposal activities.[21]

2.23 A number of exemptions apply to the above requirements, most notably that provided in the Regulations, which empowers a Chief Executive Officer to exempt a specific procurement decision from the requirements imposed by the two higher thresholds, that is to seek three written quotes where a purchase is valued at more than $25 000 or to go to public tender above a value $200 000.

2.24 The Chief Executive must have '…reasonable grounds *[for believing]* that the benefit of the exemption outweighs the benefit of compliance with the requirement'.[22] The Regulations give some examples of what might constitute reasonable grounds, for example where, for technical reasons, there is only a limited number of suppliers or where time pressure makes it impossible to seek public tenders.

2.25 The Auditor General's submission expressed some reservations about the use of single or select tender processes:

> While there might be a merit to adopt such select tender process …decisions on single select process without sound justifications could lead to higher costs in the long run as projects do not achieve the intended outcomes.[23]

2.26 In evidence at a committee hearing, the ACT Audit Office acknowledged that the use of restricted tenders was '…an area we are interested in', noted that

---

[21] ACT Government, *Purchasing Guide,* Version 3, May 2009, pp. 3–4.
[22] *Government Procurement Regulation 2007*, s.10.
[23] Submission No. 16, ACT Auditor-General, pp. 4–5.

the Chief Executive's decision was not a public document, and commented that:

> Documentation is king for us. So we look for that and we need to see that the *[decision]* is well supported. The decision needs to be made and needs to be documented…And if we do not have that documentation then we are left with the position of trying to form a judgement, obviously, on that basis.[24]

2.27 The Auditor-General commented that:

> …when that practice of a select tendering process is used more often than an open tendering process, that is when you start to worry about the misuse of the select tender process. So some information regarding the percentage of select tender processes compared to open tender processes would increase that transparency.[25]

2.28 The Committee has been advised by ACT Procurement Solutions that contracts awarded through a restricted tender process are subject to the legal requirements for notifiable contracts and are, therefore, available for public scrutiny.

2.29 A search of the ACT Government Contracts Register showed that 150 select contracts, of which 56 were single select, were entered into in the year ending 30 June 2009 out of a total of 610 contracts registered in that year.[26] However, there is no requirement for agencies to report on the number of times they make use of exemptions from the tendering requirements or to publish the Chief Executive's reasons for doing so. The Committee believes that to increase transparency both the number of exemptions and the reasons for them should be made public.

RECOMMENDATION 4

2.30 **The Committee recommends that the *Chief Minister's Annual Report Directions* be amended to require agencies to include a statement in their annual reports indicating the number and value of contracts that have been let under an exemption from the Government Procurement Regulation 2007.**

---

[24] Mr Rod Nicholas, Director, Performance Audits and Corporate Services, ACT Audit Office, *Transcript of evidence*, 1 April 2010, p. 83.

[25] Mrs Tu Pham, ACT Auditor-General, *Transcript of evidence*, 1 April 2010, p. 84.

[26] http://www.contractsregister.act.gov.au/contracts/cr.nsf/?Open—accessed 21 April 2010.

2.31 The Committee notes that the reasons for an exemption may contain commercially sensitive or damaging information, for example adverse comments on particular businesses, which it would not be desirable to publish. When reasons are put on the public register they should be subject to the same processes that allow commercially sensitive information to be removed from contracts prior to inclusion in the register.

RECOMMENDATION 5

2.32 **The Committee recommends that the Chief Executive's reasons for exempting a procurement from the requirements of the Government Procurement Regulation 2007 be included with the contract in the Notifiable Contracts Register. This procedure should be consistent with the current processes for dealing with commercially sensitive information.**

Comment on ACT Government procurement processes

2.33 In commenting on the ACT Government's procurement processes, the Property Council of Australia, in its submission, specifically supported:

- a centralised model for procurement governance
- a centralised model for the purchasing of government goods and equipment with appropriate exceptions where properly required
- the efficiencies created by procurement based on pre-qualification which, if better practices were employed, result in fairer industry costs
- the centralisation of procurement skills, although processes and methods need to be updated, and
- recent process improvements adopted by ACT Procurement Solutions (ACTPS) such as the Call Tender Schedule and Procurement Threshold Review.[27]

---

[27] Submission No. 8, Property Council of Australia, p. 4. The Property Council of Australia does make a number of recommendations for changes to procurement processes.

2.34 Government procurement has become a progressively more tightly regulated and scrutinised activity in the last decade and efforts to ensure efficiency, integrity and accountability have, inevitably, led to more complex processes. This in turn has given rise to complaints that processes are unwieldy, favour established suppliers, and can make it difficult for new entrants, particularly small businesses, to compete successfully. These comments are not without substance and are examined below. However, it must be acknowledged that, overall, processes that meet the tests of integrity and accountability, particularly with regard to high value tenders, inevitably, will be onerous.

2.35 It was put to representatives of ACT Procurement Solutions that procurement processes in the ACT were unduly demanding compared with other jurisdictions. In response it was stated that ACT processes are not dissimilar from other jurisdictions and that, in terms of 'onerousness' the ACT was in about the middle of the table. With regard to moving to a lower level, the Executive Director of ACT Procurement Solutions commented that:

> I am not sure whether we should be aiming to be at the lowest level. It is basically a case of ensuring that we manage the risk to the *[T]* territory in terms of the money that we are helping to manage…[28]

2.36 ACT Procurement Solutions is a third-party quality assured organisation subject to processes of constant review and improvement. In evidence to the Committee it was explained that internal audit teams examine:

> …what project officers actually do with regard to individual procurements and delivery of those procurements. We also have an external auditor that comes in and does a review of the system that is operating as well as individual projects that are delivered as part of that system.[29]

2.37 Extensive effort goes into developing and improving services. To make clear how decisions were arrived at and how future tenders might be improved, officers of ACT Procurement Solutions explained to the Committee the processes involved in providing feedback to individual tenderers. As areas for improvement are identified and implemented, liaison with peak bodies in

---

[28] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 50.

[29] Mr David Evans, Acting Director, Infrastructure Procurement Group, ACT Procurement Solutions, Committee transcript, *Transcript of evidence*, 30 March 2010, p. 49.

the business community such as the Master Builders Association, the Civil Contractors Association, and the Australian Information Industry Association are also an important part of the quality improvement process.[30]

2.38 An example of the improvements made in response to business comments has been the removal of the requirement that small businesses provide audited financial statements as part of tender. This was considered a costly and onerous requirement. ACT Procurement Solutions is now looking at other options, for example, obtaining the information only from preferred tenderers later in the process.[31]

2.39 The Committee strongly supports this process of continuous improvement based on consultation with business and other client stakeholder groups.

2.40 The ACT Government's submission to the Committee stated that the '…procurement framework and practices do not favour certain market segments over others' and stressed that the procurement principles in the Act precluded any bias in favour of particular groups. The ACT is further constrained by the requirements of various free trade agreements. That with the United States requires all jurisdictions to cease any preferential practices contrary to the terms of the agreement. [32]

2.41 The Government submission argued that within those limits it '…does assist local industry to do business with the Territory' and cited as examples of this assistance, regular meetings with peak industry bodies, information sessions and forums, pre-tender consultation with industry, the Call Tender Schedule and support for the Industry Capability Network (ICN) which seeks to promote and introduce '…local business capability to project proponents, prime contractors and buyers'.[33]

---

[30] *Transcript of evidence*, 30 March 2010, pp. 48–51.
[31] *Ibid.*, pp. 49–50.
[32] Submission No. 12, ACT Government, pp. 9–10.
[33] *Ibid.*, p. 9.

Cost of ACT Procurement Solutions' services

2.42 The Property Council of Australia's submission to the Committee raised the issue of the charges levied by ACT Procurement Solutions for use of its services. The Council stated that ACT Procurement Solutions currently charges other agencies in the range of 4 to 5 per cent of project costs for the use of its services. This is contrasted with industry averages of 1.5 to 3.5 per cent depending on the size of the project.[34]

2.43 In response, ACT Procurement Solutions stated that the figure is 4 per cent but on large projects is reduced by negotiation to as low as 2 per cent. This range is comparable to charges levied by agencies performing a similar range of functions in other jurisdictions. It was further pointed out that ACT Procurement Solutions' services extend far beyond typical project management services:

> …including project management right through to the end of the defects liability period (12 months from practical completion), approvals, contract formation, payment of claims, management of performance, IT expenses, advertising, prequalification system costs, etc..[35]

2.44 The Council further stated that many ACT agencies:

> …in addition to the mandatory engagement of ACT P*[rocurement]* S*[olutions]*, engage private project management consultancies to assist and oversee the project …almost acting as the program manager/project manager/client representative.[36]

2.45 It is suggested that this is an unnecessary additional cost, to a large extent duplicating the role of ACT Procurement Solutions. The Property Council of Australia has argued that, to avoid duplication and impose some competitive pressure on ACT Procurement Solutions:

> Independent Project Managers should be allowed to compete with ACTPS in assisting ACT Government Departments and agencies prepare business cases and in managing the design, supervision and close out of projects.[37]

---

[34] Submission No. 8, Property Council of Australia, p. 9.
[35] Letter to the Committee Secretariat, 7 June 2010.
[36] Submission No. 8, Property Council of Australia, p. 9, paragraph 3.4.2.
[37] *Ibid*., p.10, paragraph 3.4.2.

RECOMMENDATION 6

2.46 **The Committee recommends that the ACT Government review the place of independent project managers in the ACT procurement process.**

Alternative approaches to procurement

2.47 The Property Council of Australia was critical of the outcomes achieved by a number of significant capital works projects in the ACT which were characterised by cost-or time-overruns or reductions in scope. It argued that the managing contractor approach used by the ACT, '…can result in the ACT Government taking on a disproportionate amount of the projects *[sic]* risk associated with scope, time and cost'.[38]

2.48 Further, the Council suggested that the Territory should be more open in its approach to this type of procurement:

> Alternative procurement and delivery methods including P*[ublic]* P*[rivate]* P*[artnership]*, P*[rivate]* F*[inance]* I*[nitiative]*, Alliance, Head Contractor, Managing Contractor, Construct only contracts should be better understood and embraced to deliver the right outcomes and to better apportion risks…[39]

2.49 The Committee notes that ACTEW Corporation Ltd, a wholly owned Territory corporation, is exempt from the requirements of the Government Procurement Act. ACTEW is using the alliance approach in constructing the major water security projects, including the building of the new Cotter Dam wall, and the Murrumbidgee-Googong pipeline.

2.50 Alternative procurement and delivery methods have a number of advantages for the public sector. This includes: (i) providing capacity and flexibility throughout the delivery of a project to assist with addressing unforseen issues as they arise, (ii) contributing to cost savings, and (iii) assisting with the delivery of technically complex projects. The literature suggests that a barrier to the implementation of these methods/techniques has been the

---

[38] Submission No. 8, Property Council of Australia, p. 10, paragraph 3.5.
[39] *Ibid.*, p. 9, paragraph 3.4.1.

slowness of the public sector to endorse them for infrastructure procurement.[40]

2.51 The Committee is of the view that ACT Government agencies should have greater scope to choose alternative procurement and delivery methods where such methods are in the public's interest and do not diminish competition or encourage favouritism.

RECOMMENDATION 7

2.52 **The Committee recommends that the ACT Government review its procurement system with a view to the suitability of a range of procurement approaches.**

[40] Abramson, M.A. & Harris, R.S. (eds.) (2003) *The Procurement Revolution*, IBM Endowment for the Business of Government, Rowman and Littlefield Publishers Inc., Maryland.

3 THE TENDERING FRAMEWORK

The tendering process

3.1 The most common complaint about the ACT's procurement process is that it is unduly onerous and complex for small and medium sized businesses. The submission from the Housing Industry Association (HIA) expressed this view clearly:

> …a large number of potential local suppliers do not have the same opportunity to compete for government business as they do not have a proper understanding of procurement or adequate internal resources to enable them to meet and satisfy the requirements that exist under this process.[41]

3.2 The HIA characterised the ACT's system as a:

> …one size fits all approach that is skewed towards larger businesses that have unlimited resources, and familiarity and experience in the procurement process…*[which]* only serves to exclude small to medium sized businesses in relation to small commercial and residential projects or maintenance projects that are government funded.[42]

3.3 In evidence, specific complaints received went to inaccessibility of information and documentation on tenders and '…practices that work against fair access for small and medium enterprises such as excessive professional indemnity and public liability insurance…'.[43]

3.4 Complaints that tendering processes favour established contractors and larger businesses are common, and to a degree, inevitable. The resources required to put together a tender will be more readily available to larger businesses and, once a business has successfully navigated the process, subsequent tenders will be easier and consume less time and fewer resources. Economies of scale also encourage the use of large contracts rather

---

[41] Submission No. 2, Housing Industry Association (HIA), p. 1.
[42] *Ibid.*, p. 1.
[43] *Ibid.*, p. 2.

than a number of smaller contracts that may be more readily accessible and manageable by small business.

3.5 The Director of ACT Procurement Solutions, made the point that:

> Small businesses engage with the *[T]* territory often as subcontractors to other head contractors because, other than consultancy services, we do not often buy the kinds of services that very small or micro-businesses actually supply.[44]

3.6 Thus the Committee, while not disputing the points made by the HIA, does not view them as evidence of any deliberate bias within the procurement system. What is required is an intensification of the efforts already being made by ACT Procurement Solutions to simplify processes, particularly the documentation required from tenderers, and to educate and assist small business in navigating those processes.

3.7 More generally, the ACT makes extensive use of pre-qualification schemes and panel contracts to reduce the burden on suppliers. Pre-qualification allows the Territory to 'filter' potential tenderers and, at the same time enables tenderers to register their interest with a minimum of paper work. ACT Procurement Solutions can assess the compliance of potential tenderers with a range of criteria including: financial viability; compliance with ACT laws; and environmental management. Pre-qualification applies to a range of activities, most particularly in the construction sector.

3.8 Similarly, panel contracts require a supplier to tender only once, for inclusion on the panel. When a panel is established territory agencies can purchase goods and services from any supplier on the panel. Panel contracts can run for several years.

---

[44] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 50.

ICT tenders

3.9 Information and communications technology (ICT) is a sector characterised by many small and independent contractors. An independent Information Technology professional[45], provided specific examples of inadequacies in the ACT's online tender system which imposed a burden on the small-scale contractor:

> …the ACT system every week sends me a notice saying that there are new ACT government tenders that I can apply for. But it does not say what they are. …I then have to hunt around to see if there is anything relevant and to get a particular tender document I have to *[type]* in my ABN and all my details over and over again.[46]

3.10 This was contrasted with the Commonwealth and New Zealand systems which allow the user to register company details and particular areas of interest and to access documentation with one click without the necessity of repeatedly providing details.[47]

3.11 The individual IT professional, echoing the comments of the HIA quoted above, also described the procedures surrounding public indemnity insurance, which he is required to have, as a problem for micro businesses, involving the need to produce a statutory declaration of his income counter-signed by an auditor and an accountant. He also argued that the indemnity amount was set at an unrealistically high level for a one-person business.[48]

3.12 In response to questions from the Committee, ACT Procurement Solutions outlined a number of steps being taken to streamline procedures with regard to ICT, in particular the implementation by InTACT, the ACT Government's ICT service provider, of panel arrangements for consultant services.[49]

3.13 Further, in evidence, an official from ACT Procurement Solutions advised:

---

[45] Mr Tom Worthington, *Transcript of evidence*, 4 March 2010 and Submission No. 4, Mr Tom Worthington.

[46] Mr Tom Worthington, *Transcript of evidence*, 4 March 2010, p. 2.

[47] *Ibid.*, p. 2.

[48] *Ibid.*, pp. 4-6.

[49] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 50.

> I would like to give another example of feedback from industry and how we have adjusted our processes and practices. From a workshop we had with ICT companies late last year, we went through different statements of requirements that they brought to show us which had been used in other jurisdictions. We also tabled quite a wide selection of ones we have used in the ACT. We went through with that sample of companies how we might improve the statements of requirements and improve the selection criteria. We came out of that half-day workshop with about 10 key areas in which we were going to improve things.[50]

RECOMMENDATION 8

3.14 **The Committee recommends that ACT Procurement Solutions engage specifically with representatives of micro, small and medium sized businesses to refine procurement processes to ensure that they are accessible to that sector.**

RECOMMENDATION 9

3.15 **The Committee recommends that ACT Procurement Solutions investigate the viability of adopting the Commonwealth's online tender system or modifying its own system to provide a similar targeted service to users.**

3.16 Evidence received from two individuals drew the Committee's attention to the work being done by the Commonwealth Government to develop a whole-of-government ICT sustainability plan which is in its final stages.[51] Both recommended that the ACT adopt the Commonwealth's standards.

3.17 Subsequent to the evidence received, the ACT Legislative Assembly passed a motion[52] calling on the ACT Government to:

- commit to measuring its ICT impact environmental impact
- expedite the ICT sustainability plan, including consideration of life cycle impacts of ICT

---

[50] Ms Catriona Vigor, A/g Director, Goods and Services Procurement and Policy, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 49.

[51] Submission No. 4, Mr Tom Worthington and Submission No. 13, Mr Peter Bell.

[52] ACT Legislative Assembly, *Minutes of Proceedings No. 76*, Wednesday 22 September 2010, pp. 892–893.

- commit to considering all the actions in the Australian Government's ICT Quick Wins paper
- commit to making data available on relevant government websites as soon as it is advertised in the media and to ensuring that information is in all appropriate formats and retained while useful to the community
- develop a policy to encourage appropriate telecommuting and teleconferencing, and
- report back to the Assembly on these issues by 30 March 2011.

Tendering and the community sector

3.18 In recent years there has been a transition from direct grant funding to tendering for service provision as the basis for providing government funding to community organisations. In its submission to the Committee, the ACT Council of Social Service (ACTCOSS) commented that:

> Increasingly, *[ACT]* Procurement Solutions is playing a greater role in the provision of tenders and contracts for community sector services, such as Home and Community Care (HACC) and disability services.[53]

3.19 The shift from grant funding to tendering for service provision has introduced an additional layer of government into established relationships between community sector organisations, and the departments which have direct responsibility for the particular services, with which community organisations have normally had extended working relationships and a level of mutual understanding.

3.20 ACTCOSS identified the most significant roles of ACT Procurement Solutions as drafting tender documentation and participating in tender evaluation panels and expressed some concern that ACT Procurement Solutions was insufficiently attuned to the work of the sector to fulfil these roles. ACTCOSS also commented that:

---

[53] Submission No. 1, ACTCOSS, p. 3.

- the work carried out by ACT Procurement Solutions sometimes prolongs the tender process due to the additional steps in the development of the tender, and
- the value that ACT Procurement Solutions can add to the procurement process is limited by their knowledge of the work being tendered for.[54]

3.21 The ACT branch of National Disability Services (NDS) also commented on the difficulties its member organisations experienced in dealing with tender processes. NDS was concerned that these processes fail to take into account the limited resources (of funds, time and staff) available to community sector organisations. It also identified the lack of adequate time to respond to tender requests and the tendency for tender requests to fall within a relatively short time period, which imposes considerable strain on organisations' capacity to respond, as significant problems.[55]

3.22 A further issue identified by NDS was that its member organisations had, on occasion, experienced some difficulty in getting answers to questions about tenders from the responsible agencies, nor had closing dates for tenders been extended to allow answers to be received.[56]

3.23 Clearly there is a need for improved communication and consultation between the community sector and ACT Procurement Solutions to ensure that the sector has a better understanding of ACT Procurement Solutions' processes and, at the same time, that ACT Procurement Solutions understands the unique characteristics of the sector, its needs and capacities. The Committee notes that NDS has already organised one information session for its members with ACT Procurement Solutions in March of this year.[57]

---

[54] Submission No. 1, ACTCOSS, pp. 2–3.
[55] Submission No. 14, National Disability Service (NDS ACT), pp. 1-2.
[56] *Ibid*.
[57] *Ibid*., p. 1.

RECOMMENDATION 10

3.24 **The Committee recommends that ACT Procurement Solutions liaise with peak bodies in the community sector and organise regular briefing sessions on procurement to assist the sector in understanding processes and to give the sector early advice of forthcoming opportunities. ACT Procurement Solutions should also work with purchasing agencies to seek to schedule tenders to avoid significant numbers of tenders falling within limited time periods.**

3.25 NDS also suggested that the demand on community sector agencies would be reduced if pre-qualification and/or panel arrangements were extended to this sector. This would enable organisations to submit one detailed application to be put on a panel of qualified service providers and remove the need for detailed responses to each tender request.[58]

RECOMMENDATION 11

3.26 **The Committee recommends that ACT Procurement Solutions, in conjunction with peak bodies in the community sector, investigate the feasibility of greater use of pre-qualification and panel arrangements for procurements involving community sector service providers.**

3.27 The Committee notes that following the ACT Government's announcement of its intention of '…changing its tender process to favour organisations that employ people with disabilities and the long-term unemployed',[59] the demands from community sector organisations for simpler and more accessible tendering processes is likely to increase.

---

[58] Submission No. 14, National Disability Service (NDS ACT), p. 3.

[59] Mr Jon Stanhope MLA, Chief Minister Media release: 'Government tenders to favour employers of people with disabilities', 10 June 2010.

Contract management

3.28 An issue that received some prominence in the Committee's inquiry was the management of contracts with regard to ensuring that employee entitlements were properly met and also that OH&S requirements were complied with. Matters put to the Committee related mainly to capital works projects, for which ACT Procurement Solutions is the contract manager.[60]

3.29 UnionsACT and, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), provided a number of examples to the Committee. UnionsACT quoted the Government Procurement Act on the need to achieve the best value for money, having regard to probity and ethical behaviour, which:

> …from an industrial perspective means paying employees according to recognized industrial instruments such as an award or an enterprise bargaining agreement and not an Australian Workplace Agreement (which is no longer a lawful instrument). It also means paying appropriate superannuation contributions and workers' compensation premiums for employees. Ethical behaviour and probity also includes paying any subcontractors who complete work for the lead contractor.[61]

3.30 The CFMEU submission commented on 'Sham contracting *[which]* is responsible for workers compensation under-insurance, tax avoidance (income and payroll), underpayment and non-payment of wages, entitlements and superannuation'.[62] The CFMEU's submission said:

> The level of non-compliance with ACT and Commonwealth legislation on ACT Government funded building sites is appalling and the government needs to take definite steps to improve the conduct in this vital industry.[63]

3.31 The CFMEU gave an example of a major ACT Government project where it was found that a work gang of foreign workers, provided by a body hire company, on a variety of visas—student and tourist visas for example—with

---

[60] ACT Procurement Solutions, *A Guide to ACT Government Procurement*, 2 March 2010, section 17, p. 8.

[61] Submission No. 5, UnionsACT, p. 2. It was noted at the Committee's hearings that the problem of failure to make progress payments to sub-contractors had been addressed in the *Building and Construction Industry (Security of Payment) Act 2009* which commences on 1 July 2010.

[62] Submission No. 7, CFMEU, p. 1.

[63] *Ibid.*, p. 2

extensive arrears of payment and no provision for statutory requirements such as superannuation, workers compensation insurance or long service leave.[64]

3.32 The Unions' complaints related both to consideration of companies' records during the tender process and to actual performance when discharging the contract.

3.33 ACT Procurement Solutions acknowledged that as part of the tendering process:

> …the *[T]*territory would want to know if there was a prospective tenderer …that was legitimately poor – had a poor industrial relations record. That would form a serious part of the tender evaluation because if they were continuously underestimating their worker comp or not joined up to the ACT long service leave board then that is quite a risk to the *[T]*territory…[65]

3.34 In the Committee's opinion, natural justice would require the company that was the subject of any such complaint to be advised and given an opportunity to respond.

3.35 The union representatives argued that too little was done to check that contractors and sub-contractors were meeting their legal obligations with regard to OH&S, superannuation, long service leave, and other entitlements, and that too much reliance was placed on paperwork. For example, contractors submit statutory declarations saying that payments have been made, but no systematic mechanism exists to actually confirm that that is the case.[66]

3.36 ACT Procurement Solutions recognised the problems and argued that, to the extent of its own responsibilities, it sought to ensure that contractors met their legal obligations. All contracts include clauses requiring compliance with applicable legislation. ACT Procurement Solutions also advises various regulatory authorities and UnionsACT of companies who have tendered for

---

[64] Mr Dean Hall, Secretary ACT Branch, CFMEU, *Transcript of evidence*, 4 March 2010, pp. 18–19. It should be noted that this particular case was not raised with ACT Procurement Solutions; refer to *Transcript of evidence*, 30 March 2010, p. 62.

[65] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 61.

[66] *Transcript of evidence*, 4 March 2010, pp. 17-21.

a particular project giving them an opportunity to raise any concerns about a particular company's record.

3.37 Representatives of ACT Procurement Solutions stressed that their contractual relationship was with the head contractor not with sub-contractors and any problems that arise are dealt with in that contractual relationship:

> We have a contract management issue in a contractual environment… We do not have regulatory environment to operate in.[67]

Further, ACT Procurement Solutions will also react to complaints but, as stated above, their relationship is with the contractor not the sub-contractors.

3.38 It was further pointed out that ACT 'Procurement Solutions is not a regulatory organisation'.[68] It relies on pre-qualification and undertakings from successful tenderers that they have the appropriate plans and structures in place to meet their obligations. Other than that it relies on contractors' undertakings that progress payments have been made to sub-contractors. In turn contractors are largely dependent on the assurances of their sub-contractors that their various obligations to their employees are being met.

3.39 In other areas—OH&S, long service leave or superannuation payments—ACT Procurement Solutions has a very limited role. Enforcement in those areas is the responsibility of agencies such as ACT Workcover and the ACT Long Service Leave Board. In the view of the CFMEU these bodies are under resourced and lack sufficient authority to discharge their responsibilities and are largely reactive[69]:

> …someone makes a complaint, that is generally how it is driven, because they do not have the resources to be proactive…[70]

3.40 It does appear to the Committee that there is a problem with the distribution of responsibility between the various bodies charged with investigation and enforcement. ACT Procurement Solutions acknowledged that, while it was often the recipient of complaints on these matters, it could, as a committee member put it, '…not actually do much with the information other than pass

---

[67] Mr David Evans, A/g Director, Infrastructure Procurement Group, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 59.

it on to someone that can deal with it'. The Executive Director of ACT Procurement Solutions responded 'Exactly' to this statement.[71]

3.41 The Committee is of the view that there is a need to ensure that complaints in these areas are followed-up in a timely manner and, if required, appropriate action taken.

RECOMMENDATION 12

3.42 **The Committee recommends that the ACT Government review the legal powers and resources of regulatory bodies such as ACT Workcover and the ACT Long Service Leave Board to ensure that these entities can discharge their responsibilities proactively.**

Once completed, the ACT Government should inform the ACT Legislative Assembly of the outcome of the Review.

Procurement training

3.43 The ACT Government's submission expressed a very strong commitment to '…developing the skills and knowledge base of its procurement staff'.[72] This is demonstrated by its participation in the National Procurement Capabilities Forum and its support for the creation of a degree level qualification in procurement. The Government also indicated that it commits '…substantial resources to providing a program of procurement training for its staff'.[73] Unfortunately the submission provided no information about the level of resources, the numbers participating in the program or the outcomes achieved.

3.44 An individual noted in his submission to the Committee that the Canberra Institute of Technology (CIT) is a leader in the field of e-learning and that

---

[68] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 57.

[69] Mr Dean Hall, Secretary ACT Branch, CFMEU, *Transcript of evidence*, 4 March 2010, p. 21.

[70] *Ibid.*, p. 23.

[71] *Transcript of evidence*, 30 March 2010, p. 61.

[72] Submission No. 12, ACT Government, p. 8.

[73] *Ibid*.

many nationally accredited courses in procurement were available.[74] He suggested that the ACT Government use this capability in its staff training.[75]

3.45 The Committee has stated elsewhere in this report that it is essential that procurement processes and practice are subject to constant review. As part of this program of continuous improvement the upgrading of staff skills and their awareness of developments in the field are essential. Thus training should be an ongoing part of the careers not only of ACT Procurement Solutions' staff but also of departmental and agency officers engaged in procurement.

RECOMMENDATION 13

3.46 **The Committee recommends that the ACT Government ensure that regular training is provided for all officers engaged in procurement activities on the latest developments in public sector procurement.**

Termination of tender processes

3.47 The Committee's terms of reference required it to consider the impact of the termination of tender process. However, both the ACT Government in its submission and ACT Procurement Solutions in evidence to the Committee indicated that this was a very rare occurrence.

3.48 The ACT Government stated that it was fully aware of the cost in time, effort and money to industry in putting in tenders and thus was extremely reluctant to cancel a process. This step is taken in only a very small proportion of cases and only for the most pressing of reasons. Cancellation is only considered when other possible responses to the problems with the process have been exhausted.[76]

---

[74] Submission No. 4, Mr Tom Worthington.
[75] *Ibid.*, p. 1.
[76] Submission No. 12, ACT Government, p. 15.

Waste management

3.49 The Committee received evidence from a number of witnesses relating to the management of the ACT's waste and recycling centres at Mitchell and Mugga Lane.[77] Waste management at these sites is operated by Theiss Australia under contract to the ACT. The resource recovery and recycling operations at these sites were, prior to 2007, sub-contracted to a community-based not–for–profit, company, Revolve. After a tender process in 2007 this contract was awarded to a company called Aussie Junk. This company has since gone into liquidation.

3.50 Two issues have been raised with the Committee. The first relates to the tender process which resulted in the transfer of the recycling and recovery contract from Revolve to Aussie Junk. Representatives of Revolve put it to the Committee that their business was independent of the ACT Government and that the Government had no right to put the business out to tender.

3.51 It was also argued by a representative of Revolve that the tender process was not conducted as required by the legislation and, specifically, that information with regard to Aussie Junk's breaches of OH&S requirements and failure to pay employee entitlements was ignored.[78] Various other assertions are made in Revolve's submission with regard to this tendering process and, more broadly, with regard to Theiss's relationship with the ACT Government's waste management administration.

3.52 The second set of claims related to Aussie Junk. Both the Revolve submission and that from Mr Winters,[79] a former employee of Aussie Junk, made claims about the treatment of staff of sub-contractors all of which involve breaches of various laws of the ACT. The Committee notes that the Fair Work Ombudsman has found that Aussie Junk was responsible for substantial under-payment of its employees.[80]

---

[77] Refer *Transcripts of evidence*, 4 March 2010, evidence of Mr Gillespie and Ms Hewitt, re: Revolve and 1 April 2010, evidence of Messrs J & J Winters re: Mitchell. See also Submission No's 6 and 11.

[78] Submission No. 6, Revolve, p. 2.

[79] Submission No. 11, Mr Jamie Winters.

[80] Fair Work Ombudsman, Media release: 'Recycling company underpaid workers almost $300 000, watchdog alleges', 10 June 2009.

3.53 In evidence to the Committee, Mr Winters made a number of claims in relation to operations at the Mitchell site concerning the management of staff. Mr Winters stated that Aussie Junk staff performed a whole range of tasks on the Mitchell site which properly fell within the Theiss contract.[81] Mr Winters also claimed that there was inadequate, or non-existent, training in the handling of dangerous materials and that serious non compliance among the workforce was ignored by the employer and the head contractor.[82]

3.54 The various claims made to the Committee go to matters of contract law, claims of breaches of the Trade Practices Act, the Procurement Act, and legislation in relation to OH&S and employees' entitlements.

3.55 It is not the role of Legislative Assembly committees to conduct forensic investigations or to make findings in regard to complex legal disputes. However, it does appear to the Committee that there is sufficient evidence—particularly the findings of the Fair Work Ombudsman in relation to the underpayment of Aussie Junk employees—to support the need for a comprehensive investigation of the whole operation and management of the Mugga Lane and Mitchell facilities.

3.56 The Committee notes that ongoing legal action exists and, subject to consideration of that legal action, is of the view that the contractual arrangements for the Mugga Lane and Mitchell facilities should be examined.

RECOMMENDATION 14

3.57 **The Committee notes that ongoing legal action exists and, subject to consideration of that legal action, recommends that the ACT Auditor-General conduct a broad ranging investigation of the allegations raised with regard to Aussie Junk's employment practices and the management of contractual processes for the letting of the leases for the Mugga Lane and Mitchell facilities.**

---

[81] Mr Jamie Winters, *Transcript of evidence*, 1 April 2010, pp. 90–91.
[82] *Ibid.*, pp. 91–91 and 96.

4 SUSTAINABIILITY CONSIDERATIONS

Sustainable procurement

4.1 The Bruntland Report, *Our Common Future*, defines sustainability as 'Development which meets the needs of the present without compromising the ability of future generations to meet their own needs'.[83] Essentially this requires the integration of environmental and social considerations on an equal footing with commercial and economic imperatives in decision making.

4.2 In a procurement context, the Australian Procurement and Construction Council refers to sustainable procurement as:

> …a process whereby organisations meet their needs for goods, works and utilities in a way that achieves value for money on a whole of life basis in terms of generating benefits not only to the organisation, but also to society and the economy, while minimising damage to the environment.[84]

4.3 According to the Westminster Sustainable Business Forum, the power 'of sustainability as a concept within procurement is its ability to encourage consideration of the environmental, social and economic aspects of any procurement'. As a consequence, it can offer decision makers the potential to determine 'what course of action offers the best value for money'.[85]

4.4 The procurement process does not change because of the application of sustainability criteria. As a general rule, the most common procurement model[86] is based on six phases:

---

[83] World Commission on Environment and Development 1987. http://www.swinburne.edu.au/ncs/whatissustainability.htm, accessed 8 June 2010.

[84] Sustainable Procurement Task Force (Commissioned by the United Kingdom Government), quoted in Australian Procurement and Construction Council, *Australian and New Zealand Government Framework for Sustainable Procurement*, APCC, Canberra, 2007, p. 5.

[85] Westminster Sustainable Business Forum (2008) Costing the Future: Securing Value for Money through Sustainable Procurement, p. 16.

[86] Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008) *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education; UK Sustainable Procurement Task Force (2006) *Procuring the Future.*

Table 4.1—Procurement phases[87]

Phase 1	Specify
Phase 2	Select
Phase 3	Contract
Phase 4	Order
Phase 5	Monitor
Phase 6	Support

4.5 The application of sustainability criteria requires them to be considered as part of the different phases of the procurement process. The potential to improve sustainability is greater at the earlier stages of the procurement process. Thus it is important that sustainability is considered early in the procurement process to avoid more constrained and expensive options that may result from its consideration at later stages.[88]

4.6 Sustainability criteria can be considered initially at the business case stage and then as part of the specification and selection phases. Importantly, when considering 'the different phases of the procurement process, the purchase is defined in terms of specification of what to procure, the selection of the right supplier, and the definition of the adequate procurement conditions'.[89]

4.7 At the business case stage, sustainability considerations can be introduced through the development of the general specification of the problem or the basic requirements. Further, at this stage there are opportunities to redefine organisational demand which can generate more sustainable solutions. For

87 Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008) *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education; UK Sustainable Procurement Task Force (2006) *Procuring the Future;* Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement.*

88 Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008) *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education; Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement.*

89 Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008) *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education, p. 25.

example, where an organisation is considering a new car fleet contract, this can provide the opportunity to mandate more fuel efficient cars but also to review the organisation's travel policy. A review of the travel policy can include questions such as what kinds of transport are available as an alternative to cars, such as buses, and whether some transport/travel requirements can be replaced with electronic communication and meetings.[90] This is also applicable to interstate travel—innovative use of technology, or incorporating time as a factor—for example, taking a bus to Sydney takes longer but allows time for working or laptop/reading papers, as compared to taxi/plane/taxi transit time.

4.8 The end result of the specification phase is a schedule of requirements which may include sustainability. In the case of building and construction this can include a requirement to ensure energy efficient design, the use of sustainable building materials and an 'ecological or biological sewage system'.[91]

4.9 At the selection phase, suppliers are evaluated against selection and awarding criteria. The selection criteria provides the opportunity to focus on the suppliers' organisation which can include, for example, sustainability criteria, such as efficient work practices, human rights principles, health and safety, and social responsibility etc.. As part of the award criteria, proposals are evaluated in terms of how they meet relevant social, economic and environmental requirements which have been included in the schedule of requirements. Methods which are used to integrate the consideration of sustainability into the evaluation of tenders include 'whole-of-life costing' and 'net present value'.[92]

---

[90] Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008) *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education; Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement.*

[91] Sustainable Build UK (2010), Sustainable Sewage Design; Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008), *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education; Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement.*

[92] Helmik, J., de Jong, M., & Frits Droge, I. (eds.) (2008) *Sustainable Procurement—A Thematic Review on Sustainable Procurement in Higher Education*, Dutch Network for Sustainable Higher Education;

4.10 The Committee is of the view that government procurement policies and practices can play a significant role in promoting sustainability. Further, given the size of public sector procurement, as noted previously, the purchasing power of government has the potential to act as a major influence on the development of more sustainable products and services.[93]

Sustainable procurement in the ACT

4.11 Sustainability is one of the key principles which must be adhered to in framing the ACT's Budget. Specifically, section 11 of the *Financial Management Act 1996* requires that the budget must be prepared taking into account:

> …
> (b) the object of providing a basis for sustainable social and economic services and infrastructure fairly to all ACT residents; and
> (c) the object of ecologically sustainable development.[94]

4.12 Ecologically sustainable development is defined as '…the effective integration of economic and environmental considerations in decision-making processes…' having regard to a number of principles including the intergenerational equity principle which is, itself, defined as:

> …that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.[95]

4.13 The ACT Government's submission stated that:

> For sustainability to be effectively achieved through procurement activities, it needs to be incorporated into the project requirements and anticipated project outcomes. Decisions regarding sustainability … are more easily achieved at the procurement stage when they have been considered in the preliminary planning.[96]

Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement.*

[93] Martin, L. (2008) 'Sustainable Government procurement—An assessment of current policies, practices and opportunities for improvement', Total Environment Centre.

[94] *Financial Management Act 1996,* s.11 (4) (b) & (c).

[95] *Ibid.,* s.11 (6).

[96] Submission No. 12, ACT Government, p. 6.

4.14 The procurement principles[97] set out in the Government Procurement Act do not specifically include sustainability as a factor to be considered in making a procurement decision. However, sub-paragraph (d) which requires consideration to be given to 'optimising whole of life costs' certainly provides an opportunity to integrate sustainability into the process. Sub-paragraph (a), which requires 'probity and ethical behaviour' also points towards adopting a sustainable approach to the use of public resources and having regard to the social and environmental impact of one's actions.

4.15 ACT Procurement Solutions has provided guidance on this subject in its Procurement Circulars which echo the principles (and language) of the Financial Management Act. In its circular, 'Optimising Whole of Life Costs', the focus is on commercial costs—acquisition, maintenance, operating costs, training and disposal.[98] The Circular also notes that 'Sustainability encompasses environmental, economic and social outcomes' and that 'Sustainability elements should be considered as part of the determination of whole of life costs'.[99]

4.16 Sustainability is further considered in a later circular, Sustainable Procurement.[100] This circular makes reference to the ACT Government's sustainability policy which identifies factors that decision makers need to take into account, such as:

- the importance of a healthy environment underpinning a productive economy
- the need to value and protect ecological integrity and biodiversity
- prudent use of resources
- applying the precautionary principle, and
- adopting a whole of life approach to projects.[101]

---

[97] Section 22A, *Government Procurement Act 2001*.

[98] ACT Procurement Solutions, Procurement Circular 2007/10, *Optimising Whole of Life Costs,* October 2007.

[99] *Ibid.*, p. 4.

[100] ACT Procurement Solutions, Procurement Circular, 2007/08, *Sustainable Procurement*, November 2007.

[101] *Ibid.*, p. 1.

4.17 Implementation of sustainability policies requires agencies '…to focus on aspects of proposals that give effect to these sustainability outcomes in advance of commencing the procurement process',[102] with the aim of obtaining:

> …products, services, building designs and construction that minimise waste, conserve resources, and protect society's health and the environment throughout the life cycle of the procurement.[103]

4.18 Thus to a large extent sustainability is the responsibility of individual agencies in developing their procurement proposals at the project initiation stage. This view is supported by the ACT Government's submission to the inquiry.

4.19 ACT Procurement Solutions can influence the process at the tender evaluation and contract management stages but it should not be seen as having to drive the process. A whole-of-government approach is necessary if sustainability considerations are to be properly integrated into procurement decisions.

4.20 The Sustainable Procurement Circular provides an extensive list of ACT Government policies and plans that should be considered when developing a project and also a range of labelling and certifying standards to guide purchasers towards environmentally responsible products and services.

4.21 As a final point, the Circular reminds agencies that they need to consider whether the procurement is really necessary or whether the outcomes sought may be achieved by other means.

4.22 Clearly the policy framework with regard to sustainability is excellent. However, the Committee received relatively little evidence on the actual outcomes achieved. The Property Council of Australia suggested that evaluation still focussed on financial cost considerations:

> The current approach of aiming to measure sustainability by adopting a whole of life costing exercise, is not appropriate in many instances and again leads towards a financial cost justification argument, avoiding evaluation of broader environmental and community benefits that could also be sought.[104]

---

[102] ACT Procurement Solutions, Procurement Circular, 2007/08, *Sustainable Procurement*, November 2007, p. 1.
[103] *Ibid.*, p. 2.
[104] Submission No. 8, Property Council of Australia, p. 12.

4.23 The Property Council of Australia recommended that the Procurement Act and Regulations be amended to make specific mention of sustainability and 'triple bottom line' accounting, that ACT public servants involved in procurement receive more training on the principles and practice of sustainability and that there be improved public reporting of outcomes.[105]

4.24 The Committee notes that whilst the policy framework with regard to sustainability is worthwhile, in the absence of clear sustainability criteria for assessing competing products and services and requiring assessment on the basis of triple bottom line impacts, price will continue to remain a dominant factor.[106]

4.25 The Master Builders' Association cautioned that increasing environmental demands in pursuit of sustainability objectives would come at a cost.[107]

4.26 Other submissions, for example ACTCOSS, commented on social tendering as an example of sustainable procurement. The Committee notes that in other jurisdictions the objectives of sustainability and social procurement are combined. For example, the Department for Families and Communities in South Australia operates a 'Social Responsibility in Procurement Policy' whose object is to:

> …guide the department towards socially and environmentally preferred products and services that enhance positive social or environmental outcomes.[108]

4.27 In the absence of detailed reporting on what is being achieved the Committee believes that it would be desirable to review a selection of recent procurements to evaluate their success in integrating sustainability considerations into the process.

4.28 Further, in the absence of clear guidance on how to include assessment of sustainability and other non price factors in the assessment of what constitutes value for money, it is unlikely that decisions which favour more

---

105 Submission No. 8, Property Council of Australia, pp. 12–13.

106 Martin, L. (2008) 'Sustainable Government procurement—An assessment of current policies, practices and opportunities for improvement', Total Environment Centre.

107 Submission No. 3, Master Builders Association of the ACT (MBA-ACT), p. 2.

108 Government of South Australia, Department for Families & Communities, *Social Responsibility in Procurement*, May 2007.

costly products and services on the basis of superior sustainability credentials will be able to be justified. As a consequence, financial cost considerations will continue to have priority over sustainability considerations.[109]

4.29 The Committee is aware that the Total Environment Centre has assessed policies, practices and opportunities for improvement of the sustainability aspects of government procurement across Australia, including the ACT. The report, *Sustainable Government Procurement—An assessment of current policies, practices and opportunities for improvement*, was released in April 2009.[110]

4.30 The Report noted that the ACT has:

> …no specific requirement to select goods and services on the basis of triple bottom line impacts. In the absence of such requirements or guidance it is likely that price will remain a dominant factor.[111]

4.31 Further, the Report also noted that: 'lack of reporting requirements... is a weakness of current procurement policies', which 'should be addressed by requiring agencies to report on the compliance with sustainable procurement requirements'.[112]

RECOMMENDATION 15

4.32 **The Committee recommends that the *Chief Minister's Annual Report Directions* be amended to specify that ACT Government agencies are to report on compliance with sustainable procurement requirements.**

---

[109] Martin, L. (2008) 'Sustainable Government procurement—An assessment of current policies, practices and opportunities for improvement', Total Environment Centre; Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement.*

[110] Total Environment Centre Inc. (2009) *Sustainable Government Procurement—An assessment of current policies, practices and opportunities for improvement*, April, <http://www.tec.org.au/recent-tec-reports>

[111] *Ibid.*, p. 8.

[112] *Ibid*.

Assessing sustainability impacts

4.33 The book *Cradle to Cradle*[113] looks at the life cycle impacts of production of a broad range of products (cited by Ecospecifier in its submission[114]). Some of the considerations of whole-of-life cycle impacts include:

> In general terms it relates to products that not only:
>
> - are not harmful ecologically (cradle to grave);
> - require minimal maintenance in use;
> - don't cause human illness;
> - minimise resource demand because they are:
>   - salvaged, or contain recycled materials;
>   - reusable or recyclable with minimal additional energy or processing;
>   - designed for Disassembly (DfD);
>
> but are also:
>
> - durable & low maintenance;
> - minimise resource demand e.g. energy, water, rare and non-renewable resources;
> - use renewable resources;
>
> and come with manufacturer:
>
> - extended responsibility commitments, and
> - corporate social responsibility reporting.[115]

4.34 Some of the above considerations may not seem linked to important procurement outcomes. However, the larger impacts on the Government budget cannot be measured simply through the usual budget assessment process. For example, purchasing goods, services or works which don't cause human illness, or designing buildings which are sustainable and designed for cleaner air, have other measurable aspects, including increased productivity, increased workplace performance, and fewer sick days.

4.35 The refurbishment of the Sustainability Victoria's office building has provided a case study of this with significant measurable improvements, for

---

[113] McDonough, W. & Braungart, M. (2002) *Cradle to Cradle: Remaking the way we make things*, North Point Press, New York.

[114] Submission No. 10, Ecospecifier Pty Ltd.

[115] *Ibid*., p. 3.

example, the refurbishment project specified the selection of products with the lowest level of risk to employee health.[116]

Barriers to sustainable procurement

4.36 The Committee is aware that there can be significant barriers in the way of sustainable procurement, despite having good policies in place. These include:

Organisational barriers *[the need for/to]*

- clear and supportive green procurement and productivity policy;
- gain commitment for green procurement and productivity at senior levels;
- identify and support internal sustainability champion/s;
- increase understanding of issues;
- determine appropriate organisational structure and delegations; plus
- use change management processes to overcome:
  - intrinsic conservatism
  - automatic assumption of increased costs
  - identified sources of funding (if necessary)
  - perception that green 'is not a business concern'

Individual barriers

- Work to overcome
  - individual 'butt protecting'—fear of failure;
  - culture of conservatism;
  - lack of time (or will) to research alternatives;
  - bias in specifications towards 'tried and true';
  - over-focus on first cost not whole-cost;
  - specifications preclude innovative solutions;
  - perception that 'second hand is second class';
  - unwillingness to take responsibility for change;
  - lack of information or alternatives;
  - lack of credible eco-assessment of products.[117]

4.37 The Committee notes the findings of the Westminster Sustainable Business Forum inquiring into costing the future—securing value for money through sustainable procurement, that:

> …despite the enormous potential of whole-life costing as a tool for delivering sustainable procurement, it is poorly understood in the public sector and rarely

[116] Submission No. 10, Ecospecifier Pty Ltd, p. 2.
[117] *Ibid.*, p. 4.

applied. Government must ensure that whole life costing is implemented throughout public sector procurement.[118]

Transport considerations

4.38 Transport impacts should also be part of sustainability considerations. For example, if government contracts include delivery of products and services, there could be consideration of reducing the number of deliveries made, for example, specifying one stationery delivery per week, not daily.

4.39 There could also be consideration of purchasing from local suppliers to reduce transport fuel usage.

4.40 The Committee notes that there are many certifications, standards and ratings systems already in place that could assist with the assessment of triple bottom line impacts as part of procurement processes. Some of these are set out in the submission from Ecospecifier Pty Ltd.[119] A useful standard is the British Standards Institution whole-life costing standard which can be used:

> …as a means of assembling benchmark data to maximise the application and benefits of whole-life costing.[120]

Purchasing environmentally preferable goods, services or works

4.41 The Committee is aware that the Victorian State Government and Local Councils have ECO-Buy[121], an organisation which vets products suitable for procuring for all the Councils.

---

[118] Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement*, p. 2.

[119] Submission No. 10, Ecospecifier Pty Ltd.

[120] Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement*, p. 2.

[121] ECO-Buy, www.ecobuy.org.au, accessed 8 November 2010.

4.42 ECO-Buy Limited is a 'not for profit centre of excellence in environmental purchasing, established to encourage the purchasing of environmentally preferable (green) products and services'. ECO-Buy provides a wide range of services and resources, from policy and strategy development and implementation to practical tools, templates and advice.[122]

4.43 ECO-Buy has developed a Sustainable Procurement Assessment Tool[123] which measures an organisation's 'success in reducing the environmental, social and economic impact through green purchasing. It covers all aspects of green procurement, from policy to suppliers and is designed to be completed on an annual basis'.[124] ECO-Buy also offers regular sustainable procurement workshops and training sessions, which officers from ACT Procurement Solutions could attend.

Safety and social issues

4.44 In the context that sustainable procurement is concerned with 'incorporating an appreciation of the wider goals of society'[125] into procurement processes, safety and social issues are important considerations.

4.45 The Committee notes the suggestion from the CFMEU in its submission that social clauses should be included within construction contracts that require a percentage of labour to be filled by apprentices.[126] The CFMEU stated:

> We would further like to highlight the procurement policy that accompanies the federal governments Stimulus Package. This policy requires apprentices to make up at least 10% of the workforce on these projects. This policy also factors in the number of apprentices being used by a company when assessing the dollar value of their proposal.
>
> We would support the adoption of this policy in the ACT as it supports young Australians seeking to learn a trade, without disadvantaging businesses who

---

[122] ECO-Buy, www.ecobuy.org.au, accessed 8 November 2010.

[123] ECO-Buy, http://assessment.ecobuy.org.au/, accessed 8 November 2010.

[124] ECO-Buy, www.ecobuy.org.au, accessed 8 November 2010.

[125] Westminster Sustainable Business Forum (2008) *Costing the Future: Securing Value for Money through Sustainable Procurement*, p. 14.

[126] Submission No. 7, CFMEU, p. 1.

seek to invest in training. The monitoring arrangements within this policy are also noteworthy.[127]

4.46 Further, in relation to contract management, relating mainly to capital works projects, for which ACT Procurement Solutions is the contract manager, some submissions emphasised the importance of contractors complying with their legal obligations, in particular employee entitlements and OH&S requirements. This issue is discussed in detail under the section—Contract management.

4.47 The Committee notes the comments from Magistrate Shane Madden in handing down his findings on the collapse of the airport hangar at the RAAF base, Fairbairn, Canberra in 2005:

> Workplace safety must come before profit…[128]

RECOMMENDATION 16

4.48 **The Committee recommends that ACT Government agencies should be required to select goods, services and works on the basis of triple bottom line impacts. Guidelines should be developed to assess these impacts, including whole-of-life cycle impacts.**

RECOMMENDATION 17

4.49 **The Committee recommends that the ACT Auditor-General conduct a review of a selection of recent procurements to evaluate the influence that ACT Government sustainability policies are having on the procurement process.**

RECOMMENDATION 18

4.50 **The Committee recommends that explicit reference to sustainability, expressed in terms similar to those used in section 11 of the *Financial Management Act 1996*, be included in section 22A of the *Government Procurement Act 2001* as matters which must be considered in pursuing "…the best value for money" objective.**

---

[127] Submission No. 7, CFMEU, p. 1.

[128] McLennan, D. (2005) 'Two fined for $18 000 for airport hangar collapse', *Canberra Times*, 20 December.

RECOMMENDATION 19

4.51 **The Committee recommends that the ACT Government ensure that all officers engaged in procurement activities receive training on:**

(i) incorporating sustainability considerations into the request for tender development process

(ii) incorporating sustainability considerations into the tender selection process, and

(iii) engaging with suppliers on sustainability issues.

5 SOCIAL PROCUREMENT

5.1 Social procurement or social purchasing is concerned with factoring social value into procurement. This can be achieved by:

- offering tendering opportunities to businesses that demonstrate socially responsible practices, for example, fair pay for employees, equal opportunity employment practices and adherence to ethical practices
- securing social outcomes as part of the request for tender (RFT) development process via the inclusion of a community/social benefit criterion in the assessment of a procurement and as a clause in a contract that may follow. This can take the form of: (i) asking tenders to describe how they might promote un-specified social outcomes or benefits or (ii) developing assessment criteria that targets specific outcomes
- engaging a lead contractor who is then required to sub contract part of their work to social benefit organisations, and
- social tendering—which is a form of social procurement, in that the procurer directly sources goods and/or services from a 'social purpose business' or 'social enterprise'. This involves the negotiation of contract terms (using single select tendering) with a 'social enterprise' or 'social purpose business' as opposed to undertaking a competitive tender process.[129]

Implementing social procurement

5.2 Social procurement can be implemented in a range of ways. In evidence, the Committee heard about a number of practical examples utilising different approaches.[130] These include:

---

[129] ACT Procurement Solutions, Procurement Circular 2010/2, *Social Procurement*, June, 2010.

[130] Accessed 1 June 2010, <http://www.socialtraders.com.au/sites/www.socialtraders.com.au/files/Building%20Social%20Enterprise%20through%20Social%20Procurement.doc.pdf>

- specifying the social outcome required as part of an ordinary contract and following normal public tender procedures
- restricting tenders to defined social enterprises
- utilising single and select tender procedures
- providing a subsidy to agencies that give contracts to community-based groups in recognition of the social benefits that flow from social procurement[131]
- inserting community benefit clauses in contracts which specify that tenderers must meet certain social objectives, and
- purchasing under other arrangements such as MOUs between an agency and a community organisation.

5.3 From the point of view of transparent and competitive purchasing achieving the best financial outcome, the first option is to be preferred. If the social outcomes can be clearly defined (and that is, in itself, essential) they can be included in contracts and prospective suppliers can deal with them on the same basis as other contractual requirements.

5.4 The contractual relationship does not necessarily need to be with a community organisation. The tender documents can simply specify the desired outcome and commercial businesses can integrate that requirement into their proposal, often working in partnership with a community organisation.

5.5 An example provided to the Committee was of the Department of Human Services in Victoria which has a policy of stipulating that a proportion of the employees of businesses providing services such as cleaning to public housing be public housing tenants. Initially the arrangement described to the Committee was not subject to a tender process but had been undertaken through a direct agreement between the Department and the Brotherhood of

---

[131] In South Australia this process is used by the SA Housing Trust demanding social outcomes from successful commercial tenderers. A premium is paid to the successful tenderer from a separate arm of government.

St Laurence for the provision of concierge services to high rise public housing estates in inner Melbourne.

5.6 The original agreement was terminated in 2009 and the service put out to tender with the social objectives clearly set out in the tender documents. In summary the services required were:

> …neighbourhood services, intermediate labour market services, controlling building access, assisting with community events and community facility management.[132]

5.7 The successful tenderer was a not-for profit community service. However, a private security firm also tendered for the work and integrated the social objectives into their tender.[133] Evidence to the Committee suggests that the success of this approach relied heavily on the earlier non-competitive stage where the capacity to provide the service had been built up.

Social procurement in the ACT

5.8 Social procurement as part of government procurement in the ACT can only be described as being at a very early and tentative stage. A social enterprises hub already exists as a cooperative venture between Social Ventures Australia, ACT Health, Disability ACT, PricewaterhouseCoopers, the Snow Foundation and the Mental Health Foundation. The primary purpose of the hub is to support the development of social enterprises which provide opportunities for productive employment of people with disabilities or mental health issues. The hub works through providing advice, developmental support and funding grants to assist social ventures.[134]

5.9 Representatives of the ACT's Department of Disability, Housing, and Community Services acknowledged that the types of ventures being supported by the hub had little to do with government procurement at this

---

[132] Mr Mark Daniels, Manager, Policy and Development, Social Traders, *Transcript of evidence*, 29 April 2010, p. 127.

[133] *Ibid.*, p. 127.

[134] Ms Lois Ford, Executive Director, Disability ACT, DHCS, *Transcript of evidence*, 29 April 2010, p. 140 and pp. 147–148.

stage. However, the potential is there once ventures that can provide services to government are established and competitive.[135]

5.10 Of more immediate relevance to social procurement, the Committee heard of cooperative work being undertaken by Disability ACT and ACT Procurement Solutions to develop:

> …a range of tools to work with ACT *[G]*government departments to assist them to identify …a social enterprise opportunity within their own department and also how they can include that within their tendering…[136]

5.11 ACT Housing is also moving, again tentatively, in a similar direction to the Victorian Department of Human Services. Its contract with Spotless, its facilities manager, includes an 'aspiration' to work towards the employment of public housing tenants and indigenous Australians.[137]

5.12 In answer to a question taken on notice, the Minister for Disability, Housing and Community Services, Ms Burch, provided further details. A variation to the Total Facilities Management contract with Spotless has set targets for employment of ten public housing tenants, four Aboriginal and Torres Strait Islanders and three people with disabilities.[138]

5.13 The three main avenues currently being pursued for encouraging social procurement in the ACT are utilising the existing procurement processes by including targets for social outcomes in ordinary contracts, utilising select tenders and supporting social enterprises through grants and other assistance.

5.14 The last of these does not, strictly, come within the ambit of social procurement. However, as noted above successful social procurement through ordinary procurement processes is the culmination of a series of stages moving from wholly supported schemes to develop capacities and skills through to self-sustaining commercially competitive operations.

---

[135] *Transcript of evidence*, 29 April 2010, p. 147.

[136] Ms Lois Ford, Executive Director, Disability ACT, DHCS, *Transcript of evidence,* 29 April 2010, p. 140.

[137] Ms Maureen Sheehan, Executive Director, Housing & Community Services, DHCS, *Transcript of evidence,* 29 April 2010 , pp. 140–143.

[138] Minister for Disability, Housing and Community Services, Response to QToN at public hearing of 29 April 2010, 27 May 2010.

5.15 There are in fact no structural impediments to the implementation of social procurement within the ACT system. The discretionary power given to Chief Executives enables them to use single or restricted tender processes if they so wish and, where social objectives are to be achieved through ordinary contract arrangements, it is simply a matter of including the appropriate conditions in tender and contract documents.

5.16 The success of social procurement requires an explicit commitment from government and a clear policy framework. Thus the Committee welcomes the statement by the Chief Minister on 10 June 2010 that:

> ACT Government departments and agencies must consider the social benefits of awarding contracts to such organisations alongside some of the more competitive requirements.[139]

5.17 Further detail on the explicit social procurement commitment and its policy framework is discussed in the next section.

ACT Government's new commitment to social procurement

5.18 During the course of the Committee's inquiry, the Government announced that it was changing its tender processes to favour organisations that employ people with disabilities and the long term unemployed.[140]

5.19 In announcing the new commitment, the Chief Minister stated:

> This ACT Government initiative aims to break down some of the barriers faced by people with disabilities wanting to enter the workforce by making it easier for organisations that employ people with disabilities to win Government contracts. The changes will mean that ACT Government departments and agencies must consider the social benefits of awarding contracts to such organisations alongside some of the more competitive requirements.[141]

5.20 The Committee was interested to explore the detail of this commitment and

---

[139] Mr Jon Stanhope MLA, Chief Minister Media release: 'Government tenders to favour employers of people with disabilities', 10 June 2010.

[140] *Ibid*.

[141] *Ibid*.

relevant departmental officials appeared at a public hearing[142] to discuss the announcement by the Chief Minister.

5.21 Whilst the Chief Minister's announcement specifically referred to social tendering, which is a form of social procurement, the Committee understands that the ACT Government's new commitment is concerned with a broader policy statement on social procurement, of which social tendering is one option for adding social value as part of the procurement process. The Executive Director of ACT Procurement Solutions told the Committee:

> We have started off with the preparation, in the first instance, of a policy statement. The procurement regime within the ACT already allows, and is broad enough to allow, the inclusion of social tendering, social procurement and the engagement of social enterprises.[143]

5.22 The Committee inquired as to the driver of the new commitment and was told that:

> The *[G]*government was asked about this by the commonwealth department…Min*[i]*ster Shorten's *[D]*department. He wrote to the Chief Minister seeking the ACT's agreement to allow direct tendering to disability enterprises. As I said, the ACT regime already allows that kind of treatment of a social tendering enterprise within a value for money context.
>
> However, the Chief Minister considered then that it was necessary perhaps for the ACT government to make a broader statement about the inclusion of social procurement and social enterprises. Hence, *[P]*procurement, the Department of Disability, Housing and Community Services and Mental Health got together and produced the policy document and the circular which was then articulated.[144]

5.23 At present, ACT Government agencies do support social procurement in an *ad hoc* way, largely driven by the interest and enthusiasm of individuals or agencies. The Committee believes that the objectives of social procurement be explicitly included in the matters to be considered in making procurement decisions set out in section 22A (3) of the Procurement Act.

---

[142] 10 August 2010

[143] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, p. 152.

[144] *Ibid*.

RECOMMENDATION 20

5.24 **The Committee recommends that section 22A (3) of the *Government Procurement Act 2001* be amended to include a new subparagraph stating that entities, in making purchasing decisions, must have regard to the potential social benefits that may flow from the decision and the potential of the community sector to deliver a service, or component of a service, being sought by the entity.**

5.25 To encourage social procurement in the ACT (and to assist the private sector in utilising its capacity as well) the Committee supports the collection of baseline data on the number and type of social enterprises operating in the ACT.

RECOMMENDATION 21

5.26 **The Committee recommends that the ACT Department of Disability, Housing and Community Services undertake a study of the community sector in the ACT and develop a guide to the type and number of social enterprises operating in the territory. This could include the development of an ACT Register of Social Enterprises.**

5.27 The Committee also believes it would help to promote the community sector, and assist both the ACT Government and the community generally, if the *Chief Minister's Annual Report Directions* included a list of social procurement initiatives entered into by the reporting agency.

RECOMMENDATION 22

5.28 **The Committee recommends that the *Chief Minister's Annual Report Directions* be amended to include a requirement for reporting entities to include a list of social procurement contracts and agreements entered into by the entity.**

Lead agencies involved in new social procurement policy commitment

5.29 On the basis that a new policy commitment had been formulated and articulated, the Committee sought clarification on the lead agencies involved in its development and whether this had included public consultation. An official from ACT Procurement Solutions stated:

> …Procurement Solutions had carriage of the policy. Basically it was just consultation with Disability ACT and the mental health policy unit in ACT Health—seeking comments and input on the policy.
>
> …
>
> There was no public consultation. It is not a new policy as such. Basically it is just an iteration of what is possible within the framework.[145]

5.30 The rationale for no public consultation was that the new policy commitment was not a new policy *per se* but rather an iteration of what was already possible within the existing procurement framework. In effect the new commitment appears to be one of providing specific guidance on social procurement and how it may be pursued within the existing procurement framework.[146]

5.31 Notwithstanding the finer detail of whether or not the recently announced government position on social procurement is already supported by the prevailing procurement regime, it is nonetheless a new policy commitment. The Committee is of the view that public consultation would have been a useful exercise to assist with: (i) fine tuning the policy and related guidance, (ii) informing potential stakeholders of the Government's new commitment, and (iii) raising awareness more generally within the community.

Awareness of new social procurement policy commitment

5.32 The Committee was interested to know how the new policy commitment and its related guidance, in the form of a policy circular, would be disseminated to stakeholders in the community. In particular, the Committee sought clarification as to whether an advertising program or an awareness campaign

---

[145] Ms Jan Pearse, A/g Manager, Policy and Capital coordination, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, pp. 158–159.

[146] *Transcript of evidence*, 10 August 2010, p. 159.

would be used. The Executive Director of ACT Procurement Solutions told the Committee that advertising in a pure form would not be used but that, in addition to using the Social Enterprise Hub, other dissemination channels would include: Procurement Solutions' industry forum and information sessions; as part of regular meetings Procurement Solutions has with key business bodies; and through the development of special forums for key target groups such as micro businesses.[147]

5.33 The Committee is of the view that the development of a special forum targeting organisations and groups that would fall under the gambit of ACTCOSS would be a worthwhile exercise to: (i) promote the new policy commitment and (ii) inform these organisations as to how they may engage with the Government to promote their suitability for social procurement opportunities.

RECOMMENDATION 23

5.34 **The Committee recommends that ACT Procurement Solutions hold a special information forum on the ACT Government's new social procurement policy commitment, in particular but not restricted to targeting organisations and groups that fall under the gambit of the ACT Council of Social Service.**

Implementation of and compliance with new social procurement policy commitment

5.35 With regard to implementation of the new policy commitment, the Committee understands that a capacity building approach will be used. In evidence, the Executive Director of ACT Procurement Solutions stated:

> The way we are implementing it in the first instance is that we believe there is a level of knowledge base that has to be gained within each of the agencies. We have conducted a number of information sessions for Procurement Solutions officers to help advise. We have just completed three sessions for ACT government officials and they were very well attended.
>
> …
>
> We have also revised the procurement plan minute.

[147] *Transcript of evidence*, 10 August 2010, pp. 160–161.

…We have included a new category or paragraph in there which says, "Have you considered this as a social tendering exercise and, if not, why not?" So it is to provide advice to the chief executive on why it is a good thing that we could use social procurement or use it as social tendering, or a portion of it, or why we have not and what the reasons are. So it prompts staff and officers to consider social tendering, social procurement, social ventures, as a possibility within any procurement.

Procurement Solutions have now commenced training…who will then help to facilitate the idea of doing the social procurement as procurements come up for renewal. As you can imagine, a procurement might come up for mowing, or all kinds of services, which may be suitable for putting out to social ventures or to include social procurement elements. It will be one of the duties of Procurement Solutions officers to then say to the officer from the client agency, "Have you thought about potentially using social ventures or a proportion of this, or incorporating it somehow?" That is another part of the role.

We are also going to access the resources of the Hub, and we have asked Kevin Robbie and Mark Daniels if they would come back on occasions, when we are doing what we consider the first few social procurements or social tenders, to help us to scope out what we call the statement of requirements and the contractual templates et cetera to assist us…They have agreed that we will get them back on a consultancy basis to help us develop that in the first instance, which will develop our skills in that area.

…we will be liaising and continue to liaise with the Social Enterprise Hub, which is now becoming very vibrant and getting out there. It is developing and supporting more social enterprises all the time and that has been very successful.

The other thing is that the Chief Minister has written to his colleague ministers, and I have written to the chief executives, and asked agencies to put forward specific procurements for social tendering exercises or social procurement elements. So as procurements come up these will begin to be identified.[148]

5.36 As to when the new policy commitment will take effect, the Committee was told that:

It is considered to be in practice now.[149]

---

[148] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, pp. 152–153.

[149] *Ibid.*, p. 160.

5.37 The Committee sought clarification on the strategic nature of the policy commitment. The Executive Director of Procurement Solutions confirmed that the policy commitment had a whole-of-government effect.[150]

5.38 The Committee discussed with officials from ACT Procurement Solutions how compliance with the new commitment would be managed. The Committee established that, as opposed to optional or mandatory compliance, all Chief Executives will be required to consider whether various procurements in their respective agencies are suitable or appropriate for social procurement. This will be supplemented by Procurement Solutions' staff, in their advisory capacity, suggesting that certain agency procurements may be suitable for social procurement. The Executive Director of ACT Procurement Solutions stated:

> It is incumbent on the chief executives, because they are the ones responsible for procurement under the Government Procurement Act, to consider whether or not this is a correct one, whether it is value for money or whatever. They are responsible for that procurement. But we bring it up with them, in the same way that we bring up things like the method of tendering, whether or not this is a good one for a panel arrangement—that is a good example—or whether or not this is a better one for open tendering or select tendering because of the market. Those are the kinds of advisory things that we do.[151]

5.39 Worthy of note is that there will be varying degrees of compliance depending on which form of social procurement may be used, for example, a social tender or securing social outcomes as part of the tender development process via the inclusion of a community/social benefit criterion. An official commented:

> In some cases you might go directly to a social enterprise and in other cases you might weight assessment criteria. In some cases you might put in a requirement in your tender document which carries through to the contract. In other cases you might only put in a monitoring and reporting role: "The territory has a policy of doing this and we would like you to report on your implementation of this policy." It is not a firm requirement in the contract.[152]

---

[150] *Transcript of evidence*, 10 August 2010, p. 155.

[151] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, pp. 155–156.

[152] Ms Catriona Vigor, A/g Director, Goods and Services Procurement and Policy, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, p. 158.

Evaluating the new social procurement policy commitment

5.40 The Committee notes that the different degrees of compliance will also be an important issue and challenge with regard to gathering baseline data on the extent to which social procurement may be taking place within the ACT Government.[153] The Committee was interested to know how the Government would evaluate its new policy commitment and sought clarification on what baseline data would be collected initially and whether any targets had been identified. In response to a question asking whether targets for social procurement had been established, an official stated:

> No. I think at this stage it is probably premature to even consider that. It might even be counterproductive to set targets when, as we said, we are a little bit dependent on the development of the industry to start with—rather than going out there and saying, "Okay, in the next 12 months we must achieve 10 per cent social tendering." The industry is not there to support it yet.[154]

5.41 The Committee and officials discussed at length the difficulties that would be encountered in capturing data on the various forms of social procurement and the work that Procurement Solutions was presently doing to build this capability into its systems. The Committee was told:

> One of the things that we will be attempting to monitor—we will have to build some capability into our systems to do this—is the number of social procurements that are underway. That is a systemic thing within Procurement Solutions, to build it into our business management system—first, to capture contracts that are going to social tenders. That will be an issue of me capturing it in my business system as well as in the contracts register, which will mean amendments to that, or ways of finding amendments to that, because at the moment you would have to go in and search the facility to look for the actual name of the venture rather than having a little button or a tick which just makes it a social venture.
>
> The other complexity around that is that you might have a large procurement and a large tender where the initial head contractor is not a social venture but they actually subcontract to social ventures and so there is an issue around how do I capture that sort of information. One of the things we are considering at the moment is how we amend our systems to capture some of these to show how it is being developed. The Chief Minister himself has said that he wants his

---

153 *Transcript of evidence*, 10 August 2010, pp. 156–157.

154 Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, p. 156.

> ministers to tell him what social procurements are coming forward, so he has already said that he is monitoring it. In that sense I will have to work out a way to monitor it. But, as I said, it is not quite as easy as just ticking a box because in some instances it will be a portion of the procurement that is social.[155]

5.42 In concluding discussion and questioning on this matter, the Executive Director summarised the various challenges faced by ACT Procurement Solutions in: (i) capturing or identifying the different forms of social procurement; and (ii) building capability within its existing systems to support the capture, monitoring and reporting of social procurement. The Executive Director of ACT Procurement Solutions commented:

> So there is a fair bit of work on us to try to identify the different elements and how we can capture them within our systems to begin to report on them. I would hope that we can report almost in a triple bottom line sort of way through our annual reports that we have begun to capture this data. But before we make agencies do that I am going to have to work out how I do it. So, for instance, if one of Catriona's officers is doing a procurement for cleaning, we know that the paragraph is in the procurement plan—that has been identified—and we know that the statement of requirements has in it the requirement for 10 per cent to be disadvantaged people. So, when the contract is then loaded in my system somewhere and in the contracts register, I say, "This is a social procurement," or, if I need more granular information, "This is an actual social tender."[156]

5.43 The Committee is firmly of the view that to ensure that the new social procurement policy commitment is adequately evaluated, and consequently given the best chance of succeeding, as a matter of urgency, appropriate systems need to be developed to capture, monitor and report on social procurement initiatives under the policy.

---

[155] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, p. 156.

[156] *Ibid*., p. 157.

RECOMMENDATION 24

5.44 **The Committee recommends, as a matter of priority, to ensure that appropriate data is captured under the ACT Government's new social procurement policy commitment, that ACT Procurement Solutions should be appropriately resourced to make appropriate adjustments to its current system to monitor and facilitate reporting on social procurement under the new policy commitment.**

5.45 The Committee was interested to know whether there was any baseline data on the current level of social procurement within ACT Government. An official advised that:

> The actual data, rather than anecdotal data, is quite low because, as I said to you, we have not captured, and I doubt whether the agencies have captured in any explicit way, what procurements include a social element. We know anecdotally that there are several out there but I could not tell you today which ones do. What I would have to do literally is search each contract—all of the contracts—to find if there are elements in there. There is no explicit data other than anecdotal stuff. We know some that have come through us recently. We can now identify them and say, "Look, we remember that one."[157]

5.46 During the public hearing the Committee discussed at length with officials, how social procurement may be economically evaluated in terms of costs and consequences/benefits. In evidence, the Committee heard that evaluating social procurement in terms of costs and benefits is an area that is in its infancy and there are issues that are presently being addressed. Lead advocacy groups—Social Traders and Social Ventures—are developing some guidance at the moment, however this is further complicated by the various forms that social procurement may take.[158] In evidence, the Committee was told that:

> The Victorian group, Mark Daniels and Kevin Robbie, have grappled with those very issues and they are developing that sort of guidance at the moment. They said to us that they would certainly help us with that and share that kind of information with us because they have been faced with those kinds of

[157] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, p. 159.

[158] *Transcript of evidence*, 10 August 2010, p. 166.

> decisions—is this one better than that one for various reasons?—and tried to assess the cost-benefit essentially.[159]

5.47 The Committee acknowledges that an economic evaluation is better suited at the individual procurement level as opposed to at an aggregate level in the form of measuring the effectiveness of the new policy commitment. The Executive Director of ACT Procurement Solutions commented:

> It is more possible to do a cost-benefit analysis of each procurement as you are going through to demonstrate the value for money. I understand what you are saying. In terms of all procurements and doing a cost-benefit analysis, these social ventures were the better way to go. The cost-benefit will be in the demonstration of the value for money in the single select or select methodology, or whatever, in the procurement plan.[160]

5.48 Notwithstanding that social procurement is in its early infancy, the Committee is firmly of the view that it is important to establish criteria which will provide meaningful data collection for its evaluation. This will not only position social procurement as a viable and sustainable consideration in public sector procurement but as an overriding factor will assist with measuring a range of improved social outcomes, for example, direct benefits for those individuals who may be employed, in addition to positive externalities in the form of community benefits.

5.49 In responding to a question taken on notice, the Government advised that it intended to evaluate the new commitment at the individual procurement level as opposed to at an aggregate level by making agencies:

> …responsible for the outcomes, contract management and evaluations of their own procurements. The 'performance' of each project (procurement) will be separately evaluated by the agency. Each project will have its own specific criteria. Procurement Solutions will record any social procurements on its Business System. This will provide some statistics on types of projects put in place. While early measures are likely to be output based, as the sector and agency data gathering methodologies mature, improvements in performance measurement to a more outcomes focus will be possible.[161]

---

[159] Ms Catriona Vigor, A/g Director, Goods and Services Procurement and Policy, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, p. 166.

[160] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 10 August 2010, p. 163.

[161] Minister for Territory and Municipal Services, Response to QToN at public hearing of 10 August 2010, 8 September 2010.

5.50 Whilst the Committee welcomes the new policy commitment to promote the uptake of social procurement within the ACT Government, it remains concerned about: (i) how the policy will be evaluated at an individual procurement level, (ii) how data on social procurement initiatives will be captured, monitored and reported, and (iii) that it does not favour blanket exemptions of all social enterprises from the ACT's procurement processes.

5.51 In the absence of a more detailed statement of how the Government intends to achieve its objectives, the Committee would counsel caution. This policy change will have a very limited impact and will not represent a radical shift in the way the ACT Government does business.

5.52 In considering the complaints of small business in the ACT that it did not have ready access to government procurement, the Executive Director of ACT Procurement Solutions commented that '…we do not often buy the kinds of services that very small or micro-businesses actually supply'.[162] This will apply with equal or greater force to the community sector.

5.53 The Committee does not favour a blanket exemption of all social enterprises from the ACT's procurement processes. One objective of social procurement is to encourage social traders to develop the capacity to compete for open tenders. More importantly it is necessary for the integrity of the acquisition process that exemptions are granted for sound reasons and that those reasons are open to public scrutiny.

5.54 If Chief Executives of agencies are to use their powers to exempt community organisations from the tendering process then there must be a clear policy in place against which to justify such exemption. There must also be alternative and rigorous assessment methods to ensure that the social trader or community group being awarded a contract is fully capable of discharging its obligations.

---

[162] Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, *Transcript of evidence*, 30 March 2010, p. 50.

Social tendering and the community sector

5.55 The subject of social tendering was not mentioned explicitly in the Committee's terms of reference. However recommendation 75 of the Select Committee on Estimates 2009–10 invited the Committee to include the subject in its inquiry. The Committee agreed that the existing terms of reference did not require amendment to accommodate an examination of social tendering.

5.56 The object of social tendering is to provide the target group, usually via a community group working with the long-term unemployed or people with disabilities for example, with meaningful and productive employment which utilises existing skills, develops new capacities and provides work experience and long-term employment.

5.57 It is important to distinguish social tendering from the provision of support services such as health, drug and alcohol or homeless support to disadvantaged groups. The services that are provided by these social enterprises range from maintenance of parks and gardens to nursery and plant supply services, printing and packaging, distribution and warehousing, catering and manufacturing.[163]

5.58 At a recent public forum, a representative of Social Traders[164] identified the distinguishing feature of a social enterprise as that it combined a social purpose with trading to raise revenue to further its objectives.[165]

---

[163] For example, Koomarri, an organisation familiar to ACT residents that supports people with disabilities, provides a range of services in this region including general office administration, packing and mail out services, garden and grounds maintenance and, in cooperation with ActewAGL, the assembly of electronic circuit boards for street lighting.

[164] Mr Mark Daniels, Manager, Policy and Development, Social Traders.

[165] *Public Money for Public Benefit*, Seminar/Workshop, ACT Social Enterprise Hub, 9 June 2010.

5.59 Social tendering has the added benefit of 'leveraging' public expenditure on goods and services to further social policy objectives. The Chief Executive of National Disability Services (NDS), Dr Ken Baker characterised the process as, '… making a choice that aligns the Government's purchasing decisions with its commitment to support the employment of people with disability'.[166]

5.60 Evidence provided to the Committee indicated significant returns on investment in social tendering. A report prepared by Allen Consulting for the Brotherhood of St Laurence, which examined a program moving long-term unemployed through a social enterprise and into the open labour market indicated returns of $8 to $22 per dollar invested, depending on the assumptions applied.[167] These were savings to government as people ceased to be dependent on government payments such as unemployment benefits.

5.61 The less tangible benefits to the individual and the community flowing from participation in the workforce, social engagement and economic empowerment are also significant. For example, a witness to the Committee stressed the positive impact on the whole community of having residents in public housing schemes, characterised by extremely high unemployment, employed productively in their own communities.[168]

5.62 The budgetary pressures which all public sector agencies are subject to militate against the adoption of practices which may result in a greater outlay for no immediate benefit to the particular agency. Benefits flowing from the employment of people with disabilities, the long term unemployed, etc., often accrue over time and to agencies or levels of government other than the one entering into the contract.

5.63 Accurate measurement of the wider benefits which accrue from social procurement—getting people off pensions and benefits; adding to social capital; reducing long-term health cost, etc.—will assist with the take up of social procurement on a whole-of-government basis.

---

[166] National Disability Services (NDS), Media release: 'Expo Showcases Disability Enterprises, Targets Government Buyers', 24 May 2010.

[167] Mr Mark Daniels, Manager, Policy and Development, Social Traders, *Transcript of evidence*, 29 April 2010, pp. 136–137.

[168] *Ibid*., p. 127.

RECOMMENDATION 25

5.64 **The Committee recommends that the ACT Department of Disability, Housing and Community Services, as the lead department in this area, develop methodologies to measure the benefits flowing from social procurement.**

5.65 During its inquiry, the Committee heard examples of social procurement, in the form of social tenders, that had failed because the importance of developing the capacity and skills to deliver the service to a high standard comparable to a commercial service provider was not fully appreciated; '…you have to apply the same due diligence to a social enterprise as you would apply to any contractor…'.[169] The need for a rigorous and businesslike approach to social enterprises was a recurring theme.

5.66 Social tendering should, properly, be seen as one part of a process flowing from supported situations where people develop new skills and work habits through to a position where the individual or community enterprise has the capacity to compete in the open market. In practice most social tendering proposals involve some degree of financial or other 'in kind' support. Employees require training and, depending on the nature of their particular disadvantage, will require various kinds of social support while they adjust to the demands of the workplace.

5.67 It is important that it not be seen simply as a means of getting people 'off the books' of an agency or of shifting costs to another part or tier of government; this will result in bad decision making.

5.68 It also has to be recognised that employment or service provision through social procurement schemes may have adverse impacts or create resentment if, for example, its adoption displaces people who are already employed.

5.69 Purely commercial organisations excluded from competing for work by the use of single or select tender process may consider themselves unfairly treated. Employees may resent the tolerance built into performance expectations, at least initially, to accommodate the needs or capacities of

---

[169] Mr Mark Daniels, Manager, Policy and Development, Social Traders, *Transcript of evidence*, 29 April 2010, pp. 131–133.

people with disabilities. Thus a continuing effort may be required in the workplace to support these workers and explain the policy objectives to the broader community.

5.70 Many of the employment areas where social tendering has achieved success, for example, building cleaning and maintenance of parks and gardens, are job categories that already employ people with relatively low skills, or in the case of cleaning, need, for family reasons, to work at non-standard hours.

5.71 It is important that social tendering does not result in merely replacing one set of more or less disadvantaged workers with another marginally more disadvantaged group. Care needs to be taken by government agencies to define their objectives clearly and adopt the appropriate methods to achieve them.

6 CONCLUSION

6.1 The Committee wishes to thank all of the organisations and individuals that have contributed to its inquiry, by making submissions, providing additional information, and/or appearing before it to give evidence.

6.2 The Committee recognises the significant commitment of time and resources required to participate in an inquiry of this nature and is grateful that it was able to draw on a broad range of expertise and experience in its deliberations. The Committee notes that it has adopted many of the recommendations, or variations thereof, suggested by participants as recommendations for this report.

6.3 The Committee has made 25 recommendations in relation to its inquiry into ACT Government procurement.

Caroline Le Couteur MLA

Chair

9 November 2010

APPENDIX A: List of written submissions

Written submissions received by the Committee:

No. 1	ACT Council of Social Service (ACTCOSS) Inc.
No. 2	Housing Industry Association (HIA) Ltd—ACT/Southern NSW
No. 3	Master Builders Association of the ACT (MBA-ACT)
No. 4	Individual—Mr Tom Worthington
No. 5	UnionsACT
No. 6	Revolve—Resource Recovery Estate
No. 7	Construction, Forestry, Mining and Energy Union (CFMEU)
No. 8	Property Council of Australia
No. 9	Replas—Recycled plastic products
No. 10	Ecospecifier Pty Ltd
No. 11	Individual—Mr Jamie Winters
No. 12	ACT Government
No. 13	Individual—Mr Peter Bell
No. 14	National Disability Services (NDS ACT)
No. 15	Confidential submission
No. 16	ACT Auditor-General's Office
No. 17	Individual—Mr Richard Sharp

APPENDIX B: Committee public hearings

List of witnesses who appeared before the Committee at public hearings:

Public hearing of Thursday 4 March 2010

- Mr Tom Worthington, Individual
- Mr David Livingston, UnionsACT
- Mr Dean Hall, Secretary, ACT Branch, Construction, Forestry, Mining and Engergy Union (CFMEU)
- Mr Warren Tegg, Industrial Officer, ACT Branch, CFMEU
- Mr John Miller, Executive Director, Master Builders Association of the ACT
- Mr Gerry Gillespie, Director, Revolve—Resource Recovery Estate
- Ms Kay Hewitt, Director, Revolve—Resource Recovery Estate

Public hearing of Tuesday 30 March 2010

- Ms Robin Hardy, Executive Director, ACT Procurement Solutions, Department of Territory and Municipal Services (TAMS)
- Mr David Evans, Acting Director, Infrastructure Procurement Group, ACT Procurement Solutions, TAMS
- Ms Catriona Vigor, Acting Director, Goods and Services Procurement and Policy Group, ACT Procurement Solutions, TAMS
- Ms Roslyn Dundas, Director, ACT Council of Social Service (ACTCOSS)

Public hearing of Thursday 1 April 2010

- Mrs Tu Pham, ACT Auditor-General
- Mr Rod Nicholas, Director, Performance Audits & Corporate Services, ACT Audit Office
- Mr Russell Hearne, Audit Manager, ACT Audit Office
- Ms Louise Gray, ACT Manager, National Disability Services (NDS ACT)
- Mr Jamie Winters, Individual
- Mr Justin Winters, Individual

Public hearing of Tuesday 27 April 2010

- Mr David Dawes, Acting Chief Executive, Department of Land and Property Services
- Mr John Robertson, Chief Executive, Land Development Agency (LDA)
- Mr Chris Reynolds, General Manager, Development, LDA

Public hearing of Thursday 29 April 2010

- Mr Mark Daniels, Manager, Learning and Development, Social Traders
- Ms Lois Ford, Executive Director, Disability ACT, Department of Disability, Housing and Community Services
- Ms Bronwen Overton-Clarke, Executive Director, Policy and Organisational Services, Department of Disability, Housing and Community Services
- Ms Maureen Sheehan, Executive Director, Housing and Community Services, Department of Disability, Housing and Community Services

Public hearing of Tuesday 10 August 2010

- Ms Robyn Hardy, Executive Director, ACT Procurement Solutions, Department of Territory and Municipal Services
- Ms Jan Pearse, Acting Manager, Policy and Capital Coordination, ACT Procurement Solutions, Department of Territory and Municipal Services
- Ms Catriona Vigor, Acting Director, Goods and Services Procurement and Policy, ACT Procurement Solutions, Department of Territory and Municipal Services

APPENDIX C: Correspondence from Manteena Pty Ltd

manteena

SUBMISSION BY MANTEENA PTY LTD TO THE INQUIRY INTO ACT GOVERNMENT PROCUREMENT

Authorised for publication

5·10·10

Authorised for publication

TO:

Ms C Le Couteur, Mr. B Smyth and Mr. J Hargreaves
Standing Committee on Public Accounts
Legislative Assembly for the Australian Capital Territory

Dear Madam Chair

Re Inquiry into ACT Government Procurement

We have now had the opportunity to review the Hansard transcript of evidence taken by the Committee on Thursday 4 March, 2010.

While Manteena Pty Ltd was not present at this hearing, it wishes to bring to the attention of the Committee various matters of concern arising out of the evidence given by Mr Dean Hall, Secretary of the ACT Branch of the CFMEU recorded on pages 17 to 28 of the transcript.

The Union clearly has genuine concerns about the unethical activities of some participants in the construction industry and Manteena shares these concerns. Manteena understands that the CFMEU is a significant industry participant representing the rights of workers and promoting their own political interests.

However, numerous statements and inferences made by Mr Hall in his evidence **under the cover of privilege** and recorded in Hansard are factually incorrect and unsubstantiated and have had a detrimental impact on Manteena's reputation as a long-standing good corporate organisation.

We set out in the attached submission a detailed response and correction to these statements and the implications concerning Manteena.

Given the seriousness of these allegations and the possible damage to the reputation of Manteena, which has had long standing, positive and professional relationships with both the ACT Government and the Federal Government over a period of thirty years, we have spoken with the CFMEU representatives, Tilton's representative and also ACT Procurement Solutions and we request that this response and correction be placed on the record with the transcript to ensure that these inaccurate allegations are not promulgated further.

Should additional information be required please contact Manteena Pty Ltd's Chief Executive Officer, Mr Simon Butt on 02 6280 7033 or S.Butt@manteena.com.au whenever convenient.

Yours faithfully

Simon Butt
CEO
Manteena Pty Ltd
PO Box 529
FYSHWICK ACT 2609

RECEIVED
30 SEP 2010
ACT LA

manteena

BACKGROUND

Manteena has on its own and through its association of many years with the Master Builder's Association of the ACT (MBA) promoted and required of itself and its trade and sub-contractors, compliance with all regulatory and statutory requirements. This has taken, and continues to take significant resources from within Manteena.

Manteena has engaged with and continues to encourage the active involvement from relevant regulatory bodies such as the Office of Regulatory Services, Fair Work Australia, Long Service Leave Board, Australian Building and Construction Commission and others. There is a proper role for these bodies to be involved in the establishment of the regulatory framework the industry operates in but also to be involved in training and education along side the compliance audit of all industry players.

Manteena notes that the role of ACT Government through its agencies and departments has generally provided a responsible system of procurement that has to date, despite the issues raised, been able to pass the appropriate level of responsibility to the contracting parties that are best able to carry and manage the risks and responsibilities involved.

Unfortunately the misleading and unsubstantiated claims and statements made by the CFMEU under privilege were aired in the media with little or no investigative diligence.

As a result some of Manteena's clients have raised questions about due process being carried out by Manteena on ACT Government and other projects. Manteena does not accept the premise of the evidence provided by the CFMEU. It is therefore appropriate to respond to correct the public record.

manteena

SUMMARY OF KEY POINTS

We note the key points to our submission are:

1. Manteena refutes the unsubstantiated claims made by the Union in relation to Manteena.
2. The statements made by the CFMEU do not clearly nor accurately define whom they are referring to when they are making their allegations.
3. Contrary to the claim by the CFMEU that some benefit is gained by the Project/Construction Managers (PM/CM) at the time of appointment of the PM/CM by selected trade/subcontractors no advantage is gained because this claim is factually incorrect. Trade/sub contractors are not known at the time appointment of the PM/CM and therefore no advantage could be gained as alleged.
4. Tilton as the partitioning trade contractor, were engaged by ACT Procurement Services on behalf of the ACT Government as is the usual practice for a major trade package. The trade contractor was not engaged by Manteena.
5. There was, and still remains, no evidence of any failure by Tilton on the Kingsford Smith project to meet its statutory, legislative or employee entitlement requirements.
6. Manteena does not support the failure of any industry participants to meet their statutory and regulatory obligations whether they relate to employee entitlements, Occupational Health and Safety requirements, contractual obligations or industrial relations obligations.
7. Manteena is regularly audited and held accountable through a range of audit and regulatory regimes including the ABCC, Office of Federal Safety Commissioner (OFSC), Fair Work Australia, ACT Office of Regulatory Services (ORS), ACT Building Licencing (BEPCON), Department of Education, Employment and Workplace Relations (DEEWR). Manteena continues to meet and exceed those requirements on a regular basis.
8. Manteena was audited by the ABCC on a number of occasions on the project in question and the results were positive.
9. Manteena has, for over 30 years, been an active and committed participant in the construction industry in Canberra, committing significant time and resources to support the employment and training of apprentices, building cadets, construction workers and providing school based experience for students. Manteena is an equal opportunity employer and now has a workforce of over 130 full-time employees.

manteena

DETAILS OF RESPONSE TO ALLEGATIONS AND STATEMENTS MADE BY MR. HALL AS RECORDED IN THE TRANSCRIPT

Claimed: *"Manteena Pty Ltd is a classic example of this. We have been on a number of their projects. A number of the subcontractors on their projects have collapsed over the last two to three year, owing in excess of hundreds and thousands of dollars in entitlements to workers. This has been going on for a long time. It is not just in the last few years; it is an ongoing problem."*

Response: This claim is false.

No trade or sub-contractors have collapsed on Manteena sites as alleged.

One other major trade contractor, not the one referred to by the Union in their evidence, on the Kingsford Smith school project went into voluntary administration during the course of the works, yet with support and assistance from Manteena and ACT Procurement Solutions completed their trade works and managed to trade out of their difficulties.

In their submission the CFMEU then detailed allegations regarding Tilton and the situation of one of their subcontractors who provided the labour resources to carry out the dry-wall plastering on the Kingsford Smith school project.

Manteena notes the following in relation to the claims made by the CFMEU regarding Tilton and their performance on the project.

Manteena were not made aware, by any party including the CFMEU during the course of the contract of any such alleged failure of the partitioning trade contractor, Tilton to make payment to its subcontractor providing the labour resources. Nor of any failure by Tilton's subcontractor to make payment to its labour resources (the plasterers).

There was no failure to pay and no delay in payments to Tilton by the ACT Government. Payments were made as due and payable on a regular monthly basis.

There was no notice to Manteena by the trade contractor or employees, the media or the Union during the course of the contract at the time of the alleged claimed failure to pay the trade contractor, sub-contractor nor its employees.

There was no advice to Manteena from either the employees, the Union or Media that the Union had to feed "starving" workers.

The Secretary of the CFMEU did attend site during the course of the project and claimed once, to Manteena's representative that there were incorrect employee relationships (an 'employment contract' issue) between the trade contractor's sub-contractor and its employees, the plasterers. Despite a request at the time from Manteena's representative to provide evidence none was ever passed to Manteena and no further claims were made by the CFMEU or any other person to Manteena. Manteena did, as a matter of diligence check on site and no evidence to support any of the claims made by the CFMEU were found.

manteena

Claimed: *"We approached the builder and got the back pay, which was the luckiest thing, which these Chinese people, most of them visa holders, were quite happy to receive. They were quite happy to get their money and go away because they were hungry. We fed them for two days."*

Response: The CFMEU did not obtain any "back-pay" from approaching Manteena. As previously noted there were no claims outstanding from Manteena nor the ACT Government to the trade contractor.

Claimed: *We said, "Where is the super?" There were no super records. We said "Where is the long service, which is an ACT act? The company was not even registered for long service. They had no registration or superannuation . We said, "Where is your workers comp?" They had comp for 10 people. "There were no super records.", "The company was not even registered for long service.", "They had no registration of superannuation*" and "*They had workers comp for 10 people.*"

Response: We are not sure who the CFMEU is talking about here however we can confirm that contrary to the claims made above evidence was provided by the trade contractor (Tilton) submitted, amongst other documents, as part of his tender, receipted via 'hole-punching' by ACT Government in the ACT Procurement Solutions tender box on 13/12/07 the following documents:

i. Certificate of Registration of a Company (ASIC)
ii. Certificate of Registration of Business Name (in ACT)
iii. Australian Business Register – ABN Registration
iv. Certificate of Currency – Public and Products Liability
v. Certificate of Currency – ACT Workers' Compensation – number of employees stated as 25.
vi. Certificate of Currency – NSW Workers Compensation – number of employees stated as 26.
vii. Construction & Building Industry Super (CBUS) Employer Registration certification.
viii. Long Service Building & Construction (LSLB) – certificate of employer registration.
ix. Australian Construction Industry Redundancy Trust (ACIRT)
x. Department of Employment and Workplace Relations (DEWR) letter dated 31 May 2007 regarding compliance of their industrial arrangements.
xi. Completed 'Compliance with National Code of Practice (NCoP)' checklist.

We have records showing that the Workers Compensation Certificate for the ACT was upgraded to cover 100 employees. Other documentation confirming compliance, including statutory declarations was provided on a regular basis by the trade contractor.

Further, for the information of the Committee, we note that the contractor also provided at the time of tender:

1. References
2. Completed 'Hazard Identification & Risk Assessment' – OH&S.
3. Confirmation of OH&S and Quality Assurance (QA) systems in place.

manteena

4. Letter dated 10 Dec 07 from their accountants confirming the Working Capital, Net Tangible Assets and belief that the Contractor had the financial capacity to complete the project.

It is worth noting that the diligence of this particular contractor in providing evidence of compliance of regulatory and statutory requirements exceeded, at that time and still to date, that of many other locally and inter-state based contractors, directly refuting the claims and subsequent allegations made by the Union.

Claimed: "*We went to the builder and said," Here's the evidence of this...* "

Response: At no time did the CFMEU provide to Manteena any evidence of the stated claims.

Claimed: "*The response was: "That's not a requirement. I don't have a requirement to do that.*"

Response: The quoted response, we presume allegedly one of our staff, is neither true nor accurate of Manteena's approach to compliance and protection of employees entitlements and employment conditions. Our Senior Project Manager, who was on the project and has worked for the last 33 years in the industry, denies this claim by the Union.