



CENTRALITY OF PRICE IN NEW ZEALAND PROCUREMENT: TIME FOR CHANGE

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I Introduction

The New Zealand public sector is New Zealand's single largest procurer with an estimated annual expenditure of NZD\$10 billion on multifaceted infrastructure projects such as roading, education, transport and healthcare.¹ The private sector plays a leading hand in securing the success of the public sector procurement by delivering projects on behalf of the Government. However, price (or securing the lowest price possible) is a predominant factor in any procurement model, which can present a negative output towards the project's success by discarding economic, social and timing considerations.

This essay seeks to examine New Zealand procurement models and the process of public procurement to illustrate the issue of centrality of price and lowest price-based procurement. This follows with an overview of overseas procurement processes and initiatives which are significantly more liberal in their approach. Finally, the essay will consider the Construction Sector Accord as an example of a recent Government initiative that seeks to address the issues of price and unfair risk allocation, with an evaluation of whether this initiative goes far enough to address the issues posited by centrality of price.

II New Zealand procurement models

The definition of "procurement" is wide-encompassing. The term is intended to capture all project pathways for the principal from shortlisting a selection of contractors to participate in the tender process, to choosing the preferred contractor to deliver the works. The method of procurement will depend on the requirements of the specific project, market position and the objectives of the client.²

The 'lifecycle' of a typical procurement model begins with project initiation. This involves identifying key internal and external stakeholder groups, establishing a budget estimate for procurement costs, and identifying potential time and resource constraints. This is followed by analysing market behaviour, selecting suppliers and, finally, negotiating and awarding the contract.³ It is important to understand the types of procurement models commonly adopted in New Zealand before examining the issue of centrality of price.

A Traditional Model (conventional client-led design)

Traditional procurement (also known as conventional client-led model) is the most commonly adopted method for procuring small to medium-sized projects. The traditional procurement model requires project design to be (ideally) fully developed prior to the contract being awarded, and consists of a client, at least one consultant and the contractor.⁴ Consultants generally retain full control over the design and quality of the project. However, at least as between the client and the contractor, the client will retain most if not all of the design risk.

As a first step, the client will appoint a consultant to prepare a detailed design of the project against budget estimate. Contractors are then invited to submit tenders for the construction of the project on a competitive basis. After tenders are received, they are reviewed by the consultant and the most favorable option is then recommended to the client. This model is advantageous for a 'lump-sum' contract where price for the works is agreed prior to the works commencing.⁵ The

¹ Infrastructure New Zealand "Creating value through procurement: a report into public sector procurement of major infrastructure projects" (August 2018).

² New Zealand Government "Mastering procurement: A structural approach to strategic procurement" (March 2011).

³ Above n 2.

⁴ New Zealand Government Procurement "Traditional Delivery Model: Construction Procurement Guidelines" Information Sheet (October 2019).

⁵ Above n 4.

advantage of this is that contractors are able to accurately price the works in advance. However, this depends on the completeness of design documentation (where errors or omissions are common).

B Design and Build Model

Unlike the Traditional Model, a Design and Build procurement model requires the main contractor to assume responsibility for the design, planning and construction. Quite often, a client may employ a consultant to prepare design and build specifications (also called technical performance requirements) which are then implemented by the contractor (this is often the case where the client wants greater involvement in project design). A notable advantage of this model is that it provides more certainty as to costs. This is because the contractor can work together with the design team to enhance 'value-for-money' decisions and develop design solutions that will promote design objectives.⁶ Design and Build procurement is commonly used by the Government for publicly funded projects.

C Alliance Procurement

An alliance procurement and delivery model is based on a relationship-style arrangement whereby the client and related parties collaborate resources and decision-making to deliver the project. This model is also known as a "collaborative procurement method". A notable advantage of this model is that it enables the parties to make decisions in accordance with good faith obligations and according to a "best-for-project" decision-making approach (in contrast to a traditional model). In relation to price, the parties will often negotiate a pre-agreed percentage split whereby the costs that are either above or below the target costs are shared between the parties. There is often a transparent contract-pricing process which enables the parties to understand the risks and costs involved.⁷ An alliancing model is most suitable for large and complex infrastructure projects where risk allocation, project scope (including project risks) and programming are uncertain and where there are tight timeframes for project delivery. However, it is important that strong leadership is established throughout the project.

D Joint Venture (JV) Model

Joint venture (also known as commercial alliance) is a popular procurement method for both the public and the private sector. In New Zealand, this model is often chosen for big scale projects where pooling of resources is necessary (for example, where it is impossible for the contractor to deliver the project alone) and as a way to submit tenders in order to compete for international projects.⁸

However, while the New Zealand construction industry is slowly moving away from traditional project relationship of lowest price tenders towards a more collaborative contract procurement (as illustrated by the JV and alliance procurement models), price remains a predominant factor in procurement and the client's decision to award a contract for the project.

III Issue of centrality of price and lowest price procurement

In 2019, Infrastructure New Zealand conducted a survey amongst key stakeholders in the industry about the performance and the main issues facing New Zealand's construction industry (these included Procurement and Commercial Managers, Civil Engineers, Bid Writers, Senior Consultants and Project Directors).⁹ The survey results showed that procurement expertise are worsening in both the public and private sectors as procurement is increasingly seen as a "standalone" activity removed from wider considerations that go into project delivery. Most participants believed there is a lack of understanding by procurers on costs of tendering (including the low margins that most contractors are operating under) and the wider market conditions. Procurement process is actively seen as being driven by "lowest price, rather than lifecycle cost".¹⁰ These survey results illustrate the prevailing issue in the industry where a lack of a holistic approach to procurement leads to the lowest-based tender being chosen, which may not result in the best outcome (for example, operating costs may be higher in the long run due to poor project design).

⁶ New Zealand Government Procurement "Design and Build Delivery Model: Construction Procurement Guidelines" Information Sheet (October 2019).

⁷ New Zealand Government Procurement "Alliance Delivery Model: Construction Procurement Guidelines (October 2019).

⁸ Suzanne Wilkinson and Yana Shestakova "Collaborative procurement on the rise" (2007).

⁹ Sarah Lang, Project Director "2019 Infrastructure Procurement Survey Results" Infrastructure New Zealand.

¹⁰ Above n 9.

In 2018, the Entwine Report (**Report**) was prepared for Infrastructure New Zealand in partnership with the Construction Strategy Group and Civil Contractors New Zealand based on both quantitative and qualitative research into New Zealand's procurement of major infrastructure projects, including issues surrounding lowest price-based procurement.¹¹ The Report usefully summarises this issue as follows:

*"Multiple concerns exist over the quality of some agency leadership and the impact this has on a positive procurement culture. Autocratic master-servant relationships roadblock peer-to-peer collaboration while public and political expectation to see immediate results contributes to a culture of fear. Rather than strive to maximise value, employees often focus on **immediate cost reduction and 'on the ground' results**. Meanwhile a lack of strategic data collection compromises both evidence-based decision-making and any robust appraisal of long-term investment outcomes. The 'old ways' of delivering can be perpetuated despite not offering best value to the New Zealand public."¹²*

The focus on cost reduction in procurement process, together with a lack of collaboration and understanding of the wider social and political factors are seen as being the predominant driving factors towards ineffective project delivery. In particular, the focus on lowest bid price during tender will rarely show the 'whole picture' of how the contractors have performed in the past, including their levels of expertise and whether they will deliver the project within budget. Moreover, contractors who bid the lowest price will often 'make up' the margins elsewhere, which can include excessive variations to the contract and/or hiring inexperienced subcontractors who are keen to secure the project. In consequence, this can lead to litigation and complex disputes (and therefore higher costs).

Another contributing factor is the nature of the tender process. Very often, contractors will be required to submit their tender price based on a set of specifications, schedules and project drawings. This requires a detailed understanding and review of the information in order to interpret both the quantity and scope of works. For bigger infrastructure projects, contractors will often break this information into "packages" to be used to obtain price from subcontractors, which is then used as part of the tender price. Contractors will often include a risk allowance to take into account possible omissions and/or errors in pricing. However, the effectiveness of this largely depends on experience and whether the contractor has sufficient resources (including robust pricing information from the market).¹³ Where the latter is lacking, the contractor will submit a tender price which, although may be the lowest tender, may not reflect the true project risks and the contractor's ability to deliver the project within budget. In turn, this will have adverse consequences for the project itself and the sector for which the project was intended. This issue is further exacerbated by excessive changes in project's scope during the pricing stage of the tender process.

A Lowest price in tender evaluations

The Report identifies significant issues with the fairness, quality and consistency of tender evaluations and their impact on procurement process. Lowest price continues to be the most basic technique for evaluating tenders whereby the total price of each offer is treated as the sole criteria for awarding a contract without having regard to other factors that might impact the project. The notable issue with this is that choosing contractors based on the lowest initial tender will often expose the client to significantly higher risk of post-contract claims and cost over-runs (as project quality will be reduced).¹⁴ This similarly links to the issue of 'dumb bidders' whereby "Informed tendering parties will recognise when risk transfer is inappropriate and worst case may withdraw from a tender. This leaves only the 'dumb bidders' - and when things go wrong these bidders may be unable to absorb the financial loss."¹⁵ Therefore, lowest tender price will rarely guarantee lowest project cost.

Another significant issue is the excessive time taken to evaluate tender bids (for example, an evaluation period of 8 weeks without a deadline for final shortlisting).¹⁶ The consequence of this is fewer contractors submitting tenders; meaning fewer tenders to choose from. While not directly related to lowest price, it is a contributing factor towards the procurement process (and thus industry performance) being less efficient.

¹¹ Infrastructure New Zealand "Creating value through procurement: a report into public sector procurement of major infrastructure projects" above n 1.

¹² Above n 1, at 4.

¹³ At 5.

¹⁴ Mehrdad Soltanifar "A Framework to improve the Performance of Public Tender Evaluation Procedures in New Zealand" Auckland University of Technology, School of Engineering (July 2019) at 32.

¹⁵ Above n 1, at 17.

¹⁶ At 20.

B Unfair risk allocation

Another unavoidable consequence of lowest price-based procurement (which flows on from the quality of the tender process) is unfair risk allocation onto the contractors.¹⁷ This arises in situations where the public body commences its procurement process before the project is sufficiently developed (together with very tight timeframes for tender), which often forces the contractors to submit bids that over-promise on price to secure the project. This is supplemented by the public body transferring risk onto the contractor that is often not budgeted for during the process of tender evaluation.¹⁸ The effect of this "lowest price culture" and unreasonable approach to risk allocation is contractor failure and poor industry performance. While it is correct that government agencies ought not (and do not have the resources) to conduct due diligence for the private sector in this regard, the private sector should equally be allowed to rely on government agencies to act reasonably and transparently in their procurement process to achieve the value the project was intended to deliver, instead of focusing on securing the lowest price.

Accordingly, for a procurement strategy to be successful, consideration should be given to the following factors *alongside* price:¹⁹ the economic, technological, commercial, social and legal factors likely to influence the client and the project (for example, the possible changes in interest rates and/or legislation or regulation); client and contractor experience; project characteristics likely to influence price; and the potential cost issues (including an assessment of price certainty between initial project estimate and the time when tenders are received). Only accounting for price will rarely achieve the long term outcomes sought.

To illustrate this problem, one should consider the Housing New Zealand Corporation. This is an example of a public body which has been criticised by Entwine and the private sector for its lack of positive participation in the procurement process due to a price-driven decision making approach.²⁰ Another example is the Ministry of Education (**Ministry**) which for a long period has been linked to having a "lowest cost wins" decision-making approach. Following this criticism, the Ministry made changes to its procurement practices by adopting a strategic procurement approach whereby the wider context of the project informed the procurement strategy, rather than decision-making being managed solely at a school level.²¹ This is a helpful example of a public body recognising the issues of lowest price-based procurement and taking positive steps to implement change. However, not all public bodies have adopted a similar holistic approach – the culture of lowest price remains prominent in the industry.

IV Overseas public procurement processes and initiatives

A Sweden: National Public Procurement Strategy

Sweden is known for having one of the best performing public procurement systems; it is one which focuses on innovation and integration. Sweden has two broad institutions for procurement policy; the Swedish Competition Authority (**KKV**) which operates under the Ministry of Enterprise and Innovation, and the recently created National Agency for Public Procurement (**UHM**) which operates under the Ministry of Finance.²² Both institutions play separate but important roles: KKV is responsible for the supervision of procurement for efficiency and compliance with the relevant laws and regulations, while the UHM has the responsibility of developing public procurement and supporting innovations to enhance procurement. There are also three primary pieces of legislation that help regulate Sweden's public procurement: the Public Procurement Act (SFS 2016:1145), the Utilities Procurement Act (SFS 2016:1146) and the Concession Procurement Act (SFS 2016:1146) (**Legislation**). The underlying principles of the Legislation reflect the general principles of European Union Law of transparency and equal treatment, which are important for building trust amongst the suppliers and the procuring bodies themselves.²³

In 2017, the Swedish Government introduced the National Public Procurement Strategy (**Strategy**) to enhance public sector procurement and project delivery. The Strategy focuses on integration to "achieve the Government's aim of establishing public procurement as a strategic tool for efficient organisations and a means of achieving the national environmental, social sustainability and administration policy objectives".²⁴ The Strategy broadly forms part of the Government's reform of its public procurement (alongside the establishment of the National Agency for Public Procurement in 2015). While the Strategy is intended to capture all entities involved in the provision of goods, services and contracts, it is aimed at central government

¹⁷ Bassam Maghzal "The Construction sector: Will anything change?" (24 February 2020).

¹⁸ Above n 17.

¹⁹ CRC Construction Innovation "Building Procurement Methods Report" (June 2008).

²⁰ Above n 1, at 39.

²¹ At 39.

²² Public Procurement – Study on administrative capacity in the EU Swedish Country Profile, at 215.

²³ Above n 22.

²⁴ Government Offices of Sweden "National Public Procurement Strategy" (2018) at 6.

authorities and their representatives. This is because these bodies are better placed to develop and implement public procurement for the benefit of the public.²⁵

In broad terms, the Strategy's objective is to ensure that public procurement remains efficient, legally certain, promotes market competition, and takes into consideration social and economic factors. The seven policy objectives of the Strategy are:²⁶

1. Public procurement as a strategic tool for doing good business;
2. Effective public purchasing;
3. A multiplicity of suppliers and well-functioning competition;
4. Legally certain public procurement;
5. Public procurement that drives innovation and promotes alternative solutions;
6. Public procurement that is environmentally responsible; and
7. Public procurement that contributes to a socially sustainable society.

The second policy objective of effective public purchasing plays a key part in ensuring that public procurement is efficient and contributes to a socially sustainable society. The Strategy recognises that a lack of a holistic approach (for example, by focusing on the lowest price) omits value for other activities affected by public procurement, which often results in undesired pass-on effects and sub-optimisation of resources.²⁷ Therefore, the Strategy advocates for adoption of a life-cycle perspective to procurement to ensure that quality and sustainability is not compromised. This can be achieved by the public bodies taking into account the project's life cycle costs. Additionally, the Strategy advocates for the adoption of a multidisciplinary approach whereby Government agencies, councils, and contracting authorities work collaboratively in their procurement processes to implement the objectives within their activities.²⁸ From this brief overview, it is plain that the Strategy is more liberal than New Zealand procurement models as it recognises the importance of adopting a holistic approach to infrastructure procurement.

B Scotland: Scottish Futures Trust

Scotland is another useful example of "best practice" public procurement. It is arguably the best international comparison to New Zealand due to its similar population density and population size of 5.45 million.

One of the mechanisms which Scotland has adopted to enhance its public procurement and public investment is with the establishment of the Scottish Futures Trust (**SFT**) in September 2008. This is a non-departmental public body of the Scottish Government which works closely with the private sector. Although the SFT's primary objective is to reduce delivery costs of public sector infrastructure projects, the SFT has since developed a secondary role of assisting agencies to improve the quality of project delivery by focusing on the lifecycle costs and the value of the projects (rather than focusing on lowest price).²⁹ By focusing in collaboration and transparency in public procurement, the SFT has been able to provide the Scottish government with a clearer set of priorities than were previously available.³⁰

C New South Wales Action Plan

In 2018, the New South Wales (**NSW**) Government Construction Leadership Group released an action plan and a ten-point Commitment to the Construction Sector (**Commitment**) in partnership with the private sector.³¹ This sets out specific Government actions to improve capability and capacity of the construction sector. In summary, the ten commitments are:

1. Procurement and management of projects in a collaborative way, including moving away from fixed price and lump sum procurement methods towards collaborative contracting models (such as alliancing);
2. Adopt partnership-based approaches to risk allocation (which recognises that not all risks can be fully assessed or priced);
3. Standardise contracts and procurement methods (including moving to collaborative procurement contracts);

²⁵ Above n 24, at 9.

²⁶ At 11.

²⁷ At 15.

²⁸ At 9.

²⁹ At 43.

³⁰ McClelland J "Review of Public Procurement in Scotland – Report and recommendations" (2006) at 21.

³¹ NSW Government Progress Report "A ten-point commitment to the construction sector" (June 2020).

4. Develop and promote a transparent pipeline of projects;
5. Reduce the cost of bidding;
6. Establish a consistent NSW Government policy and bid cost contributions;
7. Monitor and reward high performance;
8. Improve the security of timelines of contractor payments;
9. Improve skills training; and
10. Increase industry diversity

As we saw with Sweden and Scotland, the Commitment demonstrates a trend in Government recognising the need for a high performing construction sector and acknowledging the need for collaboration and collaborative procurement models. This essay argues that this is the preferred approach which should be equally followed in New Zealand.

In relation to procurement of projects in a collaborative way (commitment number 1), an example of this being implemented in Australia is through the School of Infrastructure NSW increasing the use of early contractor involvement model to give the private sector greater opportunities to collaborate. In addition, the Transport for NSW Rail host team has been building workshops aimed at critical points on the Redfern Station Upgrade project (as part of the Transport Access Programme) as a way to promote alliancing principles.³² In regards to adopting partnership-based approaches to risk allocation (commitment number 2), the NSW Government reports that 88% of project personnel required the best placed party to manage risk and to share risk when necessary, while only 71% actually adopted risk-sharing mechanisms to incentivise the parties during procurement not to put the contractor's viability at risk.³³ An example of this commitment being implemented is the Sydney Metro Greater West pilot which seeks to initiate and promote collaborative engagement on NSW tunnelling packages as a way to facilitate the method for selecting procurement models.³⁴

Overall, the recognition of unfair risk allocation in procurement, the need for collaboration and a preference for a move towards collaborative procurement methods (such as alliancing and away from the traditional and design and build models) are excellent examples of Government's recognition of the key issues facing the construction industry. It is argued that similar principles ought to be adopted and implemented in New Zealand to address the issue of lowest price-based procurement.

V Construction Sector Accord: The New Zealand Context

The Construction Sector Accord (**Accord**) is the key Government Initiative in New Zealand which seeks to address the "lowest price culture" in procurement (alongside other issues affecting the construction industry). This analysis section focuses primarily on the Accord in order to analyse whether the New Zealand Government is doing enough to address the issue of lowest price culture.

The Accord was launched in 2019 by the Prime Minister, the Accord Minister and the Industry Development Group which consists of 13 sector leaders (including MBIE, Ministry of Housing and Urban Development, WorkSafe and NZ Transport Agency).³⁵ The purpose of the Accord is to improve collaboration and strengthen partnership between the industry and Government leaders. It represents a joint commitment to address the key issues facing the construction sector. The vision of the Accord is "A high performing construction sector for a better New Zealand". This addresses the issues identified in the 2018 Entwine Report.

The Accord contains four "shared goals" which are intended to act as a guide for the industry and the Government. These are:³⁶ increase productivity of the construction sector; raise capability via a skilled and capable workforce; improve resilience by having strong and sustainable businesses; and restore confidence, pride and reputation (meaning a high performing and transparent construction sector).

³² Above n 31, at 4.

³³ At 4.

³⁴ At 4.

³⁵ MBIE "Construction Sector Accord" accessed at <https://www.hud.govt.nz/urban-development/construction-sector-accord/> (April 2019).

³⁶ Above n 35, at 8.

A Accord's Transformation Plan

One of the primary ways in which the Accord intends on improving the industry's procurement practices is through the Construction Accord Transformation Plan (**Transformation Plan**). This is a 3-year action plan that was launched just over a year ago (on 26 January 2020) by Government leaders. As part of the Accord, the purpose of the Transformation Plan is to increase collaboration between public and private sectors in procuring New Zealand's infrastructure.

The Transformation plan specifically recognises the culture of focusing on the lowest price rather than the long-term value, and includes specific principles and objectives to ensure this cultural change is addressed by 2023. Phil Hebden, a Commercial Manager at Armstrong Downs Commercial, expressed his vision on the Transformation Plan: "*One of the biggest issues in the procurement of government projects has been **the race to the bottom which has forced the lowest price to win out**... I hope the Transformation Plan will see more government agencies working with us like the Ministry of Education has on [this] project*".³⁷

In summary, the Transformation Plan contains "shared goals" and priority working areas as part of the Accord. The most important one for the purposes of this essay is procurement and risk whereby the private and public sector must share good procurement practices, engage in fair and transparent contracts (including fair allocation of risk), and improving subcontractor assurance for contracts, payments and retentions.³⁸ As we saw with the NSW Government Commitment and Sweden's National Public Procurement Strategy, the Transformation Plan contains similar goals of multi-party collaboration. The Transformation Plan will be monitored annually by the Accord leadership group to ensure compliance with the Accord.

B Updated Construction Procurement Guidelines

On 1 October 2019, the Government (through Economic Development Minister Phil Twyford and Building and Construction Minister Jenny Salesa) announced updated Construction Procurement Guidelines (**Guidelines**) to help support the Accord's objectives and to encourage government agencies to adopt a "whole-of-life approach to construction rather than just securing the cheapest price".³⁹ As part of this, it is now mandatory for government agencies with construction contracts exceeding \$9 million to comply with standards of good practice under the Guidelines (for example, by ensuring that contracts are only awarded to companies which adopt a holistic approach to the design process). In addition, construction suppliers bidding for government contracts are now required to demonstrate compliance with the Accord's principles during tender, which can be achieved by inserting the Accord's outcomes into tender documents. The agencies are also required to demonstrate how their risk management strategies (as provided in the Guidelines) will be implemented in their procurement strategy. This has direct consequences for lowest price as it helps ensure that contractors do not submit bids which over-promise on price, thereby reducing the issue of cost over-runs down the line. Although the \$9 million threshold is unlikely to capture all construction contracts, it will target those projects which will have the biggest impact for the public and the industry. However, its success will require a commitment from both the public and private sectors to work collaboratively in delivering New Zealand infrastructure.

VI Tangible Solutions Going Forward

The success of the Accord and the Guidelines will require monitoring over the next few years. Accordingly (and realistically), more tangible solutions are needed in the meantime to address the issue of lowest price-based procurement.

A Good faith clauses

The first suggested solution is to make good faith clauses mandatory in tender documents in accordance with the Accord's principles of collaboration and transparency. This will require the principal and the contractor to act fairly towards each other through mutual cooperation.

The English law has generally approached the good faith doctrine with hostility in favour of procurement pathways and contract models which promote collaboration (such as early contractor involvement). However, because procurement models are yet to be developed to a standard reflective of good faith principles (as demonstrated by the Accord), this solution is more likely to have immediate impacts for the industry.

³⁷ At 15.

³⁸ At 18.

³⁹ Construction Sector Accord "New Construction Procurement Guidelines to promote better practices" (2019) retrieved at <https://www.constructionaccord.nz/news/news-stories/new-construction-procurement-guidelines-to-promote-better-practices/>

In *Yam Seng v International Trade Cooperation Ltd*,⁴⁰ Leggatt J in obiter stated that good faith is an incident of certain categories of conduct which, following the implications of terms in fact theory, can be implied into commercial contracts based on the parties' presumed intentions. Keating supports the concept of good faith in construction contracts, noting that good faith will depend on the context of the contract, having regard to the legitimate interests of the parties.⁴¹

Although this solution raises the question of how to conceptualise good faith clauses to make them proportionate, Keating notes that if drafted accurately and not too widely, these clauses "can help operate collaborative activities in honesty, fairness, and reasonableness".⁴² This is based on the recognition of reasonable commercial dealings and the requirement for the principal to adopt a collaborative and holistic approach to procurement and evaluating tenders (akin to alliancing procurement model).

One way a good faith clause can be drafted in tender documents is as follows: "In all matters relating to this process of [tender], the Principal and bidder shall act with the utmost good faith towards each other". Where the principal decides that lowest price tender does not objectively reflect the anticipated costs, the principal will not be in breach of the tender document by accepting a higher bid.⁴³ Although good faith clauses have certainly been adopted in other contexts (such as alliancing model which recognises good faith obligations and collaborative decision-making), good faith clauses are not compulsory in every procurement model (such as Traditional and Design and Build). Accordingly, making good faith clauses mandatory will likely address the issue of centrality of price by encouraging transparency and collaboration in line with the Accord's objectives.

B Schedule of quantities

The second suggested solution is to use a schedule of quantities in tender schedules and contracts to give the principal a solid basis for comparison of tender prices and to filter unusually low prices.

This solution builds on clause 2.3.1 of NZS 3910:2013 Standard Form (measure and value contract) which states: "*In a measure and value contract the Contract Price shall be calculated according to the measured quantity, as determined by the Engineer, of each item of work carried out at the rates set out in the Schedule of Prices, subject to such adjustments as are provided for in the Contract*".

For lump sum contracts (which are more commonly adopted than a measure and value type contract) the solution contemplates for the contractor (rather than the Engineer) to assess the quantities in a 'sheet' format for Principal provide items and to provide pricing based on those items (this could include earthworks and environmental compliance costs). This would be a relatively easy way to compare items and pricing to determine whether the contractor might have underpriced particular items; thereby allowing the Principal to holistically assess costs rather than opting for lowest price without taking into account external considerations. If this solution is adopted, the issue of lowest price-based procurement may be addressed going forward by ensuring the Accord's objectives are *actually* implemented.

VII Conclusion

The Accord (together with Government Guidelines and Transformation Plan) are excellent examples of the Government recognising the need for a high performing sector that is not centered on price. However, realistically, it is too early to forecast with certainty whether the intended outcomes will be achieved. For the culture of lowest price-based procurement to be addressed through Government initiatives, commitment is required from both the public and private sectors together with comprehensive monitoring over the next few years. However, the suggested solutions of mandatory good faith clauses, together with a schedule of quantities in tender and contract documents in procurement are realistic and tangible options that could 'lessen' the issue of centrality of price, given that they mirror the goals and principles of the Accord and the Guidelines. Meanwhile, it is important that government agencies apply the life-cycle holistic approach to procurement and assessing tenders. Coupled with the proposed solutions, the issue of lowest price-based procurement may be addressed for the benefit of the construction industry and the public as a whole.

⁴⁰ [2013] EWHC 11 (QB), [2013] 1 All ER (Comm) 1321, [2013] Lloyd's Rep 526.

⁴¹ David Thomas, *Keating on NEC3* (Sweet & Maxwell, 2012) para 2-004.

⁴² At 13.

⁴³ *Sound Contracting Ltd v Nanaimo (City)* 2000 BCA 312.