

**STANDING COMMITTEE ON
ESTIMATES AND FINANCIAL OPERATIONS**

2011–12 AGENCY ANNUAL REPORT HEARINGS

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 12 NOVEMBER 2012**

**DEPARTMENT OF FINANCE —
BUILDING MANAGEMENT AND WORKS**

Members

**Hon Giz Watson (Chair)
Hon Philip Gardiner (Deputy Chair)
Hon Liz Behjat
Hon Ken Travers
Hon Ljiljanna Ravlich**

Hearing commenced at 3.11 pm

NOLAN, MS ANNE

Director General, Department of Finance, sworn and examined:

SULLIVAN, MR WILLIAM

Commissioner of State Revenue, Department of Finance, sworn and examined:

McGRATH, MS JENNIFER

Acting Executive Director, Building Management and Works, Department of Finance, sworn and examined:

ALDERTON, MR RODNEY

Executive Director, Government Procurement, Department of Finance, sworn and examined:

The CHAIR: On behalf of the Legislative Council Standing Committee on Estimates and Financial Operations I welcome you to the hearing this afternoon. Before we commence, I am required to ask you to either take an oath or an affirmation.

[Witnesses took the oath.]

The CHAIR: You all would have signed a document entitled “Information for Witnesses”. Have you read and understood this document?

The Witnesses: Yes.

The CHAIR: The hearing is being held in public, although there is discretion available to the committee to hear evidence in private either at its own motion or at the request of a witness. If for some reason you wish to make a confidential statement during this afternoon’s proceedings, you should request that the evidence be taken in closed session before answering the question. The proceedings this afternoon are being recorded by Hansard. A transcript of your evidence will be provided to you. The committee reminds agency representatives to respond to questions in a succinct manner and to limit the extent of personal observations. It would assist the committee and Hansard if you would please quote the full title of any document that you might refer to during the course of the hearing. Please be aware of the microphones; ensure you have one pointing at you. Members, it would assist Hansard if you could refer to a page or reference in the annual report in preface to your questions.

Government agencies and departments have an important role and duty in assisting the Parliament to review agency outcomes on behalf of the people of Western Australia. We appreciate your assistance in this process this afternoon.

Hon KATE DOUST: My questions reference back to the Building the Education Revolution program which is first mentioned on page 4 of your annual report. First of all I refer to page 5 under the heading “Building Management and Works”: “Leads the management, planning and delivery of new government buildings”. I want to know, first off, how does BMW judge value for money in relation to the delivery of non-residential building services to government agencies?

Ms Nolan: Thank you for the question. It is a broad scope of value for money. I think Jenny McGrath will elaborate.

Ms McGrath: One of Building Management and Works' services is the delivery of new non-residential buildings. In that process of tendering and getting value for money, we go through a public tender process. Apart from just looking at the price that we get from a tender, there is also the quality of the builder, so there is a process that we go through that qualifies builders.

Hon KATE DOUST: How do you assess the quality of the builder?

Ms McGrath: BMW has a pre-qualification process that they go through. For any building program or any project over \$300 000 we do both a financial assessment and an organisational capacity assessment for that organisation. Some of the things that we include in that is we look at their previous work experience and the experience and qualifications of key personnel. We look at some of the management systems that they actually have in place. We also, as I mentioned, do a business risk assessment that looks at the financial capacity of the organisation. We look at information such as past financial reports and other non-financial information. We do external credit risk assessments like a Dun and Bradstreet assessment. We look at the current workload. We also look at safety reports and other contractor performance. They are the things that we go through.

Hon KATE DOUST: Thank you for that. I might come back to that a little bit later on. If we could perhaps go to page 18 of the annual report; I have a number of questions around this area. Page 18 talks about 11 new schools that were ready for the current academic year, 2012. Could you provide the names of those 11 schools that were ready for the 2012 academic year?

Ms McGrath: The new schools included Freshwater Bay Primary School in Claremont; Malvern Springs Primary School in Ellenbrook; Piara Waters Primary School in Piara; Lake Gwelup replacement primary school in Gwelup; Ashdale college stage 2 in Darch; Roleystone District High School, Roleystone; Aveley Primary School, Aveley; Meadow Springs Primary School in Mandurah; Atwell College stage 2 in Atwell; Dongara District High School in Dongara; and Kununurra District High School.

Hon KATE DOUST: Are you able to identify the original head contractor granted the contract for each of those schools?

Ms McGrath: We can. I do not have that information with me.

Hon KATE DOUST: Would you be able to provide that on notice?

Ms Nolan: Yes.

[Supplementary Information No A1.]

Hon KATE DOUST: Following on from that, for each of those head contractors for each of those 11 schools, did that head contractor complete that school?

Ms McGrath: I have not got that detail on me as well, so I would have to provide that one.

Hon KATE DOUST: I will add a couple of follow-ups to that when you are getting that information: if the head contractor did not complete that school, could you identify all the head contractors that were then involved in the completion of the contract and the dates that they were awarded the contract? So, if the head contractor did not complete the task for that school, if you are able to provide the names of any ensuing head contractors, when they were given the contract and when they finished. I do not know whether those people actually completed the job; if you are able to provide us with the names of the head contractor who actually completed the contract. I would also like to know—and I hope you would be able to tell us today—if the original head contractor did not complete the contract, are you able to provide the reasons as to why they did not complete the contract?

[3.20 pm]

Ms McGrath: We would be able to. I do not have that information today for these ones.

[Supplementary Information No A2.]

Hon PHILIP GARDINER: And as part of that information could you also provide, where there has been a change of head contractor, what the difference is in the cost that was for the original and then for the new or equivalent work?

Ms McGrath: Yes.

The CHAIR: We will include that in A2, I think, because it makes sense.

Hon KATE DOUST: For these 11 schools that we are talking about, did all of the head contractors undergo the pre-qualification process?

Ms McGrath: All these schools were part of our normal infrastructure delivery program and, as I mentioned before, any tender that we award over \$300 000 has to be awarded or is only available to pre-qualified contractors. So all of those projects would have been awarded to a pre-qualified contractor; and then at time of evaluation, tender evaluations, they would have gone through another business risk assessment. So each building contractor that is pre-qualified is actually renewed every two years, but then we actually do a business-risk assessment at time of tender award.

Hon KATE DOUST: So when that is happening, who is actually responsible for oversighting that?

Ms McGrath: We have an area within BMW in our business-risk area which has people there that are qualified to assess financial statements and provide risk assessments, and we also get information from the private sector; for example, Dun and Bradstreet credit risk reports.

Hon KATE DOUST: Have all the retention moneys for practical completion been paid to head contractors?

Ms McGrath: There is a process that we go through around retention. So, until a project is fully complete and even the defects period is up, moneys would be retained. And as soon as that process is finished, moneys are then provided back to the head contractor.

Hon KATE DOUST: That still does not answer my question. Has all the money been paid?

Ms McGrath: For those projects I have not got that information on me because some of those could still be in defects period, but I can get that information.

Hon KATE DOUST: I would appreciate that.

[Supplementary Information No A3.]

Hon KATE DOUST: Can we perhaps add to that, if any retention money has been withheld, are you able to provide information as to why that money has been withheld in each situation?

Ms McGrath: Yes.

Hon KATE DOUST: And how much was retained for each head contractor per contract.

Ms McGrath: Yes.

Hon KATE DOUST: I ask that question in case there may have been more than one head contractor for each of those pieces of work.

Ms McGrath: Yes.

The CHAIR: We will include that in A3.

Hon KATE DOUST: Still looking at those 11 schools, did all of the head contractors submit statutory declarations for all progress claims?

Ms McGrath: Yes, that is for the standard process that we work through. So yes, all statutory declarations would have been provided for those schools.

Hon KATE DOUST: When these are submitted, is there some sort of logbook or register of stat decs maintained, and where is that held?

Ms McGrath: We do not hold a register of stat decs. But we have our project manager who is usually the architect on the project. It is their responsibility as part of their role to actually work with the head contractor and get the statutory declaration, and then our internal project manager also sights that. The actual stat decs are usually held by the architects, so we do not actually hold them. We can get copies of them, but they are held by the actual architects in most cases.

Hon KATE DOUST: So you do not keep any record of those stat decs at all?

Ms McGrath: No.

Hon KATE DOUST: As a standard practice?

Ms McGrath: Not standard. It depends. If we do not use an external architect for the management of that project, we might have them internally; but otherwise they are held with the architect.

Ms Nolan: But we always have access to them.

Ms McGrath: We all have access to them.

Ms Nolan: We always have access. It is a physical issue versus an access issue.

Hon KATE DOUST: So, if the stat dec is going as far as the architect for the head contractor saying, “Look, we’ve paid out all our moneys and we’ve reached this point of the project”, then really the department is taking it in good faith that what is stated on the stat dec is true.

Ms McGrath: Yes, and I suppose that is the purpose of a stat dec. You are saying, “Yes, I have paid all my subcontractors.” And we take that as granted, and it is one of the roles and responsibilities of the architects that work with our project managers within BMW to ensure that that stat dec is sighted prior to BMW internally pressing the button and making payment.

Hon KATE DOUST: So who is responsible for making that decision?

Ms McGrath: It is our project manager and the architect that we have on the project.

Hon KATE DOUST: Is there any type of follow-up on those stat decs to check that the statements made on the document are in fact true?

Ms McGrath: We rely on being advised by subcontractors if they are not being paid. Because we do not have a contractual relationship with the subcontractor—we work to the head contractor—we do not know whether the subcontractor is being paid. So we rely on them to notify us. As soon as we are notified, we then start to make inquiries. So, with the subcontractor, we need some information from them about what invoices they believe are overdue and have not been paid. As soon as we have that information we can then talk to the head contractor and talk through and make sure to see whether there is an issue.

Hon KATE DOUST: Okay.

Hon LIZ BEHJAT: So, is there a contractual arrangement between the head contractor and the project architect?

Ms McGrath: No, because the project architect is working on behalf of BMW as part of BMW.

Hon LIZ BEHJAT: So the stat decs from the head contractor go to the project architect?

Ms McGrath: Yes, which are basically working on part of our project managers.

Ms Nolan: The reason for that being, of course, that they are in the best position to ascertain whether the progress of the works has actually been achieved as per what the head contractor’s expertise of the project architect to under —

Hon LIZ BEHJAT: So you use the expertise of the project architect because you do not have that expertise?

Ms McGrath: Yes, or the resources to cover that. Basically, we outsource part of that role, so we work together on that.

Hon LIZ BEHJAT: Which is a fairly normal contractual arrangement.

Ms Nolan: An absolutely normal contractual arrangement.

Hon LJILJANNA RAVLICH: Can I just ask about your own tendering documents under “12.6. Security of Payment/Construction Contracts Act” it clearly states in relation to a pre-qualified building contractor —

A PBC is required to:

- (a) comply with all of its obligations under the contracts between the PBC and its subcontractors (subject to the requirements of the Construction Contracts Act ... including in particular its payment obligations;
- (b) comply with the Act, including paying any amounts the PBC is liable to pay under an adjudication determination; and
- (c) provide true and correct statutory declarations in relation to payment of workers and subcontractors in accordance with the applicable works contract.

If a PBC is found to have failed to comply with any of the above obligations, its pre-qualification status will be reviewed and appropriate action will be taken. This may include suspension or cancellation of its pre-qualification status.

[3.30 pm]

I wonder whether you could provide the committee with or indicate how many pre-qualified building contractors have had a suspension or a cancellation of their pre-qualification status in 2009, 2010, 2011 and 2012; and, if you have any information in relation to 2011 in relation to suspensions or cancellations of pre-qualification status of any pre-qualified, or all pre-qualified, building contractors, can you please advise the committee of such now?

Ms McGrath: I do not have that detail on me. But I can say that over those years, we have suspended and taken people off our pre-qualification, for various reasons, due to either their financial capacity or their performance on jobs. So we can provide that information and detail.

Hon LJILJANNA RAVLICH: What about the nonpayment of wages?

Ms McGrath: Including payments to subcontractors?

Hon LJILJANNA RAVLICH: Yes, to subcontractors more specifically.

Ms McGrath: We can provide that information as well.

Hon LJILJANNA RAVLICH: In relation to the information that I have previously sought, and that is the number of suspensions and cancellations for those years that I already identified, can you also identify by category of either suspension or cancellation the number of contractors that have been suspended or cancelled, and for what reason, and specifically identify those that have been suspended or cancelled as a result of nonpayment to subcontractors?

Ms McGrath: Yes.

[*Supplementary Information No A4.*]

Hon PHILIP GARDINER: When you actually assess the building contractors, what information do you seek? Is it simply the last balance sheet and the profit and loss, or do you get monthly balance sheets and profit and losses to try to get an understanding of exactly what their current position is?

Ms McGrath: As mentioned before, when we look at the business risk assessment, we look at all their financial statements over a few years, and we get some forward-looking projections around their order books. One of the difficulties with doing a financial assessment on building companies is the way that they are structured. A lot of them are trusts, so they move money around here and

there, so it is difficult to do financial assessments on them. For a lot of these building companies, the financial information that we are using is often from their tax returns, which can often be six to nine months old. That is the sort of information that we use.

Hon PHILIP GARDINER: I guess that is what I was fearing. So, really, it is pretty historic information at firsthand that you are doing. Secondly, it is very complicated, which is also going to cause you difficulty, because you have to go to a lot of effort sometimes in trying to unwind it. So, really, with the sense of confidence that you give that you actually assess the financial standing of these companies, is it a bit of a wish and a hope?

Ms McGrath: It is at a point in time. There are things that we do on a regular basis to try to ensure that we see that a builder is still financially viable and things are going okay. There are things like we have alerts from ASIC around if there are changes in their management structures. We get alerts from court hearings and court actions that might be taking place. The work on site is a good way so see whether there are problems with a builder—if things start to slow down, or there is staff turnover. So there are some things that we can do on an ongoing basis, and that we do do, to monitor the situation with any project.

Hon PHILIP GARDINER: I do not know whether they even exist these days, but do you get a banker's opinion about what they may have in their account and so on? Is that something that you do to try to get a current view of how they stand?

Ms McGrath: I do not go into that much detail, but we did get their financial statements, which would have some information on them.

Hon PHILIP GARDINER: I understand, as we agree, I think, that they are historic, those things; often they are three or four or five months late, and they can often be later, and a lot can happen in three or four or five months.

Ms McGrath: That is right, and a lot of our projects do go over a couple of years. Some of the things that we do mitigate, especially in times when it is tough—when the market is tough and organisations might be struggling—is that when we rate them as maybe a moderate to a high risk, we look for some other guarantees, like bank guarantees or deeds of guarantee that have asset backing to them, to protect the state.

Hon PHILIP GARDINER: That is helpful to hear—so bank guarantees or letters of credit or something like that so that if there is an issue about payment, you have some recourse to the bank of the building contractor to get the payment. Does it happen very often that you exercise those bank guarantees or letters of credit or what have you?

Ms McGrath: For every contract, we do have bank guarantees that protect the state in its contractual relationship with the head contractor. So if the head contractor does go broke in the middle of the project, the state is covered for any financial loss that it has there. So there is that in place. What we have done in the last six to 12 months, because of the tighter market, is ask for, over and above that, deeds of guarantee from owners of the business to further safeguard.

Hon PHILIP GARDINER: Do you mainly get those deeds of guarantee or personal guarantees from private directors and proprietors when you engage them?

Ms McGrath: For a significant amount of projects that have recently been tendered, we do. For projects that we would have taken out maybe two or two and a half years ago, where the projects are probably now coming to an end, we might not have done that, because the financial situation of most businesses two or two and a half years ago was not as tight.

Hon PHILIP GARDINER: And of course the trouble may be not because of your project but because of other projects that are being done by the same building contractor. How do you manage that? Do you rely then on the guarantees from their bank to cover the circumstance in which other of their contracts might drag them down and therefore put your contract in jeopardy?

Ms McGrath: That is right, yes. One of the other things—I cannot remember where I have mentioned it—is that when we are looking at a builder to take on a project, we look at how much other work they have got to see whether they have the capacity to take on these jobs; so if they look like they have got too much on, and based on their financial and physical capability, can they actually take on this work as well. So they are some of the things that we would guarantee against.

Hon PHILIP GARDINER: Just a bit more on this—I may be stepping on someone else's questions—how do you make the judgement about the size of the builder? For example, small business builders do a lot of work. I think we are talking about \$300 000 and above when you go out for tender, are we not?

Ms McGrath: Yes.

Hon PHILIP GARDINER: So if it is a relatively small business going for a \$300 000-plus contract, how do you make a decision about that?

Ms McGrath: Basically, we go through the same process to try to get some sort of financial assessment. We do try as a government to spread the workload. We do not want it just for big builders. We use a lot of medium-size builders as well, and there can be difficulties in looking at their financials, because of the way that they are structured, because some of them are family trusts, and the way that they move money around. But as we said, it is not just about their financial assessment. It is about their capability as builders and their capacity. With some of the smaller builders, we would not allow them to, say, take on three schools at once, if you know what I mean. We would look at them and we would go, “No; at this point, they really should be able to take on only one building.”

[3.40 pm]

Hon PHILIP GARDINER: In terms of the payment that the building contractors have for their subcontractors, I think in the contract act or contractors act—whatever it is called—I think about 60 days is prescribed in the act. That seems a long time to me to have payment terms —

Ms McGrath: From the contractor to the subcontractor?

Hon PHILIP GARDINER: Yes, that is right. If I was a subcontractor—I know a little bit about building houses and the terms are much shorter than that and normally 30 days is about it. Is 60 days being taking advantage of by the contractor?

Ms McGrath: From my knowledge of what is—whether it has always happened, but what is happening now—and, look, I think it has probably always been this way—is that there are different arrangements between different subcontractors and contractors around what the payment terms are. There is in the Construction Contracts Act—I am pretty sure, I think it is 55 days. What happens in practice, I think, a lot of subcontractors have arrangements with the builders that they are working for. Again, that relationship is between the contractor and the subcontractor and not BMW. What we try to do, especially in times when it is a tighter market, like what it is now, in our payments to our contractors, the head contractor, to help the flow of money, because it is usually cash problems when things are tight—normally our claims would be on a monthly basis. We provide the head contractor with the opportunity if they want fortnightly or even weekly claims at different points to help move that process around, which then in turn helps the head contractor get money to the subcontractors.

Hon PHILIP GARDINER: Have you thought about or considered having a register where there are subcontractors' complaints against a particular building contractor?

Ms McGrath: Until recently, the issue of dealing with subcontractors has not really been an issue. The construction market has looked after itself, basically, until probably about late 2010. That is when we have started to see when the market has tightened and there are more issues that we are working with and trying to support the subcontractors and the builders in that. So, one of the things

that we are looking at now is—the Minister for Finance announced the other day in one of the new initiatives—trying to get some information from the head contractor at the beginning of the contract on who all the subcontractors are. That will enable us to be able to provide information and have access to subcontractors more readily so we can talk to them and be talking about nonpayment. But at the end of the day we really need subcontractors to make sure they are advising us if payment is not happening.

Hon PHILIP GARDINER: Do you have any sense of what outstandings there are to subcontractors with arrangements you have with building contractors on different projects which you have?

Ms McGrath: It is very difficult for us to know what that is, because we do not have the arrangement with subcontractors. All we know is the subcontractors that have contacted us and talked to us about when a head contractor has gone into administration or liquidation. We have had those conversations with them. We obviously go to creditors meetings, but usually the detail of how much each person is owed is not provided to that much detail. We know how much in total any one company is owed secured and unsecured creditors but we do not know the detail. Because we are not party to that contract, we do not know.

Hon KEN TRAVERS: I just wanted to go back to the issue about the deeds of guarantees and the bank guarantees. They are guarantees back to the state that you will recover money if you have paid it out to the contractor and they have not completed the work that you paid them for.

Ms McGrath: It protects the state—the state's contract.

Hon KEN TRAVERS: At any given point in time it would only cover the amount prepaid by the state to the builder prior to the work being completed?

Ms McGrath: Yes.

Hon KEN TRAVERS: If work has been done, but the subcontractors have not been paid from the state's perspective, that would not be covered by the guarantee?

Ms McGrath: No.

Hon KEN TRAVERS: You were saying that a lot of the companies operate as trusts and move assets around. It allows them the capacity to move their assets around. Is that what you said earlier?

Ms McGrath: Basically, when you are looking at how people have structured their companies, sometimes it can be difficult to know their true financial position. We look at different types of financial statements and then there are the other things I talked about to try to find a true picture about what a company's true financial position is.

Hon KEN TRAVERS: Effectively, if they have got that structure of trust, without a directors' guarantee of some form, as I think Hon Philip Gardiner was alluding to, examining their historical data is not much use at all, is it?

Ms McGrath: No. That is why in the last 12 to 18 months we have tightened up the pre-qualifications and added things like the guarantees of directors over their personnel assets to cover.

Hon KEN TRAVERS: But again only to the point of what is required —

Ms McGrath: For the state.

Hon KEN TRAVERS: — to protect the state. You say 12 to 18 months. There must have been a more precise date when you started that process.

Ms McGrath: I can get that information. We stepped that up and we looked at the ratios that we look at in our financial assessment. We tightened up about 12 months ago, which was when the market started to get tighter. So, we are now looking for a higher amount of working capital and net

tangible assets. At the same time, what we did is if a company was borderline we would ask for more of these guarantees like bank guarantees or the deeds of guarantee.

Hon KEN TRAVERS: Because I guess working capital, if it is just held in a trust company, would dissipate very quickly.

Ms McGrath: Yes.

Hon KEN TRAVERS: You were saying earlier that the stat decs are required to be held by the architects. How long do you require them to hold those for?

Ms McGrath: I would have to check that. I am not quite sure of the length of time, but they would hold them for at least the length of the contract and longer. We can find that information.

Hon KEN TRAVERS: If you could get the earlier documentation too. If we can get that date of when those deeds of guarantees and bank guarantees were implemented.

[Supplementary Information No A5.]

Hon KEN TRAVERS: The second one is the length of time that architects are required to hold stat decs for. Do we need to a separate number for that?

The CHAIR: I do not think so. I think we can put them together.

Hon KATE DOUST: Just coming back to the issue around the subcontractors and the claims of nonpayment, I am just wondering if you are able to tell us how many emails, phone calls or letters were received at BMW in relation to the nonpayment issue?

Ms Nolan: Could you clarify?

Hon KATE DOUST: We have been advised that a number of subcontractors phoned BMW to talk about the fact that they had not been paid —

Ms Nolan: Over what time—are we talking about a time period?

Hon KATE DOUST: Let us take it over the time period of 2011–12, for example. So, these people are saying that they have either phoned BMW to register a complaint of nonpayment or sent in emails or written letters. Do you keep any sort of record of those types of complaints?

Ms McGrath: Yes, we do. I have not got a full comprehensive list of what they are, but what I can say is that of the seven building contractors that have gone into administration since 2010, prior to that the last building contractor to go into administration was 2004. So, there was a period of six years. As I said, the industry was just going along well. The year 2010 was the first time in recent times that we had someone enter into administration.

[3.50 pm]

Over that time in relation to those seven, we were contacted by subcontractors in only three instances prior to going into administration. Two of those instances, it was found after investigation, were in relation to contractual disputes—so a dispute between the contractor and the subcontractor. In the third instance it was found to be nonpayment. When we talked to the head contractor, they said, “Yes, there is a problem and we withheld payment”, and within a week, that company had gone into administration.

Hon KATE DOUST: In that example where there had been a nonpayment, had that head contractor provided a statutory declaration saying, “Yes, that had all been paid”?

Ms McGrath: Yes, they had.

Hon KATE DOUST: What action did you take against that head contractor on that occasion?

Ms McGrath: As soon as we had a complaint from the subcontractor, we investigated and we found out there was a problem, so we stopped payment. Since then we have looked at and investigated further, and if there was sufficient evidence, which in that case there was, it was then

referred to the police. At this stage, in the last month or so, we have referred seven separate cases to the police for investigation for fraud.

Hon KATE DOUST: With that one we just talked about, was that the issue that happened in December of 2010 or was that later?

Ms McGrath: I would have to check the date on that one.

[Supplementary Information No A6.]

Hon KATE DOUST: What date did BMW first make the minister aware of the matter of nonpayment to subcontractors by BMW-appointed head contractors? When did you advise Minister of O'Brien that there was a problem with nonpayment to subcontractors?

Ms Nolan: We could provide advice as to when we were aware that they were in receivership or administration, is that what you are after?

Hon LJILJANNA RAVLICH: No; to the minister.

Ms Nolan: We would advise the minister of that.

Ms McGrath: I would have to get the exact date of the first one. There were a few.

Hon KATE DOUST: That would be good. Could we also have a copy of all contentious briefing notes on the issue that were provided to the minister as well?

[Supplementary Information No A7.]

Hon KEN TRAVERS: I am just intrigued that you are suggesting that that there may have been different categories of events that caused you to advise the minister, so I was just wondering whether you could tell us what those different categories of events that led you to advising the minister were.

Ms Nolan: I was seeking clarification about the question rather than trying to suggest that there were different events, but one level of event is the notification of a potential nonpayment by a subcontractor, all the detail of which we provided in response to an earlier question. The second question was the issue in my mind about whether that was what you were after or whether it was when we actually notified the relevant minister when the companies went into administration. They are two different things.

Hon KEN TRAVERS: I understand that, but the question that seemed to make sense to me was: when did you first notify the minister that there was an issue in regard to the contractors? I think that was the question.

Hon LJILJANNA RAVLICH: Nonpayment of subcontractors.

Hon KEN TRAVERS: So, I would have thought that that was a fairly clear issue in its own right. Your point about administration is a good one to also get that answer to, but surely there must have been a point at which you first advised the minister.

Ms Nolan: Yes.

The CHAIR: That is supplementary information A7.

Hon KEN TRAVERS: So we are getting both now?

The CHAIR: Yes.

Hon LJILJANNA RAVLICH: Madam Chair, Hon Kate Doust asked for contentious briefing notes in relation to the notification of the minister of the nonpayment by contractors to subcontractors. Can I just broaden that out and can we have all information, whether it is briefing notes or whether it is correspondence or whether it is emails in respect to this issue between the agency and the minister's office?

The CHAIR: I will give that a separate number.

[Supplementary Information No A8.]

Hon LJILJANNA RAVLICH: I just have a quick one here. I noticed in the tender documents that in section 12.2 there is provision for contractor performance reporting, and it says that at various times during a contract a contractor performance report will be prepared for the sole use of the principal in respect to all aspects of the contractor's performance and that the frequency of these reports may vary, but generally at least once during a period of the contract and at practical completion. I just wonder whether, as a part of that contractor performance reporting, there is any reporting on whether the contractor is actually paying his workers.

Ms McGrath: Not to my knowledge; it is more about the performance on the actual job rather than the payments. Basically, you would be presuming that the statutory declarations would be saying that they are signing statutory declarations and they are paying their subcontractors, and that is what they are doing.

Hon LJILJANNA RAVLICH: In that earlier provision that I cited in relation to this contracting document, clearly the relationship between the contractor and the payment by the contractor to the subcontractor is an issue that is of some interest to the agency, so I wonder why there is actually no attempt by the agency to determine whether the contractors are paying their subcontractors.

Ms McGrath: I do not think that there is no attempt, but a statutory declaration being what it is, is actually saying, "We are paying". For us to believe that not to be true, we need evidence to then investigate, otherwise we would not ask for a statutory declaration. For every payment we would have to ring every subcontractor and ask, "Have you been paid previously?"

Hon LJILJANNA RAVLICH: The point is that you are doing a performance report on the contractor. What I am suggesting to you is why is there no capacity under that performance report, as a part of that evaluation of the performance, to take that next step to say, "Are you paying the workers?", because what you are telling the committee is that all you are really assessing is the quality of the work and not whether or not people who are actually doing that work are getting properly paid or getting paid at all.

Ms McGrath: But I would say that the statutory declaration that is provided on a voluntary basis or before every claim is saying the same thing.

Hon LJILJANNA RAVLICH: Can I just say to you that it is clearly not working, because you are here before a committee of Parliament explaining or trying to explain or give information as to why people who have given their hard labour and expertise to deliver these projects are not being paid by the contractors for the work they have done. You are saying you continue to rely on statutory declarations and I am saying that clearly they do not work.

Hon LIZ BEHJAT: And your question is?

Hon KATE DOUST: On Tuesday, 23 October I asked a question in the upper house about a number of the builders who have been referred to the police. I just want to know whether you would be able to provide the names of the seven builders who have been referred to the police due to suspected fraudulent statutory declarations.

Ms Nolan: I do not think we are able to do that.

Hon KATE DOUST: That is okay.

The CHAIR: Just checking, because they are actually under investigation and outside of our reach.

Hon KATE DOUST: I understand that the first claim of a dodgy statutory declaration, if you like, was in December 2010 and that we have recently had these additional allegations about false statutory declarations. Why has it taken so long for BMW to inquire into these statutory declarations and then refer the matters off to the police? There has been a period of almost two years in which people have been making complaints, why has it taken this long?

Ms McGrath: As I have mentioned before, until we actually have the evidence from working with contractors to provide that evidence that statutory declarations were false, we are not able to do anything. So, it has taken us a while, especially for the first one that was in 2010. In regard to most of the others, with the builders that have gone into administration or insolvency within the last 12 months, we are now working through those.

[4.00 pm]

Hon KATE DOUST: Where those builders have gone into administration or receivership and a new head contractor was given the contract, did BMW do any investigation before letting out a new contract to find out whether or not subcontractors had been paid?

Ms McGrath: So what happens, if a head contractor goes into administration in the middle of a project, basically a line has to be drawn in the sand with that head contractor and the relationship they had with those subcontractors. When we then go, “Okay, from a state’s perspective we have to finish this project. How do we do that?”, we have a couple of alternatives. If it is close to the end of a project, we can actually just take the project over ourselves. What we try to do then is work with the subcontractors that were already working on that site and have them complete the rest of the work. We would only be paying them for the work that they did from then on, because we have already paid, as the state, money to the head contractor for all of that work. Yes, it did not get to the subcontractor.

Alternatively, if it is earlier in the project, it is more than likely that we would go back to the tender process that we went through and go to the second highest bidder that had put a tender in and we would negotiate with them to take it over. When we do that, we also request for them to actually talk with and try to negotiate with the subbies that are currently on the job to actually continue the work for them. Basically, we try not to leave the subcontractors high and dry and continue to use them to work for the rest of that job.

Hon KATE DOUST: I am just wondering: how many subcontractors has BMW referred off to the Building Commission dispute resolution service?

Ms McGrath: I would not have the numbers on that, but that is part of the process. So when we have our builder, a subcontractor that gives us a call and says that there is an issue, if it is a contractual issue, and in most cases it is a contractual issue between the builder and the subcontractor, that is something that we as BMW cannot get involved in because we do not know the details. We are not part of that contract. That is why the Construction Contracts Act was put in place in 2004, which is a process, through the Building Commission, that they can have a quick resolution of the issue.

Hon KATE DOUST: That is if it is a complicated issue. What if it is just a simple nonpayment?

Ms McGrath: Nonpayment is a different issue. So if there is no contractual issue, nonpayment is different. That is when we would ask the subcontractor to give us evidence, invoices to say, “I haven’t been paid for this.” When we have that information we then can go to the head contractor and say, “You need to provide us information saying that you have paid that invoice.” If not, then we would suspend payment. Interestingly, in most cases when a subbie does call us, often they are very reluctant to provide us all the information that we need, because of the relationship that they have with their contractor.

Hon KATE DOUST: It is interesting you say that. I have actually met with a subcontractor who was providing services to the warehouse. They had a BMW contract for goods and services to a BER project at a school. When that individual did not receive payment for their product and they tried to pursue it, they did actually contact BMW and they did actually write to the minister and offered their copies of their invoices. They received a letter back from the minister saying, “You need to seek legal advice.”

Ms McGrath: I would probably need to know more details about that one.

Hon KATE DOUST: I am happy to provide that detail, because that person is out of pocket \$30 000 and that is the response they have had through your department: “Go and get legal advice. There is nothing that we can do for you.”

The CHAIR: Can I just check back? Did you want the numbers on the conflict resolution?

Hon KATE DOUST: Yes, please.

The CHAIR: I am just checking back. There was a question on the numbers of cases referred to do with conflict resolutions. I will just give that a number, assuming you do not have an answer now.

Ms McGrath: No.

[Supplementary Information No A9.]

Hon KATE DOUST: I am just wondering: are you able to provide us with the names of the six primary schools due for completion in the 2013 school year?

Ms McGrath: East Dalyellup Primary School, Baynton West Primary School, West Byford Primary School, Yakamia Primary School, Pearsall Primary School and Esperance Primary School.

Hon KATE DOUST: Can you identify the head contractors for each project?

Ms McGrath: I would have to get that information.

Hon KATE DOUST: When you are doing that, can you also advise us as to whether or not that is the same head contractor that was given the original contract or whether there has been a change?

[Supplementary Information No A10.]

Hon KATE DOUST: Those head contractors, given that the projects are due for next year and there have been some amendments to the pre-qualification process, would those head contractors have been picked up under the new system or are they under the previous arrangements?

Ms McGrath: They could have been under the previous, because often a primary school probably would take at least two years.

Hon KATE DOUST: For those six projects, has BMW been made aware of any nonpayment issues for subcontractors working on those six projects?

Ms McGrath: Again, I would have to check the details of those ones.

[Supplementary Information No A11.]

Hon KATE DOUST: Of those six projects, can you also advise if any of those subcontractors have been referred by BMW to the Building Commission’s dispute resolution service?

The CHAIR: We will make that part of that last one, supplementary information A11.

Hon KATE DOUST: This question, some of it you might be able to answer and some you might have to provide. Again, on page 18 of the annual report, it refers to 62 capital projects. I appreciate you may not have that on you today, but if you are unable to provide the project name for each of those 62 capital projects —

The CHAIR: It is the middle of page 18.

Hon KATE DOUST: If you have it there, rather than reading it out, you might want to table that.

Ms McGrath: Yes, it is probably easier if we can. I have not got all of that detail of the 62 projects, but we can get the detail.

Hon KATE DOUST: Can I perhaps go through the other things attached to that?

The CHAIR: Yes, I will just give it a number and it will also include.

[Supplementary Information No A12.]

Hon KATE DOUST: So the project name for each of those capital works projects, the date that the contracts were awarded, the head contractor that received the original contract, the budget for each project. If you could identify projects that have reached practical completion and the date that that occurred. Was it completed by the head contractor that received the original contract? Has all retention moneys for practical completion been paid to the head contractor? If any retention moneys have been withheld, if you could provide a reason as to why that money has been withheld. How much money has been withheld per head contractor per contract? If you could also identify any projects not yet certified as reaching practical completion. What is the expected date of that practical completion? If there has been any change of head contractor during this period; if yes, why? That is quite lengthy.

Ms McGrath: I am glad someone else is getting all this.

The CHAIR: You will have your work cut out for a little while there. Any further questions?

Hon KATE DOUST: Can I just finish off that?

Ms McGrath: There is more!

The CHAIR: But wait, there is more!

Hon KATE DOUST: It is a very complicated issue, so yes, there is more. On that particular issue about the 62 capital projects, has BMW been made aware of any subcontractor claims of nonpayment? That is for those 62 projects. If so, we would like to know how many emails, phone calls or letters have been received by your office. Also, how many individual head contractors do these allegations of nonpayment relate to? Finally on that part, what actions have BMW taken in relation to these issues? Have there been complaints made? What have you done about it?

[4.10 pm]

Ms McGrath: Okay.

Hon PHILIP GARDINER: I venture into an area that is a little bit difficult, because I can see the degree of difficulty in this whole area of awarding contracts. It is not just a quantitative assessment that BMW has to make. There is a lot of subjectivity; I understand that. I want to ask some questions about the culture within the building and management area. In a couple of cases people have called me and they are reluctant to complain about what I would have thought are reasonably valid complaints because of the possibility of repercussions. Do you have any sense that is a real concern?

Ms Nolan: Are you suggesting that is repercussion from BMW or from the head contractor?

Hon PHILIP GARDINER: From BMW.

Hon LJILJANNA RAVLICH: That they will not get further contracts.

Ms Nolan: Given that these are subcontractors in the main, we do not believe that has been an issue. We would certainly welcome any information to the contrary—or, we would welcome the opportunity to look into it. We are certainly aware that subcontractors are reticent about their comments regarding head contractors, for obvious reasons of continuity and future business.

Hon PHILIP GARDINER: No; it is outside that area, which I am talking. I have offered to discuss the issues with Building Management and Works, but these people then pulled back and said not to take it any further; they are concerned that they will not be awarded any further work. What I do not know is what the solution is, if that is a perception outside. It is a perception outside. I wonder if you have any other inkling that that is a perception in some areas or not?

Ms Nolan: I guess our silence on this end is about understanding the nature of the problem. If they are subcontractors, we do not actually enter into any contractual arrangements with them so they could not be fearful of any repercussions.

Hon PHILIP GARDINER: No, as I said, it is not subcontractors.

Ms Nolan: So it is head contractors?

Hon PHILIP GARDINER: It is head contractors, architects and these kinds of people.

Ms Nolan: I am sorry; I am a little confused now.

Hon LJILJANNA RAVLICH: Why?

Ms Nolan: Because I do not understand the nature of the question, that is all; I am sorry.

Hon LJILJANNA RAVLICH: Basically, contractors do not want to put their heads up either in case they risk not getting the next contract.

Ms Nolan: That is with the head contractor, not with BMW, because BMW does not issue contracts to subcontractors. That is what I am trying to understand.

Hon LJILJANNA RAVLICH: I know, but they offer contracts to a contractor and then the contractor enters into a subcontract with the subcontractor.

Ms Nolan: Yes.

Hon LJILJANNA RAVLICH: Yes; but they are concerned that they will not initially get the contract; and if they do not get the contract they have nothing to offer to a subcontractor. Now, that is pretty easy to understand.

The CHAIR: Can I just interrupt?

Hon LJILJANNA RAVLICH: Yes, because you know the building industry.

The CHAIR: Are you suggesting that there might be some head contractors who might be aware of issues but are not willing to raise them because they might be concerned they do not get contracts.

Hon LJILJANNA RAVLICH: Absolutely; spot on the money!

The CHAIR: I think that is the issue.

Hon LIZ BEHJAT: Are you saying that the department is bullying people or something?

The CHAIR: No, no; I am just trying to clarify the question.

Hon PHILIP GARDINER: I am just asking about the culture and whether it is a cultural issue, because in two cases that is what people have come to me about. I wonder whether the department is aware of that; and, if so, how does it try to deal with it? I recognise how hard it is to try and deal with it, because there is a lot of subjectivity in the way that you work.

The CHAIR: Perhaps maybe part of the question is: is there a particular process or policy if somebody raises a question like that? I guess they could be seen as being anticompetitive in a way. On the other hand, they might be blowing the whistle.

Hon LIZ BEHJAT: I have a question, because I am just a bit confused. Is the committee suggesting there is some sort of culture within the department that if a head contractor makes a complaint about something to the department they will get struck off this list of preferred tenders?

Hon PHILIP GARDINER: Hang on! It is not a suggestion. I had a question.

The CHAIR: Let us stick with Hon Philip Gardiner's question, because that is where we were.

Hon PHILIP GARDINER: It is a question; it is as simple as that. I recognise how hard it is, and there may be misconceptions —

Hon LIZ BEHJAT: These are extraordinary matters to bring up in an annual report hearing, I would have thought.

Hon PHILIP GARDINER: I will continue, despite my colleague's remarks. It is really a question about whether you had any inkling of anything like that or whether it is a misperception that may be outside that may be totally ill-founded.

Ms Nolan: In terms of that, we do not believe we have any systematic bias against somebody who does provide complaints. We actually think those people who provide evidence to enable us to pursue issues are the ones that are helping the system work to ensure that all subcontractors get paid. The state pays all head contractors. We would certainly like to see that that flow of money goes down to the subcontractors. There is nothing in our system, in our processes, that we would like to see inhibit that. We can only operate on the basis of evidence and information we receive, rather than hearsay. So, if there is a bias, it is a bias because we need information to enable us to do our job. I think that is somewhat of a cleft stick on occasions.

Hon PHILIP GARDINER: That is the problem; it is a bit of a cleft stick. I agree with your difficulty in that.

Ms Nolan: It is probably the cleft stick for subcontractors rather than the department.

Hon PHILIP GARDINER: I do not believe it is a subcontractor, as I understand that these people have direct relationships with your department; and maybe what I can do is just say to them again to come and talk to you if they have concerns.

Ms McGrath: Yes.

Hon PHILIP GARDINER: But I cannot give them any guarantees. They are then going to have to try to work that out, and the best I can do is just follow it through.

Ms McGrath: As Anne mentioned, the construction industry is very small and very tight in a way, and there are always rumours about lots of organisations. We are very conscious that we do not want to feed rumours without evidence. Basically, we listen to rumours whether they come from other head contractors, subcontractors or wherever they are coming from; but then we actually need some evidence to go by so that we can make an informed decision around whether there really is an issue or not, because the position of a lot of building companies can actually be a lot worse if a rumour gets out, especially if it is BMW saying they are not going to do any more work with them; there could be a problem. The worst thing is that we could send people broke; they are not going to get more jobs. We are very, very careful. We listen to what is out there, and we want to hear from people, but we then have to have the evidence. We mentioned before the importance to us of subcontractors providing us with evidence so that we can actually make that decision.

Ms Nolan: Our evidence-gathering process is not that we fold our arms and say if they do not provide us with evidence, we do not do anything. We then use all the other mechanisms we have available to us in terms of using intelligence that is available in the marketplace, looking at processes and progress on site, asking other subcontractors, and all those sorts of issues; so we use our network of information flows to try to provide evidence. It does not necessarily have to come directly from that one subcontractor who has got an issue, but obviously the more information that they can provide us enables us to do a better job of tracking those issues down.

Hon KEN TRAVERS: I have something else on that point.

Hon PHILIP GARDINER: Taking our theory on subcontractors, are you able to provide any information to the committee from main contractors who have won tenders, or architects, or whomever they might be, who have formally made complaints or raised concerns with the Building Management and Works area that you have documented? I just want to know the number; I do not want to know which ones they are, but whether you have an account of that.

[4.20 pm]

Ms Nolan: Regarding the nature of operations of the BMW? I am just trying to understand —

Hon PHILIP GARDINER: It is the nature of the work that they are doing and where there is some tension which has arisen and where they have come to try to work through a solution.

Ms Nolan: We will provide whatever information we can ascertain in that regard.

The CHAIR: I think you were saying that the information you rely on in terms of reporting is a stat dec to say that the contractor has met all those requirements. In terms of if it was specifically required to make a statement about payment of subcontractors, does it go to that level of detail?

Ms Nolan: My understanding is that it does.

Ms McGrath: It is a one-page document that says that they can say that all payments due have been paid.

The CHAIR: That is it; okay.

Ms Nolan: Can I also just make the comment that stat decs have been the mode of operation since 1992 in the building industry, so it is not actually a new initiative; it is a longstanding arrangement and it is used extensively throughout Australia and, I think, overseas as well. It is not like it is an abnormal arrangement.

The CHAIR: Yes; I was just interested in how much detail was in there.

Hon LJILJANNA RAVLICH: So why have we got a mess here?

Ms Nolan: We have also sought to clarify to ensure that people understand that when they sign a stat dec, that is actually a legal document. It is a serious piece of paper that you are signing as a stat dec.

Hon KEN TRAVERS: I like Hon Ljiljanna Ravlich's question, so I am happy for that to go before mine.

Hon LJILJANNA RAVLICH: If that is the case, why have we got such a mess over here? Why have up to 1 500 people not been paid and some \$11 million in revenues not been paid to these workers? Why has that come about given that your stat dec system works so well?

Ms Nolan: The stat dec works as a mechanism of payment between the head contractor and the subcontractor. However, the building industry itself is a very unstable arrangement in that because we have got very tight financial conditions, the market is soft, so builders are not getting the continuity of work, which is interrupting their cash flow. The lifeline of any business is its cash flow, and cash flow has been a problem for some of these businesses. So it is a question of scheduling how some of that work is done.

Hon LJILJANNA RAVLICH: Is it not a case that perhaps the contracts that are being awarded are not going through appropriate due diligence and that may be in part the reason why we are in such a mess?

Ms Nolan: I do not believe so.

Hon LJILJANNA RAVLICH: All right. What about the fact that pre-qualification measures are not tight enough, so that is why we are now going through this mess?

Ms Nolan: It is probably if we look more broadly at the economic environment since 2010 post-GFC when there were a number of fiscal stimuluses which were about, which actually boosted non-residential building construction in an attempt to ensure that the Australian economy did not go into an economic downturn and that many of those stimulus packages have come to the natural end of their life; that is, the economy more broadly has not picked up. There is an economic environment which is adding to the stress on some of these companies.

Hon LJILJANNA RAVLICH: Can I just say your minister recently told the media that he accepted that pre-qualification measures were not tight enough.

Ms Nolan: We could always do more on pre-qualification; absolutely.

Hon KATE DOUST: I just want to talk about stat decs. Earlier you said that the stat dec came to the architect or the project manager. So, can you outline for us what is the process the architect or the project manager uses to authenticate that stat dec?

Ms McGrath: A stat dec is a stat dec; it is a statutory declaration saying that that is true.

Hon KATE DOUST: So they just receive it and they accept it as it is; they do not actually go and check it.

Ms McGrath: No. Unless we have got some reason to doubt that it is not valid—it is false—we take it on face value.

Hon KATE DOUST: So that reason would be a complaint from a subcontractor.

Ms McGrath: If we had a complaint from a subcontractor, we would investigate that and we would not make payment until we were assured that the stat dec was true. As Anne mentioned a minute ago, we do not look at just that one subcontractor; we would ring another three or four and say, “Have you been paid on this job? Have you got any outstanding?” We will go through that. More often than not, it is usually around a contractual dispute and the person who has rung us might think that they are out of pocket, but it is about something that they are in disagreement with the head contractor on. That is when we talk to them and advise subcontractors to progress that through the Construction Contracts Act to get that sorted out quickly.

Hon KATE DOUST: Can we just talk about the due diligence that you pay for these contracts? I received an email, as has your minister, about a week ago from a subcontractor. They have stated in their email that BMW awarded a contract for completion of the works at City Beach Primary School to Stillcon Pty Ltd in July–August 2012 and that on 18 September 2012 Stilcon went into liquidation. Given the level of detail that you provided us with at the beginning of the meeting, how is it possible that a company you gave a contract to some time in July or August, within a month or six weeks is no longer able to function?

Ms McGrath: I have not got the details on Stillcon. We can provide those. We can provide what financial assessment was done. It is interesting to note that of the projects that were involved with head contractors that have gone into administration since 2010, the majority of those had reached practical completion prior to them going into administration or liquidation.

[Supplementary Information No A14.]

Hon KATE DOUST: The thing that concerns me is we had this massive fantastic building project of 1.2 billion federal dollars—a great opportunity for the state. I think your department received just under \$18 million in terms of a commission to oversight the project. I know there has been a report done through the federal department praising Western Australia for having managed the project so well. I cannot remember when that report was actually done. But we now know, with the many subcontractors that are providing evidence of nonpayment, that that is just not the case. If the department received that kind of money to oversight the project, having listened today, there is very much a disconnect—a hands-off approach—once the contracts have been let out and there does not seem to be a lot of follow-up or responsibility to ensure that, right down the line, not just that the work is done, but that people are actually paid.

Ms McGrath: In relation to the BER, of the seven builders that have gone into administration, six did have some BER jobs; they also had some other government BMW jobs. Of all of those, there were 37 BER contracts that were made up of all of them. Only three did not reach practical completion by the time they went into administration. That would suggest that these companies were financially okay during that bit of work. The majority of the BER money—about \$1 billion of it—was in the 2009–10 and 2010–11 financial years. So, all those jobs had been completed. Anne mentioned a minute ago that private sector work has not picked up; it is very flat and there has not been that extra stimulus that we had in those two years from BER. Companies’ cash flows had basically dried up; there were no more jobs for them to go to. They were financially okay once they

got through, but then their work dried up around, and that is why a lot of them are going into administration at that point.

[4.30 pm]

Hon KEN TRAVERS: The only reason I could think that they would then go into administration at that point is that either they did the jobs and did not make a profit on them or they have asset stripped out of their shelf companies their profits and then sent the rest of the company into administration. One of the things that has always been explained to me is that builders tend to go bust in good times, not bad, when they suddenly take on work, and then the cost of actually doing that work becomes higher than what they actually tendered for. I do not understand why, if they have completed the work and been paid for the work, that would have an impact on either their cash flow, or send them into administration if that is the theory you are putting forward?

Ms Nolan: Cash flow administration of any business, small or large, is how it survives, and when you go into receivership it is largely because you do not have the cash flow, so you do not have the new projects coming on. In the case of when projects go into receivership at the height of the environment it is usually because they cannot deliver on those projects; in the downturn when the projects go into receivership, it is because they do not have cash flow management processes underway, and perhaps did not have the management processes in place in the companies themselves. I have just been reminded, of course, that it is not just government work involved in these companies; these companies work across the public and the private sector, and we are unable to ascertain the causality of some of these issues.

Ms McGrath: I think the other information we have received is that since 2009-2010 there have been 269 building companies enter administration in Western Australia. Of them, 13 have had work with BMW; seven of them are building contractors, and the other six are, like, the fit-out contractors or minor maintenance work-type contractors. So the exposure BMW has—we usually do around about 25 per cent of the construction work in Western Australia, non-residential—is that of the builders we are working with a lot lower proportion of the total amount have actually have gone into administration since 2009-2010; 270 of them. We have actually, in Western Australia, got off pretty easy compared with over east.

Hon KATE DOUST: I am sure that is a relief for the subcontractors.

Ms Nolan: We do not mean that in any way, shape or form. Of course we do not want to see any subcontractor in financial difficulty.

Ms McGrath: No.

Hon LJILJANNA RAVLICH: So what are you going to do about it?

Hon KEN TRAVERS: It is a shame the minister crowed about this a couple of months ago—how good it was.

Hon KATE DOUST: Page 28 of your annual report refers to efficient and effective systems. I just want to know what risks in government practices will be adapted to the current issue of nonpayments to subbies when BMW is the principal issuing state government contractor? You have sort of touched around few of those matters.

Ms McGrath: So there are some things I think I mentioned before that the minister announced a few weeks ago that we will have in place by December, the first being a revised statutory declaration, which will also include any payments that are in dispute. So we will actually know if they are having disputes with subcontractors about that; we will have to be advised. We are launching an education program to raise the awareness for subcontractors, so that they understand the avenues available for resolution, including the Construction Contracts Act. We will require BMW to have, from the head contractor, the list of all the subcontractors—I think I mentioned that

before—so then we can actually have more information about the subcontractors and be able to contact them and provide information.

Some other things we have already progressed: we are looking at doing some random spot checks with subcontractors to check they are making payments; working with WA Police to determine the minimum evidentiary requirements for prosecuting fraud; and liaising with other jurisdictions and peak bodies to share that information around the subcontractor issue here. In addition, as I mentioned we have made the improvements over recent times and tightened up on the pre-qualification process, and we have also put industry on notice in regard to the importance of statutory declarations around the issue of nonpayment.

Hon KATE DOUST: I just have a couple of questions in relation to that. In the minister's press release of 17 October he talks about payments in dispute. What will happen in the future about the issue of simple nonpayment to subcontractors? Will that be treated in any different way when somebody makes a complaint that they have not been paid?

Ms Nolan: We would to continue pursue it, yes.

Ms McGrath: Yes.

Hon KATE DOUST: So what are the penalties for head contractors who do not provide the initiatives set out in the minister's statement? So, if the head contractor does not pay a subcontractor, what action and what penalties would be imposed under the new set of guidelines the minister has talked about?

Ms McGrath: Our new contracts from early December will have, for example, the change in the statutory declaration to include the information about contractual issues. So if a contractor does not give us that information, they are not abiding by their contract and we would be able to withhold payment.

Hon KATE DOUST: So aside from the option you have to withhold payment from the head contractor, does BMW have any capacity to pay subcontractors directly?

Ms McGrath: We do. If we get agreement from the head contractor to make payments direct, we actually can do that. So if there is an issue that a subcontractor has raised, we investigate it with the head contractor and he says, "Yes", he obviously must be in a bit of trouble. We can either withhold payment, which we will withhold payment, or alternatively he can agree that we make the payments on his behalf.

Ms Nolan: That has occurred, too.

Ms McGrath: That has occurred.

Hon KATE DOUST: Okay. Well, of the current situation, where there may be moneys that have been retained or withheld, does the department have any intention of using any of that money to pay any subcontractors who have not been paid by the head contractor to pay them directly?

Ms McGrath: Yes, but once a company has gone into administration under contracts law, we are unable to pay subcontractors with that money because they have gone into administration.

Hon KATE DOUST: So you maintain that—what is it—five or 10 per cent of the moneys at the end —

Ms McGrath: Yes, yes; we would then give that back to the administrator, and the administrator would put that into their process of allocating out to secured and unsecured creditors.

Ms Nolan: Under corporations law.

Ms McGrath: Under corporations law.

Hon KATE DOUST: I just have one question, and I suppose it is the obvious one. What practical assistance is the government going to provide to these subcontractors who have not been paid and in some cases have lost their homes or lost their income?

Ms Nolan: As you are aware, the minister has announced a review by the Small Business Development Corporation, and that will be a matter for that to consider.

Hon KATE DOUST: I am not sure whether you can provide this or whether I need to go directly to the minister, but I understand it is anticipated that that report will be provided by the Small Business Commissioner to the minister on or around 21 December. I do not know if you can explain to us whether that will be made public or what the process is for dealing with that?

Ms Nolan: I am unaware.

The CHAIR: Given this issue that has come up, are you confident that, I guess, the complaints management processes are adequate to deal with these kinds of things? I realise some changes have been made to the statutory declaration, which would seem to be the obvious thing, to make that more explicit, but in terms of actually managing the process of complaints?

Ms Nolan: There is always room for improvement on processes, and given that we have had these issues, we, of course, will review our processes and make sure they are subject to thorough review to make sure they are as best as they possibly can be. I would be reticent to say they are world's best practice, but we will try to make sure they are world's best practice in complaint handling.

[4.40 pm]

Hon KEN TRAVERS: In answer to the question from Hon Kate Doust about what the government is doing to assist these subcontractors, you said that is now a matter for the SBD commissioner and his review. Does that mean you are not doing any work as an agency about providing advice for government on how to assist the subcontractors?

Ms Nolan: Providing all information is available—Hon Kate Doust has also asked us for information—we are providing evidence to enable government to understand the nature and the scope of the issues the best we are aware of.

Hon KEN TRAVERS: You are not looking internally at how the government may be able to assist the subcontractors?

Ms Nolan: We are looking at pre-qualifications, education and all those types of issues. Yes, we are looking at the general framework of the environment in which the contractor and subcontractor relationship is in.

Hon KEN TRAVERS: If the subcontractor was to contact you—I think you are now saying that one of the things you might do is do spot checks by ringing subcontractors—how do you manage to get advice from that subcontractor without it getting back to the head contractor that they have provided advice to you?

Ms McGrath: That is the dilemma we have. We have forms, which has information that we need from the subcontractor. That is the information that we need to be able to contact the head contractor. We do not know who they have paid. We are taking their word for it that they have made a stat dec saying they have paid. We have another person saying, “No, you haven’t paid.” We have to contact the contractor.

Hon KEN TRAVERS: Have you ever had any examples where you have contacted a subcontractor and they have said, “No, we haven’t been paid”?

Ms McGrath: Yes. Then we would say, “Can we have some evidence about that?” If we have one person call and we get a bit of information, we would call some others as well.

Hon KEN TRAVERS: How do you then use that information without identifying the subcontractors that have told you?

Ms McGrath: Then we go back and talk to the head contractor. We are trying to preserve the relationship between everyone here. We say to the head contractor, “We’ve had some calls from some people who are doing work on your job. Has the work been done? Have you not made other payments?” We would go back to the subcontractor. In most cases, the subcontractors will say, “Payment’s not due yet but it’s due soon. I’m not willing to say that it’s not paid.”

Hon KEN TRAVERS: I would imagine part of the structure is you give out the contracts to the head contractors and most of those head contractors will have subcontractors they work with on a regular basis. For those subcontractors, a large part of their business model will be contracting to that head contractor. They may have other work but in many cases, they will depend on one or two head contractors for a lot of their work. If they are brought into it and that head contractor then works out who it is and dumps them, they lose a large part of their business anyway, do they not? Am I right in making that assumption that in most cases there is a strong case for the subcontractors as they rely on head contractors for a fair chunk of their business and the same head contractors?

Ms Nolan: That is our understanding.

Hon KEN TRAVERS: There is a structural problem there about them identifying to you that there is a problem because it is pretty easy to identify who has then told you that, and then they lose their work.

The other thing is that you were talking about some of the other changes you are making about pre-qualification and all of those things. The problem is they are all looking back, not trying to look forward about the capacity of the builder to manage their cash flow. Everything you do looks back at what they have been doing but there is no attempt to look forward. I think, as we have discussed this afternoon, the key issue is about the builder’s ability to manage their cash flow. What are we doing to put in place mechanisms to ensure the builder has an ability to manage their cash flow moving forward rather than just looking back?

Ms McGrath: As we did mention earlier, it is difficult to get forward projections. We do get some. We get their order books. There is some other information that we can get. How much can you rely on forecast information? When we consider whether we should accept a company, we put in those other things like the bank guarantees.

Hon KEN TRAVERS: But they only protect you.

Ms McGrath: That is right; they only protect us. But it is not in our interests either to take on a company that is going to go broke in the middle of a project. It is not in anyone’s interest. We do not have to do that. It is very difficult to get that financial information and to have certainty. As I mentioned, a lot of our projects can take two to three years to complete and a person or a company’s financial position can change a lot over that period of time.

Hon KEN TRAVERS: I understand that and that is why I would have thought that the only real mechanism that will avoid this happening again is coming up with mechanisms where you are able to get some guarantee about the future rather than just looking at a historical record of the past, particularly in light of the way you indicated the majority of these building companies are set up where the individual’s personal assets are not at risk. You make the personal assets at risk through a deed but only so far as to protect the state, not to protect those working under it. In some respects, that potentially gives false confidence to people that there is a government process here to ensure that it is all above board when there is no government process that can guarantee that forward process. Pre-qualification and all of those things will give people the impression that there is a process in place to protect their interests.

Hon PHILIP GARDINER: It sounds like the Wheat Export Authority. It is exactly the same problem.

Hon KEN TRAVERS: If you create the impression that you are going through a process that gives people the security that this is effectively a government-backed contract —

Ms Nolan: That is where the education role comes in that we are trying to develop—to understand that it is not a government-backed contract. The government does not renege on its contracts.

Hon KEN TRAVERS: I understand that. Even some of the mechanisms you have talked about today are about securing your position but that could give people the false view that that is some way of securing the protections for the subcontractors when, in fact, it is not. I do not think any of the things that you have outlined today will protect subcontractors in the future.

Ms Nolan: I think they will all go towards helping.

Hon KEN TRAVERS: But how because they all look back; they do not look forward?

Ms McGrath: As we mentioned, it is not in anyone's advantage to take on a builder that is going to go broke.

Hon KEN TRAVERS: I am not suggesting you do it deliberately.

Ms McGrath: We would not want to be doing that.

One of the other things that we are doing is that the issues we are facing here have been faced all across Australia and there is work happening in each of the jurisdictions and we are working with them. There could be something that comes out of what they are doing that enables us to improve our systems and our process.

Hon LJILJANNA RAVLICH: Very quickly, in terms of becoming a pre-qualified building contractor, my understanding is that if you lose your pre-qualification, you can apply for it again. Is that correct?

Ms McGrath: Yes.

Hon LJILJANNA RAVLICH: You could be a building company and for a range of reasons, you could lose your pre-qualification. How long do you have to wait before you can reapply?

Ms McGrath: I would have to get the detail on it but we go through a detailed assessment again to see what had changed. We do have to be careful with building companies as they could go broke one day and pop up another day as basically the same people. We do all of those types of checks to make sure who is really behind that company. But it is very much a detailed assessment that we would go through because that builder has obviously been taken off for a very good reason and we would want a very good reason to put them back on again.

[4.50 pm]

Hon LJILJANNA RAVLICH: From your own knowledge, are there some companies that may have lost and then once again received pre-qualification three or four times?

Ms McGrath: I would have to get that information? I am sure it has happened on and off.

Ms Nolan: It would be very unusual but not experienced in the time Jen and I have been involved.

Hon LJILJANNA RAVLICH: Three or four times it would not be unusual?

Ms McGrath: No; not back on and off. I do not think that would be the case.

Ms Nolan: That would be very unusual.

Ms McGrath: Yes; very unusual.

Hon LJILJANNA RAVLICH: Can you give us an indication of how many for the financial years of 2010–11 and 2011–12 how many have lost their pre-qualification and how many have subsequently gone on to become pre-qualified again, and where there have been multiple pre-qualifications, if and when they exist?

[*Supplementary Information No A15.*]

Hon KEN TRAVERS: Do you look at the builder, the person who holds the building licence, the directors of the company?

Ms McGrath: All of the above.

Hon KEN TRAVERS: Does that include looking at whether there is family relations?

Ms McGrath: That is where it gets very complicated, but yes we look at all of that.

Hon LJILJANNA RAVLICH: In relation to tendering for contracts, my understanding is that Finance reserves the right to determine that a tender will not be advertised publicly and there are a cohort, if you like, that must be on some panel that are invited to tender. Is that correct? “A tender may be either publicly advertised or sent to a relevant pre-qualified building contractor”, so I assume that a panel of pre-qualified building contractors are invited to tender.

Ms McGrath: In the majority of cases we go out to tender, so all of our building contractors that are pre-qualified can apply. In some cases we might do an expression of interest on certain projects. But, again, we still go through a process that is an open-tender process around the qualified builders.

Hon LJILJANNA RAVLICH: I wonder whether you can provide the committee with a schedule of all of those companies or individuals—I am assuming they will all be companies—who are the relevant pre-qualified building contractors who may be on a list where they are invited to tender as opposed to having to compete for a tender.

Ms Nolan: We can give a list of all pre-qualified builders.

[Supplementary Information No A16.]

Hon LJILJANNA RAVLICH: Is there a group of relevant pre-qualified contractors who are regularly invited to undertake contracts without going through a formal tender process?

Ms McGrath: No.

Hon KATE DOUST: Coming back to Minister O’Brien’s media statement of 17 October—we have already had some of this discussion about the requirement in future to provide more detail on a statutory declaration—given the issues that have been raised now that there have been several building head contractors referred to the police for allegedly false statutory declarations, is BMW going to take a more proactive role in checking future statutory declarations?

Ms McGrath: What I did mention before was that we have put a process together and we will start doing some random spot checks of subcontractors so that we can get an idea of whether there are issues out there.

Ms Nolan: The other thing I think that media release alluded to was a list of all subcontractors who are with each of the head contractors so that we know the full complement of subcontractors that are working on jobs.

Ms McGrath: At the moment we do not know that because we are not part of the contract.

Hon LJILJANNA RAVLICH: As I understand it, tendering is the normal way in which business operates in your agency. Under your tendering guidelines, there is a reference at 11.3.2 that deals with the question of exceptions. It says that “Finance reserves the right to determine that a tender will not be advertised publicly.” So, there must be some tenders that do not go out for public tender.

Ms McGrath: If there are, there are very few, so I would be happy to provide that information.

Hon LJILJANNA RAVLICH: You just told me you did not know what I was talking about and there were not any, but anyway.

[5.00 pm]

Ms McGrath: I do not know of any that have not gone out to tender, but I am happy to give any exceptions.

Ms Nolan: There may be about two types.

[Supplementary Information No A17.]

Hon LJILJANNA RAVLICH: Can you identify for the financial years of 2010–11 and 2011–12 which tenders fall within that category of 11.3.2 under “Exceptions” in your tendering document. Sorry, Madam Chair, do you want to record that? You have it?

The CHAIR: Yes.

Hon LJILJANNA RAVLICH: “In some but not all such circumstances an expression of interest or a registration of interest, a tender may be either publicly advertised or sent to relevant PBCs.” I want to know which contracts have been sent to relevant PBCs rather than advertised publicly, therefore, would fall within that particular provision of your tendering documents. The notion that all tenders are in fact put out to tender is not true because that is what is written here under your own tendering guidelines. If you can provide that information to the committee, that would be very useful.

The CHAIR: As has already been indicated, that is supplementary information A17.

Hon KEN TRAVERS: I know there were some earlier questions, but I am interested in what data you collect about people contacting you regarding issues with builders and subcontractors. What data did you previously collect and what data do you now collect?

Ms McGrath: Until probably 12 months ago, as we talked about, we had hardly any issues with subcontractors because the building industry was working okay. In the last 12 months there have been, so we have tightened up our processes and we now have more formal process that document every phone call we get and investigations we make after that.

Hon KEN TRAVERS: When did the new data collection system exactly come into effect?

Ms Nolan: I do not think we would say it was a system that came into effect on a date; it was in recognition that there was more activity collecting more and better information, so it is a more systematic way.

Hon KEN TRAVERS: I have seen letters that go back more than 12 months ago that were being sent maybe not to your office, but to ministers. I understand also people have suggested that they were ringing Building Management and Works more than 12 months ago. That is why I am intrigued to know how the data was being recorded 12 months ago and what management system you had in place to know whether there is an increasing number of complaints. I accept that you might not have been the person there at the time. I assume someone will have looked into what was happening 12 or more months ago.

Ms McGrath: As I said, 12 months or so ago, we did not have as precise systems as we have now because they were few and far between. But since then we have got more information.

Hon KEN TRAVERS: I know, that is why I am trying to find out what was in place 12 months ago.

Ms McGrath: It was very much a manual system. We still have one central point where issues needed to be raised. A subcontractor would sometimes call the project manager and then the project manager would need to contact our one point within the organisation.

Hon KEN TRAVERS: How can you then be confident that more than 12 months ago people were not raising complaints with your organisation and they were just being ignored?

Ms McGrath: More than 12 months ago we would have to go on what our staff were saying—our project managers and the central team.

Hon KEN TRAVERS: What process have you done to check with them that that was the case?

Ms McGrath: We have gone back through the files. We have talked to staff about the stuff that was prior to 12 months ago, and in some cases we have information on file.

Hon KEN TRAVERS: That then suggests that people were raising this more than 12 months ago.

Ms McGrath: We could have had issues being raised by subcontractors 12 months ago. Most issues that are raised by subcontractors are in relation to a contractual dispute between the head contractor and the subcontractor.

Hon KEN TRAVERS: Except you are telling us that there were no records kept. This is the problem I have: you are saying this is only a recent phenomenon, and since it became a phenomenon you have put in place mechanisms to control it. It might not be your intention, but you are giving me the impression that prior to more than 12 months ago there was not an issue and these issues were not being raised with your agency. If you have no records, I do not know how you can make that claim.

Ms McGrath: We do have records. They would be manual records in files. We have still got manual things but we are putting them into databases so we can keep a trend of those things. Prior to 12 months ago everything was looked at on an individual basis because they were few and far between. Now that we actually have more, we still look at them individually but we also consolidate the information so we know we have a pattern. But what we do have now—it has tightened up since 12 months ago—is a central point where all information comes through. If there is information, we have that central point.

Ms Nolan: The only other comment we would make is there had not been a company go into liquidation for a period of time before that. It probably did suggest that the issues were more of a random nature that related back to not necessarily systematic nonpayment but contractual issues between the head contractors. And you are right, I am making that on the assumption of having spoken to individuals rather than having an extensive database to provide evidence back to you.

Hon KEN TRAVERS: The point I am making is: what investigations have you done internally to identify what was going on in your organisation more than 12 months ago? What actual investigations or inquiries have been undertaken to establish that sense of what was going on more than 12 months ago?

Ms Nolan: It is not a certain investigation or inquiry; it is a general conversation that we have with our staff to understand what their role is, the stresses that they are under now, because everyone is concerned about the issue. These people are talking to people who are in difficult circumstances. That affects us all. There is a lot of conversation. It is not necessarily a systematic: “What did we record?” It has very much been project by project, and now, as Jen has mentioned, we have a systematic database collection. It is about talking to people.

Hon KEN TRAVERS: I understand that. I would have thought that when you get a situation like this—I am not necessarily suggesting an inquiry that looks for a head to be chopped or anything—in the same way as you try to predict what may happen in the future for contractors, you look at the past. To understand what may have gone wrong, part of what you would be doing as an organisation is going back and asking, “Were there predictors we should have picked up more than 12 months ago and we didn’t, and how do we now put in place mechanisms to ensure that that never happens again?”

Ms Nolan: The very first mechanism we are putting in place is systematic data collection so we can have accurate records to understand that in a way that is more easily pulled out than it has been in the past, where it has been project by project and it would have been detailed pieces of paper on government files.

Hon KEN TRAVERS: I understand that. I am still trying to find out whether there was any further level of examination to try to identify what went wrong in the past.

Ms Nolan: I do not think we would quite have the ability to do that at this time.

Hon KEN TRAVERS: You say no-one had gone bust, but if you think about your whole process today, it is about using things to identify and predict the future. If complaints were being raised 18 months ago, if you look at how you are now responding to it, if you had a better system in place then, you might have been able to identify future problems before they became a problem.

Ms Nolan: I would love a better rear-vision mirror, yes.

Hon LJILJANNA RAVLICH: How do you know that no-one went bust, out of interest?

Ms Nolan: As in a head contractor with the state?

Hon LJILJANNA RAVLICH: Yes.

Ms Nolan: As far as I am aware that is the case because we have no records of it.

Hon LJILJANNA RAVLICH: A lot of subcontractors would have gone bust though.

Ms Nolan: I said “head contractors”.

Ms McGrath: If they were a head contractor and they were doing work for us, when a head contractor goes broke we would be advised and be a part of the whole administration liquidation process.

Hon LJILJANNA RAVLICH: But you accept that a lot of subcontractors would have gone bust?

Ms Nolan: Yes.

Hon LJILJANNA RAVLICH: Whilst you might have empathy with them, you would not probably understand what it is like not being able to find the money for the weekly shopping or lose your house or whatever.

The CHAIR: Let us stick to questions.

Hon KEN TRAVERS: What complaints were you receiving from members of Parliament more than 12 months ago? Again, I have seen correspondence from 18 months ago in which people were going to members of Parliament and ministers of the Crown and expressing their concerns about what was going on. What complaints did you get from members of Parliament, and by that I include ministers?

Ms McGrath: I do not know on an individual basis, but if we got a complaint and it came to us, we would have investigated that individual complaint, like we would have a phone call from a subcontractor or from any other person.

Hon KEN TRAVERS: Maybe we can take on notice the number of letters of complaint or concern from members of Parliament.

The CHAIR: What dates?

Hon KATE DOUST: 2011.

Hon KEN TRAVERS: As I understand it, some of the original complaints go back to 2010. Maybe the middle of 2010 through to the beginning —

The CHAIR: The 2010–11 financial year?

Hon LJILJANNA RAVLICH: 2010–11 and 2011–12.

Hon KEN TRAVERS: How many letters and correspondence did you get from members of Parliament? If there are hundreds, we are probably asking a bit much, but if there were only a few, what action was taken as a result of those letters of complaint? What then occurred as a result of those letters and any other subsequent correspondence that came out of that?

[Supplementary Information No A18.]

The CHAIR: Members, I am mindful of the time. I will conclude by saying that the committee will forward any additional questions it has to you via the minister—if there are any, I should add—in writing in the next couple of days, together with a transcript of evidence which includes questions that have been taken on notice. Responses to these questions will be requested within 10 working days of receipt of the questions. Should you be unable to meet that due date—I flag at this point that might be likely—please advise the committee in writing as soon as possible before the due date, including specific reasons as to why the due date cannot be met. Finally, on behalf of the committee, thank you very much for your attendance.

Hearing concluded at 5.08 pm