



OUR REF: ICCEXE:APP:280223

28th February 2023

Policy & Budget Group
NSW Treasury
GPO Box 5469
Sydney, NSW 2001

ATTENTION: Jeff Nelson - Associate Director
Peter Nicholls - Senior Engagement Officer
Frankie Timar - Policy Officer

BY EMAIL ONLY: nswppolicy@treasury.nsw.gov.au

SUBMISSION: NSW ABORIGINAL PROCUREMENT POLICY (APP) REVIEW

Dear Jeff, Peter & Frankie,

In sending this submission, the NSW Indigenous Chamber of Commerce Inc. (NSWICC) wishes to acknowledge the traditional people of the lands we visit throughout the course of our work and recognise their continuing connection to the land and water, to the dreaming and to all living things. We pay our respects to our ancestors, and to the elders, past and present, whose strength and guidance continually nurture us. We pay tribute to Aboriginal and Torres Strait Islander leadership within our communities, within business and among our youth.

1. Introductory Context

As the peak body for Aboriginal business within New South Wales, the NSWICC represents 500+ majority-owned, Aboriginal and Torres Strait Islander enterprises, and we welcome the opportunity to provide this submission.

Of the NSWICC membership base, at least:

- 80% currently engages, or possesses the ability to engage, within NSW government agency procurement activities, across 70 spend categories.
- 35-45% can be classified as operating their enterprise or core business activities from a regional NSW location.



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In gathering the feedback provided as part of this submission paper, we undertook an extensive consultation within our membership, via email, phone and during in-person interviews.

The NSWICC is supportive of the Aboriginal Procurement Policy (APP) and its intention under the NSW response to Closing the Gap, specifically Priority Reform 5. However, we also wish to highlight that there is significant work to be undertaken, to embed these intentions into everyday business practice.

Please find our key findings and insights as summarised below:

2. Policy Awareness & Communication

2.1 Poor buyer awareness of the APP:

Following the commencement of the current alliteration of the APP in January 2021, NSW Government Agencies were encouraged to *'apply the APP to all relevant procurement activities'*, however resounding feedback from our membership has indicated:

- business owners advised they have on more than one occasion within the last 12-months, had to explain the APP to a purchasing officer or representative of an agency, specifically the *'first consideration to Aboriginal businesses for procurements to \$250,000'*, and,
- business owners further advised that despite meeting the criteria of both the procurement activity and the applicable section of the APP, they were required to undertake a formal tender process, or not invited to tender at all.

2.2 Poor visibility of Agency Aboriginal Participation Strategies:

Despite the APP articulating that *'agencies must publish an annual Aboriginal Participation Strategy that describes how the agency will meet its obligations under the APP'*, most agencies:

- do not have their current individual strategies publicly or readily available, and/or,
- most publicly available strategies have expired as of 2020.

This creates a barrier for Aboriginal businesses to research upcoming opportunities, understand how to approach agencies and in the instance of having to explain the APP to a buyer (*as in 2.1 above*), there is no reference document to refer to that applicable agency's commitment.

3. Individual Policy Instruments

3.1 Aboriginal participation in contracts valued at \$7.5m or above:

For procurement activities at \$7.5m or above, we have canvassed the following high-level concerns:

3.1.1 Aboriginal Participation Plans are no longer public

Aboriginal participation plans are no longer published publicly (see 4.1 below). Alarming, it appears that often, the agreed targets for a particular program of work, are not being included within the standard contract terms and/or schedules, rendering it difficult for agencies to manage and/or mandate reporting on target progress.

3.1.2 Poor utilisation of the 3rd minimum requirement

There is little understanding, and therefore utilisation, of the 3rd minimum requirement option (being *'at least 1.5% of the contract value to be applied to the cost of education, training or capability building for Aboriginal staff or businesses directly contributing to the contract'*). The NSWICC views this as a significant missed opportunity, especially for programs of work within and near regional communities.

3.1.3 Poor focus on non-price evaluations

There is not enough focus being applied to *'applying an Aboriginal participation non-price evaluation criterion, so that the response may also be evaluated on its social commitments'*. This would allow for a more appropriate level of evidentiary intent.

3.2 Applying the APP for procurements valued below \$7.5m:

For procurement activities below \$7.5m, we have canvassed the following high-level concerns:

3.2.1 First consideration and direct negotiation

'Agencies should whenever feasible give first consideration to Aboriginal businesses for procurements up to \$250,000' - The NSWICC believes this is arguably the single most effective tool within the APP, however as articulated in 2.1 above, due to poor communication, buyers are still largely unaware. Many Aboriginal businesses have reported they are being advised they must be a member of a pre-qualification scheme, despite meeting this criterion and the APP's articulation of direct negotiation.

3.2.2 More information is required for limited tender activities

During the last 6-12 months, there has been an increase by agencies to invite several (typically 3) Aboriginal businesses to a limited tender for procurements up to \$1m:

- Whilst this is briefly covered within the FAQs of the APP section on buy.nsw, for the avoidance of doubt, if this practice is to continue to become commonplace, it should be properly articulated within the APP itself.

- This is of particular importance if there is an agreed maximum number of Aboriginal businesses and spend threshold, for example, 3 businesses up to \$1m. There is currently inconsistency between the agencies that are utilising this practice, and further confusion as to how to apply, when it's not covered specifically within the policy itself.

3.2.3 Non-pricing criterion and insufficient weighting

As articulated in 3.1.1 above, for procurement activities that fall between \$250k-\$7.5m (or if in certain situations, is under \$250k and still proceeding to market), there is not enough focus being applied to non-pricing evaluation criterion or sufficient weighting to support the overarching intention of the APP.

4. Governance & Public Accountability

4.1 Publicly published Aboriginal Participation Plans

Whilst the merging of the former Aboriginal Participation in Construction Policy (APIC) with the current alliteration of the APP has been embraced, the removal of the requirement to publicly publish Aboriginal Participation Plans, has led to a significant decline in accountability and therefore compliance. The NSWICC would strongly encourage an obligatory requirement to publish Aboriginal Participation Plans, principally to encourage:

- greater APP compliance through public accountability,
- a more dedicated approach to socio-economic development for regional communities, and,
- best practise demonstration and provide benchmarking for organisations lacking in their requirement understanding.

4.2 Currency of Agency Aboriginal Participation Strategies

As articulated in 2.2 above, the APP specifically states that '*agencies must publish an annual Aboriginal Participation Strategy that describes how the agency will meet its obligations under the APP*' and that said strategy '*must be published on the cluster's website*', despite this, most agencies' and/or clusters' strategies are hard to locate publicly, and if locatable at all, most are not current.

It is important to also note at this point, that there appears to be a differing opinion of how to calculate addressable spend from one agency and/or cluster to another, however the absence of both public and up to date strategies, renders this difficult to completely quantify.

4.3 Aboriginal Participation Fund

As articulated in 4.1 and 4.2 above, the absence of publicly published plans and strategies, increases the probability of failure to comply with the APP and a higher amount committed to the Aboriginal Participation Fund. The NSWICC

views this as contradictory to the intent of the APP, and wishes to raise concerns that there is currently no readily available public record of:

- the Aboriginal Participation Plan failures, resulting in monies being committed to this fund, and,
- of the funds committed, where and how are they being dispersed.

This fund could be described as the great mystery of the APP and it would appear from considerable sector feedback that compliance failures are not being enforced and potentially due to lack of public reporting, poor performers have the potential to then be awarded further procurement opportunities.

4.4 NSW Procurement Board Audits

Currently, the NSW Procurement Board has a commitment to undertake a random audit of 5% of all contracts annually. Whilst the NSWICC agrees that this is standard procurement practice, we would recommend, that whilst the APP is still in a stage of relevant infancy, the target of 5% should be applied to APP procurements specifically, particularly those procurements over \$1m in value.

4.5 Identification of an Aboriginal business

It is important as part of this feedback paper to reiterate that the NSWICC's longstanding position, that we are not supportive of the '*Aboriginal business is one that has at least 50 per cent Aboriginal ownership*' model, as articulated within the APP, as the perpetuates the sector's continuing concerns with 'black clad' businesses. For the purposes of doubt, the NSWICC will only certify businesses that are 51% or more Aboriginal owned and controlled, which was established in direct alignment with the *UN Declaration on the Rights of Indigenous Peoples*.

It is also important to note that Aboriginal businesses are regularly being advised by agencies that they must register with the ICN Gateway, particularly for construction and infrastructure procurements. However, ICN Gateway is not in a position, nor should it be, to certify Aboriginal businesses.

4.6 Feedback requests regularly being ignored

The NSWICC regularly receives examples of Aboriginal businesses requesting feedback because of an unsuccessful procurement activity, and a significant number of these examples often receive no response at all from the relevant agency and/or cluster. This is in direct contradiction to the intent of the APP, however the policy phasing '*where feasible*' is currently both allowing and encouraging for the non-provision of feedback to become commonplace.

In further contradiction to this, an agency CPO at a recent public event, in front of several Aboriginal businesses and NSWICC representatives, made a sweeping statement that "Aboriginal businesses are the poorest at requesting feedback", we strongly refute both this statement and this CPOs behaviour.

5. Support Channels

5.1 Acknowledgement of the peak body as a support channel

Whilst the NSWICC is acknowledged within the APP as a certifying body for Aboriginal businesses, we would welcome the opportunity to collaborate further with government, particularly to assist with Aboriginal businesses that are unsuccessful or require further assistance, and as NSW's peak body for Aboriginal business, we are arguably the best placed to provide this support.

5.2 Recognition of the NSWICC's sector intelligence

The NSWICC, and its former entity the Mandurah HIBC, was the first Indigenous Chamber of Commerce in Australia, with nearly 20 years of cumulative sector intelligence and an intimate knowledge gathered from the grass roots support of Aboriginal entrepreneurs and business owners. Considering this, we found it alarming that the NSW Treasury commissioned '*The NSW First Nations Business Sector - A return to prosperity*' report in October 2022, without any consultation or advice from the NSWICC or its 500+ members. We are of the view that this has led to incredibly misleading sector intelligence and inconsistent references to certain sub-sectors within the report.

6. Conclusion

We would like to thank you again for the opportunity to provide this submission and look forward to growing a more collaborative relationship with NSW Treasury. We also welcome the opportunity to discuss this submission in further detail.

Yours faithfully,



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