



# ***PUBLIC ACCOUNTS COMMITTEE***

## **INQUIRY INTO CONTRACTS ENTERED INTO BETWEEN CONSOLIDATED CONSTRUCTIONS PTY LTD AND MAIN ROADS WA AND THE PUBLIC TRANSPORT AUTHORITY**

**Report No. 7**

**2004**

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Public Accounts Committee

Inquiry into Contracts Entered Into Between Consolidated Constructions Pty Ltd and Main Roads WA and the Public Transport Authority

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## **INQUIRY INTO CONTRACTS ENTERED INTO BETWEEN CONSOLIDATED CONSTRUCTIONS PTY LTD AND MAIN ROADS WA AND THE PUBLIC TRANSPORT AUTHORITY**

### **Report No. 7**

Presented by:  
**Mr J.B. D'Orazio, MLA**  
Laid on the Table of the Legislative Assembly  
On 16 September 2004



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PUBLIC ACCOUNTS COMMITTEE

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## COMMITTEE'S FUNCTIONS AND POWERS

The Public Accounts Committee inquires into and reports to the Legislative Assembly on any proposal, matter or thing it considers necessary, connected with the receipt and expenditure of public moneys, including moneys allocated under the annual Appropriation bills and Loan Fund.

The Committee may:

- 1 Examine the financial affairs and accounts of government agencies of the State which includes any statutory board, commission, authority, committee, or trust established or appointed pursuant to any rule, regulation, by-law, order, order in Council, proclamation, ministerial direction or any other like means.
- 2 Inquire into and report to the Assembly on any question which -
  - (a) it deems necessary to investigate;
  - (b) is referred to it by resolution of the Assembly;
  - (c) is referred to it by a Minister; or
  - (d) is referred to it by the Auditor General.
- 3 Consider any papers on public expenditure presented to the Assembly and such of the expenditure as it sees fit to examine.
- 4 Consider whether the objectives of public expenditure are being achieved, or may be achieved more economically.



## **INQUIRY TERMS OF REFERENCE**

Due to Consolidated Constructions Pty Ltd being placed into administration, the Public Accounts Committee resolved on 31 March 2004 to inquire into the contracts Consolidated Constructions entered into with Main Roads WA and the Public Transport Authority to complete the seal of the Marble Bar Road and works on the rail track and stations at Armadale and Gosnells.

The Committee will examine the following Terms of Reference:

1. Whether established tender practices were adopted by Main Roads WA and the Public Transport Authority;
2. How similar tender processes can be improved;
3. Whether the outcome may have been different if improved tender processes had been in place; and
4. Any other related matter that the Committee resolves to consider.



## CHAIRMAN'S FOREWORD

It is with great pleasure that I table in the Legislative Assembly the Public Accounts Committee's seventh report, *Inquiry into Contracts Entered into Between Consolidated Constructions Pty Ltd and Main Roads WA and the Public Transport Authority*.

I would like to express my gratitude to Committee members for their contribution to this Inquiry: Hon. Monty House MLA, Mr John Bradshaw MLA, Mr Tony Dean MLA and Ms Jaye Radisich MLA. Once again, the Committee has worked cooperatively towards reaching unanimous conclusions, and it has been a pleasure to work with all my fellow Committee members.

I also thank the Committee's Principal Research Officer, Ms Andrea McCallum, for her continued support to the Committee.

On behalf of all the Committee members, I am also grateful to all those who prepared written submissions and appeared before the Committee to give evidence. Particular thanks to the large number of sub-contractors who gave their time to appear as witnesses in Marble Bar, Karratha and Perth. Many of these people drove substantial distances to meet with the Committee and I wish to acknowledge their assistance in the inquiry.

MR J.B. D'ORAZIO, MLA  
CHAIRMAN



## ABBREVIATIONS AND ACRONYMS

Carr Civil	Carr Civil Pty Ltd
CFMEU	Construction, Forestry, Mining and Energy Union
Committee	Public Accounts Committee
Consolidated Constructions	Consolidated Constructions Pty Ltd
MRWA	Main Roads WA
PTA	Public Transport Authority
SSC	State Supply Commission
State	State of Western Australia
WA	Western Australia





## FINDINGS

Page 7

### **Finding 1**

Consolidated Constructions' contracts with MRWA and the PTA had no impact upon Consolidated Constructions going into liquidation.

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### **Finding 2**

Given that Consolidated Constructions intended to sub-contract approximately \$6 million of a \$7.6 million contract to Carr Civil, Consolidated Constructions should have provided Main Roads WA with sufficient information about Carr Civil to confirm that Carr Civil had the financial capacity and experience to perform the majority of the contract work.

Under current tender processes, it was not a requirement for Main Roads WA to conduct any of its own financial checks on Carr Civil, as it was sub-contracted by the principal contractor, Consolidated Constructions.

Page 14

### **Finding 3**

Carr Civil did not have the financial capacity or sufficient previous experience to undertake a roadworks project of this scale.

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### **Finding 4**

The Committee finds that Main Roads WA followed established tender practices in awarding Contract 706/02 to Consolidated Constructions.

Although Main Roads WA assessed Consolidated Constructions' financial position based on information from the previous financial year, it nevertheless complied with its existing pre-qualification and tender policies.

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**Finding 5**

Although the financial due diligence process employed by government agencies is not flawless, it is reasonable for them to make an overall risk assessment due to the cost of administering exhaustive financial assessments. In the history of both Main Roads WA and the Public Transport Authority, there have only been three occasions of financial collapse of a principal contractor.

Page 27

**Finding 6**

Had Main Roads WA staff noticed that the wording of the final two statutory declarations from Consolidated Constructions was altered to provide only a qualified declaration that sub-contractors had been paid, they may have made further enquiries to verify that sub-contractors had in fact received payment for works invoiced.

Main Roads WA's failure to notice the significant change of wording on the statutory declarations was a careless oversight, which may have contributed to the financial losses sustained by sub-contractors of both Consolidated Constructions and Carr Civil.

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**Finding 7**

From the available evidence, it is unclear whether Main Roads WA staff represented to sub-contractors of Carr Civil that it had provisions in place to ensure they would be paid, or simply whether they required statutory declarations from Consolidated Constructions confirming that **its** sub-contractors had been paid. Either way, the Committee can see how sub-contractors of both Carr Civil and Consolidated Constructions thought they were being protected by Main Roads WA.

In its haste to ensure that the roadworks were completed before the cyclone season, Main Roads WA gave ambiguous and misleading advice to sub-contractors. Notwithstanding the representations, Main Roads WA is not responsible for sub-contractors engaged by Carr Civil, as they are third-tier contractors to its principal contractor, Consolidated Constructions.

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**Finding 8**

The financial losses sustained by sub-contractors engaged by Carr Civil are directly attributable to Carr Civil's financial incapacity and inexperience. Their losses were not ultimately caused by any direct act of Main Roads WA.

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**Finding 9**

In breach of its own financial assessment policy, the Public Transport Authority accepted a cash retention from Consolidated Constructions instead of the required bank guarantee, thereby reducing its security over the contracts. The decision to waive a bank guarantee was inappropriate given that internal advice warned that there was a financial risk entering into a contract with Consolidated Constructions.

Page 34

**Finding 10**

In the construction industry, individual companies' dynamic risk and delinquency scores in Dunn & Bradstreet reports fluctuate widely, even during the course of one contract. However, they are a useful tool to assess companies' abilities to fulfil contracts at a particular time.

Page 36

**Finding 11**

The Public Transport Authority should have conducted a further financial check on Consolidated Constructions prior to signing the contracts, especially as internal advice had warned that there was a financial risk entering into a contract with Consolidated Constructions.

Had a further financial check been undertaken, the Public Transport Authority would have realised that the financial status of Consolidated Constructions had deteriorated since its initial financial assessment undertaken in March 2003.

**Finding 12**

The Committee accepts that even if the Public Transport Authority had conducted a further financial check on Consolidated Constructions prior to signing the contracts, it probably would still have entered into the contracts on the basis that:

- It is normal practice in the public sector to accept the lowest credible conforming bid. For both contracts, Consolidated Constructions was the lowest conforming bidder, offering a further \$100,000 discount if awarded both contracts;
- Consolidated Constructions was assessed to be a company of substance, and the Armadale and Gosnells contracts were considered to be well within the company's financial capacity; and
- Consolidated Constructions had a proven track record with the Public Transport Authority, having successfully completed a \$2.4 million at Claisebrook, and smaller works at Mosman Park and various station carparks. These previous contracts were completed on time and on budget.

## RECOMMENDATIONS

Page 15

### **Recommendation 1**

Where a principal contractor sub-contracts to a single secondary contractor over \$1.5 million of the entire works contract, there should be a legal requirement under the tender for the government agency to approve the sub-contractor and conduct the same financial pre-qualification requirements as for the principal contractor.

The contract should require the principal contractor to notify the government agency of the sub-contractor prior to the commencement of the works, and the government agency to apply its pre-qualification requirements in a timely manner.

Page 23

### **Recommendation 2**

Government agencies such as Main Roads WA and the Public Transport Authority should review their respective pre-qualification processes and financial due diligence assessments with a view to conducting more rigorous and timely financial checks on prospective tenderers.

The State Supply Commission should participate in this review process to assist agencies adopt best practice methods.

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### **Recommendation 3**

Contracts entered into between government agencies and principal contractors should clearly state that the terms and conditions of further contracts entered into between sub-contractors and the agency's principal contractor are not the responsibility of the agency.

Principal contractors should advise their sub-contractors in writing to make appropriate risk assessments and stress that the contractual relationship is between the sub-contractor and the principal contractor, not the agency who engaged the principal contractor.

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**Recommendation 4**

Although government agencies are not legally responsible to ensure that third-tier contractors receive payment for their work, agencies should endeavour to ascertain whether sub-contractors and their sub-contractors have been paid prior to making progress payments to principal contractors.

For example, when Main Roads WA requires statutory declarations from its principal contractors stating that its sub-contractors have been paid, Main Roads WA should verify this by strengthening its current *ad hoc* practice of checking with the sub-contractors and their sub-contractors to ensure that payment has been received.

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**Recommendation 5**

The Committee encourages preferential treatment and additional weighting being given to sub-contractors and suppliers affected by the collapse of Consolidated Constructions and Carr Civil under the Government's Buy Local Policy.

## **MINISTERIAL RESPONSE**

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Public Accounts Committee directs that the Minister for Planning and Infrastructure, Hon. Alannah MacTiernan, MLA, report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.





## **CHAPTER 1 INTRODUCTION**

### **1.1 Background**

In 2003 Main Roads WA and the Public Transport Authority issued tenders for works projects which were ultimately awarded to a WA based company, Consolidated Constructions Pty Ltd. Consolidated Constructions was a large construction company that had been operating for some 40 years, and had successfully completed numerous contracts for government agencies in WA throughout that time.

Contract 706/02 between Main Roads WA and Consolidated Constructions was for the construction and sealing of approximately 16km of road, comprising two sections of the Marble Bar Road between Marble Bar and Port Hedland in the Shire of East Pilbara, including all drainage and associated works, four minor intersections, 35 culverts and two major floodways. The contract price was \$7,603,279.82 plus GST.

The two contracts between the Public Transport Authority and Consolidated Constructions involved upgrades and infrastructure works to the Armadale and Gosnells Railway Stations. The contract price was approximately \$13.2 million. Only a fraction of the work was completed before Consolidated Constructions went into administration on 2 March 2004. As a consequence, the PTA has had to engage other contractors to complete the projects, at a significantly greater cost. Consolidated Constructions did not pay the main sub-contractor it engaged for the job, AW & C Day Pty Ltd, which has subsequently gone into administration.

In relation to the contract with MRWA, Consolidated Constructions sub-contracted a large proportion of the work to another company, Carr Civil Pty Ltd, a small earthmoving company based in Karratha. Of the total contract amount of \$7.6 million, Carr Civil was to receive approximately \$6 million. In turn, Carr Civil sub-contracted much of the work to a variety of small businesses, many of them small family operations based in the local Pilbara region.

The contract was successfully completed at the end of January 2004 and MRWA was satisfied with the outcome. Apart from a nominal amount of retention money, MRWA paid Consolidated Constructions in full.

Unfortunately, however, Consolidated Constructions was experiencing severe financial difficulties from before the time the contract with MRWA was signed due to a deteriorating working capital deficiency and money being owed from other contracts in NSW and WA. As a result of a low cashflow in early 2004, Consolidated Constructions was unable to pay Carr Civil its final progress payment of approximately \$1 million.

In turn, Carr Civil did not, or was unable to, pay its sub-contractors for much, or in some cases, any of their work. However, Carr Civil's financial problems were not

limited to the debt owed by Consolidated Constructions, as Carr Civil went into administration on 8 March 2004 with a deficiency of \$3.6 million, which is significantly more than the money owed by Consolidated Constructions.

Consolidated Constructions subsequently went into administration on 2 March 2004. It has since gone into liquidation, and its 1000 or so unsecured creditors await a distribution, which the company's administrator anticipates will be approximately 18 to 20 cents in the dollar in 18 months.

The distribution will not alleviate the financial loss sustained by the sub-contractors who were contracted by Carr Civil, as Consolidated Constructions' creditors extend only to those people with whom they sub-contracted directly, including Carr Civil.

As third-tier contractors, the sub-contractors engaged by Carr Civil are literally last in line to receive some payment for their hard work. The losses sustained by this large group of sub-sub-contractors have affected not only those businesses, but also their families and the Marble Bar community generally.

There has been a great deal of newspaper coverage and parliamentary debate on the collapse of Consolidated Constructions and its ramifications on sub-contractors. Allegations were made that Consolidated Constructions had not been financially viable for several years and that it had not paid sub-contractors on other recent projects in Australia and on Christmas Island. It was asserted that if MRWA and the PTA had done adequate and timely financial assessments, they may not have entered into the contracts with Consolidated Constructions in the first place.

The Committee resolved to conduct an inquiry to investigate these issues, with a view to determining whether MRWA and the PTA complied with established tender processes in awarding the contracts, and if so, whether the current tender processes are satisfactory or could be improved to prevent similar situations recurring. The Committee also resolved to address issues surrounding the administration of the MRWA contract, as allegations had been made that MRWA made false representations to the sub-contractors engaged by Carr Civil that they would be paid, no matter what happened to either Consolidated Constructions or Carr Civil.

Finally, the Committee resolved to address the plight of the sub-contractors, both of Consolidated Constructions and of Carr Civil. Although the sub-contractors engaged directly by Carr Civil are not the legal responsibility of either MRWA or Consolidated Constructions, the Committee is sympathetic to their situation, as they became the victims of an unusual and unfortunate chain of events with the collapse of both Consolidated Constructions and Carr Civil, before they got paid in full. The Committee wanted to ensure that the tender processes of government agencies would, as far as possible, prevent similar circumstances from recurring in the future.

## 1.2 Inquiry Process

The Committee received twenty-four submissions in response to advertisements placed in metropolitan and regional newspapers in early April 2004. Submissions were received from a range of stakeholders, including the directors of Consolidated Constructions, MRWA, the PTA, the State Supply Commission, and a large number of sub-contractors throughout the State who were affected by the collapse of Consolidated Constructions and Carr Civil. A complete list of submissions received is contained in Appendix 1.

Apart from the directors of Consolidated Constructions, and the Chief Executive Officers of both MRWA and the PTA, the Committee resolved to take evidence from as many sub-contractors as possible in order to understand the extent to which they and the Marble Bar community have been affected. Public hearings were held in Perth, Karratha and Marble Bar in May 2004, providing sub-contractors and interested community members the opportunity to meet with the Committee.

Evidence was also taken from the administrators of both Consolidated Constructions and Carr Civil, former employees of Consolidated Constructions and regional staff from MRWA who were directly involved with the Marble Bar Road project.

## 1.3 Chronology of Events

18.03.03	Tenders closed by MRWA for Contract 706/02 (Marble Bar Road project) - extended from 11 March 2003
19.06.03	Consolidated Constructions notified of its Preferred Tenderer status by MRWA.
16.07.03	Consolidated Constructions notified by MRWA of being awarded Contract 706/02
14.08.03	Tenders closed by PTA for the upgrade of Gosnells and Armadale Railway Stations
09.10.03	Contracts for Armadale Railway Stations upgrade and infrastructure works signed between the PTA and Consolidated Constructions
10.10.03	Contract 706/02 signed between MRWA and Consolidated Constructions

25.11.03	Contracts for Gosnells Railway Station upgrade signed between the PTA and Consolidated Constructions
17.12.03	Stage 1 roadworks on Marble Bar Road project reached practical completion
31.01.04	Remainder of roadworks completed
02.03.04	Administrator appointed to Consolidated Constructions
08.03.04	Carr Civil placed in voluntary administration
09.03.04	First meeting of Consolidated Constructions creditors held
29.03.04	Creditors voted to place Consolidated Constructions into liquidation
08.04.04	Creditors of Carr Civil voted to accept a Deed of Company Arrangement and a Creditors' Trust

## **CHAPTER 2 CONSOLIDATED CONSTRUCTIONS PTY LTD**

### **2.1 General Background**

Incorporated in July 1966, Consolidated Constructions was a Western Australian company that had been operating for nearly 40 years.

Originally established by Vincent Yovich in 1961, its current directors are:

- Vincent Yovich (appointed 12 July 1966);
- Steven William Yovich (appointed 31 March 1989);
- Raymond Anthony Potter (appointed 3 July 1995);
- Alfred John Bell (appointed 26 October 1998); and
- Michael John Badman (appointed 1 November 2002).

In March 1988, Vincent Yovich effectively acquired 100% of the company by purchasing his former business partner's 50% share.

The company's shareholders are Vincent Yovich personally and several companies owned by Vincent Yovich, Steven Yovich and John Yovich.

### **2.2 Previous Work History**

In its recent corporate history, Consolidated Constructions was awarded a number of construction contracts by both the private and public sector, including:

- Osborne Park Hospital upgrade; (\$3.8 million)
- RAC Headquarters in Wellington Street; (\$38.2 million)
- Gosnells Civic Centre; and
- Sorrento Beach redevelopment.

Throughout its forty-year history, Consolidated Constructions also conducted extensive work for government agencies in WA, including MRWA and the PTA.

Previous MRWA contracts secured by Consolidated Constructions include:

- Replacing Concrete Overlay on Bridge No. 672 on Great Northern Highway over the Swan River (Contract 232/94 - \$649,184);
- Constructing Bridge No. 630 on Great Northern Highway at Moorine Rock (Contract 323/95 - \$1,949,423);
- Constructing Bridge No. 933a over Serpentine River (Contract 702/96 - \$1,253,337);
- Constructing Bridge No. 1293 on Jurien Cervantes Road over Hill River (Contract 361/97 - \$1,193,000); and
- Constructing Bridge, tunnel and associated roadworks over railway and Roe Highway Stage 3 (Contract 15/98 - \$30,296,198).

MRWA also advised the Committee that Consolidated Constructions unsuccessfully tendered for a further 30 contracts since 1993.

According to the company's directors, Consolidated Constructions had primarily been involved in commercial building for the last few years, and road construction constituted only a small percentage of the business.<sup>1</sup>

## 2.3 Reasons for Failure

The Committee obtained evidence directly from the directors of Consolidated Constructions and the company's administrator, Gary Anderson, as to the reasons for the company's eventual demise.

According to its directors, the company's collapse "hit us without expecting it."<sup>2</sup> Vincent Yovich explained to the Committee that the company sustained significant financial losses over the past twelve months due to some "disastrous" contracts, bad debts to the value of \$8 million in Sydney, and several contractual disputes and legal actions instituted against the company.

*We have been taken to the cleaners by a lot of strange people.*<sup>3</sup>

Vincent Yovich attributed as a major reason for Consolidated Constructions' downfall significant losses incurred on the David Jones refurbishment contract in Perth. The company claimed \$6 million payment due to unforeseen problems associated with

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<sup>1</sup> Alfred John Bell, Transcript of Evidence, 12.05.04, p.4.

<sup>2</sup> Steven Yovich, Transcript of Evidence, 12.05.04, p.6.

<sup>3</sup> Vincent Yovich, Transcript of Evidence, 12.05.04, p.11.

striking asbestos during construction, but was allegedly forced to settle for the sum of \$2 million due to its liquidity problems.

The directors also attributed some of the company's problems to union disputes. In February 2004, Consolidated Constructions issued several separate writs against both the CFMEU and union representative, Joe McDonald, personally in the District Court of WA for interfering unlawfully in the company's relationship with contractors and sub-contractors at various building sites, intimidating contractors, and conspiring to harm Consolidated Constructions' business.

In his initial circular to creditors, Gary Anderson stated that the directors' explanation was reasonable. However, he went on to state that:

*...it is also my view that there may have been some underlying problems within the company for some indeterminate time that may or may not have been identified, or acted upon by the directors.<sup>4</sup>*

Of particular relevance to this Inquiry, Steven Yovich admitted to the Committee that the contracts with MRWA and the PTA in question did not contribute to the company going into administration.<sup>5</sup> The gradual deterioration of the financial position of Consolidated Constructions was the primary reason for the company's demise.

### **Finding 1**

Consolidated Constructions' contracts with MRWA and the PTA had no impact upon Consolidated Constructions going into liquidation.

## **2.4 Financial Position**

The financial status of Consolidated Constructions at the time MRWA and the PTA entered into the contracts in 2003 has been central to public debate and the Committee's Inquiry. Questions have been raised by the company's creditors and in Parliament as to whether Consolidated Constructions was in sufficient financial difficulties by the time the contracts were signed that they should not have been awarded in the first place. Some concern has also been raised that Consolidated Constructions was trading whilst insolvent.

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<sup>4</sup> Gary Anderson, *Circular to Creditors*, undated, tabled on 02.06.04.

<sup>5</sup> Steven Yovich, Transcript of Evidence, 12.05.04, p.9.

In his initial Circular to Creditors, the company's administrator, Gary Anderson, reported that there had been a:

*...general decline of the financial position of the company over a number of years and a past history of losses being incurred on a number of contracts in Sydney, NSW.*

*In addition the company appeared to be operating on increasingly small margins and very high overheads for the volume of work currently being undertaken. Monthly overheads exceed \$500,000 just to keep the office doors open in both Perth and Sydney.<sup>6</sup>*

According to Gary Anderson, Consolidated Constructions had a working capital deficiency of \$2,034,600 as at 30 June 2002. By 30 June 2003, its working capital deficiency was \$2,845,204. It is clear that the company's financial position had deteriorated over that relevant 12-month period. It deteriorated even further over the following six months. By 31 December 2003, the company's net working capital deficiency had escalated to \$5,178,112. Its overall deficiency was \$1,575,936 after the removal of Future Income Benefit from the accounts. Gary Anderson's evidence to the Committee was that the directors probably underestimated the rate at which the company was declining.<sup>7</sup>

The company's directors requested Gary Anderson's advice in late February 2004. His recommendation that they place the company into administration was based on the fact that they simply did not have the cashflow or funds to meet their current creditors.<sup>8</sup> In evidence to the Committee, Gary Anderson said that if the directors had addressed the problems two or three months earlier, they might have been able to alleviate the situation faced at the end of February 2004 - they owed approximately \$6 million to creditors and only had approximately \$4 million available.

Other features of the company's financial position when it went into administration were<sup>9</sup>:

- It had land and buildings worth approximately \$4 million;
- It owned all its vehicles, plant and equipment outright; and
- It had cash of approximately \$4 million.

Exacerbating its financial problems, Consolidated Constructions had no large ongoing contracts that would be cashflow positive, which meant that in most cases, it was not

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<sup>6</sup> *Ibid.*

<sup>7</sup> Gary Anderson, Transcript of Evidence, 02.06.04, p.6.

<sup>8</sup> *Ibid.*, p.1.

<sup>9</sup> *Ibid.*, p.2.



going to make a profit in the near future.<sup>10</sup> Like most construction companies, Consolidated Constructions operated on extremely fine profit margins. Therefore:

*...if things go wrong - they only need a couple of hiccups - they are in big trouble.*<sup>11</sup>

Gary Anderson explained to the Committee that Consolidated Constructions was in the unique position of not having any current liability to the bank, but it had a contingent liability for a bank guarantee of approximately \$5.4 million.<sup>12</sup> Following the appointment of an administrator, the ANZ Bank immediately cashed out all bank guarantees to clients of Consolidated Constructions, to the value of approximately \$3.5 million. Some of this money should be recovered in time, however, and will form part of the funds available for distribution to creditors.

As to whether Consolidated Constructions was trading whilst insolvent, the Committee's latest advice from Gary Anderson is that it was not.<sup>13</sup> The *Corporations Act, 2001* provides that company directors have a duty to prevent the company from incurring debts when it is insolvent or where there are reasonable grounds to suspect that the company is or would become insolvent as a result of the transaction. Company directors can be held personally liable for any loss that the company suffered or debts incurred whilst the company was insolvent.

*[I]t is a very hard call for directors when they know that their company is technically insolvent. When I told them on 2 March that they were insolvent, they were getting into a very high risk if they decide to continue to trade...I had to warn them that they would be caught under the insolvent trading provisions if they continued, but if they were unable to raise, or inject - I think I said \$3 million - they could continue.*<sup>14</sup>

In his supplementary submission to the Committee, however, Gary Anderson stated that even if the directors had been able to inject an additional \$3 million to pay current creditors, it would have alleviated the company's immediate cash-flow problem, but would not have solved the company's long-term financial problems.<sup>15</sup>

To assess whether Consolidated Constructions traded whilst in an insolvent position, Gary Anderson engaged Ernst & Young to prepare a report. The report concluded that

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<sup>10</sup> *Ibid*, p.4.

<sup>11</sup> *Ibid*, p.9.

<sup>12</sup> *Ibid*, p.2.

<sup>13</sup> Gary Anderson, Supplementary Submission, 14.07.04.

<sup>14</sup> Gary Anderson, Transcript of Evidence, 02.06.04, p.4.

<sup>15</sup> Gary Anderson, Supplementary Submission, 14.07.04.

the company was solvent from 30 June 2002 to 31 December 2003, but was “most likely” insolvent from 1 January 2004 to 2 March 2004.<sup>16</sup>

However, Gary Anderson stated that at the time of tendering for the MRWA and PTA contracts, Consolidated Constructions was a solvent company and quite capable of carrying out its obligations, as although it was making losses, it still had substantial assets.<sup>17</sup>

Gary Anderson strongly recommended to creditors at their first meeting that Consolidated Constructions be placed into liquidation, on the basis that there were no grounds for creditors to contemplate that the administration would cease, and there were no logical reasons to endorse a Deed of Company Arrangement.

In his supplementary submission to the Committee, Gary Anderson anticipated that a return to creditors in the range of 18 cents to 20 cents in the dollar will be payable in approximately 18 months.<sup>18</sup> As to why such a low figure is estimated, Gary Anderson stated that liquidated damages against the company for terminating incomplete contracts may be as high as \$13.5 million.<sup>19</sup>

Gary Anderson advised the Committee that Consolidated Constructions has approximately 1000 creditors, but as some have yet to make a formal claim, it is premature to finalise a list of creditors and amounts claimed. He anticipates the company’s total liability will be between \$13 million and \$13.5 million.

Among the company’s creditors are the directors themselves, owed the following amounts:

Vincent Yovich	\$10,000;
Steven Yovich	\$40,000;
Ray Potter	\$8,549;
John Bell	\$4,158; and
Michael Badman	\$38,500.

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<sup>16</sup> Gary Anderson, Circular to Creditors, 09.07.04, p.2.

<sup>17</sup> Gary Anderson , Transcript of Evidence, 02.02.04, pp.7 & 9.

<sup>18</sup> Gary Anderson, Supplementary Submission, 14.07.04.

<sup>19</sup> Gary Anderson, Transcript of Evidence, 02.02.04, p.3.

## 2.5 Relationship with Carr Civil Pty Ltd

Consolidated Constructions indicated in its tender to MRWA that it would deliver the majority of the works using sub-contractors and that its main sub-contractor would be Karratha based earthmoving company, Carr Civil Pty Ltd.

Mark Blayney, director of Carr Civil, gave evidence to the Committee that he purchased the company in 2002, and that its main business is earthworks, minor concrete and related works for larger companies in the Pilbara region.

Carr Civil was itself placed in voluntary administration since 8 March 2004, but it is unlikely that this was a direct consequence of the collapse of Consolidated Constructions. This issue is dealt with in more detail below.

The Commissioner of Main Roads advised the Committee that MRWA has a say in which sub-contractors are appointed by a principal contractor. Proposed sub-contractors must be submitted to MRWA for approval prior to commencing the contract.<sup>20</sup>

Although Carr Civil did not possess pre-qualification status, MRWA stated to the Committee that its director, Mark Blayney, was known to the MRWA's Pilbara office from his previous role with another pre-qualified company. Further, Mark Salt, site representative for MRWA on the project, gave evidence to the Committee that he rang Carr Civil prior to Consolidated Constructions being awarded the contract to inquire about Carr Civil's quality assurance status. He also inquired within MRWA as to Mark Blayney's previous experience.<sup>21</sup>

During the tender assessment background checks undertaken by MRWA, Mark Blayney advised that he was hoping that the experience gained on the Marble Bar Road project would assist Carr Civil to meet the requirements to itself gain pre-qualification for MRWA work in the future.

Of the total MRWA contract to Consolidated Constructions for approximately \$7.6 million, Carr Civil was to be paid approximately \$6 million by Consolidated Constructions. That is, Carr Civil was engaged to perform the majority, approximately 80%, of the work for Consolidated Constructions. MRWA admits that this fact was made clear in the tender documents originally submitted by Consolidated Constructions.

As to why Consolidated Constructions engaged Carr Civil, the company directors informed the Committee that Mark Blayney had represented the company as a

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<sup>20</sup> Menno Henneveld, Transcript of Evidence, 24.05.04, p.3.

<sup>21</sup> Mark Salt, Transcript of Evidence, 26.05.04, p.6.

specialist contractor in civil engineering.<sup>22</sup> Further, Consolidated Constructions' chief civil engineer admitted to the Committee that Consolidated Constructions wanted to increase its pre-qualification rating for roadworks with MRWA and they were considering a "deal" or "strategic alliance" with Carr Civil due to Mark Blayney's local knowledge of remote-area roadworks.<sup>23</sup>

The company's directors stated that it was quite normal in the construction industry for principal contractors to sub-contract the majority of works, and that Consolidated Constructions always undertook its contracts on a sub-contract basis. However, they claim that Consolidated Constructions retained overall supervisory control of the project, with staff positioned on site at all times.

*We managed the project. We provided a team of supervisors, engineers, surveyors, testing specialists to test the earthworks for density, and the finish levels were all set out and put in place by our surveyors.*<sup>24</sup>

### **(a) Capacity of Carr Civil**

MRWA did not conduct any financial checks on Carr Civil, as it maintains that MRWA is not required to check the financial capacity of any sub-contractors.<sup>25</sup> As a sub-contractor to Consolidated Constructions, it was not necessary for Carr Civil to be pre-qualified by MRWA, notwithstanding that MRWA knew that Carr Civil was to perform 80% of the contract work on the Marble Bar Road.

However, MRWA complied with their normal tender processes in this regard. MRWA was not required under its established tender process to check the capacity of sub-contractors engaged by Consolidated Constructions. As the principal contractor, Consolidated Constructions was responsible and liable for any risks associated with engaging Carr Civil as its main sub-contractor.

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<sup>22</sup> Steven Yovich, Transcript of Evidence, 12.05.04, p.2.

<sup>23</sup> Robert Lyons, Transcript of Evidence, 02.06.04, p.6.

<sup>24</sup> Alfred (John) Bell, Transcript of Evidence, 12.05.04, p.3.

<sup>25</sup> Menno Hennevel, Commissioner of Main Roads, Supplementary Submission, 28.04.04.

**Finding 2**

Given that Consolidated Constructions intended to sub-contract approximately \$6 million of a \$7.6 million contract to Carr Civil, Consolidated Constructions should have provided Main Roads WA with sufficient information about Carr Civil to confirm that Carr Civil had the financial capacity and experience to perform the majority of the contract work.

Under current tender processes, it was not a requirement for Main Roads WA to conduct any of its own financial checks on Carr Civil, as it was sub-contracted by the principal contractor, Consolidated Constructions.

The Committee was advised by the directors of Consolidated Constructions that a cash retention of \$224,00 plus GST was taken from Carr Civil by way of security. Half the cash retention would be released on practical completion and the balance at the end of the defects liability period 12 months later.

Carr Civil was paid for all the work it performed to the end of December 2003. The directors of Consolidated Constructions claim that the company still owes Carr Civil approximately \$1.3 million, less approximately \$200,000 which must be deducted for late performance and additional expenses such as accommodation.<sup>26</sup> This figure is disputed by Mark Blayney, who claims that the additional \$200,000 should not have been deducted.

Since commencing this Inquiry, questions have arisen as to Carr Civil's capacity to fulfil its obligations under the contract. Issues were raised about whether it had sufficient experience in projects of this scale, suitable management expertise, and even whether it was a financially viable company to start with.

The Committee has evidence, for example, that Carr Civil went into administration with a deficiency of \$3.6 million, which is significantly more than the money owing by Consolidated Constructions. Mark Blayney told the Committee that Carr Civil is also owed money from other contracts, including the Water Corporation's Harding Dam project.

According to Gary Anderson, Carr Civil's financial problems were not restricted to being owed money by Consolidated Constructions. A representative of Carr Civil's former administrator acknowledged that at the start of the contract, Carr Civil had only \$300,000 of working capital.<sup>27</sup>

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<sup>26</sup> Alfred (John) Bell, Transcript of Evidence, 12.05.04, p.7.

<sup>27</sup> Nick Persichitti, Transcript of Evidence, 02.06.04, p.8.

Mark Blayney admitted to the Committee that the Marble Bar Road project was by far his biggest roadworks job, the next biggest project being worth only \$1 million.<sup>28</sup> He admitted that Carr Civil's lack of experience in large roadworks projects was "quite conceivably" a major reason for the problems. Mark Blayney did have previous experience on large earthworks projects as an employee for other companies, but not as a business owner or director.

*Hindsight is a wonderful thing. If I had my way again, you are right. A \$6.25 million job for us at that stage where the company was sitting was too big for us. You have to have cash reserves in case something goes wrong. To fund a \$6.25 million job, we funded the losses until December from other works around the area. Then we started to get into trouble.<sup>29</sup>*

Mark Blayney also attributed the company's problems to his poor selection of management staff:

*At the end of the day, we paid for high-profile supervisors and associates, and I ended up being there for five months full time - that was not the intention. We had an engineer who was ideally suited to the job, but his wife was sick and died and he left the company prior to our starting the works. That threw another spanner in the works. It was mostly poor personnel.<sup>30</sup>*

### **Finding 3**

Carr Civil did not have the financial capacity or sufficient previous experience to undertake a roadworks project of this scale.

Although Carr Civil went into administration, all but four out of 37 creditors voted to accept a Deed of Company Arrangement and a Creditors' Trust on 8 April 2004, which enables the company to continue trading.<sup>31</sup> As such, the company is no longer in administration, and its former administrator, Simon Read of PPB, has now become trustee of the Creditors' Trust.

Some of the sub-contractors engaged by Carr Civil told the Committee that they were pleased that Carr Civil could continue trading, as they may be able to do further work for the company and recoup some of their losses from the Marble Bar Road project.

<sup>28</sup> Mark Blayney, Transcript of Evidence, 25.05.04, p.2.

<sup>29</sup> *Ibid*, p.7.

<sup>30</sup> *Ibid*, p.3.

<sup>31</sup> A further two creditors abstained from voting.

Mark Blayney recently injected some of his personal assets and family funds into the company to allow it to continue trading, but the eventual distribution to creditors will be affected by how much Carr Civil in turn receives from the administrator of Consolidated Constructions. The first distribution to creditors of Carr Civil is expected to be between 10 cents and 30 cents in the dollar, spread over a couple of years.<sup>32</sup>

### **Recommendation 1**

Where a principal contractor sub-contracts to a single secondary contractor over \$1.5 million of the entire works contract, there should be a legal requirement under the tender for the government agency to approve the sub-contractor and conduct the same financial pre-qualification requirements as for the principal contractor.

The contract should require the principal contractor to notify the government agency of the sub-contractor prior to the commencement of the works, and the government agency to apply its pre-qualification requirements in a timely manner.

## **2.6 Relationship with other sub-contractors**

Apart from Carr Civil, two of the other major businesses contracted directly by Consolidated Constructions were Western Geo and AW & C Day Contractors Pty Ltd. Despite, several attempts, however, the Committee was unable to contact these businesses to assist in the Inquiry. The Committee understands that AW & C Day Contractors Pty Ltd have since been placed in administration, but the Committee is not aware of the all the factors that contributed to its demise. AW & C Day Contractors Pty Ltd and Western Geo are owed \$512,175 and \$14,000 respectively by Consolidated Constructions.

Some of the other sub-contractors engaged directly by Consolidated Constructions and details of their losses are contained in Chapter 5.1.

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<sup>32</sup> Nick Persichitti, Transcript of Evidence, 02.06.04, p.3.





## **CHAPTER 3      WHETHER ESTABLISHED TENDER PRACTICES WERE ADOPTED BY MAIN ROADS WA AND THE PUBLIC TRANSPORT AUTHORITY**

### **3.1    The Role of the State Supply Commission**

Within WA, the State Supply Commission is responsible for arranging and coordinating the supply of goods and services within government. Some agencies, however, are exempt from this requirement. MRWA and the PTA are two such agencies, pursuant to section 19(1) of the *State Supply Commission Act, 1991*.

Further, the contracts under investigation do not fall within the jurisdiction of the *State Supply Commission Act, 1991* as they are contracts for **works** as opposed to goods and services. As such, the contracts in question were entered into pursuant to the *Main Roads Act, 1930* in the case of the MRWA contract and the *Public Works Act, 1902* in the case of the PTA contracts.

According to the Acting Chief Executive Officer of the State Supply Commission, the distinction between works and services can at times be blurred, but major construction is certainly defined as works.<sup>33</sup>

Although the procurements the subject of this Inquiry do not fall within the ambit of the *State Supply Commission Act, 1991*, it is normal practice for all government agencies to conduct their purchasing subject to the best practices outlined in the State Supply Commission's policies and guidelines, such as the Buy Local Policy. However, in relation to the procurement of works, the expectation to comply with the State Supply Commission's policies and guidelines is not mandatory.

In evidence to the Committee, the Acting Chief Executive Officer of the State Supply Commission advised that as a result of this Committee's Inquiry, the accountable officers of both MRWA and the PTA requested an independent audit be conducted to review the contracts in question.

The State Supply Commission subsequently engaged an independent consultant, GCM Management Consulting, from its Process Review Panel to conduct the review. The terms of reference for the independent review resembled closely the Committee's own terms of reference.

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<sup>33</sup> Phillip Turner, Transcript of Evidence, 24.05.04, p.2.

## 3.2 Tender Process Adopted by Main Roads WA

MRWA provided a detailed written submission to the Committee setting out the tender process it employed to award the Marble Bar Road contract. The Committee also took oral evidence from the Commissioner of Main Roads, Menno Henneveld and three other senior officers located at head office in Perth. The Committee also took evidence in Marble Bar from the MRWA's Superintendent and Project Manager for the Marble Bar Road contract, both of whom spent considerable time on site throughout the road project.

Section 18A of the *Main Roads Act, 1930* enables the Commissioner to enter into contracts for the construction or any aspect of the construction of roads he is authorised to construct. Since the end of 2000, almost 100% of road construction and maintenance in WA have been delivered by competitive contracts. Historically, MRWA used its own employees and specialist contractors when specific skills were required.

In addressing the tender process employed by MRWA, the Commissioner stressed to the Committee that in the "current memory" of MRWA, only three contractors have failed to deliver the contracted services due to financial failure.<sup>34</sup>

This low figure needs to be understood in the context that MRWA enters into between 100-110 contracts each year, for the total sum of approximately \$250 million. Henno Menneveld therefore remarked to the Committee that it was an "extraordinary aberration" and "quite an extraordinary chain of events."<sup>35</sup>

MRWA has three distinct categories of construction and rehabilitation work contracts, based upon cost and complexity. Contract 706/02 for the Marble Bar Road project was a Category 2 project. Category 2 projects are not typically complex and generally cost between \$1.5 million and \$20 million. They are also usually short contracts of no more than six months.

MRWA's contracting strategy differs for each of the three categories. Different contracting processes are used to develop, award and administer the contracts for each category, reflecting relative cost and complexity of the works. Category 2 projects use standard contract documentation that sets out in detail each party's responsibilities.

MRWA's main requirement in the selection of contractors to undertake Category 2 projects is ensuring the tenderer has the appropriate level of skilled personnel and financial capacity to deliver the specified works. To minimise the cost of tendering by

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<sup>34</sup> Menno Henneveld, Transcript of Evidence, 24.05.04, p.2.

<sup>35</sup> *Ibid*, p.10.

reducing the amount of work required in preparing lengthy tenders, MRWA introduced a **pre-qualification system** in 1993 and last updated in 2002.

For the purposes of this Inquiry, the Committee deals only with Category 2 projects. MRWA explained its standard tender process for Category 2 projects, which it claims was followed in relation to the contract with Consolidated Constructions, as follows: <sup>36</sup>

### (a) Pre-Qualification System

The stated objectives of MRWA's pre-qualification system are to<sup>37</sup>:

- Provide a robust, consistent, transparent and objective process, which conforms to the State Government's Purchasing Policies;
- Enable MRWA to assess the capabilities of contractors and identify those with the requisite technical, managerial and financial capacity to effectively deliver works contracts in accordance with MRWA's requirements for time, cost and quality;
- Minimise the contractual risk to MRWA associated with undertaking the construction of roads and structures;
- Promote best practice in the road infrastructure industry in WA; and
- Minimise the costs of the tendering process for both MRWA and the road construction contracting industry.

To be eligible for pre-qualification, civil engineering construction contractors must be able to satisfy a two-stage assessment process:

#### (i) Stage One

The contractor must demonstrate that it has in place effective management systems that address specific requirements relating to:

- Quality Management;
- Occupational Health and Safety;
- Environmental Management; and

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<sup>36</sup> Menno Henneveld, Commissioner of Main Roads, Submission, 21.04.04.

<sup>37</sup> *Ibid.*

- Worksite Traffic Management.

**(ii) Stage Two**

The contractor must demonstrate that it meets specific requirements related to the levels of risk associated with the levels of complexity, risk and value of the various pre-qualification levels with respect to:

- Company Profile (including stability of the organisation, senior management and management of sub-contractors);
- Company experience (including experience in similar type of works as a contractor and as a sub-contractor, and details of all relevant completed projects);
- Technical Capacity (including details of project management experience on previous relevant works and details on proposed methodology); and
- Financial Capacity (including copies of audited financial statements for the last two financial years and management accounts, containing a balance sheet, profit and loss statement, cashflow statement, signed reports etc.).

MRWA may review or change a contractor's pre-qualification status at any time. For a company to maintain its pre-qualification status, it must submit detailed regular updates on its financial and technical capacity and experience. Financial information must include audited annual accounts for the **previous** financial year and must be submitted annually within 90 days of the accounts being finalised.

Further, all pre-qualified contractors must notify MRWA of, among other things:

*... any significant change to its financial or technical capacity...*<sup>38</sup>

**(b) Pre-qualification History of Consolidated Constructions**

Consolidated Constructions first applied for pre-qualification in April 1993. Between 1993 and 1999, its pre-qualification status increased progressively. In 2000, Consolidated Constructions applied for a further upgraded status, but MRWA's Pre-qualification Committee rejected the application on the basis that the company's capability had not improved since last assessed. MRWA engaged Estill and

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<sup>38</sup> *Ibid.*

Associates, who in turn engaged Arthur Anderson, to carry out the financial assessment, which recommended that the application be rejected.<sup>39</sup>

Seeking a reassessment, Consolidated Constructions provided supplementary information including financial accounts for the year ended June 2000 and interim accounts for the six months ending 31 December 2000. Its appeal was successful, and the company was granted a higher pre-qualification status in July 2001. This decision was based upon the experience of the company's key personnel in managing large and complex projects in the construction industry and advice showing that the earlier financial review was incorrect. Additional information was provided by the ANZ Bank that Consolidated Constructions had a higher facility limit and a higher capacity to borrow money.

A further financial assessment of Consolidated Constructions based on its 2001/2002 accounts was undertaken by Estill & Associates (through Priestley Chartered Accountants) in April 2003, which confirmed its higher pre-qualification status. When questioned by the Committee about this, one of the witnesses for MRWA said that Priestley's awarded Consolidated Constructions a score of 18 out of a possible 30 points, which although qualified as a 'pass', was clearly a borderline result.<sup>40</sup> However, for the purposes of MRWA's pre-qualification process, Consolidated Constructions' 'pass' result was sufficient for it to receive the higher pre-qualification status.

Having passed its various assessments for pre-qualification, MRWA did not conduct any further financial due diligence assessments of Consolidated Constructions prior to signing Contract 706/02 in October 2003.

### **(c) Contract 706/02 - Marble Bar Road**

#### **(i) Award of Tender**

This roadworks project was assigned a R3 or higher qualification status by MRWA. R3 projects involve "non-complex construction, reconstruction and widening involving non-complex to moderately complex worksite traffic management" to the value of less than \$10 million.<sup>41</sup> Therefore, only those construction contractors with a pre-qualification of R3 or higher were eligible to tender for the contract.

Tenders closed on 18 March 2003. Tenders were received from five pre-qualified contractors:

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<sup>39</sup> *Ibid.*

<sup>40</sup> Bob Hunt, Transcript of Evidence, 24.05.04, p.8.

<sup>41</sup> Menno Henneveld, Submission, 21.04.04.

- Consolidated Constructions Pty Ltd;
- Henry Walker Eltin Contracting Pty Ltd;
- Briery Contractors Pty Ltd;
- Macmahon Contractors Pty Ltd; and
- Highway Construction Pty Ltd.

According to MRWA, the tender assessment process was undertaken in two stages. The first stage involved selecting the Preferred Tenderer. The tendered amounts from all five tenderers were significantly higher than MRWA's estimate. The variation between the four lowest tenderers was \$247,000 or a 3.5% variance between the highest and lowest tendered amount. MRWA assumed that as the four lowest tendered amounts were similar to each other, its original estimate was too low due to an intervening upward shift in market areas.

In addition to Consolidated Constructions' positive track record with MRWA for works conducted under other contracts, one of the factors in Consolidated Constructions' favour was that it had the highest component of 83% for payment to local suppliers for plant, goods and services, in accordance with the State's Buy Local policy.

Consolidated Constructions was notified of its Preferred Tenderer status based on the above on 19 June 2004. Under stage two of the assessment process, Consolidated Constructions was required to present a detailed submission detailing the unique and critical construction activities and management plans.

Following its satisfactory completion of stage two, Consolidated Constructions was awarded the contract on 16 July 2003 for the total sum of \$7,603,279.82 plus GST. However, Consolidated Constructions did not receive 'Possession of Site' until 4 August 2003 due to MRWA having to secure additional funding for the project, over and above its original estimate of \$5.85 million. The delay in obtaining additional funding meant that the contract was not actually signed until 10 October 2003, some three months later.

**Finding 4**

The Committee finds that Main Roads WA followed established tender practices in awarding Contract 706/02 to Consolidated Constructions.

Although Main Roads WA assessed Consolidated Constructions' financial position based on information from the previous financial year, it nevertheless complied with its existing pre-qualification and tender policies.

**Finding 5**

Although the financial due diligence process employed by government agencies is not flawless, it is reasonable for them to make an overall risk assessment due to the cost of administering exhaustive financial assessments. In the history of both Main Roads WA and the Public Transport Authority, there have only been three occasions of financial collapse of a principal contractor.

**Recommendation 2**

Government agencies such as Main Roads WA and the Public Transport Authority should review their respective pre-qualification processes and financial due diligence assessments with a view to conducting more rigorous and timely financial checks on prospective tenderers.

The State Supply Commission should participate in this review process to assist agencies adopt best practice methods.

**(ii) Administration of Contract**

The Committee has heard evidence from a number of witnesses that various problems occurred soon after work commenced on the Marble Bar Road project. For the purposes of this Inquiry, the major problem was slow payments being made to sub-contractors, both of Consolidated Constructions and of Carr Civil.

According to MRWA, the project was slow to commence due to problems in obtaining adequate water supply. Although work started in early August 2003, most of that month was spent carrying out preparatory works such as clearing and construction of sidetracks.

The MRWA's administration team became aware of rumours in late September and October 2003 that sub-contractors were not being paid on time.<sup>42</sup> There were also widespread rumours that Consolidated Constructions was experiencing financial problems, including being sued in the Supreme Court of WA by Odin Central Service Pty Ltd for non-payment of a \$2.28 million debt. The writ was issued only weeks before Consolidated Constructions was awarded the contract by MRWA.

Clause 42.1 of AS 2124, the general conditions of contract that apply to Category 2 contracts, requires the Superintendent to issue to the principal and the contractor a payment certificate within 14 days of receiving a claim for payment from the contractor. The principal then has 14 days to make the payment.

Clause 43 of the general conditions enables the Superintendent to request from the contractor, prior to the principal making each payment:

- A statutory declaration that all of the contractor's employees who have been working on that project have been paid all moneys due and payable relating to the contract;
- Documentary evidence that all the workers employed by a sub-contractor of the contractor have been paid all moneys due and payable to them in respect of their work under the contract; and
- A statutory declaration that all the contractor's sub-contractors have been paid moneys due and payable in respect of work under the contract.

If the contractor fails to provide the requested information after five days of the request, the principal may withhold payment due to the contractor. The withheld money can even be paid directly to a sub-contractor with the written consent of the contractor.

However, MRWA advised the Committee that it was not usual practice to apply the requirements of Clause 43 unless the Superintendent has cause to suspect that the contractor is not making timely payments to its sub-contractors and suppliers.<sup>43</sup>

After becoming aware of the rumours of slow payments and a dispute between Carr Civil and one of its sub-contractors over terms of payment, the MRWA Superintendent, Arthur Phillips, enforced Clause 43 as from November 2003. MRWA decided to require Consolidated Constructions to furnish a statutory declaration with each progress payment claim advising that all of its sub-contractors had been paid all the moneys due to them as at the date of the progress payment claim.

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*



The history of progress payments from MRWA to Consolidated Constructions was as follows:

Table 3.1

Payment Summary to Consolidated Constructions from MRWA<sup>44</sup>

No	Invoicing Month	Date Claim Submitted By Contractor	Statutory Declaration Date	Period Covered by Statutory Declaration	Payment Date	Payment Period Covered	Main Road's Payment Amount (Incl GST)
1	August 03	31.08.03	-	-	25.09.03	1.8.03-31.8.03	\$698,653.80
2	September 03	30.09.03	13.11.03	1.9.03-30.9.03	10.10.03	1.9.03-30.9.03	\$1,846,708.39
3	October 03	31.10.03	12.12.03	1.10.03-31.10.03	18.11.03	1.10.03-31.10.03	\$1,619,087.56
4	November 03	30.11.03	-	-	16.12.03	1.11.03-30.11.03	\$1,693,559.84
5	December 03	17.12.04	20.02.04	1.12.03-17.12.03	19.12.03	1.12.03-17.12.03	\$899,088.99
		22.12.04	20.02.02	18.12.03-22.12.03	09.01.04	18.12.03-22.12.03	\$274,889.99
6	January 04	16.02.04	-	-	24.02.04	23.12.03-31.1.04	\$1,260,076.55

<sup>44</sup> Table supplied by MRWA in its Supplementary Submission, 28.04.04.

During the course of the Inquiry, it was brought to the Committee's attention that the wording on some of the statutory declarations was altered by Bob Lyons, the project manager for Consolidated Constructions, who was responsible for payments to the company's sub-contractors. Whereas the initial statutory declarations stated that the sub-contractors had been paid, the last two statutory declarations, dated 19 December 2003 and 20 February 2004 stated that the sub-contractors had been paid "to the best of my knowledge".

Surprisingly, the fact that the wording was altered did not, however, come to the attention of anyone within MRWA until May 2004, several days before its representatives gave evidence to the Committee.<sup>45</sup>

Bob Lyons told the Committee that he made the decision to alter the wording of the statutory declarations on his own, without any advice or direction from, or consultation with, any of the company's directors.<sup>46</sup> When questioned by the Committee about why he added "to the best of my knowledge" to the last two statutory declarations, he responded:

*It means that I have done what I consider to be due diligence; I checked that the sub-contractor payments for all the sub-contractors had left the building.<sup>47</sup>*

#### **Finding 6**

Had Main Roads WA staff noticed that the wording of the final two statutory declarations from Consolidated Constructions was altered to provide only a qualified declaration that sub-contractors had been paid, they may have made further enquiries to verify that sub-contractors had in fact received payment for works invoiced.

Main Roads WA's failure to notice the significant change of wording on the statutory declarations was a careless oversight, which may have contributed to the financial losses sustained by sub-contractors of both Consolidated Constructions and Carr Civil.

Consolidated Constructions also started to require statutory declarations from Carr Civil confirming that all its sub-contractors had been paid prior to being paid by Consolidated Constructions. The Committee has only received two of Mark Blayney's statutory declarations, dated 26 November 2003 and 24 February 2004.

<sup>45</sup> Glynn Logue, Transcript of Evidence, 24.05.04, p.6.

<sup>46</sup> Robert Lyons, Transcript of Evidence, 02.06.04, p.11.

<sup>47</sup> *Ibid*, p.8.

According to Bob Lyons, he certified the final progress payment of approximately \$1.1 million to Carr Civil on the basis of a statutory declaration from Mark Blayney that he, in turn, had paid all his sub-contractors, or had come to payment arrangements with them. Consolidated Constructions went into administration, however, before the Carr Civil received the funds.

Most sub-contractors to Carr Civil received their last payment in December for work done up to November 2003. Most were not paid for work done in December 2003, January or February 2004.

Many sub-contractors contracted by Carr Civil gave evidence to the Committee that when they complained to MRWA personnel that they were not getting paid, they received verbal assurances from the MRWA personnel that they would be paid. Most of the alleged undertakings were given by Mark Salt, the site manager. The sub-contractors claim that the representations from MRWA were to the effect that they need not worry - provisions were in place to ensure they would be paid.<sup>48</sup>

The Commissioner of Main Roads denies that any of his staff gave undertakings or guarantees to any of the sub-sub-contractors that MRWA would ensure they got paid. Rather, he claims that Mark Salt simply explained to them that MRWA was taking measures to ensure that Consolidated Constructions paid Carr Civil. He told the Committee that it was the responsibility of those people sub-contracted by Carr Civil to ensure that it, in turn, paid them.<sup>49</sup>

It is difficult to determine the full extent of representations made by MRWA. Sub-contractors believed they were being told their interests would be protected by MRWA. Such a belief is understandable given that at the same hearing, Menno Henneveld's evidence was ambiguous:

*In one instance, one of Carr's subcontractors was proposing to remove plant from the site. That would have been of enormous concern to Main Roads because of the impending rain. Time would have been taken to explain to the subcontractors the process that Main Roads had adopted with the issue of the statutory declarations. In other words, we explained that we were now seeking statutory declarations from the main contractor to show that the subcontractors had been paid. The nature of the discussion would have been to speak like that to the sub-subcontractor to explain the process we were undertaking.<sup>50</sup>*

This statement indicates that MRWA was determined to ensure that the project was completed before the cyclone season commenced, and was extremely concerned that sub-sub-contractors may take their equipment away if they did not receive payment

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<sup>48</sup> Rod Evans, Transcript of Evidence, 24.05.05, p.5.

<sup>49</sup> Menno Henneveld, Transcript of Evidence, 24.05.04, p.11.

<sup>50</sup> *Ibid*, p.4.

from Carr Civil. Such a threat was, according to Mark Salt, “destabilising for the whole contract.”<sup>51</sup>

Apart from requiring statutory declarations from Consolidated Constructions to verify that Carr Civil had been paid, MRWA did not take any action to ascertain whether Carr Civil’s sub-contractors were also being paid, despite knowledge that sub-contractors were complaining to Mark Salt that they were not being paid or being paid late. Although it might have been prudent for MRWA to have checked whether the sub-contractors were receiving payment, it was not required to.

#### **Finding 7**

From the available evidence, it is unclear whether Main Roads WA staff represented to sub-contractors of Carr Civil that it had provisions in place to ensure they would be paid, or simply whether they required statutory declarations from Consolidated Constructions confirming that **its** sub-contractors had been paid. Either way, the Committee can see how sub-contractors of both Carr Civil and Consolidated Constructions thought they were being protected by Main Roads WA.

In its haste to ensure that the roadworks were completed before the cyclone season, Main Roads WA gave ambiguous and misleading advice to sub-contractors. Notwithstanding the representations, Main Roads WA is not responsible for sub-contractors engaged by Carr Civil, as they are third-tier contractors to its principal contractor, Consolidated Constructions.

#### **Finding 8**

The financial losses sustained by sub-contractors engaged by Carr Civil are directly attributable to Carr Civil’s financial incapacity and inexperience. Their losses were not ultimately caused by any direct act of Main Roads WA.

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<sup>51</sup> Mark Salt, Transcript of Evidence, 26.05.04, p.4.

**Recommendation 3**

Contracts entered into between government agencies and principal contractors should clearly state that the terms and conditions of further contracts entered into between sub-contractors and the agency's principal contractor are not the responsibility of the agency.

Principal contractors should advise their sub-contractors in writing to make appropriate risk assessments and stress that the contractual relationship is between the sub-contractor and the principal contractor, not the agency who engaged the principal contractor.

**Recommendation 4**

Although government agencies are not legally responsible to ensure that third-tier contractors receive payment for their work, agencies should endeavour to ascertain whether sub-contractors and their sub-contractors have been paid prior to making progress payments to principal contractors.

For example, when Main Roads WA requires statutory declarations from its principal contractors stating that its sub-contractors have been paid, Main Roads WA should verify this by strengthening its current *ad hoc* practice of checking with the sub-contractors and their sub-contractors to ensure that payment has been received.

In his written submissions and oral evidence, the Commissioner for Main Roads acknowledged that the MRWA has learned some lessons from this unfortunate incident with Consolidated Constructions and Carr Civil, which has prompted them to reform their tender and contract management policies. The Committee encourages the MRWA to continue to implement its own reform measures in addition to those recommended by this Committee.

**(iii) Completion of Contract**

The roadworks project was completed with 'practical completion' being reached for stage 1 of the project on 17 December 2003 and for the remainder of the contract on 31 January 2004. The contract has a 12-month defect liability period, due to expire on 31 January 2005. The Commissioner of Main Roads reported to the Committee that

the contract was completed successfully, he was pleased with the result and was satisfied with the work of Consolidated Constructions.<sup>52</sup>

As is normal procedure, MRWA withheld \$140,000 as retention money from Consolidated Constructions in the event that defects become apparent during the defect liability period. If no defects become apparent by 31 January 2005, the retention money becomes payable to the administrator of Consolidated Constructions for eventual distribution to creditors.

Apart from the modest retention money, MRWA paid Consolidated Constructions the full amount of contract money. Consolidated Constructions then approved its final progress payment of approximately \$1.1 million to Carr Civil, as well as payments to other unrelated creditors for a total of approximately \$6 million, days before going into administration, but most of the cheques were dishonoured.

However, given that Carr Civil had debts of approximately \$3.6 million, it is clear to the Committee that even if Carr Civil had received its final payment of approximately \$1.1 million from Consolidated Constructions, Carr Civil was unable to pay its sub-contractors in full.

### **3.3 Tender Process Adopted by the Public Transport Authority**

The PTA provided a detailed written submission to the Committee setting out the tender process it employed to award contracts for upgrades to the Armadale and Gosnells Railway Stations. The Committee also took oral evidence at a public hearing from the Acting Chief Executive Officer, Reece Waldock, and the Director of Finance and Contracts, John Leaf.

The Acting Chief Executive Officer told the Committee that for the past several years, the PTA has had an annual capital works programme of between \$330 million and \$400 million. He said that it was the first time within the organisation's memory that the PTA or its predecessor had experienced a problem of this nature. The combined cost of the contracts with Consolidated Constructions was approximately \$13.2 million.

At the time of its collapse, Consolidated Constructions had already commenced construction work for the PTA on the upgrade of the Armadale and Gosnells Railway Stations. However, the PTA had only paid a fraction of the total contract monies to

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<sup>52</sup> Menno Henneveld, Transcript of Evidence, 24.05.04, p.3.

Consolidated Constructions - approximately \$500,00 for Armadale and \$70,000 for Gosnells.<sup>53</sup>

The Committee understands that little if any of this money was paid to sub-contractors, and that at least one of the sub-contractors, AW & C Day Contractors Pty Ltd, has subsequently gone into liquidation.

Prior to awarding the contracts to Consolidated Constructions, the PTA conducted a financial assessment of the company. Relevant parts of its policy regarding financial assessment of tenderers stipulates the following:<sup>54</sup>

**(a) Process for Financial Assessment of Tenderers**

- A financial assessment of tenderers for all contracts over \$50,000 must be undertaken in accordance with the “approved evaluation model” ;
- The financial status of all prospective tenderers must be assessed prior to them achieving pre-qualification;
- The Finance & Contracts Directorate is responsible for the financial risk evaluation and assessment for each individual contract;
- The success of any contract is contingent upon the capacity, including financial stability of the tenderer to fulfil the contract. The tenderer must thus be subjected to due diligence and independent verification prior to award of the contract;
- After evaluating the financial information, the Finance Administration Manager, Finance and Contracts Directorate, will submit a recommendation to the Contracts Section representative indicating acceptance or otherwise of the tenderer’s financial standing;
- The Finance and Contracts directorate must be requested on each and every occasion for a ruling on the need to conduct a financial assessment of preferred tenderers. There may be occasions where an assessment has recently been undertaken, for example, within the last three months and it may not be necessary for an assessment to be conducted;

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<sup>53</sup> A further sum of approximately \$900,000 is owed by the PTA to Consolidated Constructions Pty Ltd for works done but was either not invoiced or processed for payment at the time of the company going into administration.

<sup>54</sup> Reece Waldoock, Acting Chief Executive Officer, Public Transport Authority, Submission, 20.04.04, Appendix 4.



- A decision on action to mitigate any unsatisfactory level of risk or to not further consider a preferred tender submission on these grounds shall be made by the Director, Finance and Contracts;
- **Securities should be obtained in the form of a bank guarantee. Cash securities must not be accepted.** [emphasis added]

### (b) Financial Assessment of Consolidated Constructions

After conducting an initial financial assessment of Consolidated Constructions by applying its “approved evaluation model”, the PTA’s Finance & Administration Manager wrote to the Contract & Supply Manager on 11 March 2003 advising that:<sup>55</sup>

*As requested, an evaluation of the financial status of Consolidated Constructions Pty Ltd has been completed...*

*The evaluation was assessed as a low to intermediate risk contract.*

*The financial details supplied are the annual financial reports but did not include an independent audit certificate for 2002. Based on the details supplied, the company made a profit last financial year and losses in the previous 2 years and has a negative working capital.*

*A Dunn & Bradstreet dynamic risk score relative risk is “moderate” for this company.*

***There is a financial risk entering in to a contract with this entity. It is strongly recommended that a suitable guarantee be obtained to cover any warranty.*** [emphasis added]

Despite this strong warning, however, the PTA signed the contracts with Consolidated Constructions without requiring a guarantee by way of security. Instead, it accepted a cash retention of \$137,410 from Consolidated Constructions. The PTA defends this decision by saying that such as substitution “is not uncommon.”

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<sup>55</sup> *Ibid*, Appendix 5.

**Finding 9**

In breach of its own financial assessment policy, the Public Transport Authority accepted a cash retention from Consolidated Constructions instead of the required bank guarantee, thereby reducing its security over the contracts. The decision to waive a bank guarantee was inappropriate given that internal advice warned that there was a financial risk entering into a contract with Consolidated Constructions.

The Acting Chief Executive Officer of the PTA stated in his submission to the Committee that the PTA's policy for financial assessment does not require a Dunn & Bradstreet report for all evaluations. It generally obtains a full Dunn & Bradstreet report when the risk is perceived to warrant additional information. The PTA did obtain a full Dunn & Bradstreet report in relation to Consolidated Constructions.

According to the PTA, there was nothing in the report that gave rise to any serious reservations about the financial capacity of Consolidated Constructions to complete the contract works. Although the report ranked the company's Dynamic Delinquency Score as "high", the PTA's view was that it was not unusual in the construction industry, in which companies' risk scores fluctuate widely, even during the course of one contract.

**Finding 10**

In the construction industry, individual companies' dynamic risk and delinquency scores in Dunn & Bradstreet reports fluctuate widely, even during the course of one contract. However, they are a useful tool to assess companies' abilities to fulfil contracts at a particular time.

To put the PTA's financial assessment results into the context of the construction industry, the Committee requested Mr Waldock to provide further information by way of a comparison with other construction companies. Also in the 'moderate' risk category were Lakis Constructions Pty Ltd and Broad Construction Services Pty Ltd. In fact, their risk scores were higher than that of Consolidated Constructions.<sup>56</sup> These companies have now been awarded the contracts to complete the works at Gosnells and Armadale Railway Stations respectively.

<sup>56</sup> Reece Waldock, Acting Chief Executive Officer, Public Transport Authority, Supplementary Submission, 28.05.04.

The PTA also provided the Committee with a useful comparative table of Dunn & Bradstreet Dynamic Risk Scores as at March 2003 in its supplementary submission:

**Table 3.2**

**Comparative Dunn & Bradstreet Dynamic Risk Scores as at March 2003**

Company	Dynamic Risk Score
Consolidated Constructions P/L	Moderate Risk
McMahon Contractors P/L	Very High Risk
Multiplex Constructions P/L	Below Average Risk
BGC Contracting P/L	Below Average Risk
Leighton Contractors P/L	Very High Risk
Downer EDI	Low Risk
Works Infrastructure P/L	Minimal Risk
Barclay Mowlem Construction Ltd	High Risk
MVM Rail P/L	Low Risk
John Holland P/L	Very Low Risk
Thiess P/L	Below Average Risk

As a result of its financial assessment in March 2003, the PTA included Consolidated Constructions on its panel of pre-qualified tenderers in June 2003. In evidence to the Committee, the Acting Chief Executive Officer stated that only two tenders were received from panel members for both Armadale and Gosnells, and that Consolidated Constructions was selected as preferred tenderer for both contracts following “standard policy and procedure value for money criteria”.<sup>57</sup>

It is normal practice in the public sector to accept the lowest credible conforming bid. For both contracts, Consolidated Constructions was the lowest bidder, offering a further \$100,000 discount if awarded both contracts. The Committee also understands that Consolidated Constructions’ tender price was almost identical to the PTA’s own cost estimates.

<sup>57</sup> Reece Waldock, Public Transport Authority, Submission, 20.04.04.

However, Mr Waldock signed the recommendation to approve Consolidated Constructions as the preferred tenderer **subject** to its financial status being checked again before entering into a contract. Unfortunately, this final check never occurred.

By way of explanation for this failure, Mr Waldock stated that the seven to eight month period between conducting the initial financial assessment and signing the contracts:<sup>58</sup>

*...was at the limit of the typical three to six months period between pre-qualification and contract award that would not generally give rise to a detailed updated assessment, except in higher than usual risk scenarios. Discussions on the financial risks associated with Consolidated Constructions took place prior to signing the contracts. **It was concluded further checks were not required. These discussions and the conclusion were not documented which is a weakness that requires attention.** [emphasis added]*

During the public hearing, John Leaf acknowledged that in hindsight, the PTA should have undertaken a further financial check on Consolidated Constructions prior to signing the contracts.<sup>59</sup> However, he also said that they would probably still have awarded Consolidated Constructions the contracts, even if further financial checks had been undertaken.

### **Finding 11**

The Public Transport Authority should have conducted a further financial check on Consolidated Constructions prior to signing the contracts, especially as internal advice had warned that there was a financial risk entering into a contract with Consolidated Constructions.

Had a further financial check been undertaken, the Public Transport Authority would have realised that the financial status of Consolidated Constructions had deteriorated since its initial financial assessment undertaken in March 2003.

On 5 February 2004, the PTA obtained an updated Dunn & Bradstreet report in response to a phone call from a sub-contractor that Consolidated Constructions was not making prompt payments to all sub-contractors. Mr Waldock maintains that even if an updated report had been obtained prior to signing the contracts, the PTA would still have considered Consolidated Constructions to be an acceptable contractor.

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<sup>58</sup> *Ibid.*

<sup>59</sup> John Leaf, Transcript of Evidence, 24.05.04, p.4.

Mr Waldock justified to the Committee the PTA's decision to award the contracts to Consolidated Constructions by making the following observations:<sup>60</sup>

- Consolidated Constructions was assessed to be a company of substance, and the Armadale and Gosnells contracts were considered to be well within the company's financial capacity;
- Consolidated Constructions had a proven track record with the PTA, having successfully completed a \$2.4 million at Claisebrook, and smaller works at Mosman Park and various station carparks. These previous contracts were completed on time and on budget.

Mr Waldock maintains that the PTA was not aware of Consolidated Constructions' financial problems until early 2004.

#### **Finding 12**

The Committee accepts that even if the Public Transport Authority had conducted a further financial check on Consolidated Constructions prior to signing the contracts, it probably would still have entered into the contracts on the basis that:

- It is normal practice in the public sector to accept the lowest credible conforming bid. For both contracts, Consolidated Constructions was the lowest conforming bidder, offering a further \$100,000 discount if awarded both contracts;
- Consolidated Constructions was assessed to be a company of substance, and the Armadale and Gosnells contracts were considered to be well within the company's financial capacity; and
- Consolidated Constructions had a proven track record with the Public Transport Authority, having successfully completed a \$2.4 million at Claisebrook, and smaller works at Mosman Park and various station carparks. These previous contracts were completed on time and on budget.

In written submissions and oral evidence, the Acting Chief Executive Officer of the PTA acknowledged that they have learned some lessons from this unfortunate incident with Consolidated Constructions, which has prompted them to reform their tender and contract management policies. The Committee encourages the PTA to continue to

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<sup>60</sup> Reece Waldock, Public Transport Authority, Submission, 20.04.04.

implement its own reform measures in addition to those recommended by this Committee.

**(c) Status of Contracts**

As the railway station upgrades had not been completed by Consolidated Constructions prior to being placed in administration, the PTA has had to engage other contractors finish the projects.

The Armadale contract has now been awarded to Broad Construction Services Pty Ltd for \$5,976,000 and the Gosnells contract has been awarded to Lakis Constructions Pty Ltd for \$7,775,000. The replacement contracts will cost the PTA over \$3.4 million more than the original costs of the projects.

The Committee understands that the contractors have been encouraged, as far as possible, to use the same sub-contractors as were being used by Consolidated Constructions for these projects, and that in some cases, at higher rates.<sup>61</sup>

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<sup>61</sup> State Supply Commission, Submission, 06.07.04, p.6.

## CHAPTER 4 WHETHER THE OUTCOME MAY HAVE BEEN DIFFERENT IF IMPROVED TENDER PROCESSES HAD BEEN IN PLACE

After considering all the evidence available, the Committee is satisfied that even if MRWA and the PTA had received more recent financial information on Consolidated Constructions prior to signing the respective contracts, it is likely that they would still have entered into the contracts.

Both MRWA and the PTA expressed this belief to the Committee. For instance, due to the criticisms levelled against MRWA for not obtaining a business assessment report in relation to Consolidated Constructions prior to signing the contract, they recently obtained a Dunn and Bradstreet report on each of the five tenderers for the Marble Bar Road contract for the relevant period of April, May and June 2003.

**Table 5.1**

**Results of Dunn and Bradstreet Assessment on MRWA Tenderers**

Tenderer	Tender Price (\$)	Dynamic Risk	Dynamic Delinquency
Consolidated Constructions P/L	7,603,279.81	High	High
Henry Walker Eltin Contracting P/L	7,710,743 (alternative)	Very High	High
Henry Walker Eltin Contracting P/L	7,747,565	Very High	High
Brierty Contractors P/L	7,880,342	Very Low	High
Macmahon Contractors P/L	9,034,591	Very High	High
Highway Construction P/L	9,230,193.50	High	Average

The Dunn and Bradstreet assessment ranked Consolidated Constructions as being a similar performer overall to the other tenderers. Therefore, MRWA gave evidence to the Committee that:

*...such an assessment would not have been likely to influence the determination of the appropriateness of Consolidated Constructions' suitability as the successful tenderer for this contract.<sup>62</sup>*

Similarly, as outlined in Chapter 3.3, the Acting Chief Executive Officer of the PTA maintains that even if an updated Dunn & Bradstreet report had been obtained prior to signing the contracts, the PTA would still have considered Consolidated Constructions to be an acceptable contractor.

The Committee heard from a number of witnesses that the construction industry is extremely volatile, operates on slim working capital and profit margins, and is generally slow to pay creditors. Therefore, it is not unusual for their risk ratings in reports like Dunn & Bradstreet to fluctuate significantly over a short timeframe, even during the course of one contract. The Committee has been advised that financial due diligence assessments of companies in the construction industry generally result in their being assessed as moderate to high risk.<sup>63</sup>

However, the outcomes may have been different if the following two practices had been implemented:

- In the case of the PTA, if the authority had followed its own policy requirement and obtained a bank guarantee from Consolidated Constructions as security, instead of merely accepting a cash retention. This grave omission is admitted by the Acting Chief Executive Officer:

*The decision to waive PTA's requirement for a Bank Guarantee and accept retentions did weaken PTA's security. An up front Bank Guarantee would have minimised the impact of the cost to PTA in awarding new higher priced contracts. Actual work done on the contracts was in the early stages and retentions build up as the contract is progressively completed. Consequently the value of retentions was less than a Bank Guarantee at the time of the collapse.<sup>64</sup>*

- In the case of MRWA, if the financial and managerial capacity of Carr Civil to perform 80% of the work had been verified as part of the tender process, it would have been evident that the company was financially insecure and inexperienced with works on such a large scale. Had MRWA rejected Consolidated Constructions' proposal to subcontract to Carr Civil, many of the sub-contractors engaged in turn by Carr Civil would probably not have suffered the financial losses they now face.

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<sup>62</sup> Menno Hennevel, Commissioner of Main Roads, Supplementary Submission, 28.04.04.

<sup>63</sup> State Supply Commission, Submission, 06.07.04, p.6.

<sup>64</sup> Reece Waldock, Acting Chief Executive Officer, Public Transport Authority, Submission, 20.04.04.



Despite these specific issues, however, the Committee is satisfied that, overall, the collapse of Consolidated Constructions and of Carr Civil was an isolated event based on an unusual set of circumstances, and is not common practice in WA.



## **CHAPTER 5 ANY OTHER RELATED MATTER THAT THE COMMITTEE RESOLVES TO CONSIDER**

### **5.1 Impact upon sub-contractors**

The ramifications of the collapse of Consolidated Constructions on sub-contractors do not form part of the Committee's primary terms of reference, which deal with the tender processes adopted by MRWA and the PTA.

However, it has been a high priority for the Committee to address the position of the many sub-contractors who suffered financial loss as a result of the contracts with Consolidated Constructions. Committee members have a great deal of sympathy for these hard-working people who received only part of the money owing to them, and in some cases, received no payment whatsoever.

As stated earlier in the report, most of the sub-contractors working on the Marble Bar Road project were contracted by Carr Civil, which actually makes them sub-sub-contractors or third-tier contractors to Consolidated Constructions.

Nevertheless, many of the sub-contractors have taken an interest in the Inquiry and either made written submissions or appeared before the Committee to give evidence, and the Committee resolved to outline their predicament in the report, in an effort to suggest ways to assist them recover some of their losses.

A number of the sub-contractors located in the metropolitan region, Mandurah, Busselton, Albany, Dowerin and Geraldton appeared before the Committee in Perth on 24 May 2004.

Most of the witnesses were contracted by Carr Civil. However, some of the witnesses were contracted directly by Consolidated Constructions. Donald Harrington, co-proprietor of the Marble Bar Travellers' Stop roadhouse was contracted by both Carr Civil and Consolidated Constructions to supply all meals and accommodation for over 70 men working on the project.

The Committee travelled to Karratha and Marble Bar to take evidence from sub-contractors located in the Pilbara region on 25 May 2004 and 26 May respectively. At the well-attended hearing in Marble Bar, sub-contractors spoke passionately about the impact of their financial losses upon their individual families and businesses and upon the local community in general.

Unfortunately, it is often the sub-contractors and their sub-contractors who suffer the greatest loss in these situations, and yet they are least able to wear the burden of such financial loss. Their legal status as third-tier contractors affords them little or no

protection from things going wrong up the chain of command. The vulnerability of third-tier contractors concerns the Committee.

One sub-contractor provided a brief written submission to the Committee stating that as a result of not being paid by Carr Civil for their gravel cartage work, they have had to sell a block of land which took them many years of saving.<sup>65</sup> Another sub-contractor stated in a written submission to the Committee that the money owed to their small family business is the equivalent of a quarter of a year's income, and that they are now unable to pay their debts.<sup>66</sup>

Other sub-contractors told the Committee that they had mortgaged their houses to inject additional funds into their small businesses to keep them afloat after incurring losses from the Marble Bar Road project.

During the course of public hearings, the Committee was able to elicit from some of the sub-contractors the amount of money owing to them:

Donald Harrington - Marble Bar Travellers' Stop (owed by Consolidated Constructions) and (owed by Carr Civil)	\$93,465 \$5000
Peter Cox - Concrete Logistics	\$250,000
Rodney Evans - RNR Contracting Pty Ltd	\$373,000
Fiona Paech - NW & FS Paech	\$50,000
Noel Ducas - Northcoast Holdings	\$100,000
Lindsay Berry - LN & CA Berry	\$61,000
Jenny Stewart - KG & JL Stewart	\$40,000
Alfred Potter - Marble Bar Electrical Service (owed by Consolidated Constructions)	\$7,923
David Taylor - DJ & CM Taylor	\$8,400
Ronald Gilmour - Sandra Hunt Agencies	\$26,771
Helen Mitchell - (owed by Consolidated Constructions)	\$4,000
Natasha Stubbs - KG Stubbs Earthmoving and Mining Contractors Pty Ltd	\$86,998

<sup>65</sup> Lindsay Berry, LN & CA Berry, Submission, 16.04.04.

<sup>66</sup> Fiona Paech, NW & FS Paech, Submission, 20.04.04.

Ingrid Dick - Marble Bar Caravan Park (owed by Consolidated Constructions)	\$42,500
<b>TOTAL</b>	<b>\$1,149,057</b>

As stated earlier in the report, many of the sub-contractors said that they believed their payment was assured given that the work was being conducted for MRWA. This report illustrates that as third-tier contractors, most of them had a contractual relationship with Carr Civil, not Consolidated Constructions.

Notwithstanding Carr Civil's slow payment of invoices to its sub-contractors, they persevered with the work in order to complete the road. The Committee is disappointed that the sub-contractors' trust and community spirit indirectly contributed to their financial losses. In response to questions by the Committee about why they continued to work despite slow payments, the collective explanation was that in relation to work in country towns:

*...we try to give people the benefit of the doubt. We all come from a long line of people who have got to where they are because they have done it hard. We come from a long line of battlers. You try to do the right thing.*

*...In the interest of the contractor, [Carr Civil] we did what we could.<sup>67</sup>*

Sub-contractors also said that it was essential to complete the road before the cyclone season commenced. Especially for those sub-contractors who were locals in the Marble Bar district, they explained that they were also eager to see the road completed as it would enhance the local community, which was previously linked to Port Hedland by a gravel road. It was therefore in their interests to see the road completed.

Sub-contractors in Marble Bar stressed that all businesses in Marble Bar had been affected by the situation, not just those directly contracted by Carr Civil and/or Consolidated Constructions.<sup>68</sup> In such a small regional community, losses suffered by some people affects the economy and viability of the broader regional community.

Unfortunately, those people contracted by Carr Civil will not receive a return from Consolidated Constructions. They will, however, receive a partial return from Carr Civil.

<sup>67</sup> Rodney Evans, Transcript of Evidence, 24.05.04, pp.13 & 16.

<sup>68</sup> Ingrid Dick, Transcript of Evidence, 26.05.04, p.21.

## 5.2 Methods to ensure sub-contractors are protected in the future

Throughout this Inquiry, the Committee has considered the option of recommending that government agencies and statutory authorities be required to assume direct responsibility for ensuring the payment of sub-contractors engaged by its principal contractors. This could be done by various means, including paying sub-contractors directly out of principal contractors' progress payments, or withholding a percentage of contract monies to be held in trust for sub-contractors.

After careful consideration of these options, the Committee has concluded that such methods are not foolproof and cannot be regarded as a panacea. There are also sound legal and policy reasons for not recommending this course of action. Administering and 'policing' payments to sub-sub-contractors would place an enormous administrative and financial burden on the State. It would also compromise the legal contractual relationship between all parties involved.

In any event, having heard evidence from a wide range of stakeholder interests, the Committee has concluded that whilst government agencies can assist in protecting sub-contractors, it is appropriate for second and third-tier contractors to be ultimately responsible to protect their own interests in relation to payment. Indeed, this view accords with the legal position *vis-à-vis* the contractual relationship between contractors and sub-contractors.

In October 2000, a *Security of Payment Taskforce* was established to advise the Government on the best options, both legislative and non-legislative, for promoting security of payment in the Western Australian building and construction industry. Part of the current Government's policy was to introduce security of payment legislation.

*The Construction Contracts Bill*, passed by both houses of Parliament on 30 June 2004 and due shortly to be proclaimed, addresses the protection of payments to sub-contractors in similar situations. The objective of the legislation is to facilitate timely payments between parties, to provide for rapid resolution of payment disputes and to provide mechanisms for the rapid recovery of payment under construction contracts, thereby creating minimum standards for contracting parties with a disproportionately weak negotiating position.

However, the Taskforce concluded in its report to the Minister for Housing and Works in November 2001 that:

*Security of payment is a complex problem unlikely to be fully addressed by any single measure. ...[T]he Taskforce supports the view that there is no*

*single cure for payment problems, and that a broad range of measures may best address security of payment difficulties.*<sup>69</sup>

Another measure is ‘preferences’ being given to sub-contractors and suppliers affected by the collapse of both Consolidated Constructions and Carr Civil.

In early April 2004, the Minister for Planning and Infrastructure, Hon. Alannah MacTiernan, MLA, announced that the sub-contractors would be given an extra 5% weighting on their bids for the roadworks in addition to the existing 10% preference given to regional companies under the Government’s Buy Local Policy.<sup>70</sup>

The Buy Local Policy gives preference to local companies tendering for local projects, as long as their bid is no more than 5% higher on works or 10% higher on goods and services than other companies not in the local region. In relation to the sub-contractors and suppliers affected by the Marble Bar Road project, the Minister stated that the additional 5% weighting would be offered for cyclone repair work, worth between \$6 million to \$10 million.

#### **Recommendation 5**

The Committee encourages preferential treatment and additional weighting being given to sub-contractors and suppliers affected by the collapse of Consolidated Constructions and Carr Civil under the Government’s Buy Local Policy.

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<sup>69</sup> p.13.

<sup>70</sup> *Hard-hit contractors to get road aid package*, The West Australian, 07.04.04.





## CHAPTER 6 CONCLUSIONS

Having taken written submissions and oral evidence from a number of witnesses and investigated all the circumstances surrounding the collapse of Consolidated Constructions and the contracts entered into with MRWA and the PTA, the Committee is satisfied that although the tender practices of the agencies could be improved, they did both comply overall with established tender practices.

The Committee is satisfied that the disaster that occurred in respect of Consolidated Constructions and its domino effect upon Carr Civil and all the sub-contractors and sub-sub-contractors was a most unusual situation and set of circumstances, not caused by any systemic flaws in the tender practices of the agencies involved.

Although it should have been apparent to MRWA and the PTA that Consolidated Constructions' financial position was rapidly deteriorating since it attained pre-qualification status, the Committee accepts that the agencies had a number of successful prior dealings with Consolidated Constructions and that the company had a successful track record in its contractual history with government agencies generally. For over forty years, Consolidated Constructions had enjoyed a reputation as a large and successful construction company.

Having said that, however, the Committee has recommended various improvements to the pre-qualification process and tender practices of government agencies, especially in relation financial due diligence assessments of prospective and preferred tenderers. It is crucial that when there is a time lapse between awarding a tender and actually signing a contract for large works projects, the financial capacity of the successful tenderer is verified using accurate and up-to-date financial information.

The company's collapse came as a shock, as even though rumours had circulated for some time that it was experiencing financial difficulties and was not paying sub-contractors on various projects, administration and eventual liquidation were not foreseen.

The Committee has also made recommendations to improve the administration of large works contracts to ensure that government agencies, whilst not legally responsible for ensuring that second and third-tier contractors receive payment from principal contractors, maintain a closer supervision of the projects in order to be satisfied that sub-contractors are being paid.

In this case, the Committee has reached the conclusion that even if Carr Civil had received full payment from Consolidated Constructions, it would probably still have failed to pay its many sub-contractors in full. Carr Civil simply did not have the financial capacity or sufficient experience to undertake such a large project as the Marble Bar Road. As such, it should not have been awarded the contract by Consolidated Constructions in the first place.

The financial loss sustained by the sub-contractors on the MRWA and PTA contracts, particularly those engaged by Carr Civil, is extremely unfortunate. The Committee endorses those sub-contractors receiving preferential treatment for future projects to recoup some of their losses. However, the commercial and legal reality in this case is that MRWA and the PTA's contractual responsibilities extended only to Consolidated Constructions, not its sub-contractors and their sub-contractors. It is imperative that second and third-tier contractors understand their contractual relationships and make their own risk assessments regarding the financial capacity of their principals to pay them.

# APPENDIX ONE

## SUBMISSIONS RECEIVED

<b>Date</b>	<b>Name</b>	<b>Position</b>	<b>Organisation</b>
16.04.04	Mr Lindsay Berry	Sub-contractor	LN & CA Berry
20.04.04	Ms Fiona Paech	Sub-contractor	
20.04.04	Mr Alfred John Bell	Director	Consolidated Constructions Pty Ltd
20.04.04	Mr Michael Badman	Director	Consolidated Constructions Pty Ltd
20.04.04	Mr Gary Stokes	Chief Executive Officer	State Supply Commission
20.04.04	Mr Rhys Waldock	Acting Chief Executive Officer	Public Transport Authority
21.04.04	Mr Menno Henneveld	Commissioner	Main Roads WA
27.04.04	Mr Steven Yovich	Director	Consolidated Constructions Pty Ltd
27.04.04	Mr Vincent Yovich	Director	Consolidated Constructions Pty Ltd
02.05.04	Ms Jenny Stewart	Sub-contractor	KG & JL Stewart
03.05.04	Mr Ray Haeren	Director, Planning and Sustainability	City of Gosnells
24.05.04	Mr Glynn Logue	Chartered Professional Engineer	Main Roads Western Australia
24.05.04	Mr Don Harrington	[former] Partner	Marble Bar Travellers Stop
24.05.04	Mr Rodney Evans	General Manager	RNR Contracting Pty Ltd
31.05.04	Mr Reece Waldock	Acting Chief Executive Officer	Public Transport Authority
02.06.04	Mr Gary Anderson	Liquidator	Gary Anderson Chartered Accountant

04.06.04	Mr Paul and Mrs Corrinne Fowler		Fowler Surveys
04.06.04	Mr Robert Lyons	[former] Senior Civil Engineer	Consolidated Constructions Pty Ltd
17.06.04	Mr Robert Lyons	[former] Senior Civil Engineer	Consolidated Constructions Pty Ltd
06.07.04	Mr Phill Turner	Acting Chief Executive Officer	State Supply Commission
06.07.04	Mr Mark Blayney	Director	Carr Civil Pty Ltd
28.07.04	Mr Gary Anderson	Liquidator	Gary Anderson Chartered Accountant
13.08.08	Ms Natasha Stubbs	Manager	KG Stubbs Earthmoving & Mining Contractors Pty Ltd

## APPENDIX TWO

### WITNESSES TO HEARINGS

Table 1.2

Date	Name	Position	Organisation
12.05.04	Mr Michael Badman	Director	Consolidated Constructions Pty Ltd
	Mr Alfred Bell	Director	Consolidated Constructions Pty Ltd
	Mr Raymond Potter	Director	Consolidated Constructions Pty Ltd
	Mr Steven Yovich	Director	Consolidated Constructions Pty Ltd
	Mr Vincent Yovich	Director	Consolidated Constructions Pty Ltd
24.05.04	Mr Phillip Turner	Acting Chief Executive Officer	State Supply Commission
	Mr William Hargrave	Acting Director Strategic Policy and Advice	State Supply Commission
	Mr Graham McEachran	Management Consultant	GCM Management Consulting
	Mr Menno Henneveld	Commissioner of Main Roads	Main Roads Western Australia
	Mr Bob Hunt	Manager Contract Performance	Main Roads Western Australia
	Mr Glynn Logue	Chartered Professional Engineer	Main Roads Western Australia
	Mr Michael Wallwork	Executive Director Construction and Maintenance Services	Main Roads Western Australia
	Mr William Bruce	Executive Director Technical Services	City of Armadale
	Mr Ray Haeren	Director Planning and Sustainability	City of Gosnells

<b>Date</b>	<b>Name</b>	<b>Position</b>	<b>Organisation</b>
24.05.04	Mr Reece Waldock	Acting Chief Executive Officer	Public Transport Authority
	Mr John Leaf	Director Finance and Contracts	Public Transport Authority
	Mr Lindsay Berry	Cartage Contractor	LN & CA Berry
	Mr Noel Ducas	Director	North Coast Holdings
	Mr Rodney Evans	General Manager	RNR Contracting Pty Ltd
	Mr Lyndon White	Technical Manager	RNR Contracting Pty Ltd
	Mr Peter Griffiths		Marble Bar Travellers Stop
	Mr Donald Harrington		Marble Bar Travellers Stop
	Mrs Fiona Paech	Sub-contractor	NW & FS Paech
	Mr Wayne Paech	Sub-contractor	NW & FS Paech
	Mr Donald Waugh	Company Director	Concrete Logistics
	Mr Peter Cox	Director	Concrete Logistics
25.06.04	Mr Mark Blayney	Director	Carr Civil Contracting Pty Ltd
	Ms Jenny Stewart	Sub-contractor	KG and JL Stewart
26.05.04	Mrs Julie Arrowsmith	Director	Arrowsmith Transport
	Mr Gerald Dick	Company Director	Marble Bar Caravan Park
	Ms Ingrid Dick	Company Director	Marble Bar Caravan Park
	Mr Ronald Gilmour	Manager	Sandra Hunt Agencies
	Ms Helen Mitchell	Mining Registrar	Department of Industry and Resources
	Mr Alfred Potter	Electrical Contractor	Marble Bar Electrical Service
	Mr Arthur Phillips	Manager Contracts	Main Roads WA
	Mr Mark Salt	Project / Contract Manager	Main Roads WA

PUBLIC ACCOUNTS COMMITTEE

<b>Date</b>	<b>Name</b>	<b>Position</b>	<b>Organisation</b>
	Mr Kevin Stubbs	Director	KG Stubbs Earthmoving and Mining Contractors Pty Ltd
	Mrs Natasha Stubbs	Manager	KG Stubbs Earthmoving and Mining Contractors Pty Ltd
	Mr David Taylor	Drilling / Blasting Contractor	DJ & CM Taylor
02.06.04	Mr Nick Persichitti	Accountant	PPB Accountants
	Mr Simon Barnes	[former] Civil Engineer	Consolidated Constructions Pty Ltd
	Mr Robert Lyons	[former] Senior Civil Engineer	Consolidated Constructions Pty Ltd
	Mr Gary Anderson	Liquidator	Gary Anderson Chartered Accountant





## APPENDIX THREE

### LEGISLATION

<b>Legislation</b>	<b>State (or Country)</b>
<i>Corporations Act, 2001</i>	Commonwealth of Australia
<i>Main Roads Act, 1902/1930</i>	Western Australia
<i>Public Transport Authority Act, 2003</i>	Western Australia
<i>Public Works Act, 1902</i>	Western Australia
<i>State Supply Commission Act, 1991</i>	Western Australia
<i>Evidence Act, 1906</i>	Western Australia



