

## IN THE INDEPENDENT COMMISSION AGAINST CORRUPTION

## OPERATION TUNIC

## STATEMENT

PLACE: Sydney

NAME: Kylie Hargreaves

ADDRESS: MLC Centre, 19-29 Martin Place Sydney 2000

OCCUPATION: Deputy Secretary Division of Resources and Energy NSW Trade & Investment

DATE: 19 May 2015

States: -

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1. This statement made by me accurately sets out the evidence that I would be prepared to give at the Independent Commission Against Corruption (ICAC) as a witness. The statement is true to the best of my knowledge, information and belief and I make it knowing that, if it is tendered in evidence I will be liable to prosecution if I have wilfully stated anything that I know to be false, or do not believe to be true.
  2. I previously provided ICAC with a statement dated 8 April 2015 in relation to Operation Tunic. I have prepared this additional statement at the request of ICAC. The two statements should be read together.
  3. This statement sets out a number of steps that have been taken concerning the organisation and management of the Mine Subsidence Board (MSB) since my appointment as Chair.
  4. In early April 2015 I caused a representative from the Department's People Learning and Culture unit to attend MSB's Newcastle office to conduct a review of the organisational structure of the MSB and status of all positions/employees within

Signature K Hargreaves

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Witness [Signature]

MSB. This review identified a total of 37 positions, 18 of which were vacant. I advised the MSB Board of this on 21 April 2015.

5. I have implemented a three stage recruitment process in order to address the significant number of vacancies. Stage 1 involves urgent recruitment of temporary resources into 5 priority positions, being the Manager Finance and Administration, his/her Executive Assistant, the District Manager Picton, a District Supervisor Picton and a District Supervisor Newcastle. I sought the Department's support to finalise position descriptions and arrange for the advertising of these positions. Temporary employees will fill these positions pending recruitment of permanent officers.
6. Stage 2 involves undergoing external recruitment processes for a number of vacant positions, compliant with the *Government Sector Employment Act 2013*. Stage 3 will address the remaining vacancies and any vacancies created in Stage 2 through the appointment of those currently acting in advertised positions.
7. The MSB organisational structure and requirements may be revisited as part of the move to make MSB compliant with the *Government Sector Employment Act 2013*.
8. As of mid-April 2015, I have approved the Department taking responsibility for 'back-room' support of the MSB website. MSB staff will continue to manage content of the website.
9. Towards the end of April 2015, I caused MSB staff to be connected to 'all staff grouper emails', so that they receive communications sent to all Departmental staff. Such emails include staff newsletters and bulletins from the Secretary and Deputy Secretary so that MSB staff can be better connected with the Department and informed of available training.
10. On 25 February 2015 the MSB Board agreed in principle to review the MSB policies and procedures and evaluate them against contemporary governance standards. The MSB Board also agreed to review Schedule C delegations for MSB staff and determined that it be included in the review of the MSB procurement system (see below). Annexed to this statement and marked "A" is a copy of the 25 February 2015 MSB Board Meeting Minute Papers 2, 3 and 14.
11. On 16 April 2015 the MSB Board approved the Department seeking quotes from 3 forensic accounting service providers to review MSB books across all MSB offices. The objective is to ensure that no (other) questionable practices are occurring.

Signature K. Hargreaves

Witness [Signature]

12. On 25 March 2015 MSB Board member Mr Rick Still tabled a discussion document regarding procurement and the MSB Board discussed it. A copy of the discussion document from Mr Still dated 24 March 2015 is annexed to this statement and marked "B". The MSB Board agreed that it would seek a proposal from NSW Public Works to conduct a review of the MSB procurement systems and policies. Annexed to this statement and marked "C" is a copy of 25 March 2015 MSB Board Meeting Minute Paper 2.
13. On 22 April 2015 the MSB Board approved the commissioning of NSW Public Works to conduct a review of MSB procurement policies and practices against the NSW Government's Procurement System for Construction with reference to the applicable codes, guidelines, Procurement Board direction and best practice.
14. The review will cover the MSB's procurement and contract management policies, procedures and practices as they relate to the delivery of construction works associated with remedial or preventative works. Specifically, the review will cover the following:
  - (a) Delegations relating to procurement;
  - (b) Request for tender and contract documentation, including conditions of contract used by the MSB;
  - (c) Use of MSB pre-registered tender lists;
  - (d) Selection of tenderer panels for limited/invited tendering;
  - (e) Tender (or quotation) invitation and receipt;
  - (f) Tender evaluation, contract award and disclosure;
  - (g) Contract payment systems and processes;
  - (h) Contract monitoring systems and records;
  - (i) Management of variations and extensions of time;
  - (j) Processes for ensuring satisfactory construction quality, safety, management, etc;
  - (k) Processes for completion and handover;
  - (l) Contractor performance reporting.
15. The review has recently commenced.

Signature K. H. [Signature]

Witness [Signature]

16. Annexed to this statement and marked "D" is a copy of the letter from Public Works to me dated 10 April 2015, setting out the details of the review.
17. On 22 April 2015 the MSB Board also approved writing to all MSB routine trades suppliers by mid-May to advise them that the MSB plans to move to compliance with the NSW Government's Prequalification Scheme for General Construction Works wherever possible. The aim is to utilise the Prequalification Scheme for General Construction Works from 1 July 2015 and MSB's existing prequalification schemes expire on 30 June 2015.
18. Work continues between the Department and the MSB on the partnership agreement in order to determine which corporate services can be delivered by the Department to the MSB to enhance MSB's effectiveness.
19. A three-part approach has been adopted for resolution of the partnership agreement. The first part aims to identify services that are easy for MSB to adopt where the benefit to MSB is clear. The second part concerns the consideration of the adoption of services that may be of mixed benefit to the MSB and need to be submitted to the Board for decision. The third part is the identification of those services which do not need to be provided to the MSB because they do not facilitate MSB objectives and/or functions.
20. The MSB Board approved the Department seeking proposals for the review of the *Mine Subsidence Compensation Act 1961* and the development of a decision-matrix to assist with determining when preventative works should be considered for funding by the Board. A competitive procurement process resulted in Henry Davis York being selected to conduct the review, which is due for completion by the end of June 2015.
21. The MSB's Manager Finance and Administration has been asked to prepare a new 'dashboard' of indicators for inclusion in the regular management reports provided to the MSB Board. Those matters are to include, for example, the total volume, value, variation and allocation of claims by contractor by district. The MSB Board is due to consider this new dashboard of indicators at its May 2015 meeting.
22. The MSB Board has also been provided with a schedule of statutory obligations, which will be included in all Board papers.
23. I further refer to my earlier statement of 8 April 2015. At paragraph [17] of that statement I stated that as Acting Deputy Director-General, Industry, Innovation,

Signature K. Haggard

Witness Y. [Signature]

Hospitality and the Arts I had "no responsibility or contact with the Resources and Energy Division or with the MSB". What I intended to convey by that paragraph was that the position of Acting Deputy Director-General, Industry, Innovation, Hospitality and the Arts had no responsibility for the Resources and Energy Division of the Department or the MSB. However, I did have responsibility for both the Resources and Energy Division and the MSB once I assumed the position of Acting Deputy Director-General, Resources and Energy in July 2013. To be clear, between July and September 2013 I occupied both Acting Deputy Director-General positions.

24. As concerns paragraph [47] of my earlier statement of 8 April 2015, I have been asked why I did not ask to be provided with the MSB operational manuals, policies and procedures on my appointment as Chair. Given the Board is not meant to be involved in the day-to-day operations of the MSB, I did not consider it necessary to request copies of the manuals, policies or procedures.

Signed:

K Hargreaves

Kylie Hargreaves

Date:

19 May 2015

Witness:

Fiona Quinn

Name:

FIONA QUINN

Signature K Hargreaves

Witness Fiona Quinn

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**MINE SUBSIDENCE BOARD**

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**Minute Paper**

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**REPORT ON THE MANAGEMENT OF THE BOARD'S OPERATIONS**

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At their meeting held on 25 February 2015, the Members of the Mine Subsidence Board discussed the Chief Executive Officer's Executive Summary and the Management Report, including Investment Returns and Financial statements.

*K Hargreaves*  
K Hargreaves 13.3.15  
Chairperson

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## MINE SUBSIDENCE BOARD



3

## Minute Paper

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BUSINESS ARISING OUT OF THE MINUTES

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At the Mine Subsidence Board meeting held on 25 February 2015, the Chairperson sought any declarations of interest. Board Member Margaret MacDonald-Hill advised she is the Chair of the AGL Hunter Community Consultative Committee and the AGL Camden Community Consultative Committee. No other potential conflicts of interest with the February 2015 agenda items were raised.

The Board Members discussed policy and procedures and financial reporting for the Mine Subsidence Board.

The Chairperson, Kylie Hargreaves, raised the issue of transparency and accountability in procedures and the requirement for checks and balances.

Board Members discussed financial reporting and the need to be able to compare budget figures and variations. It was recognised that the nature of claims was such that they could not be budgeted and were addressed by actuarial advice.

There was general discussion regarding policies and procedures. Board Member Rick Still indicated that given Board Members accountability, it would be a good idea to review procedures and processes. Rick advised that procurement requirements were changing to electronic tendering. Board Member Rob Regan highlighted the wide scope of claims dealt with by the Board and importance of levels of delegation to maintain operational efficiency. Board Member Dan Thompson advised he would distribute a matrix utilised by HNE Health for procurement.

The Board Members agreed in principle to review the Board's policies and procedures and evaluate them against contemporary governance. The Board Members agreed to review Schedule C delegations for Board staff as detailed in Board agenda Item 14.

*K Hargreaves*  
K Hargreaves  
CHAIRPERSON

28 Feb 2015

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## MINE SUBSIDENCE BOARD



14

## Minute Paper

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**Schedule C—Staff Financial Delegations**

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At their meeting held on 25 February 2015, the Members of the Mine Subsidence Board considered the Schedule C delegations for Board staff during discussion of Item 3 - Business arising out of the minutes.

The Board Members noted Schedule C provides details of delegations to Mine Subsidence Board staff and is reviewed on an as required basis with consideration of the experience of Board staff, efficiency of business operations, submissions in Board agenda papers and as part of quality procedures.

The Board Members determined that the delegations in Schedule C would be included in a review of Mine Subsidence Board procurement system. Board Member, Mr Rick Still, agreed to prepare a document for discussion at the March 2015 meeting.

A handwritten signature in dark ink, appearing to read "K Hargreaves".

K Hargreaves  
CHAIRPERSON

21.4.2015

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**MINE SUBSIDENCE BOARD  
PROCUREMENT SYSTEM**

**To: Mine Subsidence Board Members and CEO**

**Re: Proposed Review of Mine Subsidence Board System for Procurement of Works**

**1. Introduction**

I have been ruminating about the proposed review of the Mine Subsidence Board system for procurement of "Works" and offer the following to provide a very basic framework description of requirements.

Key reference documents include the Code of Practice for Procurement and the NSW Tendering Guidelines (and there are many others).

The following extract from the Code of Practice for Procurement is particularly pertinent and underpins many of the more specific policies and procedures –

**Standards of Behaviour**

All parties will behave in accordance with the following standards at all times:

**Honesty and fairness:**

Parties will conduct all procurement and business relationships with honesty and fairness.

**Accountability and transparency:**

The process for awarding contracts on government projects will be open, clear and defensible.

**No conflict of interest:**

A party with a potential conflict of interest will declare and address that interest as soon as the conflict is known to that party.

**Rule of law:**

Parties shall comply with all legal obligations.

**No anti-competitive practices:**

Parties shall not engage in practices that are anticompetitive.

**No improper advantage:**

Parties shall not engage in practices that aim to give a party an improper advantage over another.

**Intention to proceed:**

Parties shall not seek or submit tenders without a firm intention and capacity to proceed with a contract.

**Co-operation:**

Parties will maintain business relationships based on open and effective communication, respect and trust, and adopt a non-adversarial approach to dispute resolution.

It is sound practice to have throughout the procurement system a separation between analysis/development of recommendations and granting of approvals.

## 2. Agency Authority to Procure Works

The "Works" procured by the Mine Subsidence Board to address subsidence would be classified as construction, as opposed to goods and services. The NSW Government has in place an Agency Accreditation Scheme for Construction in which agencies considered to have sufficiently robust capabilities and systems are accredited to manage delivery of construction work greater than \$1.3 million in value.

Unaccredited agencies are permitted to manage construction work up to \$1.3 million in value. For work greater than \$1.3 million in value unaccredited agencies are required to obtain external support from either an accredited agency or an approved external adviser with relevant competencies to assist in managing the procurement. The Mine Subsidence Board is an unaccredited agency.

## 3. Tendering

Key elements of a system for effectively managing tendering include (but are not limited to) –

- Procurement strategy –
  - Packaging of works - single contract or multiple contracts
  - Form of contract - mini minor works, MW21, GC21, other
  - Tendering method - open tendering, limited tendering either from a panel or single invited
  - Approval of procurement strategy - by someone with delegated authority other than the proposing officer; for routine Works a standard approach could be adopted and the approval could be concurrent with the approval to invite tenders mentioned below
- Invitation of Tenders
  - Preparation of Invitation to Tender documentation; review and endorsement
  - For limited tendering, proposed list of tenderers
  - Preparation of a pre-tender estimate
  - Preparation of Tender Evaluation Plan and nomination of tender evaluation personnel - for higher value contracts a Tender Evaluation Committee and/or Tender Recommendation Review Committee may be established
  - Approval to proceed with invitation of tenders - by someone with delegated authority other than the proposing officer

Note: Invitation of tenders is a key step as it is a commitment by the Principal to the market place to comply with "promises" made by the Principal in the Conditions of Tendering and other applicable documents (such as the Code of Practice for Procurement and the NSW Tendering Guidelines). Single invited is only used for low value work. In NSW Public Works any single invited tender requires approval at Director level or above. We normally only use single invited for construction work if the value is \$10,000 or less.

- Management of the Tender Process
  - Confidentiality - staff involved in managing the tender and tender review process are required to comply with confidentiality requirements
  - Electronic tendering - tenders and quotations should be received through a secure system with a firm tender closing time for each procurement to avoid the potential for leakage of commercial tender information either from the Principal organisation or between tenderers; competitive tendering is now all electronic; the new eQuote system is available for invited tenders from empanelled tenderers on general construction contracts up to \$1 million in value

- **Tender Evaluation and Award**

- Tender evaluation - should be in strict accordance with the Tender Evaluation Plan
- Management of tender qualifications, non-conformances and departures - tender qualifications, non-conformances and departures should be valued and factored into the evaluation process to establish the best tender; if the best tender includes any unacceptable qualifications, non-conformances or departures they should be resolved with the tenderer before the tender recommendation is finalised; negotiation with multiple tenderers should generally be avoided as this can be seen to be "bid shopping", which is not permitted
- Tender recommendation - a tender recommendation should be prepared; the aim is to achieve best value for money for the Principal, which encompasses both price and risk considerations; if the recommended tender is significantly different in value to the pre-tender estimate then an explanation should be given to indicate the recommending officer's belief that the tender represents value for money, and in the case of a low price will not cause the tenderer financial distress
- Approval to award - by someone with delegated authority other than the proposing officer
- Disclosure - disclosure requirements should be complied with

#### **4. Contract Management**

All staff engaged in the administration of contracts should have a thorough understanding of the contract conditions and mechanics as well as the organisation's contract management procedures and applicable contract management authority delegations. Issues requiring particular attention as they have direct impact on contractor payments are -

- Contract variations
- Measurement and agreement of quantities for schedule of rates items

Contract variation proposals from contractors should be assessed against a benchmark cost estimate prepared by the Principal organisation (ideally prepared before the contractor proposal is received) and should be subject to a documented analysis and approvals process.

#### **5. Conclusion**

The above provides a basic and simplified outline of key elements of a construction procurement system within Government. The NSW Government Procurement System for Construction (hosted by NSW Procurement) is designed for use by NSW Government agencies that are not accredited to procure capital works under the Agency Accreditation Scheme for Construction and provides a comprehensive suite of resources to effectively and efficiently manage procurement processes for construction. The policies, procedures and practices adopted by the Mine Subsidence Board for procurement of Works should be consistent with the Procurement System for Construction. From time to time amendments to the System are made by the NSW Procurement Board in the form of NSW Procurement Board Directions (at <https://www.procurepoint.nsw.gov.au/policies/nsw-procurement-board-directions>).

Rick Still

Mine Subsidence Board Member (nominee of the Minister of Finance & Services)

General Manager, NSW Water Solutions

NSW Public Works

Office of Finance & Services

24 March 2015

## MINE SUBSIDENCE BOARD



2

## Minute Paper

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**REPORT ON THE MANAGEMENT OF THE BOARD'S OPERATIONS**

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At their meeting held on 25 March 2015, the Members of the Mine Subsidence Board discussed the Chief Executive Officer's Executive Summary and the Management Report, including Investment Returns and Financial statements.

The Chairperson, Kylie Hargreaves, noted that further to the ICAC's public notice to investigate allegations concerning a former Mine Subsidence Board (MSB) district manager and numerous contractors, MSB's barrister and law firm in the matter were requesting a second alternate Board member to be available to instruct counsel should the Chair be unavailable for urgent instruction or if a conflict emerged for the Chair in her dual capacity as both Chair and Deputy Secretary of Resources and Energy. Board Members agreed that Mr Rick Still would be the alternate Board member able to instruct counsel for the MSB.

The Chair reminded Board members of the previous agreement to refer any media enquiries to the Chair or alternatively to limit comments to noting that it would not be appropriate to discuss a matter before ICAC.

The Chair also advised Board members that a short Information Brief had been provided to the Minister's with nominees on the Board via the Chief of Staff of Minister Robert's office.

Lastly, the Chair noted a message would be sent to MSB staff regarding the investigation and advising any staff members who may be approached by any of the named parties, to contact the MSB's lawyers – Kilmurray Lawyers.

Mr Rick Still tabled a discussion document regarding procurement and this was discussed by Board Members. It was agreed that the Board would seek a proposal from the Office of Financial Services (NSW Public Works) to conduct a review of the MSB procurement systems and policies.

The Board Members also requested the Chief Executive Officer consider introducing a new 'dashboard' of indicators for inclusion in the regular management report. Examples for consideration could include the total volume, value, variation and allocation of claims by contractor by District office.

*K Hargreaves*

K Hargreaves  
Chairperson

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Public Works

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ABN 81 913 830 179 [www.publicworks.nsw.gov.au](http://www.publicworks.nsw.gov.au)

Our Reference – BPL - 3344

10 April 2015

Ms Kylie Hargreaves  
Deputy Secretary, Resources and Energy  
NSW Trade and Investment  
& Chair, Mine Subsidence Board  
GPO Box 5477  
Sydney NSW 2001

Dear Ms Hargreaves

#### **Review of Mine Subsidence Board Procurement System**

NSW Public Works is pleased to submit this proposal to undertake a review of the Mine Subsidence Board's (MSB) procurement system. This proposal is in response to preliminary discussions with Board Member Rick Still and other members of the Board.

#### **Background**

NSW Public Works understands that the key functions of the MSB include –

- Administering the Mine Subsidence Compensation Act;
- Assessing claims from property and infrastructure owners arising out of damage or the need for preventative works allegedly caused by mine subsidence and providing reparation by way of a number of mechanisms including management of remedial and preventative works;
- Reviewing development proposals in areas affected by mine subsidence.

The MSB has a procurement system in place that includes policies and procedures to facilitate the delivery of remedial or preventative works. Construction works include repairs to damaged buildings, complete demolition and rebuild, underpinning work, grouting of collapsed mine workings and emergency repairs of pot holes. The majority of work is of low value (< \$20K) although some works are valued over \$150K. Many of the MSB clients are home owners whose properties have been affected by the effects of sub-surface mining.

Board members have recently proposed that a review of the MSB procurement system be undertaken at the Board's instigation. NSW Public Works has been asked to provide a proposal to undertake the

review in light of its own robust procurement system and the high level of expertise available in the organisation.

### Scope of the Review

It is proposed that the review cover the MSB's procurement and contract management policies, procedures and practices as they relate to the delivery of construction works associated with remedial or preventative works. Particular issues which should be addressed include (but are not limited to):

- delegations relating to procurement
- request for tender and contract documentation, including conditions of contract used by MSB
- use of MSB pre-registered tenderer lists
- selection of tenderer panels for limited/invited tendering (including single invited)
- tender (or quotation) invitation and receipt
- tender evaluation, contract award and disclosure
- contract payment systems and processes
- contract monitoring systems and records
- management of variations and extensions of time
- processes for ensuring satisfactory construction quality, safety, management, etc.
- processes for completion and handover
- contractor performance reporting

NSW Public Works will be provided with copies of all relevant existing MSB procurement system documentation. We will also consider documentation available on the MSB website and findings or recommendations coming out of previous reviews undertaken by the Internal Audit Bureau or investigations undertaken by the ICAC, in so far that they relate to procurement practices.

NSW Public Works review will compare the MSB procurement system with the NSW Government's Procurement System for Construction with reference to applicable codes, guidelines, Procurement Board direction, and best practice.

The review will identify instances of non-compliance and risk, highlight areas for improvement and provide recommendations to address these findings.

### Our approach

If agreed by the MSB, NSW Public Works proposes a staged approach to the review.

**Stage 1** | Will involve an initial visit to the Mine Subsidence Board, Head Office, Newcastle and interviews with key staff to determine the level of the construction related procurement activities and gain an understanding of the policies and procedures that are provided for staff involved in procurement activities. At this meeting we would like to gain an understanding of how the MSB policies and procedures integrate with NSW Government's Procurement System for Construction Policy and Procedures. We would also like to confirm any constraints on the review process and collect all relevant documentation and agree on a report format. During this visit we would also discuss a governance structure for the review including the areas of communications and staff contact. This initial investigation should also test the need to review specific case study construction projects to determine how the current policies and procedures are working in practice.

**Stage 2 |** A desk top audit/review of the documentation provided and information revealed in Stage 1 will be undertaken by NSW Public Works procurement experts. If required it will be supported by further tele/videoconference interviews with various staff from MSB.

**Stage 3 |** Provision of detailed report and recommendations to MSB.

### Our Team

The team will consist of staff from our Contract and Procurement group which is part of Strategic Support and Business Performance, located in the McKell Building in Sydney.

NSW Public Works has substantial experience assisting Government agencies review and improve on their procurement systems for Construction Capital Works. NSW Procurement, Health Infrastructure, the Department of Justice and some Local Government have sought our capability in assisting them finalise and/or improve their procurement systems. We have also undertaken training programs for several NSW Government agencies on various aspects of procurement, e.g. the use of GC21 contracts.

**Tony Moore**, Contract and Procurement Manager, will lead the review and will be responsible for finalising scope, monitoring and reporting progress and presenting the final report and recommendations. He has over 25 years' experience in the project and construction management field, having worked on public infrastructure projects throughout his career. Tony's experience is mainly in the fields of procurement, contract, construction, management of contractor insolvencies and project management on multidisciplinary projects. He has substantial knowledge of the NSW Procurement systems for construction procurement and conducts training on the system within NSW Public Works and other NSW Government agencies. Tony will be supported by **Robyn Brewer**.

Robyn is a procurement specialist who spent 20 years managing construction projects and several years in contract dispute resolution, followed by 3 years managing the development and maintenance of NSW Government Procurement System for Construction. For the past 10 years, she has provided high level advice on construction procurement to NSW Public Works personnel, including developing procurement guidelines and procedures.

### Fee Structure

As some elements of our approach and the scope may change after the initial stage, NSW Public Works proposes a combination of fixed lump sum and variable fees as follows:

#### Stage 1 | Fixed Fee

Initial meeting in Newcastle. All inclusive cost of NSW Public Works team lead meeting with key staff in the MSB head office in Newcastle. ( <i>team lead for 1 day plus travel time &amp; disbursements</i> )	\$2,880.00
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#### Stage 2 | Estimated Fee

Desk top audit of policies and procedures inclusive of tele/video conferences with MSB staff as needed. This estimated fee is based on the following assumptions –	\$14,798.00
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- That the extent of review can be achieved in the equivalent of 8

working days. (team lead for 3 days & team member for 5 days)

- That travel outside of Sydney is not required

**Provision of Report**

Detailed report including the findings of the review, areas of risk and recommendations of actions to be taken (team lead for 3.5 hours & team member for 1.5 days) \$3,675.00

**Additional work not included in the above:**

Audit of specific project within Sydney area (team member for 3.5 hours) \$906.00

Auditing a specific project in a regional area will incur additional costs.

Additional meetings in MSB office(s)

As per hourly rates below

**Hourly Rates**

Team Lead - Tony Moore \$273.00

Team Member - Robyn Brewer \$259.00

All costs above are provided excluding GST.

Any changes to the estimated fee (plus or minus) provided for Stage 2 as a result of the findings from Stage 1 will be discussed and agreed with the MSB representative. Any additional work will not be undertaken until agreement is reached with the MSB representative.

This proposal is subject to our standard conditions of engagement, see attached.

If you require further clarification about the proposal please contact me. If the terms of the proposal are satisfactory, please provide the contact details of the MSB representative and NSW Public Works will proceed to schedule the Stage 1 visit at the earliest opportunity convenient to all parties.

Yours sincerely

Tony Moore  
Contract and Procurement Manager  
P | 9372 8869  
M | 0418 212 836

## CONDITIONS OF ENGAGEMENT

### 1. PREAMBLE

- 1.1 If any provision in these Conditions of Engagement conflicts with a provision in the Proposal to which they apply, the provision in the Proposal will apply to the extent of the conflict.

### 2. SERVICES WE WILL PROVIDE

- 2.1 We will provide the Services in accordance with the terms set out in the Agreement, none of which may be changed without the prior written consent of both parties.
- 2.2 We will, subject to matters beyond our reasonable control, provide the Services with the skill and care generally exercised by competent persons performing services of a similar nature at the time the Services are carried out.
- 2.3 We will provide the Services in accordance with the Timetable unless the provisions of Clause 9 apply.

### 3. YOUR OBLIGATIONS

- 3.1 You and your Associates will co-operate with us and not delay or vary the Services without adjusting the Timetable and the Fee as required under Clauses 9 and 10.
- 3.2 You will only communicate with us about the Services through the NSW Public Works Representative nominated at item 3 in Schedule 1.
- 3.3 To help us understand your requirements for the Services, you will:
- a. inform us of your specific requirements;
  - b. answer any questions and provide any information we ask of you, including providing information specified in the Proposal by the specified time; and
  - c. provide written comments on any Contract Material, if we request you to do so.
- 3.4 We assume that any information you or your Associates provide to us for the purpose of carrying out the Services is complete and accurate and will not check it unless doing so is part of the Services. We do not accept any Liability in connection with any information you provide to us.
- 3.5 You agree to indemnify us in the event that our use of information you provide infringes the intellectual property rights of a Third Party.

### 4. CONFIDENTIALITY

- 4.1 All information that either of us provides to the other is confidential and must not be disclosed to any other person, unless the disclosure is authorised under this Agreement or required by law.
- 4.2 You authorise us to disclose to our Associates any information you provide for the purpose of carrying out the Services.
- 4.3 You agree that we can publish promotional and technical information relating to the Services and the Project unless you advise us otherwise in writing when we enter into the Agreement.

### 5. INTELLECTUAL PROPERTY RIGHTS

- 5.1 Intellectual Property Rights in all Contract Material shall be vested in us.
- 5.2 We grant you an irrevocable, non-exclusive, royalty-free and non-transferable licence to use the Contract Material for the Project. However, you must not use, adapt, publish or otherwise exploit any of the Contract Material for any other purpose or allow others to do so without our prior written consent.

### 6. CHANGES TO THE CONTRACT MATERIAL

- 6.1 We authorise you and your Associates to make minor changes to the Contract Material:
- a. to suit site conditions encountered in completing the Project, providing such changes do not affect the design intent; and
  - b. to produce work-as-executed drawings.
- 6.2 If you or your Associates change the Contract Material whether pursuant to clause 6.1 or otherwise, you agree to release and indemnify us against any and all claims, proceedings, demands, losses, damages, costs or expenses, by you or any Third Party resulting from such changes; and
- 6.3 Any change made by you to the Contract Material will be annotated to indicate where and when changes were made and by whom.

### 7. LIABILITY AND INDEMNITY

- 7.1 You agree that, except where the law does not permit such limitation, our Liability to you is limited (in the aggregate) to the lesser of:
- a. \$5 million; or

- b. ten times the Fee payable at the Date of Agreement (the "cap") and you release us from any further Liability.
- 7.2 You agree to indemnify us and our Associates against any claim made against us by any of your Associates for any loss or damages which are greater than the cap. Further, you agree that our Liability to you is reduced to the extent that an act or omission by you or any of your Associates contributed to the injury, damage or loss.
- 7.3 The Services and the Contract Material are provided for your exclusive benefit. We accept no Liability to any Third Party in respect of any claim made in connection with the Services, and you agree to indemnify us against any such claim.
- 7.4 We are not liable to you or any Third Party in respect of any Consequential Loss, however it arises.
- 7.5 On the date that is three years after the date we send you our final payment claim under the Agreement, you release us and our Associates from all Liability.

## **8. INSURANCE**

- 8.1 We will maintain self-insurance arrangements with the NSW Treasury Managed Fund in relation to professional indemnity and public liability. We will give you confirmation of such self-insurance arrangements on request, at any time before we complete the Services.

## **9. DELAYS TO THE SERVICES**

- 9.1 If we are, or will be, delayed in carrying out the Services:
  - a. we will give you reasonable notice after becoming aware of the delay;
  - b. we will advise the effect on the Timetable;
  - c. you will extend the time(s) for carrying out the Services provided for in the Timetable by the extent of the delay; and
  - d. you will reimburse us, as a Variation, for any additional costs and expenses we incur as a result of any delay that is not a result of our breach of the Agreement.

## **10. VARIATIONS TO THE SERVICES**

### **Variations proposed by you**

- 10.1 If you propose a Variation, you will advise us in writing what is required and request a written quotation from us.
- 10.2 We will provide a written quotation setting out the effects of the proposed Variation on the Fee, the Timetable and any other relevant matters, for your consideration and acceptance.
- 10.3 We will not commence any Variation proposed by you until we receive your written instruction to do so (which may be before you receive or accept our written quotation).

### **Unavoidable Variations**

- 10.4 If we become aware of any circumstances, including those listed at item 4 in Schedule 1, which have caused, or may cause, a Variation, we will notify you in writing as soon as practicable, setting out the circumstances and the likely effect on the provision of the Services, the Fee and the Timetable.
- 10.5 Unless we ask for confirmation under Clause 10.6, we will continue to carry out the Services, including any unavoidable Variation, until we receive instructions to the contrary from you in writing.
- 10.6 In some circumstances we may ask you to confirm in writing that you will pay for a notified unavoidable Variation. If we do so, you agree that we are not required to carry out that Variation work until we receive your written confirmation and that, if this delays the Services, the provisions of Clause 9 will apply.

### **Adjustments for Variations**

- 10.7 You will pay us the additional costs and expenses we incur in connection with any Variation instructed by you under Clause 10.3 or notified by us under Clause 10.4. Payment will be made on the basis of:
  - a. an agreed lump sum adjustment to the Fee; or
  - b. in accordance with Clause 11.4 (e).
- 10.8 If a Variation delays the Services, you will extend the Timetable in accordance with Clause 9.

## **11. PAYMENT**

- 11.1 You will pay the Fee, other amounts payable under the Agreement and applicable tax in accordance with this Clause.
- 11.2 Where the Fee was based on a nominated percentage of the estimated construction cost of the Project and the pre-tender estimate or accepted tendered price for the Project exceeds the estimate by more than 10%, the Fee payable will be the Fee set out in the Proposal plus an amount calculated by applying the nominated percentage to the difference between the estimated construction cost and the tendered

price. If the pre-tender estimate or accepted tendered price for the Project is less than the estimated construction cost when the Services commenced, the Fee will not be adjusted.

- 11.3 Unless otherwise agreed, we will submit a monthly payment claim for amounts due under the Agreement up to the date of that payment claim, less amounts previously paid.
- 11.4 The amounts due under the Agreement will be calculated as follows:
  - a. Where the Fee is a lump sum: based on the percentage of the Services carried out;
  - b. Where the Fee is to be paid on an Hourly Rates basis: based on the hours worked by our personnel multiplied by the Hourly Rates;
  - c. For Disbursements: as set out at item 1 in Schedule 1;
  - d. For Variations for which a lump sum Fee adjustment was agreed: based on the percentage of the Variation work carried out; and
  - e. For all other Variations:
    - (i) an amount based on the hours worked by our personnel multiplied by the Hourly Rates, plus
    - (ii) any amounts due to our subcontractors or sub-consultants, plus a 12.5% margin, plus
    - (iii) the costs we incurred for Disbursements of the kinds listed in paragraphs (a), (b) and (c) in item 1 of Schedule 1; plus
    - (iv) costs and expenses we incurred due to delays.
- 11.5 Within 20 Business Days after you receive our payment claim you will pay the amounts due under the Agreement.
- 11.6 All amounts in the Agreement and other documents we give you in relation to amounts payable are exclusive of GST or other applicable tax unless expressly included.
- 11.7 If you fail to pay any amount due under the Agreement in full within 10 Business Days after the agreed time for payment:
  - a. you will pay interest at the rate of 7% per annum on all overdue amounts, until the amount is paid in full; and
  - b. we may keep any Contract Material prepared in connection with the Agreement and:
    - (i) suspend carrying out the Services until the amount is paid in full and the provisions of Clause 9 will apply; or
    - (ii) end the Agreement by giving you written notice under Clause 14.

## **12. CIRCUMSTANCES BEYOND OUR CONTROL**

- 12.1 We are not liable for any loss or damage caused by any failure or delay in performance of the Agreement resulting from any cause beyond our reasonable control including, but not limited to: acts of God, acts or omissions by you or your Associates, adverse weather conditions and industrial disputes.

## **13. DISPUTE**

- 13.1 If a difference or dispute arises between the parties in connection with any matter under this Agreement, either party may notify the other in writing, providing details of the dispute.
- 13.2 The parties will continue to perform the Agreement notwithstanding the existence of a dispute.
- 13.3 Within 14 days after receipt of a notice of dispute, senior representatives of the parties will confer at least once to try to resolve the dispute or agree on methods of doing so.
- 13.4 If the dispute has not been resolved, or a method of resolution agreed on, within 42 days after receipt of a notice of dispute, then before either party has recourse to litigation, the party must submit the dispute to an independent expert for determination.
- 13.5 The expert determination will be conducted in accordance with the procedure in Schedule 2.
- 13.6 Nothing in this Agreement is intended to stop either party from instituting proceedings to enforce payment due under the Agreement or to seek injunctive or declaratory relief.

## **14. ENDING THE AGREEMENT**

- 14.1 Either party may end the Agreement at any time by giving the other party at least 10 Business Days notice.
- 14.2 If the Agreement is ended, we will send you a payment claim for Services carried out up to the date the Agreement is ended and you will pay us all amounts owing under the Agreement plus expenses incurred by us as a result of ending the Agreement.
- 14.3 The Clauses in these Conditions of Engagement headed "Confidentiality", "Intellectual Property", "Liability", "Variation", "Payment", "Dispute", "Ending the Agreement" and "General Matters" continue to operate after this Agreement is ended.

## **15. GENERAL MATTERS**

- 15.1 The only duties, obligations and responsibilities we have in connection with the Agreement are those expressly set out in the Agreement.

- 15.2 The Agreement will be governed by and interpreted in accordance with the laws in force in the State of New South Wales, Australia.
- 15.3 The parties submit to the exclusive jurisdiction of the courts of the State of New South Wales, Australia.
- 15.4 Neither party may transfer the Agreement or any right or obligation under the Agreement without the other party's prior written consent.
- 15.5 You authorise us to destroy all Contract Material and other documents we hold in connection with the Agreement seven (7) years after the date we send you our final payment claim under the Agreement.

## 16. DEFINITIONS

Unless the context otherwise requires, in these Conditions of Engagement:

**"Agreement"** means either:

- (a) the Agreement executed by the parties in connection with the Services; or
- (b) if the Agreement is made by a Letter of Award, it means the contract formed by the Agreement Documents, which supersede all understandings, representations and communications made between the parties in connection with the Agreement before the Date of Agreement.

**"Agreement Documents"** include:

- (a) the Proposal;
- (b) these Conditions of Engagement; and
- (c) the Letter of Award and any other documents listed therein.

**"Associates"** means the relevant party's employees, personnel and agents. Our Associates include our subcontractors and sub-consultants who are involved in carrying out the Services. Your Associates include your contractors and consultants who are involved in carrying out the Project.

**"Business Day"** means any day other than a Saturday, Sunday, public holiday or 27, 28, 29, 30 or 31 December.

**"Consequential Loss"** includes loss of revenue, loss of profit, loss of custom, loss of goodwill, loss of overhead recovery, loss of business opportunity, loss of the use of property, loss of contract, loss of production, loss of financing charges or cost recovery, loss of the use of money and payment of liquidated sums or damages under any other Agreement.

**"Contract Material"** means all material that is produced by us or on our behalf in carrying out the Services, including but not limited to documents (including drawings, reports, specifications and bills of quantities), calculations, equipment, information and data stored in hard copy or electronic format.

**"Date of Agreement"** means the date of execution of the Agreement or the date of the Letter of Award, as applicable.

**"Disbursements"** means costs and expenses we incur in carrying out the Services that are not included in our Fee. These are set out at item 1 in Schedule 1.

**"Fee"** means either:

- (a) the lump sum amount set out in the Agreement; or
- (b) an amount calculated on the basis of hours worked multiplied by the Hourly Rates.

The Fee is adjusted in accordance with the Agreement.

**"Hourly Rates"** means:

- (a) the relevant Hourly Rate(s) set out in the Proposal; or
- (b) if relevant Hourly Rate(s) are not set out in the Proposal, the rate(s) that NSW Public Works normally charges for the relevant personnel, at the time the Services are carried out.

**"Intellectual Property Right"** means any statutory and other proprietary right in respect of inventions, innovations, patents, utility models, designs, circuit layouts, mask rights, copyright (including future copyright), confidential information, trade secrets, know-how, trademarks and any other right in respect of intellectual property.

**"Latent Condition"** means an aspect of the Services or the Project, including physical conditions on the Project site or its surroundings, which differs materially from what could reasonably have been anticipated by us at the time we prepared the Proposal, including conditions that were known by you and not disclosed to us.

**"Letter of Award"** means written notification that you accept the Proposal.

**"Liability"** means legal liability for injury, loss or damage arising in connection with or for breach of the Agreement, however such liability arises.

**"NSW Public Works Representative"** means the person nominated in item 3 in Schedule 1.

**"Project"** means the project(s) that the Services relate to.

**"Proposal"** means the proposal (or if more than one, the final proposal) we gave you in relation to the Services.

**"Services"** means the services we carry out in connection with the Agreement, including any Variations. Refer to item 2 in Schedule 1.

**"Third Party"** means a person who is not a party to the Agreement, but does not include our Associates.

**"Timetable"** means any schedule included in the Agreement Documents that sets out when the Services are to be carried out.

**"Variation"** means any change to the scope or timing of the Services set out in the Agreement. A Variation may be caused by any of the circumstances listed at item 4 in Schedule 1.

**"We", "us" and/or "our"** means NSW Public Works and all its branches and divisions, on behalf of the NSW Office of Finance and Services.

**"You" and/or "your"** means the client(s) addressed in the Proposal

## Schedule 1 – Agreement Information

Item No	
1	<p style="text-align: right;"><i>Mentioned in Clauses 11.4 &amp; 16</i></p> <p><b>Disbursements</b> are costs and expenses identified as Disbursements in the Proposal and costs and expenses for any of the following, unless the Proposal specifically states that they are included in the Fee:</p> <ul style="list-style-type: none"> <li>(a) fees, charges, levies and taxes payable to authorities;</li> <li>(b) travel and accommodation associated with attendance at meetings, site inspections, audits etc;</li> <li>(c) preparation of archived material, or transfer or translation of computer files; and</li> <li>(d) products and services provided by subcontractors or sub-consultants, such as: site investigations; BCA inspections; hazardous materials or geotechnical studies; condition surveys; cadastral or infrastructure surveys; production of measured drawings of existing infrastructure; printing multiple copies of reports; and printing or production of artist's impressions/ perspectives / 3D CAD modelling, videos or other presentation material.</li> </ul> <p><b>Notes:</b> Unless the Proposal specifically states otherwise:</p> <ol style="list-style-type: none"> <li>1. The costs of word processing, phone, fax and routine photocopying are not Disbursements.</li> <li>2. For Disbursements listed in (a), (b) and (c) above, you will pay us the actual costs we incur.</li> <li>3. For products and services provided by subcontractors and sub-consultants (as set out in item (d) above), you will pay us the costs we incur plus a 12.5% margin.</li> </ol>
2	<p style="text-align: right;"><i>Mentioned in Clauses 2 &amp; 16</i></p> <p><b>The Services</b> are described in the Proposal, subject to the following: <b>Not Applicable</b></p>
3	<p style="text-align: right;"><i>Mentioned in Clauses 3.2 &amp; 16</i></p> <p><b>The NSW Public Works Representative</b> is : Tony Moore</p>
4	<p style="text-align: right;"><i>Mentioned in Clauses 10, 11 &amp; 16</i></p> <p><b>A Variation</b> occurs when:</p> <ol style="list-style-type: none"> <li>1. There is a change to the Services because: <ul style="list-style-type: none"> <li>(a) you request additional or reduced Services;</li> <li>(b) there are changes to the scope or timing of the Project;</li> <li>(c) information provided by you or your Associates is incomplete, inaccurate or contains discrepancies;</li> <li>(d) you request re-work, except if due to our failure to provide Services complying with the Agreement;</li> <li>(e) there is a change to legislative requirements affecting the Services, Project or amounts payable; or</li> </ul> </li> <li>2. Part or all of the Services are delayed by a cause (including suspension, acceleration or deceleration instructed by you or interference by you or your Associates) other than our breach of the Agreement;</li> <li>3. During or after completion of the Services, we or any of our employees are required to give evidence before, or provide any information to, a court or other competent authority.</li> </ol>

## Schedule 2 – Procedure for Expert Determination

1. If a dispute is to be submitted to an expert for determination, as provided for in Clause 13.4 of the Conditions of Engagement, the parties are to attempt to agree on an expert.
2. If the parties fail to agree upon an expert within 28 days, either may request the Chief Executive Officer of the Australian Commercial Disputes Centre Ltd Sydney to nominate an expert, who is not to be:
  - (a) an employee of the either of the parties;
  - (b) a person who has been connected with the Agreement; or
  - (c) a person upon whose appointment the parties have previously failed to agree.
3. Once the expert has been agreed or nominated, either party may appoint the expert in writing on behalf of both parties. The letter of appointment is to be provided to the other party and to set out:
  - (a) the dispute being referred to the expert for determination;
  - (b) the expert's fees;
  - (c) the procedures detailed in this Procedure for Expert Determination;
  - (d) the arrangements for each party to lodge \$10,000 as initial security for the expert's fees; and
  - (e) any other matters relevant to the appointment.
4. The parties are to share equally the cost of appointing the expert and the expert's fees and out-of-pocket expenses, including any security required for the expert's fees. Each party is to otherwise bear its own costs in relation to the determination process.
5. If a party defaults in providing the initial security within 28 days after the expert is appointed, the other party may provide the security in full and the defaulting party's share is a debt due and payable to the paying party.
6. Any dispute will be deemed to be abandoned if an expert has not been appointed or the initial security has not been lodged in full within 6 months after the dispute is notified under Clause 13.1 of the Conditions of Engagement.
7. The parties are to make written submissions to the expert, copied to the other party, as follows:
  - (a) Within 7 days after the appointment of the expert, the notifying party is to make its submission on the matter in dispute.
  - (b) Within 14 days after receiving a copy of that submission, the other party is to make its submission in response, if any, which may include cross-claims.
  - (c) If a cross-claim is made, the notifying party is to make its submission on the cross claim within 14 days after receiving a copy of the submission from the other party.
  - (d) The expert may request further information from either party and that party must respond within 14 days after receiving the request.
  - (e) The expert must ignore any submission not made within the times stated in this clause and make a determination on the submissions or information provided within time, unless the parties agree otherwise in writing.
8. The expert must determine whether the claimed event, act or omission did occur and, if so:
  - (a) when it occurred;
  - (b) what term of the Agreement or other obligation in law, if any, requires one party to pay the other money or otherwise act in respect of it; and
  - (c) the merits in law of any defence or cross-claim raised by the other party.
9. The expert is then to determine the amount, if any, which one party is legally bound to pay the other on account of the event, act or omission. The expert must also determine any other question(s) referred by the parties in the submissions.
10. In making the determination, the expert acts as an expert and not as an arbitrator and is:
  - (a) not liable for acts, omissions or negligence;
  - (b) to make the determination on the basis of the Agreement and written submissions from the parties without formalities such as a hearing; and
  - (c) required within 56 days after appointment to give the determination in writing, with brief reasons, to each party.
11. If the expert determines that one party is to pay the other an amount exceeding \$100,000 (excluding interest) and within 14 days after receiving the determination, either party gives written notice to the other that it is dissatisfied, the determination is of no effect and either party may commence litigation.

12. Unless a party decides to exercise a right to commence litigation, the parties are to treat each determination of the expert as final and binding and give effect to it. If the expert determines one party is to pay the other money, the payment is to be made within 20 Business Days after the expert determination is received.