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Local Government Act Review - CCF WA Submission

Thank you for the opportunity to contribute to the Local Government Act Review. We commend you and your Department for undertaking this wide-ranging review and for the extensive thought and research which has gone into the supporting documentation.

CCF WA's submission below focuses on Procurement, and addresses issues raised in the *Financial Management Detailed Discussion Paper*.

Procurement of civil infrastructure works is a key role of WA's local government authorities (LGAs). According to a WALGA report (*Road Assets & Expenditure 2016/17*), local governments in 2016/17 spent more than \$900 million on building and maintaining local roads alone, so total local government infrastructure spending in WA is likely to exceed \$1 billion annually.

In this context, it is vital that these civil works are procured transparently and effectively, so that

- Local governments (and ratepayers/taxpayers) receive value for money
- Works are delivered to a high standard; and
- Suppliers (e.g. civil contractors) receive full, fair and reasonable opportunity to bid for works.

Open tender thresholds

The *Financial Management* discussion paper notes that LGAs are currently not required to invite tenders for contracts under \$150,000 (notwithstanding the various exemptions available).

CCF WA recommends that the default threshold be increased to \$250,000 in line with State Government procurement rules. As pointed out by the discussion paper, however, contracts of such size can represent a significant proportion of the total annual budget of many LGAs, so a 'banding' structure may be prudent to reduce the threshold where appropriate.

Criteria for assessing advertised tenders

CCF WA supports, in principle, reforms that could provide for greater clarity and consistency in the criteria used by LGAs for assessing tenders. Any move towards more consistency in local government procurement has the potential to raise overall standards, while also reducing red tape for contractors that must currently navigate a multitude of different processes.

Consultation with industry on any such reforms is vital, and CCF WA is well-placed to represent the view of the civil construction industry.



Reform to tender exemptions

CCF WA questions the statement in the discussion paper that “exemptions for public advertising of tenders reflect that in some circumstances the need to efficiently supply the goods outweighs the benefits of an open tender process”.

For contracts above an appropriate threshold (e.g. \$250,000), we strongly argue that the costs of open tendering for civil projects are far outweighed by the many benefits of open and effective competition. Civil construction is a highly competitive and innovative market and LGAs will achieve the best result by testing the market. Open tendering should always be the default position.

The discussion paper notes that “in much of the State, securing suppliers to provide goods and services can be a challenge”. While this may be true in some goods and services markets, civil contractors are used to mobilising long distances to deliver projects in all corners of WA. The best way for an LGA to identify a capable contractor is to test the market through open tender. If only one response is received, the LGA can then choose to award the contract to the sole bidder.

CCF WA endorses the view expressed in the discussion paper that any calls by LGAs for “less prescription in procurement rules because of the investment required to comply with open tender rules ... must be balanced with the need for a procurement framework that provides confidence for suppliers and the community.” When procuring a contract worth \$250,000 or more, the cost of open tendering is a smart investment that: ensures value-for-money, both for the contract in question and for all future contracts; encourages high standards of quality and innovation; and encourages competition and helps maintain a healthy local market of suppliers.

LGAs may look to improve internal efficiencies and lower the cost of tender assessment (and the bid costs for contractors) through means such as:

- prequalification requirements to identify capable bidders. Some councils already do this for significant road works projects by requiring bidders to be prequalified with Main Roads (the WALGA Preferred Supplier Program has the potential to streamline tendering, though as noted in detail below, under its current structure the costs outweigh the benefits).
- reduce documentation requirements and streamline assessment by requiring contractors/suppliers to meet widely recognised safety/quality standards.

Timely payment of suppliers

CCF WA supports the proposal in the discussion paper to align the rules for timely payment of suppliers with State Government requirements, i.e. within 30 days of the receipt of the invoice for completed works or monthly progress payment.

Regional price preference

CCF WA supports the regional price preference for LGAs being increased in line with the State Government limits.

Self-delivery of capital works by LGAs

CCF WA believes LGAs will receive financial, quality and productivity benefits by procuring capital works rather than maintaining an in-house capability.

Some regional CCF WA Members have reported LGAs in their area have increased their capital works delivery capacity, despite the ready availability of local contractors. There is a concern that to provide continuous work for their expanded workforces, LGAs compete with private contractors for work. Ultimately LGAs and the regions suffer through the loss of private civil construction capacity.



As noted elsewhere in this submission, open tendering is the best guarantee of value for money, so ratepayers cannot be assured they are receiving optimal value through internal delivery of works by LGAs.

LGAs may justify a decision to self-deliver through an internal process designed to assess whether it is more cost-effective. Such a process is not independent and rarely factors in all of the costs associated with investing in and maintaining internal civil construction capability.

More broadly, the delivery of civil construction works by private civil contractors builds capacity in communities, stimulating the local economy and creating local jobs. Civil contractors are programmed to drive productivity, innovate with the use of new materials, new processes and construction methodologies that increase efficiency and reduce cost.

The WALGA Preferred Supplier Program (PSP)

The PSP provides a means for LGAs to bypass public tendering of contracts above the current \$150,000 threshold, by awarding the contract directly to a Preferred Supplier, or seeking quotes from a small number of Preferred Suppliers.

In reducing the pool of potential tenderers to a limited number of 'preferred suppliers', the PSP operates like a prequalification scheme, and therefore has the potential to reduce costs while maintaining value-for-money and improving quality standards. However, CCF believes that due to the way the program is structured, it does not provide the benefits promised by WALGA to local governments and suppliers.

To provide more detailed commentary, we will address the benefits of the PSP promoted by WALGA on its website (WALGA's commentary is in *italic with quote marks*)

"Value for Money - Delivers significant value to Members through Preferred Supplier Contracts."

The simple concept behind the PSP is that LGAs save by buying collectively. Such bulk buying power may be effective in the context of some goods and services, e.g. the panels for Call Centre Management Services, Corporate Wardrobe, Motor Vehicles. However, the overwhelming feedback from our members is that, in the context of civil infrastructure works (covered by the Road Building Contractors, Materials & Related Services panels) this is not the case.

"Best Price Guarantee - Preferred Suppliers are contractually bound to provide their best price and conditions to Members purchasing through WALGA. So significant financial savings can be achieved."

CCF WA notes that the WALGA Panel Contract requires contractors to give LGAs their 'best price' yet also expressly forbids contractors from passing on the WALGA commission. As we will explain below, contractors typically can't do both.

LGAs are told that rather than having to go to the market to seek bids, they can simply choose from a shortlist of suppliers who have already committed to supplying at a pre-agreed 'best price'. For civil construction projects such as road works, streetscape works, drainage upgrades, earthworks, foreshore works, landscaping etc, every contract has its unique scope, challenges and constraints, and therefore must be priced individually. Civil contractors cannot pre-commit to a 'set rate' for such works (and we understand that WALGA no longer expects them to).

Feedback from our members (see comments in Appendix 1) is that the 1% commission collected by WALGA on all PSP contracts is adding to the cost of capital works delivered by LGAs. Many contractors, who are already working to tight margins in a highly competitive market, feel they have no choice but to factor the WALGA fee into their bids and raise their price.

Others, reluctant to pass the extra cost on to valued, long-term clients in local government, have decided (in the short-term at least) to try to absorb some or all of the WALGA commission and work on a smaller margin – a difficult and potentially dangerous decision that can threaten the company's ability to operate sustainably.



“Tender Exemption - Purchasing through WALGA means that you don’t have to tender. A tender exemption applies to all of our Preferred Supplier Contracts. This saves on time, money and risks associated with tendering.”

It is misleading in the context of civil works to claim that ‘you don’t have to tender’. For civil works, the Member Request (sent by an LGA to selected panel members) is in effect a request for tender – the LGA provides a detailed spec and drawings, and each shortlisted contractor prepares a detailed estimate and quotes a price. In turn, the LGA then has to assess the tenders.

While some CCF WA members did note that the PSP process had indeed streamlined the tendering process somewhat, these marginal internal savings in time and money do not go close to compensating for the 1% commission they must pay to WALGA.

CCF WA does not know the extent of the efficiencies available to LGAs procuring civil works through the PSP – however as noted above, civil works contracts are unique and so each tender must be priced and assessed individually by LGAs, so their actual savings may also be marginal. Perhaps the major saving is in time, as tenders don’t have to be publicly advertised. However as most LGAs plan their capital works programs well ahead, the time saving may not be a practical benefit or result in faster delivery of projects.

The current pricing mechanism – contractors paying a commission to WALGA – means that LGAs may overlook the true cost of using the PSP. If WALGA charged the LGAs directly, LGAs would be fully aware of the cost of the service and could make a more informed decision on whether the cost is justified. Of course, such a transparent mechanism would also avoid the uncomfortable situation for contractors where they feel pressured to guarantee an illusory ‘best price’.

“Quality Suppliers - Through the competitive tender process, the most appropriate suppliers are awarded a contract to provide Members with direct access to the brands they want across all categories.”

WALGA advises that it “runs a rigorous pre-qualification process”, and some CCF WA members have commented that there is a reasonable level of scrutiny when being assessed for the panel. CCF WA recommends that the PSP prequalification standards are published on the WALGA website so that potential applicants have a clear idea of what is required.

Some CCF WA Members have raised concerns with WALGA’s approach to safety and quality prequalification. The panels do not differentiate, for example, between companies with independently accredited management systems in quality, safety and environment, and companies with no management system at all. Similarly, the panels for materials supply do not appear to differentiate between quality-accredited companies that build products to the relevant Australian Standards, and those that don’t. CCF WA is not suggesting that accredited quality/safety/management systems should be a prerequisite for the panel, however any scheme that promises ‘quality suppliers’ might be expected to provide clearer information on the relative capabilities/certifications of panel members.

More broadly, members report the ‘one-size-fits-all’ structure of the civil works-related panels has been a source of confusion for the industry and for LGAs. For example, the Road Building Minor & Major Works sub-panel is a mix of full-service road works contractors, specialist subcontractors and materials suppliers. The list runs the gamut from large Main Roads-prequalified contractors capable of delivering \$20 million-plus projects, to small businesses offering specialist skills. This may make it difficult for LGAs to identify appropriate companies to invite bids from. A greater number of more targeted panels could address this issue.

“Quality Procurement - All our Contracts are established by procurement specialists using a rigorous public and compliant market process. Our Preferred Suppliers are pre-qualified to provide Members with the safeguard of a quality-assured process, legal compliance, probity, risk mitigation and security of supply”.

CCF WA understands that WALGA has developed template Goods & Services and Minor Works contracts. For works with a value of more than \$1 million, WALGA encourages LGAs to use an Australian Standard contract. CCF WA supports the use of fair, standard contracts and endorses WALGA’s initiatives in this regard, while noting some concern at WALGA’s involvement in dispute resolution given the potential conflict of interest as LGAs are WALGA members.



CCF WA members are familiar with prequalification schemes operated by a number of Government agencies including Main Roads, Water Corporation, Building Management and Works, and LandCorp. These schemes typically have a tiered structure, with an entry level available to companies with basic management systems and the capability to deliver minor works, increasing in tiers (typically 4 or 5) to top-level contractors who have sophisticated management systems and the capability to deliver large, complex works. (We should also note that the agencies themselves cover the cost of maintaining their schemes and do not seek fees from contractors.) As noted previously, the ‘flat’ structure of the PSP, with broad categories and no tiers, makes it difficult for LGAs to identify appropriate bidders. Nor does it incentivise contractors to increase their capability and aspire to prequalify for more complex works. Faced with a wide range of options and limited information, LGAs may tend to seek prices from a few PSP panel members that they are comfortable dealing with.

It is not clear to CCF WA how the PSP can provide better legal compliance, probity, risk mitigation or security of supply than an open tender (for contracts over the threshold for public invitation) or written quotations (for contracts under the threshold). Both open tenders and written quotations can be conducted to meet the following principles of probity (source: *Procurement Probity Plan*, Local Government Victoria):

- Compliance with legal and policy requirements
- Use of a competitive process
- Fairness and impartiality
- Consistency and transparency of process
- Security and confidentiality
- Identification and declaration of conflict of interest

Using the PSP, LGAs can request bids from the contractor(s) they choose, which is potentially less competitive, impartial and transparent than open tendering. As one CCF WA member noted: “My biggest concern is it looks like that each individual council is selecting who to send the tender/quote request to.”

A concern raised by some members who are currently not part of the PSP is that the panels are ‘closed’ in the sense that WALGA only takes entry applications every 2 or 3 years. CCF WA recommends that the panels should be open for entry at all times to all companies with the appropriate skills and capabilities. This is how the other Government prequalification schemes mentioned above operate, and it is the only equitable way to operate. By limiting entry to the PSP to a small ‘window’ every few years, contractors may be denied access to potentially hundreds of clients and a market worth hundreds of millions of dollars annually. It may also discourage new and possibly innovative companies from entering the market.

We understand WALGA restricts the size of the panels (albeit noting that some include more than 50 suppliers) so that panel members receive regular work and are therefore incentivised to provide better than market rates. As we have noted, however, this does not happen in practice (in the context of capital works).

CCF WA supports the principle of “full fair and reasonable opportunity” for WA businesses, as enunciated in the State Government’s WA Industry Participation Plan (WAIPS), and submits that the only way to achieve this in the context of the PSP, and indeed any Government prequalification scheme, is by removing all barriers to entry, except those barriers based on quality/capability.

“Quality Contract Management - Preferred Supplier Contracts are managed by our contract specialists to ensure optimal performance, best pricing and full compliance. This means Members are not caught up with contractual disputes costing time and money.”

While contractual disputes do occur in civil works, it is not clear to CCF WA how WALGA’s involvement will stop councils from getting caught up if a dispute unfortunately arises. WALGA’s template minor works contract does state that “the Parties acknowledge and agree that WALGA may be involved in any dispute resolution process under this clause if requested by a Party”, suggesting that WALGA may mediate the dispute, however day-to-day contract management remains the responsibility of the LGA as Principal. Furthermore, as WALGA is a member-based organisation comprising LGAs, and it relies on the ongoing support of its members, it would be difficult for WALGA’s contract specialists to be impartial in any dispute between an LGA and a contractor.



In summary, CCF WA regularly seeks member feedback on a wide range of issues, however the response from members on the WALGA PSP has been unprecedented (see Appendix on next page) – hence the space devoted to the issue in this submission. The emailed comments are included below to demonstrate the depth of concern.

It is important to note that our concerns are only expressed in the context of civil infrastructure works and associated materials/equipment supply. While member feedback on the Road Building Contractors, Materials & Related Services panel has been in the main negative, there has been some acknowledgement that the PSP tendering process is streamlined – this could especially be the case for supply of materials or equipment, or simple works at day rates. However, the ability for LGAs to choose which panel members (or member) to approach has raised some concern that some suppliers may be favoured over others.

Notwithstanding these concerns, there is potential for the PSP to add value to local government procurement, if the pricing and structural issues are addressed. A fair, effective prequalification scheme should meet the following principles:

- The prequalification scheme is open to all suitably qualified contractors
- WALGA manages the prequalification scheme on behalf of LGAs however suppliers have no contractual relationship with WALGA and make no payments to WALGA
- For capital works above the threshold for public invitation, LGAs seek bids (by open tender) from contractors that meet the prequalification requirements appropriate for the size/scope of the contract.
- For capital works below the threshold for public invitation, LGAs may seek bids directly from contractors that meet the prequalification requirements appropriate for the size/scope of the contract.
- Clearer distinction between suppliers, specialist subcontractors and head contractors.
- Tiered structure, recognising varying capabilities and qualifications
- The cost of maintaining the scheme is funded by LGAs, either directly or as part of their WALGA membership.

Appendix

CCF WA Member comments on the Preferred Supplier Scheme

General civil contractor: *Initially there seemed to be movement by the Shires towards WALGA however, this no longer seems to be the case. Many Shires are again using Tenderlink instead of WALGA. We pay WALGA 1% of not only all works won through the WALGA panels, but 1% of the value of purchase orders issued directly by the Shires and Councils – contracts that have had no involvement from WALGA. We haven't had pressure for prearranged pricing or lower pricing, but obviously the WALGA commission must be factored into job costs.*

General civil contractor: *The rates that we provided some years ago were risk averse due to the nature of the standard rates they have sought and as a result, we are uncompetitive. I'm not sure that either the contracting fraternity or the councils are getting much out of the arrangement!*

Specialist subcontractor: *We are still being traded on price and having to reduce rates to win – [the WALGA commission] just cuts into our margin. We do not believe [an accredited quality system] gives us an edge on competition – we are [independently accredited to safety and quality Standards], the only in our service, but it has not proven to play a part in selection or councils paying a higher rate for quality of our approval.*

Plant & equipment hirer: *We have tried numerous times to submit an application to rejoin WALGA as we believe that we can offer equipment and services that are required but we can't get past the front door so to speak. By all accounts in the most recent panel review submissions we were not even considered, the panel voted to keep the existing supplier list and that was that. Of course, this is unsubstantiated as WALGA would not comment at all.*

Mid-sized regional civil contractor: *[The PSP] did not streamline the process at all. The only difference between the WALGA system and any other tender is the website you go to submit your bid. We worked on a smaller margin. As we are all aware, the market is extremely tight and so if we were to add an extra 1% onto our price, we would probably put ourselves out of the market. In general, I don't see the benefits to LGAs. It certainly doesn't benefit the contractor but we have to be on the panel to be considered for their work.*

Plant & equipment supplier: *[The PSP] certainly streamlines the administration process previously used. In relation to the 1% WALGA premium this value is a direct expense which is not amortised by the business, we pass this expense onto the final bid price of each unit tendered. Although the previous tender process was cumbersome, we did not pass the bidding process cost on to the customer; it was simply a cost of doing business, so the additional 1% would erode margin should we not pass this on.*

General civil contractor: *We are registered on the WALGA vendor panel. So far, a few opportunities have been presented. The tender process is more streamlined and they still include value for money criteria. My biggest concern is it looks like that each individual council is selecting who to send the tender/quote request to.*

General civil contractor: *It has come to our attention that WALGA have implemented a panel arrangement with a number of contractors... This is obviously not an equitable position with a significant number of CCF members effectively locked out of the opportunity to tender. WALGA have stated that they will be opening the panel for re-evaluation some-time in the future, however the timing is unknown and the requirements for eligibility are not available.*

General civil contractor: *There is no real pricing benefit for our clients and they actually end up paying the 1% more as we pass on the WALGA levy in our tender prices. WALGA also have regular reporting requirements which is a bit tedious and tend to advocate on behalf of their clients rather than being equally fair to the contractor.*

General civil contractor: *We do not see a real benefit of being on the panel. We have been on for 3 years and had 1 job worth approx. \$35k. We would have won this with a direct tender for the city. We see it as a waste*



of time and probably just another layer of people siphoning off my hard work.

General civil contractor: We like the WALGA process. The councils can be assured they are getting a quality contractor. It also streamlines things because councils can use panel members directly rather than a lengthy tender process. We supply the council with our normal rates plus the 1% for WALGA to cover the cost of the fee.

General civil contractor: Based on a nominal/typical \$5m project value the WALGA 1% commission would equate to \$50,000, an amount that would require a fairly significant reduction in tendering and admin costs for it to be worthwhile, so it would be difficult for us to see real value in terms of increased opportunities, revenue and profit that would offset the 1% WALGA commissions. It would also be useful to understand what costs WALGA actually incurs in arriving at a 1% commission. The lists of WALGA registered suppliers for WALGA Panels which we may be eligible to join are extensive and it was difficult for [us] to see how becoming a WALGA registered supplier would increase our competitiveness. Also, on the basis that many of them have approached [us] as potential subcontractors, we note that many of the WALGA Panel suppliers appear to have relatively limited capability and experience. We also considered the prequalification and procurement approaches of other Government agencies, State and National, and we aren't aware of any other examples where it is a requirement to commit to paying a commission in order to have the opportunity to tender for Government funded projects. As an alternative, it may be more effective for both Local Government and industry to utilise a WA Local Government prequalification system, which could be based upon the 'National Prequalification System for Civil (Road and Bridge) Construction Contracts' as utilised by Main Roads WA and other State roads authorities. Similar to the Roads Prequal System it could have different categories and criteria for different types and scale or complexity of project or supply. [We] would be happy to participate and assist in the development of such a system.

Specialist subcontractor: Both sides are told we must use this service and everyone has been sucked in. I would love WALGA to spell out and show or state clear examples of value add. Because we don't see them.

General civil contractor: [The PSP] is taking profit from contractors. Problem is a lot of good jobs are only awarded if on the panel.

General civil contractor: This is discriminatory - if you don't agree with WALGA's terms then you don't participate in the market; you're excluded from a large market. This scheme should not be supported and enabled by the state government.

General civil contractor: We take the time to meet with the council scope up the works and submit a competitive price, I advised them that we can be engaged directly as we are on the WALGA panel and this spend value is well below levels where they need to competitively test. The [council] City staff don't appear to be aware of the panel and go out to the open market including vendors who are not on the Walga Preferred Supplier Panel. This then means I spend more time putting together a submission which often asks for a great deal of supplementary information and then only if we are successful we have to pay WALGA a percentage of the value of the works for the privilege.

General civil contractor: There is absolutely zero cost saving in tendering as a preferred WALGA supplier. Councils in [region] are members of WALGA and still put out the tenders wanting the same non-monetary repetitive background info each time and quote in the tender docs, that we "must submit all supporting information as if we have never completed a job or submitted a previous tender".