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Re: Government Procurement Inquiry – Comments on Draft Report

We are writing subsequent to the roundtable discussion this week with some brief responses to the Draft Report on Government Procurement.

In general terms we would like to thank the Productivity Commission for its work and the attention it paid to procurement in the not-for-profit sector. At over \$400m in contracted services in the current year, procurement in this area represents a significant expenditure of government funds and a vital contribution to improving the lives of vulnerable and disadvantaged South Australians.

Draft Recommendations

SACOSS welcomes the directions outlined in all five Draft Recommendations, and specifically strongly support DR 6.5. However, we do have some proposed changes to strengthen DR 6.2, and would like to see a further recommendation around unexpended funds, although this will be dealt with below under the information request heading.

Draft Recommendation 6.2

In relation to Draft Recommendation 6.2, we completely agree that a review of NFP Funding Policy and processes should be done in the second half of the year. This should give time for the known transition issues to be worked out (there are issues in relation to screening clauses), and Treasury should by then no longer be granting exemptions to non-standard contracts (which it is doing as an interim measure to ease transition). However, the recommendation simply says the government should independently evaluate the policy and processes. We seek more specificity.

Any review should be conducted in conjunction with the sector (presumably through its peak bodies), but it is also important to recommend who in government is responsible for the review as our sector is very nervous about raising any issues which are seen to be critical of funding agencies. It would need to be clear that the review is at arms' length from the funding agencies. The State Procurement Board would be ideal in relation to procurement, but it might be more efficient and effective to review the whole ambit of PC044 and the

standard contracts, including grants which are outside of the SPB jurisdiction. Accordingly, we might just suggest a Treasury-led review.

We also aware of some examples of the spirit, and sometimes the letter, of PC044 and the standard contracts being ignored or side-stepped. Accordingly we believe it is important that the review establish base-line data to clearly document current level of compliance, and progress in the future. To this end we believe the review needs to begin with an audit of contracts issued since 1 January 2019 and report on whether the standard contract is used, the length of contract, and whether the service description schedule contain any generic conditions which undermine the standard terms and conditions.

We propose that DR 6.2 be amended as follows (changes in italics):

Noting the role of the NFP Funding Policy in the procurement and grants process, the ~~government independently~~ *Department of Treasury, in conjunction with NFP peak bodies*, evaluate in the second half of 2019 the implementation of the NFP Funding Policy and associated reforms to *audit contracts issued since 1 January 2019 and establish base-line data and* identify any impediments to, and opportunities to strengthen, implementation, with the evaluation process to consider the views of public authorities and the NFP sector.

Information Requests

We have noted the various specific information requests in the Draft Report, although many of these requests are primarily directed to government agencies and we don't have more information to add.

Information Request 6.6:

In the Draft Report relating to thresholds, the Commission comments that SACOSS position is imprecise in relation to the issue of risk management and contract-value thresholds – including in relation to the IPP. As we heard at the Roundtable, there appears some confusion within government or between the government agencies and the Industry Advocate as to whether IPP thresholds are annual or total contract value and their applicability to NFPs. We hope this can be resolved from this Inquiry – it is not an area that SACOSS has direct experience with.

However, while we may not have expressed it well, SACOSS' intention in our original submission was to make a broader point beyond the IPPs. During the negotiations around the SPB Guidelines and standard contracts, we were constantly told that DHS (in particular, and possibly other departments) would assess the total value of contract – possibly including the two potential 3-year extensions into its internal calculation of risk and therefore the level of tender information and reporting required for the contract. As SACOSS argued in our main submission to this Inquiry, this approach significantly exaggerates and mis-states the actual financial risk to the agency.

SACOSS' position remains that multi-year contracts or contract extensions contain no additional risks to government arising out of those extended terms, and we refer to the examples in our original submission of the perverse outcomes this can cause.

Information Request 6.7:

SACOSS does not have data on the number of contracts that could come under the ambit of the late payment interest regime if the current statutory inclusion was lifted.

Like the Commission itself, peak bodies are more likely to hear the horror stories than all the instances where payment is made unproblematically and on time. As we noted in our supplementary submission on the Issues Paper, we are advised that no NFPs applied for late payment interest under the old application scheme, but there were a range of barriers to that (which the change in regime and automation of payment was designed to fix). Further, and obviously, past performance is no indicator of future performance and both we and presumably the government would like to limit or eradicate such late payments, so it is unclear how many contracts may be impacted in future.

While we can not give further quantitative data, the key concern raised in our original submission remains that even if late payments are relatively rare, sometimes they have enormous impact on the ability of NFPs to operate and the late payment interest provides both an incentive for timely payment and for covering of NFP costs arising out of late payment. In this context, we particularly welcome your Draft Recommendation 6.5.

Finally, in relation to late payments, it may be helpful to consider a current example the sector is working through with the Department of Child Protection in relation to the growth of Out-of-Home Care placements. DCP is seeking to expand the number of placements offered through NFPs as all agree that this is in the best interests of the children, but the numbers are now growing above the block-funded places in the original contracts with sector organisations. The current way of dealing with this is to pay the block-funded placements up front for the base number of placements, and then the growth number placements at a unit cost in arrears based on number of children in care at the end of a quarter. While the sector has accepted this census-date approach, it does mean that some children will have been in care for more than two-months without payment to the NFP.

More importantly though, under the RCTI system, DCP is taking up to a month after the end of quarter to match its data to establish the supply. It then has 28 days to issue a tax invoice, and a further 28 days to pay said invoice – the end result of which could see a 3 month delay in payment (and yet the late payment interest would not be triggered in this instance) – a concern raised with SACOSS by several organisations. Given the growth placements are payment in arrears the sector is exploring whether the standard goods and services contract could apply. If that were the case and the NFP could issue the invoice, the invoice could be issued immediately after the census date with 28 days to pay – cutting the potential time to pay by a third. If government data-matching and payment took longer than that, then late payment interest would apply (on agreed payments) – thus not penalising the NFP for providing these vital services up front.

Again, this is a current discussion with DCP and is being conducted in good-faith to resolve the issues. We are not sure what the final arrangement will be, but the example does illustrate both the payment delay caused by the RCTI process and the difficulty in estimating which and how many contracts may be impacted by changes to the late payments regime. (In fact, in this instance at least some of NFPs are incorporated under the Commonwealth

Corporations Act, so if the system invoicing changed they would now be entitled to late payment interest, so again, the impact of legislative changes is hard to estimate).

Information Request 6.8:

We note your comments in the Draft Report that the Commission does not support SACOSS' views on expended funds. For many NFPs the issue does not arise because the funding barely covers or does not cover basic service cost, so there is never a question of unexpended funds. However, for others it is an issue both in terms of accounting and red tape, and a disincentive to innovation. SACOSS continues to believe that there is a basic problem when for-profit companies can keep unexpended funds while not-for-profits can't.

Even if the Productivity Commission is not swayed by the above arguments, *we still request a recommendation that the potential repayment is at the end of a contract (rather than annually)*. The annual accounting does not take account of lumpy expenditures and simple expenditure timing issues. It encourages poor accounting behaviour and/or inefficient spending to drive to a zero balance, and creates extra annual reporting and red tape. If the concern is to ensure accountability and that government money is spent on the contracted service, this will still be done at end of contract (when the what is contracted for is completed). Further, there is provision in the standard contract for additional reporting and accountability if there is a reasonable fear that money is not being spent on the agreed purpose.

More broadly, we note your invitation at the Roundtable to rethink the issue in terms of providing an incentive to innovate (that is absent when the government can potentially take back of unexpended funds). One possible option here would be to provide incentives to efficiency gains by a "carrot" of enabling an NFP to retain/reinvest some proportion of unexpended funds. If, for example, an NFP was able to retain say 50% of unexpended funds resulting from efficiency gains, there would still be an incentive to innovate while the government would still gain from cheaper services and recouping some unexpended funds. This could be mandated through a State Procurement Board Policy, so that – as per the standard contracts, unexpended funds still have to be accounted for (hopefully at the end of contract), but an NFP could apply to the Agency (as per the contract) detailing that the funds were unexpended due to efficiency gains. At that point the policy would require the Agency to allow the NFP to retain half the unexpended funds.

To be clear, as per our main submission to this Inquiry, we are not talking here about recouping unexpended funds where a service was not delivered, but rather where the NFP has made efficiency gains and met the contracted service requirements under-budget.

Accordingly, we make two recommendations:

- As per our original proposal, the Productivity Commission should recommend that accounting for unexpended funds only take place at the end of the service contract (not counting extensions – i.e. after 3 years, not after 3+3+3) – which is consistent with the new Standard Grants Agreement.
- The Productivity Commission should recommend that the State Procurement Board develop a Policy on recouping unexpended funds to the effect that, where funds are

unexpended to due innovation and efficiency gains, the NFP should be allowed to keep half the cost savings identified.

Thank you for your attention to this matter. If you require any further information, please contact me at greg@sacoss.org.au or by phone on 8305 4229.

Yours

A handwritten signature in black ink that reads "G. Ogle". The signature is written in a cursive style with a large, looped 'G' and a distinct 'Ogle'.

Dr Greg Ogle
Senior Policy Officer

20 April 2019