

The Auditor-General
Audit Report No.29 2011–12
Performance Audit

Administration of the Australia Network Tender Process

Department of Foreign Affairs and Trade

**Department of Broadband, Communications
and the Digital Economy**

Department of the Prime Minister and Cabinet

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of Australia 2012**

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Canberra ACT
3 April 2012

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit in the Department of Foreign Affairs and Trade, Department of Broadband, Communications and the Digital Economy and the Department of the Prime Minister and Cabinet in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit, and the accompanying brochure, to the Parliament. The report is titled *Administration of the Australia Network Tender Process*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name and title.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

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Abbreviations

ABC	Australian Broadcasting Corporation
AFP	Australian Federal Police
AFR	Australian Financial Review
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
ANC	Australian News Channel Pty Ltd
APS	Australian Public Service
CPGs	Commonwealth Procurement Guidelines
DBCDE	Department of Broadband, Communications and the Digital Economy
DFAT	Department of Foreign Affairs and Trade
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMA Regulations	Financial Management and Accountability Regulations 1997
KPI	Key Performance Indicator
PM&C	Department of the Prime Minister and Cabinet
RFT	Request for Tender
TEB	Tender Evaluation Board

Glossary

Approach to the market	Any notice inviting potential suppliers to participate in a procurement, including a request for tender, request for expression of interest, request for application for inclusion on a multi-use list, or invitation to tender.
Approver	An approver is the person or decision-making body that decides whether or not to spend public money. This includes decisions about whether to select a preferred or successful tenderer as the result of an approach to the market. The <i>Financial Management and Accountability Act 1997</i> regulations define an approver to mean: a Minister; a Chief Executive of an FMA Act agency or a person authorised by or under an Act to exercise a function of approving proposals to spend public money. The capacity for a Minister or Ministers collectively to undertake a decision-making role in respect to decisions about whether to spend public money is provided for in the financial management legislation provided that they are identified as the approvers.
AusTender	The central web-based facility for publication of Australian Government procurement information, including business opportunities, annual procurement plans and contracts awarded. Available from: < https://www.tenders.gov.au/ >.
Commonwealth Procurement Guidelines (CPGs)	The CPGs establish the Australian Government's core procurement policy framework and articulate expectations for all departments and agencies subject to the <i>Financial Management and Accountability Act 1997</i> and their officials, when performing duties in relation to procurement. An official performing duties in relation to a procurement must act in accordance with the CPGs.
Evaluation criteria	The criteria that are used to evaluate the compliance and/or relative ranking of tenders. All evaluation criteria must be clearly stated in the request documentation.

Open tender process	A procurement procedure in which a request for tender is published inviting all suppliers that satisfy the conditions for participation to submit tenders.
Procurement	Procurement encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property and services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.
Request for Tender (RFT)	A published notice inviting suppliers who satisfy the conditions for participation to submit a tender in accordance with requirements of the request for tender and other request documentation.
Value-for-money	The CPGs explain that value-for-money in procurement requires a comparative analysis of all relevant costs and benefits of each proposal throughout the whole procurement cycle (whole-of-life costing). ¹ Value-for-money is enhanced in government procurement by: encouraging competition; promoting the efficient, effective and ethical use of resources; and making decisions in an accountable and transparent manner.

¹ Australian Government, *Commonwealth Procurement Guidelines*, Department of Finance and Deregulation, Canberra, p.10.

Summary and Recommendations

Summary

Introduction

1. The Australia Network is an Australian Government² funded overseas television broadcasting service established to pursue foreign and trade policy objectives, including:

- promoting Australia's engagement across the Asia-Pacific and Indian subcontinent;
- fostering an understanding of Australia as a dynamic, culturally diverse nation; and
- raising awareness of Australia's economic and trade capabilities.³

2. The Australia Network service is available via satellite and online video and is re-broadcast across Asia, the Pacific and the Indian subcontinent. The service is: free-to-air, operating 24 hours a day, seven days a week; and broadcasts a mix of news, current affairs and business, English-language learning, education, documentaries, drama, sports and children's programs. The Australia Network is also used to transmit consular information to Australians living abroad, particularly in times of crisis.⁴

3. Since 2001, the Australian Broadcasting Corporation (ABC) has delivered the Australia Network service under two sequential contracts with the Commonwealth of Australia, represented by the Department of Foreign Affairs and Trade (DFAT). The most recent contract was due to expire on 8 August 2011. Prior to the expiry of the contract, the Government considered a range of options for the continued delivery of the service, with a decision taken on 22 November 2010 to award the contract through a competitive tender process.

Procurement framework

4. The letting of Australian Government contracts involves the expenditure of public money and is therefore subject to applicable financial

² For the remainder of this report, the Australian Government will be referred to as 'the Government', unless otherwise indicated.

³ DFAT, *Annual Report 2010–11*, p. 130.

⁴ Australian Government Budget 2011–12, Budget Paper No. 2 Budget Measures, p. 202.

management legislation. Specifically, the *Financial Management and Accountability Act 1997* (FMA Act) provides a framework for the proper management of public money and public property. This framework includes requirements governing the process by which decisions are made about whether public money should be spent, as well as accountability for such decisions.

5. The procurement policy framework is a subset of the financial management framework related to the procurement of property or services. For departments of state and agencies prescribed under the FMA Act, the core policy framework is established by the Commonwealth Procurement Guidelines (CPGs), which are issued under the authority of the Financial Management and Accountability Regulations 1997—the FMA Regulations.

6. The FMA Regulations require Ministers and agency officials to have regard to the CPGs when performing duties related to procurement. The FMA Regulations also require that a proposal to spend public money (including for the proposed procurement of property or services) must be considered and approved by an appropriately authorised party before contracts or other arrangements involving the expenditure of public money can be entered into.⁵

Key aspects of the Australia Network tender process

7. The Request for Tender (RFT) for the provision of the Australia Network was lodged on the Government’s central procurement website, AusTender, on 4 February 2011. The RFT sought tenders from appropriately qualified organisations to provide an international Australian television service and associated digital media services.⁶ The service was valued at up to \$223.1 million over 10 years, commencing on 9 August 2011.

8. The purpose of the tender process was to select a service provider that demonstrated value-for-money and could broadly support Australia’s national interests and meet the Government’s objectives as specified in the RFT.⁷ The

⁵ The decision about whether to spend public money may be made by a Minister, by Ministers collectively (such as in Cabinet), an agency Chief Executive, officials acting under the authority of a Minister or their Chief Executive, or other persons authorised by legislation to make such decisions. The capacity for a Minister or Ministers collectively to undertake a decision-making role in respect to decisions about whether to spend public money is provided for in the financial management legislation provided that they are identified as the approvers.

⁶ DFAT, *Request for Tender for the provision of an international Australian Television service and associated digital media services*, DFAT11-CPD-02, 4 February 2011.

⁷ *ibid.*, p. 27.

RFT attracted tenders from the ABC and the Australian News Channel Pty Ltd (ANC), a joint venture of Nine Digital, a division of Nine Entertainment Co., Seven Media Group and British Sky Broadcasting.⁸ Both organisations that tendered had also participated in the 2005–06 tender for the 2006–11 Australia Network contract.

9. DFAT initially planned for a six-month tender process. However, significant changes to the process were made by the Government at key points, which extended the timeline. These changes included the Government's decision in June 2011 to: add a new evaluation criterion to the RFT and to seek further information from tenderers; and change the decision-making process for awarding the tender by replacing the Secretary of DFAT with the Minister for Broadband, Communications and the Digital Economy (Communications Minister) as the approver. The Government sought agreement from the ABC to extend the contract for six months until 8 February 2012 to allow for the continuation of the Australia Network service while the amended tender process was completed.

10. In November 2011, the tender was terminated by the Government on public interest grounds⁹, following media reports that referred to confidential information relating to the tender process. Subsequently, in December 2011, the Government decided that the Australia Network would be delivered by the ABC on a permanent basis.

Media interest and Parliamentary requests for an audit

11. The Australia Network television broadcasting service has, over many years, been an important avenue through which Australia is promoted to other parts of the world. When considered against the background of the high level of interest in media ownership and broadcasting rights in Australia, it was to be expected that the tender for the Australia Network contract would generate more media interest than many other government procurement activities.

12. Initial reporting in the media focused on the degree to which the Government would be able to influence editorial and broadcasting content. Later reports speculated on, and reported on, aspects of the confidential tender

⁸ The ANC owns and operates Sky News Australia, Sky News Business, Australian Public Affairs Channel, Sky News Local and Multiview, and provides news content on both free-to-air and subscription services in New Zealand.

⁹ The RFT provided at clause 4.7.1 that the contract may be suspended or terminated if the Commonwealth, represented by DFAT, considered that it was in the public interest to do so.

evaluation process, delays in awarding the contract, changes to the tender requirements and the perceptions of government interference in the tender process. The probity of the tender process was also questioned following reports that senior ABC executives had approached two government Ministers at the time the Government was considering changes to the tender process.

13. The tender process also attracted considerable Parliamentary interest. In this context, in September 2011, the Deputy Leader of the Opposition wrote to me requesting an investigation into the conduct of the Australia Network tender, particularly the transfer of the decision-making responsibility from the Secretary of DFAT to the Communications Minister. My response on 28 September 2011 indicated that, given the advanced stage of the tender process, an audit would not be undertaken at that time, but that I would continue to monitor the tender process and outcome, and keep open the option of undertaking an audit at a later date.

14. The Deputy Leader of the Opposition again requested that I investigate matters relating to the Australia Network tender process on 8 November 2011, following the announcement of the termination of the tender process. The Communications Minister also wrote to me on 22 November 2011 requesting a review of the tender process in the interest of ensuring that future tender processes are as robust as possible.

15. Following consideration of these requests and the broader Parliamentary and public interest, I announced on 24 November 2011 that a performance audit of the administration of the Australia Network tender process would be undertaken under section 18 of the *Auditor-General Act 1997*.

Audit objectives and scope

16. The audit objective was to report on the administration of the Australia Network tender process and to identify lessons learned from the conduct of the process to inform future procurement activities.

17. The audit examined the administration of the tender process, including: planning; conduct of the tender; and managing the change in tender conditions. The audit also considered the advice provided to government and the manner in which government decisions were implemented, including compliance with procurement requirements.

18. The Australia Network tender process has been subject to ongoing consideration by the Government. The Government has performed a key role in the decision-making process and, in doing so, has taken into account the

advice provided by several departments and advisers. The departments concerned had also obtained advice from external probity and legal advisers. In several areas of this report, reference has been made to the advice received. The report also includes relevant references to briefings and submissions provided to Cabinet, Cabinet decisions, and the deliberations and recommendations of the Tender Evaluation Board, including the preferred tenderer, as well as complaints made about the tender process. I have taken the extraordinary step of including this information in this report as it is central to understanding the issues involved in the tender process and to provide context for the audit findings, conclusions and lessons learned. I have concluded that the inclusion of the information is not contrary to the public interest.¹⁰ The report on the audit does not extend to commenting on the deliberations of Cabinet, except where such matters have been specifically referred to by Ministers to inform the audit on key issues.

19. A separate investigation is being conducted by the Australian Federal Police (AFP) into the possible unauthorised disclosure of confidential tender information.¹¹ The audit did not directly examine these matters, but did include consideration of the confidentiality and document handling arrangements established by DFAT for the tender process.

Overall conclusion

20. The Australia Network is an Australian Government funded international television service designed to present an impartial, reliable and independent voice in Asia, the Pacific and the Indian sub-continent. Since commencement of an international broadcasting service in 1993, it has been operated by a commercial broadcaster, and also by the ABC, which held the contract to deliver services from 4 August 2006 until 8 August 2011. Under the terms of the contract, DFAT was required to provide 12 months' notice to the ABC regarding any intention to extend the contract for a further five years, effectively establishing a deadline of 8 August 2010 for a decision on the future

¹⁰ Section 37 of the *Auditor-General Act 1997* outlines the circumstances in which particular information is not to be included in public reports, including if the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest.

¹¹ The AFP informed the Senate Legislative and Constitutional Affairs Committee on 14 February 2012, that some interim findings had been provided to the Secretary of the Department of the Prime Minister and Cabinet (the matter was referred to the AFP by the Secretary—see paragraph 37). The department subsequently informed the ANAO that it has provided additional information to the AFP and that the department had not received further findings.

of the contract. This notification deadline was extended twice to provide time for the Government to make a decision on whether to extend the contract.

Retendering for the Australia Network service

21. To inform the decision regarding the future operation of the Australia Network, DFAT reviewed the ABC's performance under the existing contract and conducted an industry submission process. The review and the submission process identified benefits to government from a longer contract period and strengthened performance indicators. At the same time, a proposal outlined in an earlier 2009 submission sponsored by the Communications Minister for the Australia Network to be permanently operated by the ABC was still being considered by government.

22. In response to a briefing from the former Foreign Minister, the Hon. Kevin Rudd MP, the Government decided on 22 November 2010 that a 10 year contract for the delivery of the Australia Network should be awarded through a competitive tender process, with the details to be settled between Ministers. Inherent in this decision to approach the market for the Australia Network, was an obligation that the tender process be undertaken in good faith and conducted in a fair, transparent and defensible manner.

23. While formal records will not necessarily reflect all matters canvassed, the Government's decision to select a service provider for the Australia Network through an open tender process was silent on the decision-making process for the tender. The lack of a documented government position on this issue created some uncertainty in relation to the decision-making process for the tender, and subsequently led to modified arrangements for, and delays in, the tender process.

24. In December 2010, the former Foreign Minister appointed the Secretary of DFAT as the person to approve the outcome of the tender. The Minister later explained that his decision was taken, amongst other reasons, to ensure that the decision was, and was perceived to be, on the basis of merit and not influenced by any other consideration. The Minister also wrote to the Prime Minister, Deputy Prime Minister, the Communications Minister and the Minister for Finance and Deregulation seeking nominations from their departments for representation on the Tender Evaluation Board (TEB) and agreement to the details for the tender process. The Minister's correspondence referred to the TEB assessing the tenders and making recommendations to Ministers.

25. In response to the former Foreign Minister's correspondence, the Prime Minister in her letter of 25 January 2011 noted that the 'outcomes of the tender would be subject to Cabinet consideration, with Cabinet to agree the successful tender bid'. This was the first documented reference to a formal role for Cabinet in the decision-making process although a subsequent briefing prepared by the Cabinet Secretary¹² indicated that Ministers had agreed at an October 2010 meeting that the decision was to be made by Cabinet. However, arrangements already put in place by the Foreign Minister for the Secretary of DFAT to approve the tender outcome did not envisage an explicit role for Cabinet.

26. During December 2010 and January 2011, DFAT established governance and administrative arrangements to manage the approach to market and the evaluation of tenders, having regard to specialist advice, including probity advice. These arrangements were, in the main, effective. Probity arrangements were also put in place for the tender process. Compliance with these arrangements by all parties would have provided the basis to better control the flow of confidential information during the course of the tender evaluation; information security was later to become an issue in the tender process.

27. Over the initial five months of the tender process, issues around the approval arrangements for the tender remained unresolved. Against the background of this uncertainty, on 4 May 2011 the TEB, through the tender Steering Committee, recommended to the Secretary of DFAT, in his role as approver, that he accept the ANC as the preferred tenderer. While the Secretary of DFAT had the authority to make a decision on the preferred tenderer once he was satisfied that all required steps had been undertaken, he considered that making a decision would be inappropriate given the differing views that existed within government, including at the ministerial and departmental levels, as to how the decision on the future provider was to be made. In the circumstances, this was a reasonable approach to take.

The amended tender process

28. It was not until 6 June 2011 that the Government requested the former Foreign Minister to bring forward a submission in relation to the tender with the aim of the Government agreeing the successful tender. The submission,

¹² This brief to the Prime Minister was prepared on 14 June 2011 (paragraphs 3.37 and 3.55 refer).

which was prepared by DFAT, indicated that it was not possible for Cabinet collectively to be the approver for the tender process. This was also the view expressed in earlier advice provided by PM&C to the Prime Minister. Whilst for the purposes of approving a spending proposal under FMA Regulation 9, it is preferable to nominate an individual as an approver, the financial management legislation would not have precluded Cabinet from performing this role for the tender provided that the Ministers who took the decision were identified as the approvers.¹³

29. In the light of the former Foreign Minister's submission and a subsequent submission on 20 June 2011, the Government made a number of changes to the Australia Network tender process: appointing the Communications Minister as the nominated approver (supported by DFAT); amending the RFT to include an additional evaluation criterion; and allowing the Communications Minister to make a decision that did not reflect the recommendations of the TEB. The changes to the RFT required additional information to be sought from the tenderers, which extended the length of the tender process and increased costs. The change that explicitly provided for the approver to make a decision that did not reflect the recommendations of the TEB is noteworthy, bearing in mind there were only two tenderers in the field.

30. While the Government has the clear authority to decide on such matters, the decisions nevertheless raised a range of issues in relation to:

- perceptions, at least, of a conflict of interest arising from the Communications Minister being the nominated approver, given his portfolio responsibilities for the ABC and the earlier submission to government (in November 2009), sponsored by the Minister, that proposed the ABC provide the Australia Network service on a permanent basis;

¹³ This issue was discussed in Report No.24 2008–09, *The Administration of Contracting Arrangements in Relation to Government Advertising to November 2007*. During the audit the ANAO sought advice from the Chief General Counsel of the Australian Government Solicitor. The advice stated that:

- 'the approver should be the person, or group of persons, who determine ultimately all the substantial matters that need to be determined to assess whether a proposal will make effective and efficient use of public money';
- 'where a committee containing at least some Ministers is involved in the decision making process, close consideration should be given to making members of that committee the approvers'; and
- 'more specifically, where the Committee's role involves finally selecting a successful tenderer following an assessment of the relative merits of competing bids, the members of the Committee should be regarded as the approvers for the purposes of FMA Regulation 9'.

- whether the additional evaluation criterion would elicit much in the way of further insights into the tenderers' capacity to deliver the service, given there was considerable weight of opinion to suggest that the original tender scope of requirements was sufficiently broad to capture global events¹⁴; and
- the added time and cost of the revised tender arrangements for the parties tendering to provide the Australia Network service, and to the Government.

31. Key Ministers were provided with a range of advice from their departments ahead of the above-mentioned government decisions, which raised matters along the lines of the issues referred to in the preceding paragraph. In the process of developing advice for ministerial consideration, the TEB deliberations and recommendations, which favoured the ANC as the preferred tenderer, were provided to staff in PM&C and the former Foreign Minister's office by DFAT. In addition, the TEB report was provided to a DBCDE officer by the department's TEB member for the purposes of briefing the Communications Minister shortly before the Government's consideration of changes to the tender process—the brief was made available to a number of departmental officers and the Minister's office. While it was appropriate for the departments to prepare briefings for Ministers on the tender process, the briefings should have had greater regard to the confidentiality and sensitivity of the information being provided for what was still a 'live' tender process. Ultimately, information was not as tightly controlled as it should have been.

32. Following the Government's decision to change the tender process, an Addendum to the RFT was issued on 8 July 2011. The TEB was reconvened and, after reviewing the revised tenders, submitted a Supplementary Tender Evaluation Report to the Communications Minister on 30 August 2011. The report indicated it was the unanimous professional judgement of all TEB

¹⁴ The initial Australia Network RFT required tenderers to provide an international television service and other digital media services that broadly supported Australia's national interests. The original conditions were considered by the Government to relate to Australia's enduring interests in the Asia-Pacific region. The additional evaluation criterion focused on Australia's national interests in light of changed international circumstances, particularly emerging markets in South Asia and the Asia-Pacific, political transformation in the Middle East and North Africa, and recent consular crises. At the time the RFT was released in February 2011, political unrest had been experienced in Tunisia and Egypt, but conflict had yet to arise in other parts of the Middle East, including Libya and Syria. While the additional criterion related to international developments in the Middle East and North Africa, the Australia Network does not currently broadcast to the Middle East or North Africa and the RFT did not specify an expansion to these regions as a requirement of the new contract.

members that ‘the ANC bid offers the best overall value-for-money; [and] accordingly the Board’s original recommendation of selecting the ANC as the Preferred Tenderer remains unaltered’.¹⁵

33. The Communications Minister sought additional information from the TEB on aspects of the evaluation on two occasions. The Minister also sought advice regarding the option of conducting parallel negotiations with both tenderers. The advice obtained by the Minister indicated that, while it was not without risk, it was open to the Minister to once again refer the matter back to the TEB and request DFAT to open parallel negotiations with both tenderers.

34. Against the background of this advice, the Communications Minister’s office advised the Secretary of DFAT that, following consultation with his ministerial colleagues and in order to make a final recommendation to government, the Minister had decided that both tenderers should go through a parallel negotiation process to: further test the financial reliability of each tenderer given the duration of the proposed contract; clarify commitments made in the tenders; and firm up aspects of both offers.

Termination of the tender process

35. However, before parallel negotiations commenced, the Minister, with the agreement of the Government, announced the termination of the Australia Network tender on 7 November 2011, as follows:

due to significant leaks of confidential information to the media, the Australia Network tender process has been compromised to such a degree that a fair and equitable outcome may no longer be able to be achieved.

36. While the stimulus for this decision was the publication of media articles on 17 and 24 October 2011, there had been a series of earlier references in the media in May, June and July 2011 to confidential aspects of the tender.

37. PM&C requested that the AFP commence an investigation into the possible unauthorised disclosure of tender information in the October 2011 media articles, but not the earlier possible disclosure of confidential tender information. These earlier articles were not considered to contain tender information reflecting the same level of accuracy.

¹⁵ DFAT, Supplementary Tender Evaluation Board Report, RFT DFAT11-CPD-02 Australia Network Addendum 1, 30 August 2011, p. 3.

38. The Communications Minister acted on the basis of legal and departmental advice¹⁶ in relation to key decisions on the tender process, including the decision to terminate the tender on public interest grounds (as provided for in the RFT). Nevertheless, it is clear that the Minister had not been convinced, up until the time of the termination of the tender, that the proposal by the ANC represented the best outcome for the Australian Government to deliver the Australia Network services.

The costs and consequences

39. The ANC has estimated the direct costs of participation in the tender at around \$1.4 million plus additional preparation and indirect costs; the ABC has estimated around \$475 000 in direct costs; and DFAT's costs to March 2012 were around \$770 000. The ANC has approached the Government to seek compensation for the direct costs of participation in the tender.

40. The end result is that, after having embarked on a tender process in November 2010 for a 10 year contract for the delivery of the Australia Network, the Government changed course—on public interest grounds—to make a policy decision in December 2011 that the ABC would provide the service on a permanent basis.

41. While the Government was entitled to take such a decision, the Australia Network tender process has presented the Australian Government in a poor light and cost the two tenderers—the ANC and the ABC—time and money. In this context, the ANC informed the ANAO that:

ANC expended significant costs participating in two tender processes which were ultimately cancelled for political reasons and through no fault of ANC.¹⁷

42. Despite the Government agreeing to a tender process, key Ministers did not hold a common view of the approval processes, including any role for government in being consulted on, agreeing to, or making the decision in relation to the preferred tenderer. The approval arrangements were changed

¹⁶ The advice relied on by the Minister included: briefs from both PM&C and DBCDE in June 2011 that indicated that there were no substantive conflict of interest or probity issues with the Minister becoming the approver. The brief provided by PM&C (and relied on by DBCDE) incorrectly stated on the cover page that the advice had been cleared by the AGS. While the AGS had reviewed earlier versions of the paper, it did not review the specific paragraphs drafted by PM&C in relation to a possible conflict of interest for the Communications Minister, prior to the paper's finalisation and circulation to Ministers. Further legal and probity advice relating to parallel contract negotiations with the tenderers and termination of the tender was provided to the Minister in September and October 2011, respectively.

¹⁷ ANC, advice provided to the ANAO, 14 March 2012.

four months after the initial RFT was published, and the addition of a new evaluation criterion for the tender necessitated retendering, but did not alter the views of the TEB as to the preferred tender—the ANC. This additional step added almost five months to the process and additional costs. Further, there were indications of possible leaks of information as early as May 2011, and following further ‘significant leaks of confidential information to the media’, the Government decided, on the basis of legal advice, that the tender process had been compromised and should be terminated.

43. The manner and circumstances in which this high profile tender process was conducted brought into question the Government’s ability to deliver such a sensitive process fairly and effectively. This is despite the fact that many other tender processes are employed in all areas of government, some involving decisions by Ministers, on more substantial and complex proposals, and are concluded satisfactorily.

44. One of the reasons for conducting this audit was to identify lessons learned from the conduct of the tender process to inform future procurement activities. There are three main issues to bear in mind. Firstly, it is important that, where it is intended that Ministers or Cabinet have a formal role in a tender process, that this be made clear; departments have a role in assisting government to be explicit about this. Secondly, information security is critically important to effective tender arrangements and there are accepted ways within government of managing this, namely, by not circulating confidential tender information to any departmental officers, Ministers or their staff, unless they are part of the tender decision-making process or have a demonstrable need for such specific information. Finally, all parties involved in the management of a tender process should have regard to the importance of adhering to conventional procurement arrangements and effectively managing the range of risks involved, given they can change significantly over time.

45. The Government may also wish to reflect on Ministers performing the role of an approver, in situations where the Minister’s portfolio bodies may be submitting tenders for services to be determined by government. In such circumstances, any perception of a conflict of interest could be mitigated by the Government agreeing to another Minister, or more than one Minister, approving the tender outcome.

46. The audit has not made any recommendations in the light of the termination of the tender process. That said, the above-mentioned lessons, together with some further suggestions in the concluding comments of Chapters 2 to 4 in this report, are designed to inform future procurement

activities about important process elements necessary to achieve efficient and effective outcomes which have the confidence of tenderers and the wider community.

Provision of the proposed report

47. Under Section 19 of the *Auditor-General Act 1997*, the Auditor-General must provide audited agencies with a copy of the proposed report, and may provide a copy of, or an extract from, the proposed report to anyone (including a Minister) who, or any body that, in the Auditor-General's opinion, has a special interest in the report or the content of the extract. Sub-section 19(4) of the Act provides that, if the recipient of the proposed report, or an extract of the proposed report, gives written comments to the Auditor-General within 28 days after receiving the proposed report or the extract, the Auditor-General must consider those comments before preparing the final report. In addition, sub-section 19(5) of the Act requires the Auditor-General to include in the final audit report all such comments received.

48. Accordingly, copies of the proposed report or extracts were provided to the following agencies, organisations and individuals.

Table 1

Recipients of the proposed report or extracts of the proposed report

Recipient	Role in the tender process	Received
Department of Foreign Affairs and Trade	Administering agency Designated subject of the audit under Section 18 of the <i>Auditor-General Act 1997</i>	Full report
Department of Broadband, Communications and the Digital Economy	Policy agency Designated subject of the audit under Section 18 of the <i>Auditor-General Act 1997</i>	Full report
Department of the Prime Minister and Cabinet	Co-ordinating agency Designated subject of the audit under Section 18 of the <i>Auditor-General Act 1997</i>	Full report
Senator the Hon. Stephen Conroy	Minister for Broadband, Communications and the Digital Economy Approver for the Australia Network tender	Full report
The Hon. Kevin Rudd MP	Minister for Foreign Affairs from 14 September 2010 to 22 February 2012	Full report

Recipient	Role in the tender process	Received
The Hon. Mark Dreyfus QC, MP	Cabinet Secretary	Full report
The Hon. Stephen Smith MP	Minister for Foreign Affairs from 3 December 2007 to 14 September 2010	Extract
The Hon. Martin Ferguson AM, MP	Minister for Resources and Energy Minister for Tourism Contacted by a tenderer	Extract
Australian Broadcasting Corporation	Tenderer	Extract
Australian Federal Police	Conducting an investigation into unauthorised disclosure of tender information	Extract
Australian Government Solicitor	Probity adviser to the tender Adviser to the Communications Minister	Extract
Australian News Channel Pty Ltd	Tenderer	Extract
Department of Finance and Deregulation	Policy department responsible for administering the <i>Financial Management and Accountability Act 1997</i>	Extract
Ms Pamela Fayle	Chair of the Tender Evaluation Board	Extract

Source: ANAO.

Summary of responses to the proposed report

49. The Australian News Channel Pty Ltd, one of the tenderers, and the three departments subject to the audit provided the following summary responses.

Australian News Channel Pty Ltd

50. The Australian News Channel Pty Ltd provided the following summary response, with the full response at Appendix 1:

The Australia Network tenders represent a failure of public administration and highlight the potential risk to a commercial organisation of engaging in business with the Commonwealth, particularly when a government owned entity is the competitor. No Australian business, regardless of industry or size, should be exposed as ANC was by participating, not once but twice, in tender processes that were ultimately cancelled through no fault of their own. This cannot be in the national interest.

Department of Foreign Affairs and Trade

51. The Department of Foreign Affairs and Trade provided the following response:

The Department of Foreign Affairs and Trade believes it managed the Tender process for the Australia Network consistent with the requirements of Commonwealth Procurement Guidelines. The Department notes that the Guidelines neither suggest nor require that APS officers sign individual confidentiality undertakings. If the ANAO believes that this should be so, then it should sort it out with the Department of Finance and Deregulation. The Department believes it is untenable for the ANAO to have a standard different to that required in official Procurement Guidelines.

The Department of Foreign Affairs and Trade notes that highly sensitive and classified material is regularly handled through the Cabinet communications system and can see no reason why the Australia Network matter should have been treated any differently.

ANAO comment on the response from DFAT concerning confidentiality undertakings

52. As is outlined in paragraph 2.3 in the report, the CPGs establish the procurement policy framework for Australian Government agencies and assist senior management in meeting the financial management and accountability requirements of the FMA Act. Outlined in the CPGs are mandatory requirements and matters of sound practice. The CPGs are not exhaustive and it is the responsibility of agencies to implement appropriate arrangements to manage procurement processes in a way that is proportional to the risk and sensitivity of the various procurements in which they are involved.

53. The Australia Network tender process was a sensitive procurement given the profile that media issues of this kind attract in Australia. In administering the tender process, DFAT implemented arrangements that were over and above the mandatory requirements of the CPGs including: establishing a steering committee to oversee the tender process; convening a multi-department evaluation board with an independent chair to evaluate submissions; and engaging external probity, legal and technical advisers to assist with the ongoing conduct of the tender.

54. Where there is a sensitive tender process, the ANAO considers that asking evaluation board members to formally acknowledge the confidentiality and information security requirements outlined in the probity plan, or, alternatively, complete a confidentiality undertaking reinforces their personal responsibility for safeguarding confidential tender information and assists in

managing the flow of such information. AGS in responding to the proposed audit report advised the ANAO that 'there may be some cases where obtaining a written acknowledgement is appropriate and this is a practice which AGS often adopts'.¹⁸

55. The issue raised by DFAT in relation to the CPGs is only one element relating to information security that this report refers to. The more significant matter is the wide range of ministerial and departmental officers that had access to the TEB's deliberations and recommendations while the tender was still live. There is also the separate issue of the AFP investigation into the possible unauthorised disclosure of confidential tender information to the media.

Department of Broadband, Communications and the Digital Economy

56. The Department of Broadband, Communications and the Digital Economy provided the following summary response, with the full response at Appendix 1:

The Secretary of DBCDE, in reviewing the particular circumstances of the 14 June Cabinet consideration of the tender and amended arrangements, has concluded that the circulation of briefing within the Department and Minister's Office could not have been limited to fewer officers. The Secretary supports greater clarity in arrangements to explicitly authorise the briefing of Ministers by TEB members when the tender is the subject of Cabinet deliberation.

Department of the Prime Minister and Cabinet

57. The Department of the Prime Minister and Cabinet provided the following response:

1. The Department of the Prime Minister and Cabinet considers that the report inaccurately describes the tender as being conducted in a climate of uncertainty as to the decision-making process. The Prime Minister had advised on 25 January 2011, before the tender was released, that the tender be brought back to Cabinet for decision. Any delays to the tender in order to implement that decision did not arise from uncertainty or lack of clarity.

¹⁸ AGS, advice provided to the ANAO, 22 March 2012.

2. The Department agrees that information security is important for tender processes. Departmental officers are subject to broader duties and confidentiality obligations outside the tender process. Any confidentiality arrangements put in place for tender processes need to be considered in that light.

ANAO comment on the response from PM&C concerning the decision-making process for the tender

58. The evidence obtained by the ANAO indicates that there were differing views within government, including at the ministerial and departmental levels, about the decision-making and approval processes for the Australia Network tender. There was no formal documented decision of government in relation to the approval process in the early stages of the tender. Rather, there were clear indicators of different views being held.

59. In December 2010, the former Foreign Minister appointed the Secretary of DFAT as the person to approve the outcome of the tender. In responding to correspondence from the former Foreign Minister regarding the tender process, the Prime Minister in correspondence of 25 January 2011 noted that the 'outcomes of the tender would be subject to Cabinet consideration, with Cabinet to agree the successful tender bid'. A subsequent briefing by the Cabinet Secretary¹⁹ indicated that Ministers had agreed at an October 2010 meeting that the decision was to be made by Cabinet. However, arrangements already put in place by the Foreign Minister did not envisage an explicit role for Cabinet.

60. The decision-making arrangements for the tender remained unresolved until such time as Cabinet appointed the Communications Minister as the approver in June 2011.

Full responses to the proposed report

61. Full responses provided by the Australian News Channel Pty Ltd, the Hon. Martin Ferguson AM MP, the Department of Broadband, Communications and the Digital Economy, and the Australian Government Solicitor, are included at Appendix 1.

¹⁹ This brief to the Prime Minister was prepared on 14 June 2011 (paragraphs 3.37 and 3.55 refer).

Audit Findings

1. Background and Context

This chapter provides background on the Australia Network, examines the context for the tender process and refers to the media, Parliamentary and public interest in the Australia Network tender. The audit objective, criteria and scope are also outlined.

Background on the Australia Network

1.1 The Australian Government²⁰ funds the Australia Network, an overseas television broadcasting service to pursue foreign and trade policy objectives. These include:

- promoting Australia's engagement across the Asia-Pacific and Indian subcontinent;
- fostering an understanding of Australia as a dynamic, culturally diverse nation; and
- raising awareness of Australia's economic and trade capabilities.²¹

1.2 The Australia Network service is available via satellite and online video, and is rebroadcast across Asia, the Pacific and the Indian subcontinent. The service is: free-to-air, operating 24 hours a day, seven days a week; and broadcasts a mix of news, current affairs and business programs, English-language learning, education, drama, sports and children's programs. The Australia Network service is also used to transmit consular information to Australians living abroad, particularly in times of crisis.²²

1.3 Since 2001, the Australian Broadcasting Corporation (ABC) has delivered the Australia Network service under two sequential contracts with the Government, administered by the Department of Foreign Affairs and Trade (DFAT).

²⁰ For the remainder of this report, the Australian Government will be referred to as 'the Government', unless otherwise indicated.

²¹ DFAT, *Annual Report 2010–11*, p. 130.

²² Australian Government Budget 2011–12, Budget Paper No. 2 Budget Measures, p. 202.

Overview of service delivery arrangements for the Australia Network

1.4 The television broadcasting service now known as the Australia Network was established in 1993, following a proposal by the ABC to develop an international television service that would transmit programs to south and southeast Asia. Australia Television International was established as a subsidiary company of the ABC and funded by the Government through a grant of \$5.4 million, repayable if the service returned a profit. The ABC launched Australia Television International on 17 February 1993, initially transmitting to 15 countries. The ABC continued to operate Australia Television International for five years, during which time the service operated at a loss.²³

1.5 In 1997, the Government approached the ABC regarding transitioning Australia Television International to the private sector and in February 1998 the Seven Network purchased the service from the ABC.²⁴ The Seven Network operated Australia Television International for three years, closing it in March 2001. At the time, the Seven Network noted that the service was operating in a crowded marketplace²⁵ and that it was not commercially viable.²⁶

1.6 Following the closure of Australia Television International, the Government sought proposals from industry regarding the establishment of an enhanced television service to the Asia-Pacific region to project accurate images and perceptions of Australia.²⁷ After a 'limited selection process'²⁸, the Government announced in June 2001 that the ABC would be funded to establish the service under a \$90.4 million five-year contract, spanning the

²³ Further information on the establishment of Australia Television International can be found in: KS Inglis, *Whose ABC?: The Australian Broadcasting Corporation, 1983–2006*, Black Inc., Melbourne, 2006, pp. 286–9.

²⁴ R Alston, (former Minister for Communications, Information Technology and the Arts), *ABC base funding retained in budget*, media release, Parliament House, Canberra, 13 May 1997.

²⁵ Seven Network Limited, *To Re-Assess Ongoing Viability of Australian TV*, Announcement to the Australian Stock Exchange, 7 August 2000.

²⁶ Seven Network Limited, *Seven to close Australia Television*, Announcement to the Australian Stock Exchange, 19 March 2001.

²⁷ DFAT *Annual Report 2000–01*, p. 177.

²⁸ A Downer, (former Minister for Foreign Affairs and Trade), *Australian television service to the Asia-Pacific region*, media release, Parliament House, Canberra, 20 June 2001.

period 2001 to 2006. The ABC recommenced international television broadcasting, under the name 'ABC Asia Pacific', on 31 December 2001.

1.7 In 2005, the last year of the contract with the ABC, a tender for a new five-year contract was initiated, with the aim of testing the market for potential suppliers and selecting the most suitable provider to continue the international television broadcasting service. Two proposals were received that conformed to the tender requirements—from the ABC and the Australian News Channel Pty Ltd (ANC). The ANC is a joint venture of Nine Digital, a division of Nine Entertainment Co., Seven Media Group and British Sky Broadcasting.²⁹ The ABC was assessed as the preferred tenderer, and the then Government entered into a contract with it to deliver international television broadcasting services until 8 August 2011. The service was renamed 'Australia Network' in August 2006.

Proposals for the future of the Australia Network

1.8 From 2009, the Government considered a range of options for the ongoing operation of the Australia Network. These included: the Australia Network being permanently operated by the ABC; the existing five-year contract with the ABC being rolled over; or an open tender process to select the most suitable provider.

1.9 Under the terms of the existing 2006–11 Australia Network contract, DFAT was required to provide 12 months notice to the ABC regarding any intention to extend the contract for a further five years. This effectively established a deadline of 8 August 2010 for a decision on the future of the contract. Ultimately, the Government's decision to initiate a competitive tender process was made on 22 November 2010, after the ABC had agreed to defer the notification date to 8 November 2010 because of the Federal Election and subsequently further extend it to 26 November 2010.

²⁹ The ANC owns and operates Sky News Australia, Sky News Business, Australian Public Affairs Channel, Sky News Local and Multiview, and provides news content on both free-to-air and subscription services in New Zealand.

Proposals for the Australia Network to be permanently operated by the ABC

1.10 In November 2009, the Managing Director of the ABC delivered the Bruce Allen Memorial Lecture.³⁰ The lecture discussed the role of international broadcasting and 'soft diplomacy', and proposed expanding the ABC's international service (the Australia Network) through a four-stage approach:

- Stage one: enhancing Australia's media presence in the Asia-Pacific region, in particular, India and China;
- Stage two: expanding to 22 countries in the Middle East and 53 countries in Africa, including Arabic language content;
- Stage three: expanding to Latin America; and
- Stage four: global expansion via broadband delivery systems.

1.11 The core elements of this proposal had previously been provided to the then Prime Minister (the Hon. Kevin Rudd MP) in early 2009 following a request from the then Prime Minister for the ABC to provide its future vision for the Australia Network.

1.12 The Managing Director's lecture also informed government debate about the future of the Australia Network. In November 2009, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon. Stephen Conroy (Communications Minister), sponsored a submission to the Government³¹ outlining a proposal for the ABC to provide the Australia Network service on a permanent basis, expanding its reach and aligning the service with Australia's diplomatic sphere of influence by integrating it with the ABC's other international broadcasting service, Radio Australia. The submission stated that this approach would allow the ABC to deliver the Australia Network as part of its core business, moving the international television broadcasting function from the Foreign Affairs and Trade portfolio into the Broadband, Communications and the Digital Economy portfolio.

³⁰ M Scott, 'A Global ABC: Soft Diplomacy and the World of International Broadcasting', *Bruce Allen Memorial Lecture*, Macquarie University, Sydney, 5 November 2009.

³¹ This proposal was titled 'ABC — International Broadcasting — Expanding Australia's Voice'.

1.13 This submission was considered by the Government and it was agreed that the then Minister for Foreign Affairs, the Hon. Stephen Smith MP,³² could bring a proposal forward as part of the 2010–11 Budget considerations, if it was his preferred option. However, the Minister opted not to bring the proposal forward in the Budget considerations as, by that time, he was considering launching a formal industry consultation process.

DFAT advice to government

1.14 In January 2010, DFAT briefed the then Foreign Minister on the need to inform the ABC by 8 August 2010 of the Government's intentions regarding an extension of the existing contract. The brief outlined a proposed timeline for the preparation of a submission to the Government to inform a final decision on the contract for the Australia Network. DFAT expected this process to be complete by early July 2010. At the request of the Minister, the brief also included information about an industry submission process expected to commence in early January 2010 and be completed by the end of April 2011. There were ongoing discussions between the Minister and the department about the industry submissions process, with the Minister endorsing the process in June 2010.

Industry submissions

1.15 The then Foreign Minister launched an industry submission process on Australia's international broadcasting service on 18 June 2010 with a closing date of 19 July 2010. Through this process the Government sought the views of interested parties on three key issues:

- future opportunities and challenges for a government-funded international broadcasting service to effectively deliver a high quality, credible and reliable service in the Asia-Pacific region;
- options for the delivery and funding of an international broadcasting service in the Asia-Pacific; and
- whether future delivery of the services should be the subject of a competitive tender process.³³

³² The Hon. Stephen Smith MP was the Minister for Foreign Affairs from 3 December 2007 to 14 September 2010.

³³ S Smith, (former Minister for Foreign Affairs and Trade), *Australian International Broadcasting Service: Request for Industry Submissions*, media release, Parliament House, Canberra, 18 June 2010.

1.16 The Federal Election was announced on 17 July 2010—two days before the closing date for receipt of industry submissions. The subsequent caretaker period continued until 14 September 2010. As previously mentioned, at the request of the Government, the ABC agreed to defer the notification date for an extension of the existing contract to 8 November 2010.

1.17 In total, 14 submissions were received from industry. The majority of submissions did not support tendering for the contract and considered that, if the purpose of the Australia Network was to act as a tool of public diplomacy, the service should remain with the ABC as the national broadcaster. Several submissions also noted that it was unusual for an international broadcasting service funded by a government to operate under a commercial arrangement.

1.18 Two parties indicated an interest in the opportunity to tender for the contract if a competitive tender process was to be undertaken. It was also suggested that a longer-term contract arrangement would support the financial security of the service and, therefore, long-term planning, and brand development and recognition.

Review of the ABC's performance

1.19 Under the 2006–11 contract, a detailed performance review of the ABC's operation of the Australia Network was scheduled to be undertaken after the completion of the third year of the contract (that is, from late 2009). DFAT commenced the review in April 2010 and provided the review report to the then Foreign Minister on 28 June 2010, five weeks ahead of the August deadline to make a decision on the future of the ABC's contract.³⁴ As noted above, this deadline was not met, largely because of the announcement of the Federal Election and associated caretaker period.

1.20 Central to the review was an assessment of the ABC's performance in meeting the key performance indicators (KPIs) established under the contract. The review's findings regarding the ABC's performance against the KPIs are summarised in Table 1.1. Overall, DFAT concluded that the ABC's delivery of the Australia Network service had consistently met or exceeded most of the established KPIs. Factors beyond the ABC's control had influenced achievement of some of the KPIs, with these factors raised with DFAT during the contract period.

³⁴ The review was conducted by a committee comprised of two officials from DFAT and one official from DBCDE.

Table 1.1**Summary of the ABC's performance against the 2006 KPIs**

KPI	Performance review finding
Appeal/distribution and re-distribution of the Australia Network	Met and exceeded contractual requirements.
Reach/conducting surveys and measuring audience appeal	Partially complied with contractual requirements, but found that the KPIs were, on reflection, unrealistic.
General programming mix and scheduling	Largely met contractual requirements, with room for improvement in the drama programming.
News, current affairs and business programs	Largely met contractual requirements, with room for improvement in the lack of news broadcast on weekends (interrupted by sport).
Marketing, branding and revenue raising	Marketing targets compliant with contractual requirements. Revenue targets did not meet contractual requirements, but the targets were, on reflection, unrealistic.
Ancillary services	Met contractual requirements.
Management and business plan	Largely met contractual requirements.

Source: ANAO analysis of 'Performance Review of the Australia Network, August 2006–March 2010', 29 June 2010 (DFAT). [Internal document]

1.21 On 30 June 2010, two days after providing the then Foreign Minister with the ABC performance review, but prior to the receipt of all industry submissions, DFAT again briefed the Minister, highlighting the need for a decision to be made by August 2010. The option of negotiating with the ABC an extended notice period was raised, along with suggested options for the future of the Australia Network. These options included:

- exercising the Government's option to extend the existing contract for a further five years with the same terms and conditions;
- putting the Australia Network contract out to competitive tender; or
- bringing forward a proposal for consideration by the Government, as part of the Budget process, for the ABC to provide the service on a permanent basis.

1.22 This brief was not actioned prior to the announcement of the Federal Election on 17 July 2010.

Further government consideration

1.23 Following the Federal Election, DFAT briefed the new Minister for Foreign Affairs, the Hon. Kevin Rudd MP (the former Foreign Minister³⁵) on 1 October 2010, on the outcome of the industry submission process and the Australia Network performance review. The briefing highlighted the need to inform the ABC regarding the future of the contract by 8 November 2010 and recommended that the Foreign Minister agree to rollover the existing contract with the ABC for a further five years, with a view to then fully exploring options to either:

- move to a longer-term contractual arrangement (as suggested in the industry submissions); or
- further develop the submission sponsored by the Communications Minister from November 2009, which would see responsibility for the Australia Network permanently transition to the ABC. DFAT did not consider that this could be achieved in the available timeframe for the existing contract notice period.

1.24 A second option proposed (but not favoured) by DFAT was to put the contract out to tender. The department considered that there was little benefit in re-tendering the Australia Network contract, as the tender process conducted in 2005–06 had tested the market and the ABC had provided a strong return on the Government's investment.

1.25 The future of the Australia Network was also being considered more broadly across government. Through the Budget process, the Department of Finance and Deregulation and the Treasury indicated that they considered that a case for ongoing government support of the Australia Network in the national interest had not been adequately established. The departments indicated, however, that if the service were to continue, a tender process would be preferred over an extension of the existing contract as it would test the market and ensure value-for-money.

1.26 To inform his decision, the former Foreign Minister sought further information on the DFAT performance review of the Australia Network and met with the committee that had conducted the performance review. An area of particular focus was the KPIs in the 2006–11 contract that the ABC had been

³⁵ The Hon. Kevin Rudd MP was the Minister for Foreign Affairs from 14 September 2010 to 22 February 2012.

assessed as not meeting. While supporting the rollover of the contract for a further five years, DFAT advised the Minister that this option would forego the opportunity to: develop more quantifiable KPIs; establish a longer contract period; and increase the flexibility of the programming mix. By contrast, a tender would give the Government greater scope to use the Australia Network as a public diplomacy tool, and give greater acknowledgement to multi-media platforms, such as vodcasts.

1.27 The Government did not make a decision by the extended deadline of 8 November 2010. DFAT subsequently negotiated with the ABC to extend the notice period until 26 November 2010. The department also advised the Foreign Minister that the ABC was unlikely to agree to further extensions, as delays would impact on re-negotiations for third party service contracts and may result in a financial burden for the future Australia Network provider.

1.28 In response to a briefing from the former Foreign Minister, the Government decided on 22 November 2010 that a 10 year contract for the delivery of the Australia Network should be awarded through a competitive tender process. The Government's decision was announced by the Foreign Minister on 23 November 2010.³⁶ The Minister's announcement stated that a competitive tender process would ensure the best possible service in return for the Australian Government's investment, and that a 10 year contract for the service would be used to provide greater certainty to the service provider.³⁷

1.29 The expectation was that the tender process could be concluded by June 2011, allowing sufficient time for the possible transition to a new service provider by the expiry of the existing contract in August 2011.

Procurement framework

1.30 The letting of Australian Government contracts involves the expenditure of public money and is therefore subject to applicable financial management legislation. Specifically, the *Financial Management and Accountability Act 1997* (FMA Act) provides a framework for the proper management of public money and public property. This framework includes requirements governing the process by which decisions are made about

³⁶ K Rudd, (former Minister for Foreign Affairs), *Australia Network for the future*, media release, Parliament House, Canberra, 23 November 2010.

³⁷ *ibid.*

whether public money should be spent, as well as accountability for such decisions.

1.31 The procurement policy framework is a subset of the financial management framework related to the procurement of property or services. For departments of state and agencies prescribed under the FMA Act, the core policy framework is established by the Commonwealth Procurement Guidelines (CPGs), which are issued under the authority of the Financial Management and Accountability Regulations 1997—the FMA Regulations.

1.32 The FMA Regulations require Ministers and agency officials to have regard to the CPGs when performing duties related to procurement. The FMA Regulations also require that a proposal to spend public money (including for the proposed procurement of property or services) must be considered and approved by an appropriately authorised party before contracts or other arrangements involving the expenditure of public money can be entered into. In this respect, the FMA Regulations require that an approver not approve a spending proposal unless satisfied, after making reasonable enquiries, that the proposal is an efficient, effective, economical and ethical use of Commonwealth resources that is not inconsistent with the policies of the Commonwealth. Where a tender process is conducted in relation to a proposed procurement, consideration of the outcome of the tender evaluation process by the relevant decision-maker may result in a decision: to enter into a contract with a successful tenderer; to select a preferred tenderer for further negotiations with a view to subsequently entering into a contract; or to not proceed with the proposed procurement activity with any of the tenderers. In each case, this will, in the normal course, represent a decision about whether to approve the spending of public money.

1.33 The decision about whether to spend public money may be made by a Minister, by Ministers collectively (such as in Cabinet), an agency Chief Executive, officials acting under the authority of a Minister or their Chief Executive, or other persons authorised by legislation to make such decisions. The capacity for a Minister or Ministers collectively to undertake a decision-making role in respect to decisions about whether to spend public money is provided for in the financial management legislation provided that they are identified as the approvers.

Key aspects of the Australia Network tender process

1.34 The Request for Tender (RFT) for the provision of the Australia Network was lodged on the Government's central procurement website, AusTender, on 4 February 2011. The RFT sought tenders from appropriately qualified organisations to provide an international Australian television service and associated digital media services.³⁸ The service was valued at up to \$223.1 million over 10 years, commencing on 9 August 2011. An industry briefing was conducted by DFAT on 11 February 2011 for those parties considering submitting a tender.

1.35 The purpose of the tender process was to select a service provider that demonstrated value-for-money and could broadly support Australia's national interests and meet the Government's objectives of:

- providing a credible, impartial and independent voice, delivered to an international audience via innovative as well as conventional multimedia platforms;
- promoting an image of Australia as a dynamic and culturally diverse nation of the Asia-Pacific region and raising international awareness of Australia's strengths and achievements across a range of fields;
- presenting Australian perspectives on the world and fostering public understanding of Australia's global and regional role;
- increasing awareness of the strong links between Australia and the Asia-Pacific region; and
- providing consular information to Australians living abroad, particularly in times of crisis.³⁹

1.36 The RFT attracted tenders from the ABC and the ANC. Both organisations that tendered had participated in the 2005–06 tender for the 2006–11 Australia Network contract.

1.37 DFAT initially planned for a six-month tender process. However significant changes to the process were made by the Government at key points, which extended the timeline.

³⁸ DFAT, *Request for Tender for the provision of an international Australian Television service and associated digital media services*, DFAT11-CPD-02, 4 February 2011.

³⁹ *ibid.*, p. 27.

These changes included the Government's decision in June 2011 to:

- add a new evaluation criterion to the RFT and to seek further information from tenderers;
- change the decision-making process for awarding the tender by replacing the Secretary of DFAT with the Communications Minister as the approver; and
- allow the Communications Minister to make a decision that did not reflect the recommendations of the Tender Evaluation Board (TEB).

1.38 The Government also decided to exercise its option to extend the ABC's contract for six months until 8 February 2012 to allow for the continuation of the Australia Network service while the amended tender process was completed.

1.39 In November 2011, the tender was terminated by the Government on public interest grounds⁴⁰, following media reports referring to confidential information relating to the tender process. Subsequently, in December 2011, the Government decided that the Australia Network would be delivered by the ABC on a permanent basis. Table 1.2 outlines the timeline for key events during the tender process.

⁴⁰ The RFT provided at clause 4.7.1 that the contract may be suspended or terminated if the Commonwealth, represented by DFAT, considered that it was in the public interest to do so.

Table 1.2**Key events in the 2011 Australia Network tender process**

Date	Event
4 February 2011	Request for Tender announced on AusTender (DFAT11-CPD-02).
25 March 2011	Tender closed.
4 May 2011	Tender Evaluation Board ⁴¹ submitted its recommendation to the Secretary of DFAT as the decision-maker for the tender.
6 July 2011	The Government requested tender participants to submit amended tender documentation relating to an additional evaluation criterion, and changed the approver from the Secretary of DFAT to the Communications Minister.
27 July 2011	Closing date for amended tenders.
27 October 2011	The Australian Federal Police requested to investigate the leaking of tender information (not announced until 7 November 2011).
7 November 2011	The Government announced that the tender process had been terminated and that the Australian Federal Police was conducting an investigation into alleged leaks.
5 December 2011	The Government announced that the ABC would provide the Australia Network service on a permanent basis.

Source: ANAO analysis.

Media interest and Parliamentary requests for an audit

1.40 The Australia Network television broadcasting service has, over many years, been an important avenue through which Australia is promoted to other parts of the world. When considered against the background of the high level of interest in media ownership and broadcasting rights in Australia, it was to be expected that the tender for the Australia Network contract would generate more media interest than many other government procurement activities.

1.41 Initial reporting in the media focused on the degree to which the Government would be able to influence editorial and broadcasting content. Later reports speculated on, and reported on, confidential aspects of the tender evaluation process, delays in awarding the contract, changes to the tender requirements and the perceptions of government interference in the tender process. The probity of the tender process was also questioned following

⁴¹ The Tender Evaluation Board was responsible for conducting a detailed and comparative evaluation of tender submissions and preparing a report for the decision-maker.

reports that the ABC had approached two government Ministers at the time the Government was considering changes to the tender process.

1.42 The tender process also attracted considerable Parliamentary interest. In this context, in September 2011, the Deputy Leader of the Opposition wrote to me requesting an investigation into the conduct of the Australia Network tender, particularly the transfer of the decision-making responsibility from the Secretary of DFAT to the Communications Minister. My response on 28 September 2011 indicated that, given the advanced stage of the tender process, an audit would not be undertaken at that time, but that I would continue to monitor the tender process and outcome, and keep open the option of undertaking an audit at a later date.

1.43 The Deputy Leader of the Opposition again requested that I investigate matters relating to the Australia Network tender process on 8 November 2011, following the announcement of the termination of the tender process. The Communications Minister also wrote to me on 22 November 2011 requesting a review of the tender process in the interest of ensuring that future tender processes are as robust as possible.

1.44 Following consideration of these requests and the broader Parliamentary and public interest, I announced on 24 November 2011 that a performance audit of the administration of the Australia Network tender process would be undertaken under section 18 of the *Auditor-General Act 1997*.

Audit objective, criteria and methodology

1.45 The audit objective was to report on the administration of the Australia Network tender process and to identify lessons learned from the conduct of the process to inform future procurement activities.

1.46 The audit examined the administration of the tender process, including: planning; conduct of the tender; and managing the change in tender conditions. The audit also considered the advice provided to the Government, the decisions made by the Government and the manner in which those decisions were implemented, including compliance with procurement requirements.

1.47 The Australia Network tender process has been subject to ongoing consideration by the Government. The Government has performed a key role in the decision-making process and, in doing so, has taken into account the advice provided by several departments and advisers. The departments concerned had also obtained advice from external probity and legal advisers.

In several areas of this report, reference has been made to the advice received. The report also includes relevant references to briefings and submissions provided to Cabinet, Cabinet decisions, and the deliberations and recommendations of the Tender Evaluation Board, including the preferred tenderer, as well as complaints made about the tender process. I have taken the extraordinary step of including this information in this report as it is central to understanding the issues involved in the tender process and to provide context for the audit findings, conclusions and lessons learned. I have concluded that the inclusion of the information is not contrary to the public interest.⁴² The report on the audit does not extend to commenting on the deliberations of Cabinet, except where such matters have been specifically referred to by Ministers to inform the audit on key issues.

1.48 As previously noted, a separate investigation is being conducted by the Australian Federal Police (AFP) into the possible unauthorised disclosure of confidential tender information to the media.⁴³ The audit did not directly examine these matters, but did include consideration of the confidentiality and document handling arrangements established by DFAT for the tender process.

1.49 The ANAO assessed whether the key departments involved in the tender process: DFAT, the Department of Broadband, Communications and the Digital Economy (DBCDE) and the Department of the Prime Minister and Cabinet (PM&C) had:

- effectively established and administered the initial and amended tender processes;
- established appropriate probity arrangements for the initial and amended tender processes;
- effectively engaged key stakeholders in the initial and amended tender processes; and
- provided appropriate advice to government in relation to the tender processes.

⁴² Section 37 of the *Auditor-General Act 1997* outlines the circumstances in which particular information is not to be included in public reports, including if the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest.

⁴³ The AFP informed the Senate Legislative and Constitutional Affairs Committee on 14 February 2012, that some interim findings had been provided to the Secretary of the Department of the Prime Minister and Cabinet (the matter was referred to the AFP by the Secretary—see paragraph 37). The department subsequently informed the ANAO that it has provided additional information to the AFP and that the department had not received further findings.

Audit methodology

1.51 The audit included an examination of documentation held by DFAT, DBCDE and PM&C. Interviews were also held with a wide range of stakeholders, including: officers from each of the departments involved in the tender process; the probity, legal and technical advisers to the tender; Tender Evaluation Board (TEB) members; and representatives from the ABC and the ANC.

1.52 Discussions were also held with the Communications Minister and the former Foreign Minister with regard to their respective roles and responsibilities prior to, and during, the tender process. The then Minister for Health and Ageing and the Minister for Resources, Energy and Tourism were also interviewed in relation to media reports of inappropriate contact by the ABC during the tender process and discussions were held with the Cabinet Secretary in relation to relevant Cabinet processes.

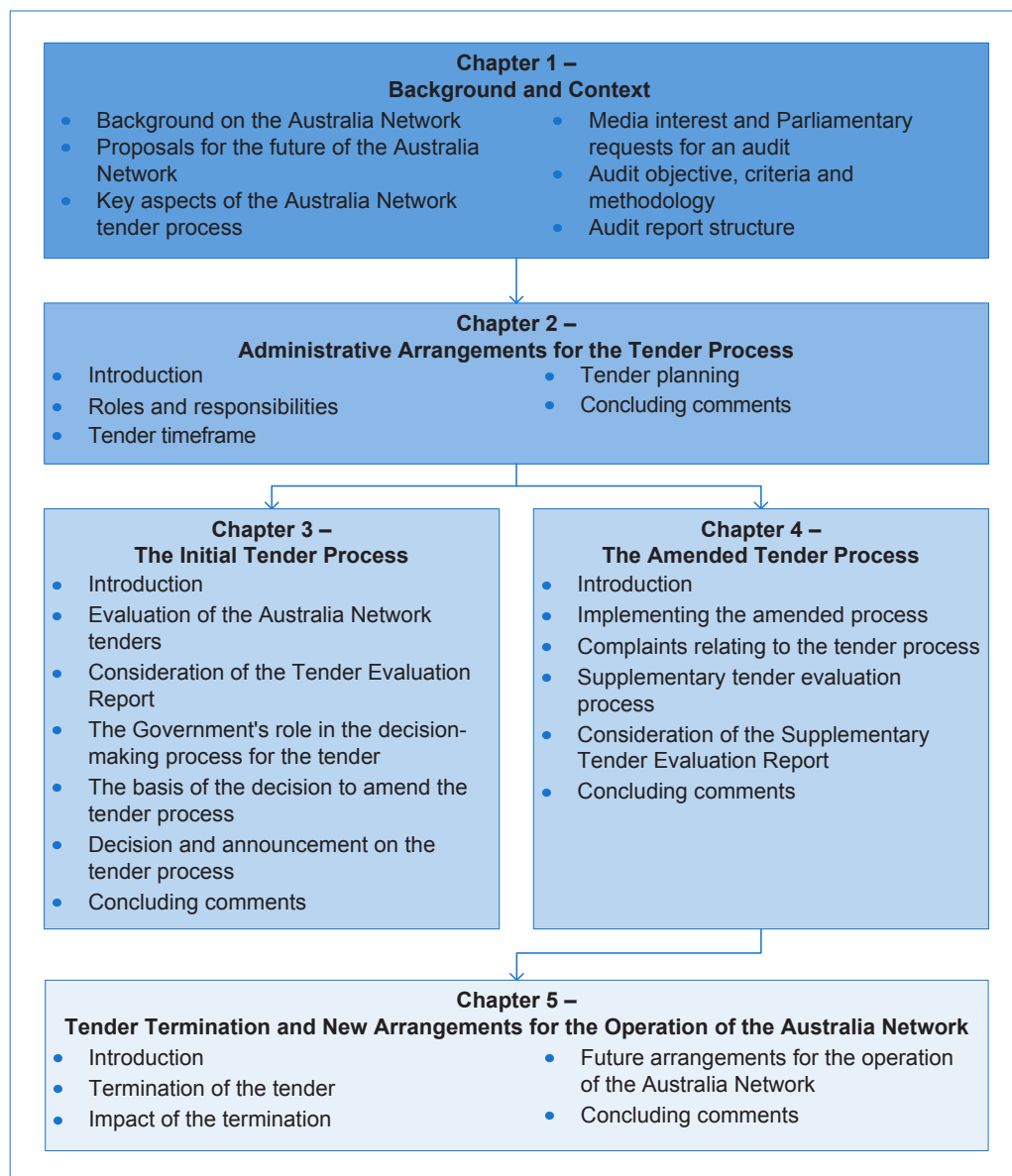
1.53 The audit was conducted in accordance with the ANAO Auditing Standards at a cost of \$380 000.

Audit report structure

1.53 The structure of the report is outlined in Figure 1.1 below.

Figure 1.1

Report structure



2. Administrative Arrangements for the Tender Process

This chapter examines the administrative arrangements established by the Department of Foreign Affairs and Trade for the Australia Network tender process.

Introduction

2.1 In response to the Government's decision on 22 November 2010 to award the Australia Network contract through a competitive tender, DFAT commenced preparatory work for a procurement process to select a preferred tenderer. As the existing contract with the ABC for the delivery of the Australia Network was initially due to expire on 8 August 2011, new contract arrangements were expected to be fully operational by this time, to prevent disruption to the broadcasting service. The details of the tender were to be settled by the former Foreign Minister (the Hon. Kevin Rudd MP) in consultation with the Prime Minister, the Deputy Prime Minister and the Minister for Finance and Deregulation.

2.2 The decision of the Government to approach the market for the Australia Network, created an obligation that the tender would be undertaken in good faith and conducted in a fair, transparent and defensible manner. As previously noted, when undertaking procurement activities, Australian Government officials are required to comply with the Commonwealth Procurement Guidelines (CPGs) established under Regulation 7 of the FMA Regulations.

2.3 The CPGs establish the procurement policy framework for Australian Government agencies and assist senior management in meeting the financial management and accountability requirements of the FMA Act. Outlined in the CPGs are mandatory requirements and matters of sound practice. The CPGs are not exhaustive and it is the responsibility of agencies to manage procurement processes in a way that is proportional to the risk and sensitivity of the various procurements in which they are involved.⁴⁴

⁴⁴ Australian Government, *Commonwealth Procurement Guidelines*, Department of Finance and Deregulation, Canberra, December 2008, available at: <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/CPG/index.html> [accessed 13 February 2012].

2.4 The ANAO examined the administrative arrangements established by DFAT for the Australia Network tender process, with a focus on: the roles and responsibilities of those involved in the tender; the timeframe for conducting the tender; and the planning process put in place to support the tender.

Roles and responsibilities

Nominated approver for the tender process

2.5 DFAT sought to establish tender approval arrangements for the 2011 Australia Network tender, based on the model developed and implemented for the previous tender. The then Minister for Foreign Affairs, the Hon. Alexander Downer MP, was the approver for the 2005–06 tender process. Based on this precedent, DFAT recommended to the former Foreign Minister that he assume the role of the approver for the 2011 Australia Network tender. The Foreign Minister did not accept this recommendation and subsequently decided in December 2010 that the Secretary of DFAT should perform this role.

2.6 The former Foreign Minister later explained that this decision was taken for the following reasons:

- to ensure that the decision was, and was perceived to be, taken on the basis of merit against the evaluation criteria, and not influenced by any other consideration;
- to avoid any potential conflict of interest which could arise in respect of the Minister's role; and
- in light of the fact that decisions in relation to other government contracts in the portfolio have been taken at arm's length from Ministers.⁴⁵

2.7 In December 2010, the former Foreign Minister wrote to the Prime Minister, Deputy Prime Minister, Minister for Finance and Deregulation, and Communications Minister seeking nominations from their departments for representation on the Tender Evaluation Board (TEB). The Minister's correspondence referred to the TEB evaluating the tenders and making recommendations to 'Ministers' in April 2011.

⁴⁵ Correspondence between the Foreign Minister and the Prime Minister, dated 5 June 2011.

2.8 The former Foreign Minister again wrote to key Ministers in mid-January 2011 in order to settle the details of the tender. This letter made no explicit reference to the identity or role of the approver for the tender. The Prime Minister's response on 25 January 2011 noted that the 'outcomes of the tender would be subject to Cabinet consideration, with Cabinet to agree the successful tender bid'. This was the first documented reference to a formal role for Cabinet in the decision-making process for the Australia Network tender, and it was at odds with the arrangements already put in place for the Secretary of DFAT to approve the tender outcome.

2.9 As the tender process progressed, ongoing discussion occurred between DFAT, PM&C, the offices of the Prime Minister and former Foreign Minister in relation to the Government's role in determining the tender outcome. This issue is examined in more detail at paragraph 3.28 et seq. following the discussion about consideration of the Tender Evaluation Report.

Australia Network Tender Steering Committee

2.10 A Steering Committee was established within DFAT to provide oversight of the tender process. The Steering Committee was chaired by a Deputy Secretary and was made up of senior departmental officers from within DFAT. The first meeting of the Steering Committee was held one month after the tender was announced by the Minister on 23 November 2011. The Steering Committee's responsibilities, as outlined in the Probity Plan, included:

- overseeing the conduct of the tender and evaluation process, and ensuring that it complied with government procurement policy and the department's policies, procedures and practices encapsulated in the Tender Evaluation Plan;
- approving the RFT and Tender Evaluation Plan, and evaluation methodology;
- providing advice and guidance to the TEB on the conduct of the evaluation and preparation of the evaluation report;
- providing briefings to the Minister on the procurement, as required;
- overseeing the preparation of a submission to the approver based on the Tender Evaluation Report; and

- appointing the Contract Negotiation Team to oversee the contract negotiations following the selection of a preferred tenderer.⁴⁶

Australia Network Tender Secretariat

2.11 A Secretariat was established within DFAT to support the TEB and Steering Committee. It was led by an Assistant Secretary and supported by three departmental officers. The Secretariat's main responsibilities were to: assist the TEB in managing the conduct of the evaluation of tenders; ensure that actions and procedures were instituted to support appropriate standards of probity and official conduct; and assist the Steering Committee and TEB with the development of the tender documentation.⁴⁷

Australia Network Tender Evaluation Board

2.12 DFAT formed the TEB for the Australia Network tender in early 2011 following the Minister's appointment of the Chair, a retired Deputy Secretary of DFAT with experience in large-scale procurement, public diplomacy and contract management. As previously noted, the Minister wrote to the Prime Minister, the Deputy Prime Minister, the Minister for Finance and Deregulation, and the Communications Minister seeking nominations of senior officers from their departments as TEB members. Nominations were subsequently received from each of the Ministers' respective departments.⁴⁸

2.13 The TEB's role was to undertake a detailed and comparative evaluation of tenders and prepare a report and recommendation for submission to the nominated approver. In undertaking this assessment, the TEB was to focus on determining which tender represented best value-for-money for the Australian Government in accordance with the tender evaluation criteria.⁴⁹

External advisers

2.14 To support the development of the tender planning documents and the conduct of the tender, DFAT engaged three external advisers. The external

⁴⁶ DFAT, Legal Process Plan (Probity Plan), Tender Process for the Australian Television Service: the Australia Network, p. 13.

⁴⁷ *ibid.*, p. 14.

⁴⁸ The Deputy Prime Minister, as the Treasurer, nominated a representative from the Treasury.

⁴⁹ DFAT, Legal Process Plan (Probity Plan), *op.cit.*, p. 13.

advisers were selected from existing panels established by the department and through a select tender process. The advisers for the Australia Network tender process were:

- the Australian Government Solicitor (AGS)—engaged from DFAT’s internal legal panel to provide probity services. The AGS was engaged from an early stage in the process, and played a key role in establishing the governance arrangements for the tender process and providing ongoing probity advice. Throughout the tender process, DFAT relied heavily on the probity advice provided by the AGS.
- Minter Ellison—engaged from an internal departmental panel to provide legal advice. Minter Ellison commenced work on the legal aspects of the Australia Network contract prior to the tender being announced, which informed DFAT’s advice to the Minister in the lead-up to the announcement. The advice related to matters such as the option of rolling over the existing contract and transition-out arrangements. During the tender process, Minter Ellison provided advice on contractual issues, including preparing the draft contract for inclusion with the RFT. As part of the final tender evaluation report submitted to the nominated approver, the legal adviser prepared a legal compliance report pertaining to tenderers’ compliance with the draft contract.
- Convergent Consulting—engaged by DFAT to provide technical advice through a select tender process in consultation with DBCDE. Convergent Consulting was the only party to submit a quotation out of the three firms approached to provide technical advice. It had previously undertaken work for DFAT in relation to the performance review of the ABC’s operation of the Australia Network. Convergent Consulting provided advice regarding the draft contract, tenderers’ submissions, the transition-out phase of the 2006–11 contract and an analysis of the Australia Network market and audience data included in the tenders.

Tender timeframe

2.15 The Australia Network tender had to be conducted within a tight timeframe because of earlier delays in initiating the tender. In order to avoid disruption to the Australia Network service, a new contract was expected to be in place by 9 August 2011. The original timeframe, as published in the RFT, is set out in Table 2.1. A period of three months was allocated to the evaluation of

the tenders and contract negotiations, with the transition to a new service provider to commence by mid-June 2011, in the event that a new provider was selected. This timeframe was ambitious, given that the 2005–06 tender process had taken 11 months to complete.

Table 2.1

Original timeline for the Australia Network tender

Event/activity	Proposed date
Issue of RFT	4 February 2011
Industry briefing	11 February 2011
Closing date for the lodgement of tenders	2pm, 25 March 2011
Selection of preferred tenderer(s)	2 May 2011
Post tender and contract negotiations	3–31 May 2011
Execution of contract and commencement of transition-in services	8 June 2011
Commencement of full services	9 August 2011

Source: DFAT, Australia Network Request for Tender.

2.16 As previously noted, the Government subsequently amended the tender process in June 2011, resulting in a further contract extension with the ABC. As a result, the expected start date for the new contract was 9 February 2012. Table 2.2 outlines the revised timeframe, which was reflected in the amended July 2011 RFT.

Table 2.2

Published indicative timetable under the amended tender process

Event/activity	Proposed date
Issue of RFT addendum	6 July 2011
Closing date for RFT addendum	27 July 2011
Decision on preferred tenderer	16 September 2011
Contract negotiations	19 September – 21 October 2011
Execution of contract	31 October 2011
Transition-in services	1 November 2011 – 8 February 2012
Commencement of full services under new contract	9 February 2012

Source: DFAT, Amended Australia Network Request for Tender.

Tender planning

2.17 To support the accountability and transparency obligations required under the CPGs, agencies are required to maintain appropriate documentation for their procurement activities.⁵⁰ The ANAO examined the development of the planning documents supporting the conduct of the tender, including: the RFT, Legal Process or Probity Plan, Procurement Plan and Tender Evaluation Plan. The engagement of external advisers in support of the tender process was also examined.

Request for Tender

2.18 The RFT for the Australia Network was developed by DFAT taking into consideration the 2005–06 RFT and the Government's updated requirements for the delivery of an international broadcasting service. In late January 2011, the Secretary of DFAT approved the RFT following consultation between the former Foreign Minister, the Prime Minister, the Deputy Prime Minister and the Minister for Finance and Deregulation, on the details of the proposed tender. Extensive input was also provided by the external legal, probity and technical advisers.

2.19 Overall, the RFT complied with the requirements of the CPGs, clearly outlined the services required to be delivered, and provided guidance to tenderers in preparing their responses. However, further guidance could have been provided to tenderers in the RFT in several areas, including the relative importance of the evaluation criteria and how complaints would be handled by DFAT.

2.20 The RFT set out the criteria against which the tenders would be evaluated, however, it did not specify their order of importance. While not a requirement of the CPGs, articulating any order of importance given to the evaluation criteria would have provided further guidance to the tenderers and assisted them in developing their responses.

2.21 In relation to complaints, the information outlined in the RFT was limited to the procedure for making a complaint and the timeframe in which the department would respond.⁵¹ The CPGs state the requirement for agencies to have in place a systematic complaints process that is well understood by the

⁵⁰ *Commonwealth Procurement Guidelines*, op.cit., p. 18.

⁵¹ DFAT, *Request for Tender*, op.cit., clause 1.7, p. 8.

parties involved. Guidance issued by the Department of Finance and Deregulation (Finance) suggests in making a complaint a tenderer should: outline what it considers defective in the process; provide supporting information; and provide a statement about what it wishes to achieve from the complaints process.⁵² In this light, DFAT could have assisted tenderers to better understand the complaints process by providing additional information about what constituted a complaint, how a complaint would be handled when received, and details of the department's internal review processes. DFAT's handling of complaints became an issue following the amendment of the tender process, and is discussed in Chapter 4.

2.22 As a government-funded national broadcaster, the ABC is subject to specific legislative and policy requirements relating to editorial independence.⁵³ For example, in delivering media services the ABC's Managing Director has ultimate editorial power and responsibility—a potential conflict with the proposed contractual obligations for the Australia Network. Under the proposed contract, and in line with government policy objectives, DFAT anticipated a high degree of editorial control and could require the service provider to refrain from broadcasting particular programs or content. Consequently, the ABC considered that the application of these controls limited its ability to agree with all of the conditions of the proposed contract for the Australia Network.^{54 55}

Assessing the tender risks

2.23 Identifying, assessing and managing risk is an integral part of any procurement. DFAT completed a risk assessment as part of its procurement and probity planning activities. The assessment identified 24 risks and outlined risk treatment strategies and accountabilities.

⁵² Department of Finance and Deregulation, *Buying for the Australian Government – Complaints Handling*, Canberra, May 2011, available at: <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/complaints-handling/principles.html>> [accessed 23 March 2011].

⁵³ *Australian Broadcasting Corporation Act 1983*.

⁵⁴ The ABC encountered similar issues during the tender process for the 2006–11 contract, with the issues being resolved during the contract negotiation phase.

⁵⁵ While not an issue for this report, these matters raise the question about whether, in delivering the Australia Network service on a permanent basis, the ABC is expected to have regard to the legislative and policy requirements which generally apply to its broadcasting services or its obligations in providing a service under contract.

The majority of risks identified can be grouped into the following three broad categories:

- timeliness—completing the tender process and contract negotiations within the allocated timeframe in order to avoid disruption to the service and the possibility of adverse comment due to the tender timeframes;
- editorial control and distribution—overseas jurisdictions seeking to control the editorial content of Australia Network broadcasts and difficulty with accessing distribution mechanisms due to increasing demand and competition; and
- audience share and appeal—decline in the quality of programming, lack of appeal with the target audience, the service not delivering against the Government's objectives, and/or damage to Australia's reputation and credibility.

2.24 Overall, DFAT assessed the tender process as having a 'moderate to high' level of risk. However, through the application of risk mitigation strategies, this risk level was expected to decrease to 'moderate to low'.⁵⁶ The use of external advisers was considered to be a key risk mitigation strategy.⁵⁷

2.25 DFAT reassessed the risks relating to the tender process, following the Government's amendments in June 2011. Despite the impact of these changes on the timetable and the heightened level of interest in the approval arrangements, only minor changes were made to the risk assessment. For example, DFAT identified a new risk relating to complaints that may have arisen from the changes to the evaluation criteria or evaluation process, and the risk that tenderers would attempt to change elements of their tenders that were unrelated to the additional criterion.

2.26 Despite the tender planning documents not being updated to reflect the strategic risks associated with the tender process, the Secretary of DFAT informed the ANAO that he emphasised to key stakeholders the potential impact of public, media and political scrutiny of the tender process and the need to manage the risks carefully.

⁵⁶ DFAT, Procurement Plan for the Provision of Australia Network, Australia's international television broadcasting service, p. 17.

⁵⁷ *ibid.*, pp. 18–27.

Probity Plan

2.27 The Legal Process, or Probity Plan, was developed by the probity adviser, reviewed by the legal adviser and approved by the Steering Committee in January 2011, in advance of the RFT being lodged on AusTender on 4 February 2011. The Probity Plan set out the roles and responsibilities of the Steering Committee, the TEB and the Secretariat, as well as the procedures to be adopted for:

- Managing conflicts of interest—all APS officers were required to provide conflict of interest undertakings and non-APS personnel (such as, external advisers and ministerial staff) a deed of confidentiality and fidelity. Throughout the tender process any actual or perceived conflicts of interest were required to be reported in writing to the probity adviser. The Plan also required conflicts of interest to be a standing agenda item at all meetings of the Steering Committee and TEB.
- The control and the distribution of confidential documents—hard copies of tenders were to be controlled by the TEB Chair and allocated by a numbering system to TEB members and relevant DFAT staff and advisers. Evaluation reports were to be classified ‘Commercial-in-Confidence’ and access to all documentation on the DFAT IT system restricted to relevant staff. *Access to tender material by anyone other than the approver, the Steering Committee, TEB, DFAT Secretariat and advisers was to be on a ‘need to know’ basis and at the sole discretion of the TEB Chair [emphasis added].*
- Storage of these documents—TEB members were responsible for the secure storage of hard-copy and electronic tender documents in their possession. Hard copies were to be stored in locked cabinets when not in use. On completion of the tender process, all documents were to be returned to DFAT for disposal or archival, as relevant.
- Communication with the Minister—the Probity Plan acknowledged that the Minister and staff may have on-going contact with one or more potential tenderers as part of normal ministerial duties. However, the Plan stated that this contact should not include discussion of the tender process. The Plan also recognised that the Minister’s office may wish to contact DFAT for a briefing about the progress of the tender. *The Plan made it clear that ministerial briefings were to be restricted to updates on*

progress, and were not to disclose details about the tender or evaluation [emphasis added]. The confidentiality requirements for ministerial staff were clearly stated, and all contact between ministerial offices and DFAT was to be recorded.

2.28 The tender involved officers from several departments, principally as members of the TEB, which brought a broader perspective to the evaluation but added to the complexity of the tender process. In this circumstance, there would have been merit in the Probity Plan providing additional guidance to members of the TEB in managing potential conflicts which may have arisen between their role as members of the TEB and their substantive departmental role.⁵⁸

2.29 By way of background, the CPGs do not require members of tender evaluation boards or those officers supporting the process to complete confidentiality undertakings.⁵⁹ APS officers are bound by confidentiality obligations in the course of their employment⁶⁰, and, for this reason, DFAT did not require these officers to provide confidentiality undertakings. While the need for the confidentiality of information relating to tenders and their assessment was stressed to all involved in the tender process, requiring members of the TEB or other APS officers to formally acknowledge the confidentiality obligations as outlined in the Probity Plan, or alternatively, complete confidentiality undertakings, would have highlighted to each individual, in addition to oral advice, the sensitivity of the tender and the need to control the disclosure of tender related information. Adopting either approach would also have helped in managing any potential conflicts arising from their responsibilities as both members of the tender board and as departmental officers, as well as reinforcing the established arrangements which required authorisation prior to the disclosure of tender information (see paragraph 2.27).⁶¹

⁵⁸ Australian Public Service (APS) officers have a responsibility to their portfolio Minister and can be subject to lawful direction. In accordance with the APS Code of Conduct, Part 3, Section 13 of the *Public Service Act 1999*, an APS officer is required to 'comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction'.

⁵⁹ As indicated in paragraph 2.3, the CPGs expect that agencies will determine their own procurement practices consistent with the Commonwealth's procurement policy framework.

⁶⁰ The *Public Service Act 1999* outlines the standards of conduct and behaviour required from APS employees, including maintaining the confidentiality of information, and avoiding real and/or perceived conflicts of interest.

⁶¹ AGS in responding to the proposed audit report advised the ANAO that 'there may be some cases where obtaining a written acknowledgement is appropriate and this is a practice which AGS often adopts'.

Procurement Plan

2.30 The Procurement Plan was also approved by the Steering Committee in January 2011. The plan was developed by the Secretariat in consultation with the legal and probity advisers and set out how the tender was to be conducted and the associated administrative arrangements, including the budget and financial considerations, the risk management plan, the indicative tender timeframe, and the complaints handling process. The Procurement Plan provided the foundation for the Tender Evaluation Plan as it set out the key broadcasting-specific considerations that were used by the TEB in developing the tender evaluation criteria. These considerations were:

- content—referring to the breadth, quality and attractiveness of the content to viewers, along with how well the content addresses the objectives of the service;
- availability—referring to the number of viewers who can freely access the service(s) across the identified geographies and technological delivery platforms; and
- awareness—referring to how well the service is marketed, how the brand is recognised and what the brand stands for in the minds of actual and potential viewers.

2.31 The Procurement Plan also provided information about the complaints handling process. DFAT appointed a Complaints Officer who was required to handle all complaints ethically and in a professional manner and to respond to complaints in writing within 10 days of lodgement. An Internal Review Officer was also appointed to review the assessment of complaints by the Complaints Officer in circumstances where a complainant was not satisfied with the outcome. In undertaking a review, the Internal Review Officer could consider all material used by the Complaints Officer in reaching their decision and any additional material as necessary.

Tender Evaluation Plan

2.32 The Tender Evaluation Plan was developed with input from the TEB and endorsed by the Steering Committee on 24 March 2011, following the lodgement of the RFT. The plan set out the procurement objectives, evaluation criteria and their order of importance, as well as the approach to be taken by the TEB in evaluating the tenders. It also provided guidance to the TEB members both individually and collectively, to support a consistent approach to the evaluation of the tender responses. The seven evaluation criteria, against

which the TEB assessed the tender responses, are presented in Table 2.3 in order of importance. The order of importance given to the evaluation criteria was agreed as part of approving the Tender Evaluation Plan, following the release of the RFT.

Table 2.3
Order of importance of evaluation criteria in the evaluation process

Order of importance	Published evaluation criteria
First	(a) The tenderer's degree of overall compliance with the RFT.
Second	(b) The extent to which the tender meets the technical, functional, operational and performance requirements stated in the Statement of Requirements (Schedule 1).
Equal third (f) being more important if price exceeds the approved amount	(c) The extent to which the tenderer is compliant with the conditions of the Draft Contract and the assessed level of risk relating to the negotiation of any resultant contract acceptable to DFAT.
	(f) The tendered price, including the extent to which the tendered price comes within the amount DFAT will pay for the Service, as set out in clause 1.1.5 of the RFT, and the proposed payment regime.
Lower importance	(d) The proposed corporate structure and the financial and corporate viability of the tenderer to fulfil contractual obligations.
	(e) The qualifications and experience of personnel proposed by the tenderer to fulfil the obligations under any resultant contract.
	(g) The tenderer's demonstrated technical and managerial capability to provide DFAT's requirement.

Source: DFAT, Tender Evaluation Plan, paragraph 3.23.

2.33 The Tender Evaluation Plan stated that the TEB may select one or more preferred tenderers, or find that there were no tenderers offering sufficient value-for-money.⁶² The TEB’s recommendations were to be submitted to the approver through the Steering Committee.⁶³ The approver was responsible for making a decision on whether or not to enter into negotiations with the recommended tenderer, and could also refer the matter back to the TEB for further consideration.

⁶² DFAT, Tender Evaluation Plan—Request for Tender for Australia Network, Australia's international television broadcasting and associated digital media services, p. 12.

⁶³ DFAT, Legal Process Plan (Probity Plan), op.cit., p. 13.

Amended tender documentation

2.34 Following the Government's decision to amend the Australia Network tender process in June 2011, including a change of approver and the addition of an evaluation criterion, DFAT updated the Probity Plan, the Procurement Plan and the Tender Evaluation Plan to reflect these changes. All of the plans were updated with input provided, as necessary, from the probity and legal advisers.

2.35 The Probity Plan, while updated, did not adequately recognise the involvement of the Communications Minister or the changed role of the former Foreign Minister. The plan specified the arrangements for managing communication with the 'Minister' (being the Foreign Minister), but failed to consider the practical application or workability of the previous arrangements, as they were now to be applied to the amended tender process. The cross-portfolio nature of the tender process, combined with the expectation that the Communications Minister would be the approver after consulting with his ministerial colleagues, increased the complexity and risks associated with the tender process.

2.36 The revised Procurement Plan reflected the Government's decision to add an additional evaluation criterion to require tenderers to specifically address how their operation of the Australia Network service would meet Australia's national interests, with a particular focus on the changing international environment.^{64 65} The national interest criterion was added to the existing criteria outlined in the RFT and Procurement Plan. While the criterion was added at the bottom of the listing, it was ranked in the Procurement Plan as equal second in the order of importance (alongside evaluation criterion (b)—see Table 2.3). Throughout the tender, no guidance was provided to tenderers about the relative importance of the tender evaluation criteria.

2.37 The amended plans were endorsed by the Steering Committee in late July and early August 2011.

⁶⁴ DFAT, *Australia Network Request for Tender Addendum*, DFAT11-CPD-02, *Addendum No 1*, 5 July 2011.

⁶⁵ The additional evaluation criterion focused on Australia's national interests in light of the changed international circumstances, particularly emerging markets in South Asia and the Asia-Pacific, political transformation in the Middle East and North Africa, and recent consular crises. At the time the RFT was released in February 2011, political unrest had transpired in Tunisia and Egypt, but conflict had yet to commence in other parts of the Middle East, including Libya and Syria. Despite these changes to the RFT, the Australia Network does not currently broadcast to the Middle East or North Africa and the RFT did not specify an expansion to these regions as a requirement of the new contract.

DFAT's administration costs

2.38 The cost of engaging external advisers and the independent TEB Chair was initially budgeted by DFAT at \$355 500. During the tender process there were three amendments to the budget for the external advisers. The first amendment was in March 2011 to take into account the complexity of the tender. The second was in August 2011 following the changes to the tender process announced in June 2011, and the third was in December 2011 to increase the 2011–12 budget to take into account the parallel negotiations and other developments around the time of the termination. The departmental budget for the tender was increased to \$548 316, \$823 976 and \$1 073 976 respectively. Table 2.4 presents a breakdown of the approved budget for the tender process.

2.39 DFAT advised that the cost of the tender, as at 20 March 2012, was \$771 328. This cost, which is also presented in Table 2.4, excludes both DFAT and other agencies' staff and related costs, as these costs were not accounted for as part of the tender process.

Table 2.4

Approved budget and departmental costs for the Australia Network tender (as at 20 March 2012)

Services	Original budget (\$)	Amended budget (\$)	Actual cost (\$)
Legal adviser	113 500	302 094	210 944
Probity adviser	80 000	301 088	276 674
Technical adviser	112 000	386 256	258 254
TEB Chair	50 000	50 916	21 162
Incidentals			4294
Contingency		33 622	
Total	355 500	1 073 976	771 328

Source: DFAT.

Concluding comments

2.40 In establishing the internal management structure for the Australia Network tender, DFAT drew on the administrative arrangements for the previous tender conducted in 2005–06. A Steering Committee was established to oversee the tender process. The Steering Committee and TEB, which evaluated the tenders, was supported by a Secretariat.

2.41 While formal records will not necessarily reflect all matters canvassed, the Government's decision to select a service provider for the Australia Network through an open tender process was silent on the decision-making process for the tender. The former Foreign Minister subsequently decided that the Secretary of DFAT should be the approver, which established a decision-making process at arms length from the Minister. Early in the tender process, it emerged that there were differing views within government about the decision-making process and the issue remained unresolved for many months, until such time as the Government decided that the Communications Minister would be the new approver for the process.

2.42 The Australia Network tender process was undertaken within a short timeframe, primarily due to early delays in decisions about the future of the service. Planning for the tender commenced in advance of the Government's decision to approach the open market, with the aim of maintaining continuity of the Australia Network.

2.43 The RFT for the Australia Network outlined to potential tenderers the services required to be delivered to government and the conditions of the tender. While the RFT was comprehensive, further guidance could have been provided to tenderers in relation to the order of importance of the evaluation criteria and the complaints handling process. Clearly articulating the order of importance for the evaluation criteria would have assisted tenderers in preparing their tenders. Providing further information about what constituted a complaint and the complaints process, would have provided greater clarity for tenderers about the scope of the complaints management process.

2.44 The risks associated with the Australia Network tender were assessed during the planning phase. While numerous risks were considered, the general nature of the risks was operational, and largely related to the timing of the tender process, editorial control of programming content and the successful tenderer maintaining audience share. Risks arising as a result of the changes to the tender process, such as potentially heightened public, media and political scrutiny, and consequential reputational risks to the Government, were not sufficiently identified and assessed in the department's planning documents; however, the ANAO was informed that such risks were explained to key stakeholders.

2.45 DFAT developed the Procurement, Probity and Tender Evaluation Plans for the Australia Network tender in a timely manner. The plans provided an administrative framework for conducting the tender and outlined the responsibilities of departmental officers and external advisers supporting the

process. Communication protocols, and the systems and the processes for managing the confidentiality of tender information and conflicts of interest were included and the documents were updated following the amendment of the tender. Nevertheless, there would have been merit in DFAT giving greater recognition in the Probity Plan to the involvement of officers from multiple departments, and the cross-portfolio nature of the tender. Within this context, requiring all APS officers involved to acknowledge the confidentiality obligations as outlined in the probity plan, or alternatively, sign a confidentiality undertaking, would have emphasised each individual's responsibilities.

2.46 The original budget for the costs of engaging external advisers and the independent TEB Chair has tripled from \$355 500 to \$1 073 976. This budget excludes both DFAT and agencies' staff and related costs.

3. The Initial Tender Process

This chapter examines the conduct of the initial tender process for the Australia Network contract, the role of the approver and the differing views within government about the decision-making process.

Introduction

3.1 The evaluation of tenders is required to be undertaken in a fair, transparent and defensible manner to identify the tender which represents best overall value-for-money.⁶⁶ Agencies have flexibility within this framework to establish evaluation arrangements that are appropriate for the size and risk of the tender. These arrangements should be supported by a clear decision-making process, whereby the approver for the tender has the delegation and authority to make a decision in respect of the outcome of the evaluation process.

3.2 The ANAO reviewed the evaluation of the tenders by the TEB and the consideration given to the first Tender Evaluation Report. The Government's decision to amend the tender process and the uncertainty surrounding the tender approval process were also examined.

Evaluation of the Australia Network tenders

Tender Evaluation Board meetings

3.3 The TEB first met in early January 2011. At that time, the TEB members were briefed on the proposed probity and administrative arrangements for the tender evaluation process. The TEB members and external advisers were provided with conflict of interest disclosure statements or deeds of confidentiality and fidelity, respectively.⁶⁷ These were completed by all parties and disclosure of conflicts of interest became a standing agenda item for subsequent TEB meetings.

3.4 The importance and sensitivity of the Australia Network tender was discussed and it was stressed by the Chair of the TEB that members must

⁶⁶ *Commonwealth Procurement Guidelines*, op.cit., Chapter 4.

⁶⁷ As previously noted in Chapter 2, TEB members were not required to sign confidentiality undertakings as the Probity Plan stated that confidentiality obligations for Australian Public Service (APS) officers were covered by the APS *Code of Conduct*.

observe the confidentiality of the tender process and must not disclose the TEB's recommendation(s) to third parties without prior written authorisation from the Chair. The Chair also noted that it was important to address any public perception that the incumbent operator of the Australia Network (the ABC) was the preferred tenderer and that this would be achieved through a transparent RFT and tender evaluation process.

3.5 The next steps in the tender process were outlined by the Chair, including that the tender details were to be confirmed between key government Ministers. The TEB was advised that:

Mr Rudd will consult key ministers on details of the project. These consultations are proposed in the week beginning 17 January 2011, to allow for RFT release on 25 January 2011. ... It is yet to be clarified whether the same ministers [Prime Minister, Deputy Prime Minister and Minister for Finance and Deregulation] or Cabinet as a whole will consider the project's outcome.⁶⁸

3.6 At this first meeting, the TEB was also advised that the Secretary of DFAT was the decision-maker for the Australia Network tender and, as such, was able to moderate the TEB's recommendation before submission to the Government.⁶⁹ The TEB met on four occasions between March and May 2011, to assess the tenders and provide feedback to the Secretary of DFAT following his receipt of the Tender Evaluation Report.

Evaluation of the tenders by the Tender Evaluation Board

3.7 In accordance with the Tender Evaluation Plan, the TEB's role was to assess the Australia Network tenders against the agreed evaluation criteria and make a recommendation to the Secretary of DFAT. The external advisers assisted the TEB in conducting the evaluation, attending all meetings and providing input where required.⁷⁰ The Tender Evaluation Plan stated that:

Tenders will be evaluated on a value-for-money basis, with evaluation to involve an assessment based on the capacity of the Tenderers to perform the required AN services, in accordance with each Evaluation Criterion. Best value

⁶⁸ DFAT, Tender Evaluation Board Meeting Minutes—Australia Network RFT 2011, 7 January 2011, p. 2.

⁶⁹ *ibid.*, p. 2.

⁷⁰ During the tender evaluation phase, the legal adviser provided a Legal Compliance Report and advice on legal and contractual issues, while the technical adviser provided a technical analysis of the two tenders and an analysis of the Australia Network market and audience. The probity adviser provided advice on legal process issues.

for money means the best available outcome when all relevant costs and benefits over the procurement cycle are considered.⁷¹

3.8 The TEB's evaluation of the two tender responses—from the ABC and the ANC—comprised five stages, as outlined in Table 3.1.

Table 3.1

Evaluation process—Australia Network tender

Evaluation stages	Process
Stage 1	TEB members to evaluate the tenders separately and assign initial ratings. Evaluation of the tender financial information to assess the financial competitiveness and overall value-for-money.
Stage 2	Assessment of tenders by the TEB as a whole, and allocation of agreed ratings.
Stage 3	Additional information to be sought from the tenderers, with the tenderers to make a presentation to the TEB if required.
Stage 4	Review of the financial and litigation history of the shortlisted tenderers to establish their ability to deliver the proposed services.
Stage 5	Preparation and endorsement of the Tender Evaluation Report and provision of the report to the nominated approver through the DFAT Steering Committee.

Source: ANAO analysis of the Australia Network Tender Evaluation Plan.

3.9 At the commencement of the tender evaluation process, each TEB member was provided with a numbered copy of each tender. DFAT provided the TEB with general guidance about the assessment of the tenders by drawing the TEB members' attention to the relative order of importance of the selection criteria. The TEB members were also advised by the probity adviser that notes made during the evaluation were subject to audit and would become part of the official record. The TEB members then individually assessed the tenders against the agreed evaluation criteria, as specified in the RFT.

3.10 Following an initial comparative assessment of the tenders by the TEB, it was considered that additional information was required from the tenderers in relation to several areas. The TEB also considered that in some areas the tenders lacked detail and that the tenderers had failed to substantiate their proposals or claims. It was agreed that each tenderer would be requested

⁷¹ DFAT, Tender Evaluation Plan, op.cit., p. 10.

to deliver a presentation to the TEB, focusing on those issues requiring clarification. Written responses to questions were also sought by the TEB. Presentations and written responses were provided by both tenderers and the additional information was considered by the TEB in further deliberations.

3.11 At the conclusion of Stage 3 of the initial tender evaluation, the TEB assessed that both tenderers had met the RFT requirements and demonstrated that they could provide the service. However, the TEB determined that each tenderer had taken a different approach in replying to the RFT, and each had strengths and weaknesses in particular areas. Accordingly, the TEB sought a meeting with the DFAT Steering Committee to obtain guidance around five key areas:

- contractual compliance and legal risk;
- schedule and/or timing of payments under the anticipated contract;
- interpretation of the Government's objectives and the importance of audience growth⁷²;
- programming mix and genre orientation; and
- service delivery risk.

3.12 The issue of most significance was the emphasis that should be placed on audience growth in achieving the Government's objectives for the Australia Network. The Steering Committee's advice to the TEB suggested that, while the Government's objectives did not mention audience growth, an expansion of the Australia Network audience was implicit if the objectives were to be achieved.

3.13 In the final meeting of the TEB, prior to the finalisation and provision of the Tender Evaluation Report to the Secretary of DFAT, the TEB assessed the financial viability and overall risk presented by each tenderer. This analysis was supported by a financial assessment prepared by the DFAT Secretariat, with the assistance of the department's Financial Management Branch. The financial assessment comprised a summary document that provided limited guidance to the TEB in respect of the financial position of each tenderer. This assessment covered the proposed payment and costing schedules and, as only limited financial information had been provided by the tenderers, outlined the

⁷² The Australian Government's objectives for the Australia Network are discussed in paragraph 1.35.

need to approach tenderers to provide further evidence of their financial viability.

3.14 The financial risk to the Government was considered to be relatively low as payments to the service provider would have been based on a fee-for-service model with annual payments. Payments were to be subject to the service provider fulfilling their obligations and provision of the service was to be guaranteed.⁷³

3.15 As part of the evaluation process, the TEB was required to assess which tender represented the best value-for-money. Value-for-money is the core principle underpinning the CPGs and is enhanced by: encouraging competition by ensuring non-discrimination in procurement and using competitive procurement processes; promoting the use of resources in an efficient, effective, and ethical manner; and making decisions in an accountable and transparent manner.⁷⁴ When determining value-for-money, agencies need to undertake a comparative analysis of all relevant costs and benefits, including consideration of whether the outputs to be delivered will contribute to the achievement of the outcomes sought by government.⁷⁵

3.16 The Tender Evaluation Plan stated that, for the Australia Network tender, value-for-money would be assessed by considering factors such as:

- the relative risk of each proposal;
- compliance with the Government's objectives;
- affordability;
- cost to the Government; and
- other whole-of-government considerations.⁷⁶

3.17 When determining which tender represented the best value-for-money, the TEB considered the qualitative ratings allocated for each evaluation criterion and the tenderers' assessed level of risk. The risk assessment focused on overall compliance with the RFT and evaluation criteria, the ability of the tenderer to deliver the required services, and the ability of the tenderer to

⁷³ This involves a related entity guaranteeing to fulfil the contract requirements if the tenderer is unable to do so.

⁷⁴ *Commonwealth Procurement Guidelines*, op.cit., sections 4.1 and 4.2.

⁷⁵ *ibid.*

⁷⁶ DFAT, Tender Evaluation Plan, op.cit., p. 14.

achieve the anticipated outputs and outcomes desired by government. The projected cost of the service and financial viability were also considered as part of this analysis. Overall, the TEB concluded that the tenderers represented a low and moderate risk, and noted that the level of risk was acceptable. In particular, the TEB concluded that any residual risk could be addressed as part of the contract management process and through the implementation of enhanced key performance indicators under the contract.

Recommendations of the Tender Evaluation Board

3.18 The TEB submitted the Tender Evaluation Report to the Secretary of DFAT, through the Steering Committee, on 4 May 2011⁷⁷, consistent with the requirements of the Tender Evaluation Plan. The report contained a number of attachments, including:

- a combined overall assessment of the responses and risk rating for each evaluation criterion;
- the Legal Compliance Report prepared by the legal adviser;
- the clarification questions to, and responses from, both the ABC and the ANC;
- a market audience and technical analysis report prepared by the technical adviser;
- the guidance received by the TEB from the DFAT Steering Committee; and
- the financial analysis report prepared by the Secretariat.

3.19 The Tender Evaluation Report recommended that the approver:

- note the outcome of the tender evaluation;
- accept the ANC as the Preferred Tenderer, based on the RFT offered; and
- enter into contract negotiations with the other tenderer in the event that negotiations with the first tenderer did not lead to an agreed contract.⁷⁸

⁷⁷ The Secretary of DFAT received the report from the Steering Committee on 5 May 2011.

⁷⁸ DFAT, Tender Evaluation Board Report, RFT DFAT11-CPD-02 Australia Network, 4 May 2011, p. 8.

3.20 In making its recommendations, the TEB noted that the ANC provided the best value-for-money proposal, although provision of the service by the ANC was assessed as a moderate risk. The ABC was also assessed as being suitable and, as the incumbent operator, was allocated a risk rating of low.

3.21 Once the Tender Evaluation Report had been provided to the Secretary of DFAT, the TEB had fulfilled its responsibilities under the Tender Evaluation Plan.

Consideration of the Tender Evaluation Report

3.22 The Secretary of DFAT received the Tender Evaluation Report on 5 May 2011. A covering minute from the DFAT Secretariat referenced informal advice from PM&C that, in recognition of the independence of the role of the approver, the Secretary should send a memo to the Government on the tender outcome after his decision had been made. The minute also stated that the DFAT Secretariat was, at that stage, still awaiting formal advice from PM&C as to what the process should be for notification to government.⁷⁹

3.23 In assessing the recommendations of the TEB, and applying due diligence appropriate in the circumstances for this tender, the Secretary of DFAT requested a meeting with the TEB to discuss the Tender Evaluation Report. At this meeting (held on 12 May 2011) the Tender Evaluation Report was discussed, with a particular emphasis given to key areas of identified risk, including: transition of the service to a new service provider; achievement of the Government's objectives and market share projections; and the proposed programming mix.

3.24 The ANAO was informed by TEB members that, at that meeting, the Secretary also asked each TEB member individually if they had any reservations about the recommendations of the report. Each TEB member confirmed that they agreed with the outcome of the tender evaluation, advising that the TEB's decision was unanimous. During the meeting the Secretary reinforced the need for TEB members to maintain the confidentiality of the process until the successful execution of a new contract.

⁷⁹ The informal advice was based on the PM&C advice to the Prime Minister dated 21 April 2011 (see paragraph 3.30).

3.25 The Secretary of DFAT informed the ANAO that, prior to taking a decision on the preferred tenderer, he was contacted by the then Secretary of PM&C (around 6 May 2011) and subsequently by other senior PM&C officials. During the course of those discussions it became evident that there was some unhappiness within government with the decision to put the Australia Network service to tender, and there was an expectation that the tender outcome would be brought back to government for further consideration or endorsement.

3.26 This situation resulted in an extended period of time (more than four weeks) during which no decision was made. In early June 2011, there was agreement by government that it wished to have direct involvement in the decision on the tender outcome (see paragraph 3.46). During this time, speculation was also building (particularly in the media) as to whether a decision on the Australia Network tender was imminent, and possible reasons for the delay.⁸⁰

3.27 As the nominated approver, the Secretary of DFAT had the authority to make a decision on the preferred tenderer once he had satisfied himself that all required steps had been undertaken. However, in the context of the uncertainty that existed within government around the decision-making process for the Australia Network tender (discussed further in the following section), the Secretary considered that he was not in a position to make a decision on the preferred tenderer. In the circumstances, this was a reasonable approach to take.

The Government's role in the decision-making process for the tender

3.28 The record of the Government's November 2010 decision to award the Australia Network contract through a competitive tender process did not make reference to the decision-making process for the tender or the Government's ongoing role. As previously discussed in Chapter 2, the record shows that details of the tender were to be settled by the former Foreign Minister in consultation with the Prime Minister, the Deputy Prime Minister and the Minister for Finance and Deregulation. The Prime Minister's correspondence of 25 January 2011 noted that the 'outcomes of the tender would be subject to

⁸⁰ This included questions at a Senate Estimates hearing on 2 June 2011, at which the Secretary of DFAT did not make a clear statement on the approval arrangements for the tender process, and several media articles that noted the delay in an expected announcement regarding the tender outcome.

Cabinet consideration, with Cabinet to agree the successful tender bid'. As a consequence, over the course of the initial tender process, there was ongoing dialogue between officials and at a ministerial level about the role of government in the decision-making process for the Australia Network tender.

3.29 From March 2011, discussions occurred between DFAT, PM&C, the Prime Minister's office and the former Foreign Minister's office, regarding how the position outlined in the Prime Minister's letter to the Foreign Minister could be implemented given the Minister's earlier decision that the Secretary of DFAT should be the decision-maker for the tender. These discussions did not, however, settle the differing views on the arrangements to be adopted to approve the tender outcome.

3.30 On 18 April 2011, the Prime Minister requested advice from PM&C on options available for the Government to consider the tender process. On 21 April 2011, PM&C provided the Prime Minister with a brief advising that the Secretary of DFAT had sole responsibility for deciding the preferred tenderer and that, under the current process, there was no scope for the Government to approve the preferred tenderer. This brief was returned to the department unsigned.

3.31 On the same day that the PM&C advice was provided to the Prime Minister, the *Australian Financial Review* reported that, based on advice from the former Foreign Minister's office:

The recommendation of the TEB will be considered by the approver, who is the secretary of DFAT. Cabinet and Caucus are not part of the decision-making process.⁸¹

3.32 This was the first public statement about who would be the decision-maker for the tender process.⁸² The content of the media statement to the *Australian Financial Review* was approved on 19 April 2011 by a senior adviser in the Prime Minister's office, with the advice provided to the former Foreign Minister's office indicating that the Prime Minister had 'cleared these lines'.⁸³

⁸¹ T Walker, 'DFAT feeling a little tender on Rudd TV', *The Australian Financial Review*, 21 April 2011, p. 74.

⁸² The Tender Evaluation Plan, finalised in January 2011, identified the Secretary of DFAT as the approver, but this was not a public document.

⁸³ Email from the Prime Minister's office to the Foreign Minister's office, 19 April 2011.

Advice received during the consideration of the TEB report

3.33 During May 2011, at the time the Secretary of DFAT was considering the Tender Evaluation Report, discussions regarding the role of the approver and the opportunity for government involvement in the decision-making process intensified.

3.34 From 17 May 2011, the Government, through PM&C, requested legal advice on three key issues to inform its deliberations:

- whether the Secretary of DFAT could take into account the expressed views of government in making a decision on the preferred tenderer;
- whether the former Foreign Minister could be substituted for the Secretary of DFAT as the approver; and
- a number of possible scenarios under which a decision that differed from any recommendations of the TEB might be reached.

3.35 In responding to the Government's requests⁸⁴, the AGS advised that it was open for the Secretary of DFAT to consult with the Government and to seek its views on 'strategic considerations relating to the procurement' and 'other Commonwealth considerations'. The advice indicated that these issues form part of an approver's consideration of whether the tenders represent value-for-money. The advice also addressed the issue of substituting the former Foreign Minister or another Minister as the nominated approver and whether an approver could make a decision inconsistent with a recommendation of the TEB. The proposed changes were considered to have minimal probity and legal process risks, providing they were implemented in accordance with the conditions outlined in the Tender Evaluation Plan.

3.36 On 25 May 2011, the Prime Minister and the former Foreign Minister met to discuss aspects of the Australia Network tender process. The Foreign Minister subsequently wrote to the Prime Minister on 5 June 2011. The Minister's letter indicated that, in the earlier meeting, the Prime Minister had requested that the tender be considered by Cabinet, and asked the Minister to review the legal advice on the matter and advise her further. The letter noted the apparent inconsistency between the Government's decision on 22 November 2010, the Prime Minister's letter of 25 January 2011, which stated

⁸⁴ The advice was prepared by the AGS at the request of PM&C, and was provided by PM&C to the Cabinet Secretary, the Hon. Mark Dreyfus QC MP, and the Prime Minister's office on 17, 20 and 27 May 2011.

that the matter was to be referred back to government, and his decision that the Secretary of DFAT be the nominated approver. The Minister outlined the reasons for his decision⁸⁵ and also stated that discussions had occurred between DFAT and PM&C and agreement had been reached between departmental officials and the two ministerial offices. This understanding was reflected in the statement provided to the *Australian Financial Review* on 19 April 2011. The Minister's letter also outlined the legal advice that he had reviewed and that he had been advised by DFAT that it was not possible for Cabinet collectively to be the appointed approver. Taking all the circumstances together, it was his view that bringing this matter to Cabinet for a decision on the preferred tenderer would entail substantial policy, political and potential legal risks.

3.37 A briefing from the Cabinet Secretary for the Prime Minister indicated that Ministers had agreed at an October 2010 meeting that the decision was to be made by Cabinet, and at the time of the November 2010 decision to go to tender, the Foreign Minister had agreed to bring a further submission on the Australia Network contract to Cabinet (paragraph 3.55 refers). Furthermore, PM&C later informed the Prime Minister that, in the department's view, there had been no officials-level agreement regarding the decision-making process for the tender (paragraph 3.54 refers).

Draft submission to government

3.38 Following discussions between senior PM&C officials and the Secretary of DFAT (paragraph 3.25 refers), and requests from PM&C officials to the DFAT Secretariat, DFAT began drafting a submission to government on the Australia Network tender process in late May 2011.

3.39 DFAT informed the ANAO that, at that time, officials in the department were of the view that Cabinet was to assume the role of approver and would select the preferred tenderer. Accordingly, DFAT developed a draft submission that outlined the tender's progress, the TEB's deliberations and its recommendations. DFAT considered that this information was necessary for Cabinet to decide on a preferred tenderer. However, this view was inconsistent with views expressed by the former Foreign Minister in his letter to the Prime Minister of 5 June 2011.

⁸⁵ The Minister's reasons for this decision are outlined in paragraph 2.6.

3.40 At the time that DFAT was preparing the draft submission, the Secretary of DFAT was the approver for the Australia Network tender. The department was also seeking legal advice regarding options to change the approver from the Secretary of DFAT (see paragraph 3.34).⁸⁶ The advice obtained by DFAT indicated that, if Cabinet was to be involved in deciding on the preferred tenderer, there were some actions which would first be required, including changing the Tender Evaluation Plan (with Steering Committee endorsement), possibly changing the approver, and ensuring that the decision was made in line with the agreed evaluation criteria and methodology. DFAT informed the ANAO that its view was that Cabinet was about to decide on a preferred tenderer for the Australia Network.

3.41 This draft submission, which as mentioned included the TEB's deliberations and its recommendations, was circulated to DFAT officials and the former Foreign Minister's office on 26 May 2011. At least two DFAT officials and two advisers within the Foreign Minister's office had access to the draft submission. The Foreign Minister's Chief of Staff informed the ANAO that the emailed copy of the submission forwarded to him was not opened. DFAT records did not indicate that the second recipient in the Minister's office responded to the email. The Foreign Minister informed the ANAO that he had not been advised of the TEB's final recommendation.

3.42 The draft submission was also provided by DFAT to PM&C on 26 May 2011. DFAT transmitted the draft submission on the secure CABNET email network, rather than using the protocol established by PM&C to restrict access to Cabinet documents.⁸⁷ As a result, the draft submission was delivered to 30 PM&C officers on a group CABNET email in-box.⁸⁸ Whilst these officers may be appropriately cleared to handle Cabinet material, there was not a

⁸⁶ PM&C had requested DFAT to seek this legal advice.

⁸⁷ CABNET is an electronic network used to securely store and transmit Cabinet documents. Only authorised public servants and ministerial staff, with at least a SECRET security clearance, can access CABNET by logging onto the network on a stand-alone computer, using fingerprint authentication. When dealing with Cabinet documents, including drafts, departments are required by PM&C to upload the documents onto a dedicated Cabinet database, managed by PM&C. If documents are to be shared, the protocol is to send a link, via a CABNET email, to the document located on the Cabinet database. This allows PM&C to track all access to Cabinet documents, including who has viewed and printed each document. As DFAT emailed the draft submission via CABNET, rather than uploading it to the secure database, PM&C is unable to track access to the document.

⁸⁸ DFAT advised the ANAO that the department was cognisant of the need to limit access to the draft submission, given the sensitivity of its contents, and it had sought to transmit it to PM&C in the most secure manner possible. DFAT and PM&C have differing views regarding the advice from PM&C on the preferred method to transmit the draft submission.

demonstrable need for them to be informed about the deliberations and recommendations of a 'live' tender process.

3.43 Information from DFAT's draft submission was subsequently included in early versions of a PM&C briefing prepared for the Prime Minister. Within PM&C at least three officers⁸⁹ had access to this briefing. The final brief to the Prime Minister did not include the reference to the Tender Evaluation Report or its recommendations. PM&C officers informed the ANAO that the early versions of the department's briefing were not provided to the Prime Minister's office or the Cabinet Secretary's office.

3.44 DFAT informed the ANAO that the draft submission was not finalised for consideration by Cabinet because circumstances changed in early June 2011. Elements of the submission—but not the information relating to the TEB's deliberations and recommendations—were subsequently included in a paper on the Australia Network tender process presented by the former Foreign Minister to Cabinet on 14 June 2011 (and discussed in the next section).

The basis of the decision to amend the tender process

3.45 The Government considered the Australia Network tender process on three occasions—on 6, 14 and 20 June 2011. These deliberations were informed by a number of briefing papers, submissions and departmental briefs.

Paper presented by the former Foreign Minister

3.46 On 6 June 2011, the Government agreed that the Foreign Minister would bring forward to Cabinet a submission on the tenders for the Australia Network, with the Government to agree the successful tenderer.⁹⁰ On 14 June 2011, the former Foreign Minister presented a paper regarding the Australia Network tender. The paper did not discuss the two tenders or the recommendations of the Tender Evaluation Report. The paper did, however, state that the recommendations of the TEB were unanimous, clear-cut and not on balance. The paper was distributed in hard copy to ministerial offices and PM&C Cabinet Secretariat staff. While the paper canvassed several options for the tender process going forward, it recommended leaving the approval process as it currently stood—that is, with the Secretary of DFAT as the

⁸⁹ Evidence indicates that the early draft was circulated to three senior PM&C officials.

⁹⁰ The Foreign Minister and the Communications Minister were not in attendance at the 6 June 2011 meeting.

decision-maker—and allowing for the Government to be consulted and briefed on the content and recommendations of the TEB report, prior to a decision being made. The paper stated that officials from DFAT and PM&C had agreed to this position.

Approver role

3.47 The Foreign Minister’s paper was prepared by his department with advice being provided by the probity adviser. In addition to the advice previously provided to government (paragraph 3.34 refers), DFAT sought specific advice from the probity adviser on whether Cabinet could be the approver of the tender, or whether the approver must be an individual. The advice prepared by the probity adviser stated that:

There is no issue with the DFAT Minister referring this matter to Cabinet for their collective consideration, but, for the purposes of Reg 9 either the Minister or the Chief Executive of DFAT or a delegate of the Chief Executive will need to be the designated ‘Approver’.⁹¹

3.48 Accordingly, the Foreign Minister’s paper indicated that it was not possible for Cabinet collectively to be the approver. The AGS has subsequently informed the ANAO that the advice provided to DFAT was not intended to be a statement of legal principle about whether a group of officials could approve a spending proposal. Rather, in the specific context of the Australia Network tender process, either the Minister or the Secretary of DFAT would ‘need’ to be the approver because Cabinet would not be well placed to perform the role of approver, given the requirements of Regulation 9 of the FMA Act.⁹² Nonetheless, the interpretation of the advice from the probity adviser, and the earlier advice provided by PM&C to the Prime Minister (paragraph 3.30 refers) had the potential to constrain Cabinet’s ability to consider the option of it acting as the decision-maker for the tender process.

3.49 In this respect, the ANAO notes that Cabinet is the apex of executive government, and this includes taking important decisions. Ministers, including Cabinet, are routinely involved in the making of policy decisions. They can also make decisions in respect to the spending of public money, including whether or not to enter into contractual arrangements following the conclusion of a tender process. As previously noted, the capacity for a Minister or

⁹¹ AGS, advice to DFAT provided by email, 25 May 2011.

⁹² AGS, advice to the ANAO, 15 March 2012. FMA Regulation 9 requirements are outlined in paragraph 1.32.

Ministers collectively to undertake a decision-making role in respect to decisions about whether to spend public money is provided for in the financial management legislation provided that they are identified as the approvers. The capacity of a group of Ministers to perform the role of considering proposals to spend public money has been outlined in advice from the AGS and other counsel in earlier ANAO audits.⁹³

3.50 An alternative view presented in the former Foreign Minister's paper indicated that, if the Government wished to make the decision on the preferred tenderer, a new approver at ministerial level should be identified. The Minister stated that he would exclude himself from this role because of his publicly stated support for the current decision-making arrangements, and because he believed they were the best arrangements from a probity perspective.

3.51 The paper also outlined an option to terminate the tender process and establish a new tender process with clear requirements pertaining to the role of government. This option would have required a further extension of the ABC's contract to allow for continuation of the Australia Network service.

3.52 The paper did not raise the option of adding a new evaluation criterion to the RFT.

Briefings to Ministers on the former Foreign Minister's paper—including provision of confidential tender information

3.53 In preparation for the Government's consideration of the former Foreign Minister's paper, departments briefed their ministers (as discussed in the following paragraphs). As noted in paragraphs 3.41 and 3.42, details of the confidential TEB deliberations and recommendations were provided by the DFAT Secretariat to the former Foreign Minister's office and to PM&C. In addition, the Communications Minister was briefed on the outcome of the

⁹³ This issue was discussed in Report No.24 2008–09, *The Administration of Contracting Arrangements in Relation to Government Advertising to November 2007*. During the audit the ANAO sought advice from the Chief General Counsel of the Australian Government Solicitor. The advice stated that:

- 'the approver should be the person, or group of persons, who determine ultimately all the substantial matters that need to be determined to assess whether a proposal will make effective and efficient use of public money';
- 'where a committee containing at least some Ministers is involved in the decision making process, close consideration should be given to making members of that committee the approvers'; and
- 'more specifically, where the Committee's role involves finally selecting a successful tenderer following an assessment of the relative merits of competing bids, the members of the Committee should be regarded as the approvers for the purposes of FMA regulation 9.'

tender process in preparation for the Government's consideration of the paper on 14 June 2011.

PM&C briefing

3.54 In a brief provided to the Prime Minister on 14 June 2011, PM&C advised that it had a differing view to that stated in the former Foreign Minister's paper, on whether the decision-making process had been agreed. PM&C's briefing stated that officials had not reached an understanding about the decision-making arrangements, and further, the Secretary of PM&C had not been involved in the 'officials-level discussions'. The briefing added that PM&C had sought over the last month to bring the 'issue' to Cabinet for a decision.

Cabinet Secretary's briefing to the Prime Minister

3.55 In a separate briefing (dated 14 June 2011) to the Prime Minister, the Cabinet Secretary (the Hon. Mark Dreyfus QC MP) disagreed with some of the points raised in the former Foreign Minister's paper, namely, that the Prime Minister's and Foreign Minister's offices had agreed the approval process for the tender. The briefing also noted that the paper omitted reference to a Ministers' agreement in October 2010 that the decision was to be made by Cabinet, and that at the 22 November 2010 meeting the former Foreign Minister had agreed to bring a further submission on the Australia Network contract to Cabinet.

DBCDE briefing

3.56 To assist in the development of a brief for the Communications Minister, DBCDE's TEB member provided the Tender Evaluation Report to an officer within DBCDE.⁹⁴ While the Probity Plan required the TEB member to seek authorisation from the TEB Chair prior to the disclosure of tender or evaluation material, this authorisation was not sought. The TEB member subsequently informed the DFAT Secretariat that a comprehensive briefing had been provided to the Minister.

3.57 The briefing prepared by the DBCDE officer for the Minister identified the preferred tenderer and outlined the TEB's deliberations and recommendation. This briefing was circulated to a number of DBCDE officers⁹⁵

⁹⁴ The DBCDE officer had assisted the TEB member during the tender process and had previously signed a conflict of interest declaration.

⁹⁵ Evidence indicates that the brief was circulated by email to at least six DBCDE officers.

and was provided to the Communications Minister's office approximately three hours prior to the Government's consideration of the former Foreign Minister's paper on 14 June 2011 (paragraph 3.46 refers). Shortly before the Cabinet meeting, the Communications Minister received an oral briefing from his staff on the departmental brief, which included reference to the TEB's preferred tenderer. The brief was returned to DBCDE unsigned by the Minister, and marked 'overtaken by events'.

The Government's consideration of the former Foreign Minister's paper

3.58 As mentioned earlier, the final version of the former Foreign Minister's paper did not include details of the TEB deliberations or recommendations, previously circulated in a draft submission by DFAT. Nonetheless, by the time the Government considered the paper and future options for the Australia Network tender, the TEB report's recommendations were circulated to the Foreign Minister's office and were known at least by the Communications Minister, staff within his office, as well as officers within PM&C and DBCDE—a circulation of sensitive tender information beyond that demonstrably required.

3.59 In considering the former Foreign Minister's paper at the 14 June 2011 meeting, the Government requested PM&C to coordinate the development of further advice on the amendment of the tender process in a number of key areas. These included:

- changing the approver for the tender; and
- the addition of a new evaluation criterion.

3.60 The rationale for the new criterion was to provide an opportunity for tenderers to present additional information on how they could meet Australia's national interests in light of the changed international circumstances since the RFT was issued. However, the Government's request for further advice did not elaborate on the changed international circumstances, but subsequent internal documents relating to this issue refer to developments in the Middle East. When the RFT was lodged on 4 February 2011, political unrest had already occurred in Tunisia and Egypt⁹⁶,

⁹⁶ These events were referenced in a speech made by the former Foreign Minister on 2 February 2011. See: The Hon Kevin Rudd MP, Speech at the Foundation for Economic and Industrial Research, 'Australian foreign policy and recent developments in the Middle East', Athens, Greece, 2 February 2011.

but conflict had yet to arise in other parts of the Middle East, including Libya and Syria.

Advice outlining proposed changes to the tender process

3.61 Advice prepared by PM&C (dated 16 June 2011) in response to the Government's request, outlined a number of options for changing the tender process and examined the probity and legal risks associated with each option. The key changes proposed for the tender process were:

- the Communications Minister to be the approver, supported by DFAT;
- the inclusion of an additional evaluation criterion relating to the tenderer's ability to meet the national interests of Australia in light of changed international circumstances since the RFT was issued;
- clear guidance to be provided to the tenderers as to the information they were required to submit;
- existing tenderers to be given the opportunity to amend their tenders in light of the new criterion;
- the TEB to provide a revised report to the approver;
- the Communications Minister to bring the revised TEB report to Cabinet and consult Cabinet on the amended tenders; and
- the Communications Minister to have discretion to make a decision that did not reflect the recommendations of the TEB report, noting the need for the reasons for any such divergence to be carefully documented and for the decision to be based solely on the evaluation framework and methodology as advised to tenderers.⁹⁷

3.62 The probity and legal process risks were considered to be minimal, however, it was noted that the changes were unusual, would attract public attention, and would need to be clearly explained in terms of the benefit they delivered to Australia's national interest.

3.63 The issue relating to a possible conflict of interest in the proposed appointment of the Communications Minister as the new nominated approver was also considered in the PM&C advice. The Minister had responsibility for

⁹⁷ PM&C information provided to the ANAO.

national broadcasting policy and for administering the *Australian Broadcasting Corporation Act 1983*. These responsibilities raised the issue of whether the Minister had a conflict of interest between his role as the approver for the Australia Network tender and his portfolio responsibilities for the ABC.

3.64 The PM&C advice to the Government indicated that the Minister's responsibility for broadcasting policy did not pose a conflict of interest, similarly, his role as 'joint shareholder Minister of the ABC'⁹⁸ was seen to be held on behalf of the Commonwealth and was not considered to present a personal conflict of interest. PM&C informed the ANAO that the specific advice on a possible conflict of interest for the Minister was drafted by PM&C officials, without direct input from the legal adviser (the AGS). The AGS confirmed to the ANAO that while it had reviewed earlier versions of the paper, it did not review the specific paragraphs drafted by PM&C in relation to a possible conflict of interest for the Communications Minister, prior to the paper's finalisation and circulation to Ministers.⁹⁹ The covering page of the briefing paper, which was relied on by Ministers, stated, in error, that the entire paper had been cleared by the AGS.

Briefing to the Communications Minister by DBCDE

3.65 On 17 June 2011, DBCDE briefed the Communications Minister on the changes proposed in the PM&C advice of 16 June 2011. The brief stated that the AGS had provided legal advice indicating that there were no substantive conflicts of interest or probity issues with the Minister becoming the approver for the tender. However, this view was based on the 16 June 2011 PM&C advice to the Government on whether the Minister had a personal conflict of interest, which had been drafted by departmental officials without input from the AGS (paragraph 3.64 refers). The Communications Minister informed the ANAO that when consideration was being given to the matter of potential conflicts, he had 'looked quite closely at the legal advice', which he considered to be 'quite definitive' and provided by AGS.¹⁰⁰ The Minister also considered that Cabinet was aware of his portfolio responsibilities when he was appointed

⁹⁸ This term was included in the brief but was not factually correct—the term 'Joint Shareholder Minister' is only used in relation to Government Business Enterprises. Further information available from: Department of Finance and Deregulation, <http://www.finance.gov.au/publications/governance-arrangements/docs/GBE_Guidelines.pdf> [accessed 8 February 2012].

⁹⁹ The ANAO notes that in August 2011 the AGS provided advice to DFAT that it considered there was no apprehended bias for the Communications Minister in taking on the approver role (see paragraph 4.20).

¹⁰⁰ See paragraph 3.64.

as the approver, and as a portfolio Minister he routinely managed competing interests.

3.66 Notwithstanding PM&C's advice to Government, DBCDE's brief stated that it was inevitable that the Minister's appointment as the tender approver would result in a perception of a conflict of interest. DBCDE further advised the Minister that the proposed changes to the tender process may lead to the perception that the Government was not comfortable with the initial tender result, and was changing the rules to favour a particular applicant. As the new approver, he would bear the increased risk associated with the tender process. The department also advised the Minister against altering the tender evaluation criteria, and noted that there was 'no certainty that a revised national interest criterion would provide an outcome different to that under the original criteria, particularly should it reference the Middle East'.¹⁰¹ The brief was delivered to the Minister's office three days before the Government's decision to change the approver on 20 June 2011. The brief was returned to DBCDE unsigned and marked 'overtaken by events'.

Briefing to the Prime Minister by departmental Secretary

3.67 On 20 June 2011, the then Secretary of PM&C submitted a brief to the Prime Minister discussing the proposed changes to the tender process. This brief outlined a number of risks emerging from the options provided to the Government in the 16 June 2011 advice from his department. The Secretary considered that the focus of the new evaluation criterion on changes in the Middle East was too limited, leaving the Government open to considerable risks. The brief noted that while the 'Arab Spring' changes may justify the Australia Network broadcasting to a wider audience, there were more immediate issues in which the network could assist, such as tourism and education, particularly given the strengthening Australian dollar and the growth in the middle class in the Asia-Pacific region.¹⁰² The brief recommended terminating the existing tender process and developing a new process, focusing on the role of the network in the Asia-Pacific region. The department does not have a record of the Prime Minister's response to the brief.

¹⁰¹ DBCDE Ministerial Briefing paper, 17 June 2011.

¹⁰² PM&C information provided to the ANAO.

Decision and announcement on the tender process

3.68 On 20 June 2011, the Government amended the tender process largely in line with the approach suggested by PM&C in its brief of 16 June 2011. The Government further agreed that consequential amendments to the tender process be agreed between the Communications Minister and the Prime Minister.

3.69 A government announcement of the changes to the tender process was pre-empted by a newspaper article on 22 June 2011, speculating that the Government would request more information from the tenderers about:

their ability to cover new global hotspots in Africa and the Middle East before finally awarding the \$223 million contract to broadcast the Australia Network [The media article further reported that] ... The cabinet is understood to have decided that international developments since the tender specifications were written, meant it needed extra facts.¹⁰³

3.70 On 24 June 2011, the Government notified tenderers and publicly announced that the RFT was to be amended.¹⁰⁴ While the media release stated that the decision on the preferred tenderer would be ‘referred to Cabinet for consideration’¹⁰⁵, it did not specify that the approver for the process had changed. Tenderers were, however, advised that the decision on the preferred tenderer would now involve ‘ministerial consideration’.

3.71 The Communications Minister was first identified as the nominated approver in a newspaper article published on 27 June 2011.¹⁰⁶ This was subsequently confirmed in statements to the media by the Minister and other government Ministers and in the Addendum to the RFT, provided to tenderers on 5 July 2011.¹⁰⁷

3.72 The implementation of the changes to the tender process is discussed in Chapter 4.

¹⁰³ L Taylor, ‘More questions over network’ *The Sydney Morning Herald*, 22 June 2011.

¹⁰⁴ J Gillard, K Rudd and S Conroy, (Prime Minister, Foreign Minister, and Minister for Communications), *Amendment to the Australia Network tender*, media release, Parliament House, Canberra, 24 June 2011.

¹⁰⁵ *ibid.*

¹⁰⁶ D Flitton, ‘Conroy trumps Rudd on network’, *The Age*, 27 June 2011. The article states that a spokesman for Senator Conroy confirmed to the reporter the change in the approver.

¹⁰⁷ The Addendum was published on AusTender on 8 July 2011. DFAT, *Australia Network Request for Tender Addendum*, *op.cit.*

Concluding comments

3.73 A fair, transparent and defensible evaluation process is a key aspect of any government procurement. Tender evaluation arrangements should also be supported by a clear decision-making process.

3.74 The TEB for the Australia Network tender comprised senior officials from a range of government departments. The Board conducted its evaluation in accordance with the agreed Tender Evaluation Plan and with the support of a range of expert advisers. The Tender Evaluation Report made a clear recommendation with respect to a preferred tenderer, while noting that both tenderers had demonstrated the capacity to deliver the service.

3.75 At a very early stage of the tender process, differing views within government emerged in relation to who would be the decision-maker and the Government's involvement in the decision-making process for the preferred tenderer. Despite discussions involving PM&C, DFAT and Ministers' offices, this issue was still unresolved in early May 2011, when the Secretary of DFAT received the original Tender Evaluation Report. Given the differing views that existed within government in relation to the decision-making process, the Secretary felt he was not in a position to make a decision on the Australia Network tender. In the circumstance, this was a reasonable approach to take.

3.76 Government involvement in the decision on a preferred tenderer for the Australia Network was considered by the Cabinet in June 2011. This involved the preparation of a series of advices to government and departmental briefs. In preparing these materials: details from the Tender Evaluation Report were included in a brief that was circulated to a number of officers within DBCDE and provided to the Communications Minister's office, and subsequently used to brief the Minister; and the DFAT Secretariat provided information from the Report, including the TEB's recommendations, to PM&C and the former Foreign Minister's office in a draft submission.

3.77 Confidential tender information, specifically the TEB's recommendations were provided to a wide range of ministerial and departmental officers to support Cabinet's deliberations about the tender process. While well intentioned, provision of this information to such a wide audience was unwise. It was appropriate for the departments involved to prepare briefings for their Ministers on the tender, but this should have been on a restricted basis having regard to the sensitivity of the tender process. Live tender information must be closely held, and its provision appropriately authorised by a senior responsible departmental officer to those with a

demonstrable need to know. The probity plan sets out the arrangements to apply to briefing of Ministers during the course of the tender evaluation. For any subsequent briefings, there are obvious benefits in participating departments having a clear understanding in place about the nature and extent of briefing that is likely to be required on such sensitive issues to meet their responsibilities to ministers as well as control the flow of information.

3.78 The advices and departmental briefs show that up to the point at which the Government made the decision to amend the tender process, there continued to be a range of views about the best way forward for the tender process.

3.79 Ultimately, on 20 June 2011 the Government exercised its right to amend the tender process. While the decision to change the tender approver and the addition of an evaluation criterion were in accordance with the conditions of the tender and the requirement of the CPGs, they had a significant impact on tenderers, adding to the time and cost already committed to the tender process.

4. The Amended Tender Process

This chapter examines the implementation of the changes to the tender process and the nominated approver's consideration of the Supplementary Tender Evaluation Report.

Introduction

4.1 The announcement on 24 June 2011 of the amendment to the RFT had a number of practical consequences for key stakeholders in the tender process. These included the:

- tenderers being required to submit new information;
- reconvening of the TEB;
- TEB evaluating the new and existing information received from tenderers in the light of the new evaluation criterion and preparing a Supplementary Tender Evaluation Report;
- new approver deciding on the preferred tenderer for the Australia Network; and
- continuing cross-departmental support to the Government throughout the extended process.

4.2 The ANAO examined the implementation of the amended tender process, the response to complaints that were received during the tender process, and particularly after the changes were announced, and the Communications Minister's consideration of the Supplementary Tender Evaluation Report.

Implementing the amended process

Amending the Request for Tender

4.3 The CPGs provide only limited guidance relating to the modification of tender documentation. In particular, the CPGs emphasise the importance of transmitting modifications and amended documents to all tender participants and providing adequate time to allow initial submissions to be modified and re-lodged.¹⁰⁸ The RFT, released in February 2011, provided DFAT with wide

¹⁰⁸ *Commonwealth Procurement Guidelines*, op.cit., paragraph 8.5.1.

discretion to: alter, amend or vary the RFT; or require additional information or clarification from any tenderer.¹⁰⁹

4.4 In deciding to amend the tender process, the Government agreed that the specific details of the new evaluation criterion, and other consequential changes, would be agreed between the Communications Minister and the Prime Minister. Following the Government's decision on 20 June 2011, officials from PM&C, DFAT and DBCDE and advisers from the offices of the Prime Minister, the former Foreign Minister and the Communications Minister prepared the wording for the additional evaluation criterion to reflect the intent of the Government's decision. The final wording of the new criterion and associated guidance material was agreed by the DFAT Steering Committee in late June 2011 and approved by the Communications Minister, in consultation with the Prime Minister, on 4 July 2011.

4.5 An Addendum to the RFT was provided to the tenderers on 5 July 2011, and released on AusTender on 8 July 2011. The Addendum invited tenderers to submit amended bids addressing an additional evaluation criterion. The new criterion was specified as:

The tenderer's demonstration of how their operation of the Australia Network service would meet the national interests of Australia, and particularly in the light of changed international circumstances since the RFT was issued.¹¹⁰

4.6 The Addendum notification made reference to key emerging markets in South Asia and the Asia-Pacific regions; the significant political transformations occurring in the Middle East and North Africa; and recent consular crises which highlighted the need for strengthened information services. A guidance note for addressing the new evaluation criterion was also made available to tenderers.¹¹¹

¹⁰⁹ DFAT, *Request for Tender for the provision of an international Australian Television service and associated digital media services*, op.cit, clause 4.7.1, 8 July 2011.

¹¹⁰ Inserted at Clause 6.5.1 of the RFT. The Addendum was first published on 6 July 2011, however this contained an incorrect closing date for submissions. The correct Addendum was published on 8 July 2011.

¹¹¹ The Guidance Note was not published on AusTender or publicly released at the time of the announcement. However it was released under a Freedom of Information request in September 2011.

4.7 The justification for the additional criterion was questioned in Parliament, by the media¹¹² and stakeholders interviewed by the ANAO. Both tenderers informed the ANAO that they considered their original submissions had addressed a 'national interest' criterion in responding to the Australian Government objectives for the Australia Network (see paragraph 1.35). Additionally, the Chair of the TEB informed the ANAO that she considered the changing international circumstances of late February and March 2011 were known to the tenderers and addressed in their first submissions to the tender process.¹¹³ At least one TEB member also questioned the need for an additional evaluation criterion, in light of the original criteria. In short, there was a considerable weight of opinion to suggest that the original scope of requirements for the tender was sufficiently broad to capture global events.¹¹⁴

4.8 Nevertheless, the Government considered that the original requirements outlined in the RFT related to Australia's enduring interests in the Asia-Pacific region, while the additional criterion was designed to reflect Australia's role in the global economy. It should be noted that while the Guidance material for the additional criterion referenced international developments in the Middle East and North Africa, the Australia Network does not currently broadcast to the Middle East or North Africa and the RFT did not specify an expansion into these regions as a requirement of the new contract.

Complaints relating to the tender process

4.9 The announcement of the changes to the tender process was the catalyst for a range of complaints being made about the tender process. From July 2011 onwards the DFAT Secretariat received several formal complaints from both tenderers as well as a series of other email correspondence,

¹¹² See for example, *Senate Official Hansard*, 43rd Parliament, 4 and 7 July 2011, and media reports including D Flitton, 'Late rule change undercuts bid for national TV service', *The Age*, 4 July 2011; M Simons, 'Cabinet in the dark on shambolic Australia Network bidding', *Crikey*, 4 July 2011; and D Flitton, 'Once firm Sky bid up in the air', *The Age*, 14 July 2011.

¹¹³ The TEB Chair informed the ANAO that views on the merit of the additional criterion did not stop the TEB from assessing the additional submissions in good faith.

¹¹⁴ Under the initial tender process, the TEB was to assess the extent to which each tender met the technical, functional, operational and performance requirements outlined in the Statement of Requirements (this was Evaluation Criterion (b)—ranked second-highest in the Tender Evaluation Plan). The opening paragraphs of the Statement of Requirement recognised that the Government was seeking an Australia Network service that 'will support Australia's national interests and meet the Commonwealth Objectives.'

primarily relating to media reports, from one tenderer.¹¹⁵ The ANAO discussed the nature of these complaints with relevant stakeholders and also examined DFAT's management of these complaints.

ANC complaints

4.10 The ANC informed the ANAO that its complaints relating to the tender process included the following:

- The impropriety of the tender process, including media speculation about that process, particularly in advance of specific government announcements.
- ABC initiated contact with government Ministers in breach of its tender declaration.
- ABC corporate and editorial public comments were made in breach of the tender process, including an allegation that an ABC radio program made comments about the tender, with the aim of influencing the decision-making process.
- Apprehended bias of the Minister for Broadband, Communications and the Digital Economy (Senator Conroy) as the nominated Approver for the amended tender process due primarily to the fact that he is Minister for the ABC, the only other tenderer for the Australia Network, and to statements he made in that capacity.¹¹⁶

In addition, the ANC expressed concern regarding prejudice to it as an organisation, as a result of: the 'first tender process' being cancelled after the tenders were submitted and the tender board having reported; the changed tender process and subsequent delays; and the lack of proper responses, or at times any response, to the numerous concerns raised with DFAT.¹¹⁷

Media speculation about the tender process

4.11 Initial correspondence in June 2011 to the DFAT Secretariat from the ANC, raising concerns about media speculation on the tender process, did not use the term 'complaint' and, therefore, was not treated by the Secretariat as a formal complaint. Subsequent correspondence from the ANC outlined

¹¹⁵ The planning and administrative arrangements for the handling of tender complaints are discussed in Chapter 2.

¹¹⁶ Advice received by the ANAO from the ANC, 14 March 2012.

¹¹⁷ *ibid.*

concerns that the correspondence had not been appropriately responded to, and DFAT then launched a formal complaints process.

4.12 The Complaints Officer had difficulty in identifying the specific issues raised by the ANC in its complaint. As a result, the Complaints Officer summarised the key issues for consideration. After reviewing the relevant tender documents, the Complaints Officer sought probity and legal advice on issues raised by the ANC, including advice on whether it was appropriate for DFAT to comment on media reports. A response was then provided to the ANC within 10 days, in accordance with the conditions of the RFT.¹¹⁸ The ANC did not accept the outcome and subsequently requested a review of several decisions conveyed to the ANC during July and August 2011.

ABC initiated contact with Government Ministers

4.13 On 14 July 2011, a media article¹¹⁹ reported that two Cabinet Ministers, the Minister for Resources, Energy and Tourism (the Hon. Martin Ferguson AM MP) and the then Minister for Health and Ageing (the Hon. Nicola Roxon MP), had declared to Cabinet that they had been approached by senior ABC Executives. Specifically, the report stated that the ABC Managing Director had spoken by telephone to the Resources Minister, and the ABC Director of Corporate Affairs had spoken with the then Health Minister when she appeared on an ABC television program. The contacts (made in mid-June 2011) reportedly included reference to the Australia Network tender process. The Resources Minister subsequently confirmed the contact by the ABC Managing Director, however, the Health Minister made no comment on the media report.¹²⁰ Immediately following the publication of these articles, the ANC lodged a complaint with DFAT relating to the reported lobbying of Ministers by the ABC.

4.14 The Australia Network RFT included a specific prohibition on tenderers making public statements about the tender without DFAT's prior consent.¹²¹ Supporting this requirement was a declaration signed by tenderers

¹¹⁸ DFAT, *Request for Tender for the provision of an international Australian Television service and associated digital media services*, op.cit., clause 1.7.2, p. 8.

¹¹⁹ D Shanahan, 'Inappropriate lobbying by ABC bosses', *The Australian*, 14 July 2011.

¹²⁰ D Shanahan, 'Ferguson says ABC lobbied on tender', *The Australian*, 15 July 2011 and A Hall, 'Minister accuses ABC of inappropriate lobbying' *ABC News*, 15 July 2011.

¹²¹ Clause 4.5.1 stated: 'Tenderers must not make any public statements (including without limitation providing information or documents for publication in any media) in relation to this RFT or any subsequent contract arising out of this RFT, without DFAT's prior written approval.'

that they had not, and would not, attempt to improperly influence an officer of DFAT in connection with the preparation or assessment of the tender submitted in response to the RFT, and that they had not approached any Minister or Commonwealth officer in connection with the RFT process other than as permitted in the RFT.

4.15 DFAT investigated the matter with both the ABC and the Minister for Resources, Energy and Tourism. The subsequent response to the ANC noted that, taking into account the fact that the nominated approver for the tender process was, at the time of the contact, the Secretary of DFAT, the department was satisfied there was no evidence to substantiate an allegation of breach of the ABC tenderer's declaration.¹²² In addition, DFAT wrote to both tenderers reminding them of the conditions of the RFT, including the prohibition outlined above.

4.16 The ANAO interviewed the ABC's Managing Director and Director of Corporate Affairs, and the Resources Minister and the then Health Minister, in relation to this aspect of the tender process. These interviews confirmed that both Ministers were approached by representatives of the ABC. However, there were differing recollections between the respective parties regarding the purpose and substance of this contact. These incidents are a timely reminder that particular care needs to be taken in any dealings by parties, or prospective parties, to a government tender process.

ABC corporate and editorial public comments

4.17 Throughout the tender process the ANC expressed concern and lodged formal complaints with DFAT about editorial coverage and public comments made by the ABC about the Australia Network or the Australia Network tender process. Matters raised by the ANC included, but were not limited to: an approach to the ANC by an ABC presenter about the ANC's involvement in the tender process; and an interview with the former Foreign Minister in which an ABC presenter asked the then Minister to confirm whether reports about the preferred tenderer were correct and whether it would be appropriate to give the contract to 'an organisation that will potentially be largely foreign controlled'. The ANC in its correspondence suggested that the ABC be sanctioned, including possible disqualification from the tender.

¹²² DFAT, correspondence to the ANC, 9 September 2011.

4.18 The concerns raised and formal complaints lodged with DFAT were actioned according to DFAT's assessment of their status. In some instances, the material was provided by the ANC for information and was noted by DFAT. In one instance, DFAT issued a reminder to the tenderers about the conditions of the tender and the requirement not to make public statements in relation to the RFT. In responding to the ANC on these matters, DFAT advised that the tender evaluation requires an assessment of each tenderers' level of overall compliance with the RFT and that a robust probity framework was in place to ensure that no tenderer would obtain an improper advantage. DFAT also advised the ANC that, in relation to selected comments made by the ABC, the comments were considered to be general in nature and were not public statements as defined in the RFT.

Apprehended bias

4.19 In late July 2011, the ANC lodged a complaint arguing that the Communications Minister was not able to determine the tender fairly and impartially (that is, there was an apprehended bias for the Minister), given his existing role as the Minister with responsibility for the ABC, and his previous statements in support of the ABC's position (at Senate Estimates in May when he indicated that the ABC had made 'a fine bid').

4.20 DFAT responded to the ANC complaint within 10 days, advising that the department had referred the complaint on apprehended bias to the probity adviser for consideration. On 23 August 2011, the probity adviser wrote to the ANC seeking examples of other statements by the Minister in support of the ABC (apart from the Senate Estimates example already provided by the ANC). The ANC later informed DFAT that it had not received this letter. In September 2011, the Complaints Officer responded to further correspondence from the ANC on this issue, and advised that, based on inquiries, they were satisfied that the Minister's comments were made 'merely to express confidence in the agency involved...and that at that stage Senator Conroy had not seen the bid of the ABC.'¹²³

Internal review of the ANC complaints

4.21 While the process for seeking an internal review of the Complaints Officer's handling of a complaint was not set out in the RFT, the DFAT Complaints Officer, in responding to complainants, advised the process for

¹²³ DFAT, correspondence to the ANC, 9 September 2011.

requesting an independent review. The role of the Internal Review Officer was to independently review the handling of complaints by the Complaints Officer. In completing the review, the Internal Review Officer had authority to uphold, vary or overturn earlier decisions.

4.22 On two occasions, the ANC requested a review of the Complaints Officer's decisions, with each matter referred to the DFAT Internal Review Officer. The Internal Review Officer examined each of the Complaints Officer's decisions and provided an appraisal on the appropriateness of the response to each complaint. The Internal Review Officer supported the assessment made by the Complaints Officer on each occasion. Following these assessments the ANC further corresponded with DFAT expressing dissatisfaction with the internal review process.

4.23 While the role of the Internal Review Officer was to review the assessment of complaints by the Complaints Officer, the review focused on the complaints handling process and whether the decisions reached were appropriate. However, the review did not consider whether the substance of the complaint had been comprehensively identified and suitably addressed. This approach substantially contributed to the ANC's dissatisfaction with the internal review process. Greater engagement with complainants to ascertain the nature and details of complaints would have enabled DFAT to better target its investigations and more appropriately respond to complainants' concerns.

ABC complaint

4.24 The complaint lodged by the ABC on 17 October 2011 related to the alleged disclosure of confidential tender information and the reporting of the supplementary TEB recommendation in the media. DFAT had not provided a response to the ABC at the time the Government terminated the tender. No further action was taken by DFAT in response to the complaint.

Supplementary tender evaluation process

Evaluation of supplementary tender information by the TEB

4.25 After the Tender Evaluation Report for the initial tender process was submitted to the Secretary of DFAT on 5 May 2011, the TEB was effectively disbanded and members considered that their involvement in the process was complete. Following the Government's decision of 20 June 2011 to amend the tender process, the TEB was reconvened with an initial meeting on 15 July 2011. The TEB members completed new conflict of interest forms and

advisers completed deeds of confidentiality and fidelity as required by the Probity Plan.¹²⁴

4.26 By way of background, in the period between May and July 2011 information relating to the confidential Tender Evaluation Report had been circulated to officers within DFAT, PM&C and DBCDE and to the offices of the former Foreign Minister and the Communications Minister. This included the provision of the full report to an officer within DBCDE, for the purpose of preparing a brief for the Communications Minister. The DBCDE TEB member had subsequently advised the DFAT Secretariat that a comprehensive brief had been prepared for the Minister and provided to his office. The ANAO was informed that no record was made of the conversation between the TEB member and the Secretariat or a subsequent discussion between the Secretariat and the probity adviser. Upon the TEB re-convening, the Chair was not advised of the disclosure of the confidential tender information, which was surprising given her responsibility for authorising such disclosures.^{125 126}

4.27 The TEB received the supplementary tender information in late July 2011 and conducted its evaluations throughout August 2011. In assessing the revised bids, the TEB followed a process similar to that adopted for the initial assessment. The amended submissions were assessed against the new criterion and the majority of the existing criteria, to ensure that any impacts on the tenderers' performance against the existing criteria were taken into account.¹²⁷

Recommendations of the Tender Evaluation Board

4.28 The TEB submitted its Supplementary Tender Evaluation Report to the Communications Minister on 30 August 2011. The TEB reported that it had assessed the amended tenders in accordance with the methodology set out in the amended Tender Evaluation Plan. The TEB further reported that it had formed the view that, when assessed against all the evaluation criteria, both

¹²⁴ As discussed in Chapters 2 and 3, the TEB members were not required to complete confidentiality undertakings.

¹²⁵ DFAT, Legal Process Plan (Probity Plan) op.cit., Attachment D: Security, Conflict of Interest and Clarifications, 28 July 2011, p. 19.

¹²⁶ Having such arrangements in place to authorise disclosures to a Minister or their staff is a critical control to safeguard the confidentiality of information during the course of tender evaluation.

¹²⁷ DFAT, Supplementary Tender Evaluation Board Report, RFT DFAT11-CPD-02 Australia Network Addendum 1, 30 August 2011, p. 6.

the ABC and the ANC had the capability to deliver the services. However, while the ABC's amended tender improved its overall position, this improvement was not considered significant enough to increase the ABC's overall rating or affect its relative rating when compared with the ANC's submission. The Supplementary Tender Evaluation Report stated:

It was the unanimous professional judgement of all TEB members that:

- The ABC's Amended Tender warrants a rating of 'good' overall and the ANC's Amended Tender warrants a rating of 'very good' overall;
- The ANC bid offers the best overall value for money;
- Accordingly the Board's original recommendation of selecting the ANC as the Preferred Tenderer remains unaltered.

The TEB also confirms its recommendation that should contract negotiations with the Preferred Tenderer fail for any reason, subsequent contract negotiations with the other Tenderer could be commenced without the need for a further evaluation process.¹²⁸

Consideration of the Supplementary Tender Evaluation Report

4.29 To enable contract negotiations and execution, with a view to the full Australia Network service commencing in February 2012, a decision on the preferred tenderer was required by 16 September 2011. Consequently, the Communications Minister had just over two weeks to consider the TEB's supplementary report, consult his ministerial colleagues, and make a decision. In early September 2011, the Minister appointed a senior lawyer from the AGS to assist him in his role as the approver.¹²⁹ The Secretary of DBCDE also supported the Minister to discharge his responsibilities as the approver for the Australia Network tender.

Consultations with the Tender Evaluation Board

4.30 The Minister sought additional information from the TEB on aspects of the supplementary evaluation on two occasions. On the first occasion, the

¹²⁸ *ibid.*

¹²⁹ The appointment of the AGS adviser for the Communications Minister was a separate role to that of the probity adviser for the tender (also provided by the AGS), which continued in accordance with existing arrangements. The AGS fees for the advice to the Communications Minister were to be paid by DFAT as part of the tender administration costs.

Minister sought responses from the TEB to 20 questions largely focused on the ability of tenderers to provide the services outlined in their submissions, and further details regarding the TEB's assessment of several key areas, including the:

- application of established editorial policies and their impact on the independent and accurate reporting of news and current affairs;
- mitigation of risks associated with non-performance and transition of the service to another service provider;
- financial viability, corporate risk and application of a financial guarantee;
- relationship between audience growth and achievement of the Australian Government's objectives; and
- digital media and programming commitments.

4.31 On the second occasion, an additional set of nine questions was provided to the TEB seeking further clarification on the Board's response to the earlier set of questions. The questions were focused on assisting the Minister to better understand the basis on which the TEB recommended the preferred tenderer. Questions around editorial control and independence, financial viability and non-performance were more applicable to the ANC than the ABC as the incumbent operator with a demonstrated capacity to deliver the service.

Parallel negotiations with tenderers

4.32 In order to further inform his decision on a preferred tenderer, the Minister sought advice on the option of undertaking a parallel contract negotiation process with both tenderers.

Advice to the Minister

4.33 In early September 2011, the Minister sought legal advice, through the Secretary of DBCDE, regarding the option of conducting parallel negotiations with both tenderers, to better inform his decision on which tender offered the Government the best overall value-for-money outcome. The advice indicated that the RFT allowed DFAT to select any number of tenderers with which to negotiate, with a view to selecting a single preferred tenderer.

4.34 The advice also stated that parallel negotiations are, generally, only undertaken where there are two or more tenderers who have been assessed from an overall value-for-money perspective to be very close, with no clear

winner identified. The purpose of the negotiations in these cases is to seek to resolve, as far as possible, all outstanding areas of concern with the remaining tenders. Where a clear winner has been identified in the evaluation process, it was considered that there is not a defensible basis for taking another tenderer forward into parallel negotiations. The advice further suggested that to do so in these circumstances would run the risk of permitting the tenderer concerned to improve their bid and expose the tender process to potential legal challenge from the other tenderer. Accordingly, in such circumstances, it is critical that there be clearly identified deficiencies in both tenders, which need to be legitimately addressed in order for a final decision to be made on a preferred tenderer.

4.35 While the TEB report had identified a preferred tenderer, the advice to the Minister was that the TEB's assessment of the value-for-money of the two tenderers was 'fairly close'. In addition, there were outstanding issues in both submissions which may be resolved or clarified in contract negotiations. Consequently, the advice stated that while it was not without risk, it was open to the Minister to once again refer the matter back to the TEB, and request DFAT to open parallel negotiations with both tenderers with a view to resolving identified areas of concern.

Preparations to commence parallel negotiations

4.36 On 7 October 2011, the Communications Minister's office advised the Secretary of DFAT that, following consultation with his ministerial colleagues and in order to make a final recommendation to government, the Minister had decided that both tenderers should go through a parallel contract negotiation process to: further test the financial reliability of each tenderer given the duration of the proposed contract; clarify commitments made in the tenders; and firm up aspects of both offers. The Minister also selected the lead negotiator.

4.37 In support of his decision to commence parallel negotiations with tenderers, the Minister documented reasons for seeking further clarification of tenders, including questions relating to: the TEB's financial evaluation of both tenders; transition-in plans; tenderers' compliance with draft contract terms; a direct assessment of each tenderer's claimed editorial independence; and the TEB's perceived over-reliance on audience growth as an important differentiating factor in the bids. The TEB had sought the Steering Committee's advice on the emphasis to be given to audience growth during the initial evaluation of the tenders. As noted in paragraph 3.12, the Committee advised

that an expansion of the Australia Network audience was implicit if the Government's overall objectives for the network were to be met.¹³⁰

4.38 By 12 October 2011, DFAT had commenced preparations and had held a meeting with the proposed lead negotiator, Mr Brad Orgill¹³¹, to clarify his role. The Minister later requested that Mr Orgill report back to him with two negotiated contracts, and stated that he did not envisage Mr Orgill providing a recommendation on a preferred tenderer. The Minister also instructed DFAT to disband the TEB and for the Secretary of DFAT to arrange for new officials to be appointed to assist him in developing a submission for government, following the completion of the parallel negotiations.

4.39 The tenderers were not advised of plans to commence parallel negotiations, although DFAT had drafted notices to each tenderer to be sent immediately prior to the process commencing. The parallel negotiation process was delayed due to Mr Orgill's availability and prior to its commencement, scheduled for late November 2011, the Minister announced the termination of the Australia Network tender. The reasons cited were that

due to significant leaks of confidential information to the media, the Australia Network tender process has been compromised to such a degree that a fair and equitable outcome may no longer be able to be achieved.¹³²

4.40 The termination of the tender process and the events leading up to this decision are discussed in Chapter 5.

Concluding comments

4.41 While the Government's decision to amend the Australia Network tender process was in accordance with the CPGs and the RFT, the change to tender criteria was unusual and raised further questions about the tender process.

4.42 A significant change to the tender was the addition of a new evaluation criterion focused on promoting Australia's national interests in the

¹³⁰ The objectives for the Australia Network, as stipulated in the RFT, are outlined in paragraph 1.35.

¹³¹ Mr Brad Orgill is a past Chairman and Country Head of financial services firm UBS Australia. From April 2010 to October 2011 he chaired the Government's *Building the Education Revolution Implementation Taskforce*. See <<http://www.bertaskforce.gov.au/pages/about.aspx>> for more information [accessed 4 January 2012].

¹³² S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Government terminates Australia Network tender process*, media release, Parliament House, Canberra, 7 November 2011.

region, given the changed international environment since the RFT was released in February 2011. The Government's rationale for this change included the political unrest in the Middle East and North Africa. While political unrest had been experienced in Egypt and Tunisia at the time the RFT was released, conflict was yet to arise in other parts of the Middle East, including Libya and Syria. Although the additional criterion included reference to international developments in the Middle East and North Africa, the Australia Network does not currently broadcast to these regions and the RFT did not specify an expansion as a requirement of the new contract. The additional evaluation criterion focused on Australia's national interests in light of the changed international circumstances. Nevertheless, the Government considered that the existing RFT requirements emphasised Australia's role in the Asia-Pacific region and that adding the new criterion would address Australia's role in the global economy.

4.43 During the later stages of the tender, DFAT received complaints (primarily from the ANC) relating to changes to the process, including the appointment of a new approver, and the conduct of a tenderer. While DFAT responded to the formal complaints in accordance with the procedures outlined in the RFT and Tender Evaluation Plan, the department did not, in all cases, fully appreciate the underlying issues or nature of concerns raised by the ANC. As a consequence, the complaints process became a source of frustration for the ANC. A greater emphasis on understanding and clarifying with the tenderer, the nature of their concerns or formal complaints, would have better positioned DFAT to investigate and address the issues raised.

4.44 At the conclusion of the TEB's evaluation of supplementary tender material, the Board considered that the ABC had improved its overall position, but the ANC remained the preferred tenderer. In response to the TEB's recommendations, the Minister sought clarification on the Tender Evaluation Report on two occasions, with a total of 29 questions being put to the TEB. To resolve ongoing concerns regarding key aspects of the TEB's evaluation, the Minister sought legal advice through DBCDE on the option of conducting parallel negotiations with both tenderers and subsequently advised DFAT that he intended conducting a parallel negotiation process.

4.45 Prior to the commencement of the proposed negotiations and notification to the tenderers, the Government decided on 7 November 2011, to terminate the tender on public interest grounds. The Government considered that due to the significant leaks of confidential tender information the tender process could no longer be concluded in a fair and equitable manner.

5. Tender Termination and New Arrangements for the Operation of the Australia Network

This chapter examines the circumstances surrounding the termination of the Australia Network tender process, and the decision that Australia's international broadcasting service should be delivered by the national broadcaster.

Introduction

5.1 On 7 November 2011, the Communications Minister announced that the Government had decided to terminate the Australia Network tender, because of significant leaks of confidential information to the media.¹³³ The Government subsequently announced that the Australia Network service would be delivered by the national broadcaster—the ABC.¹³⁴

5.2 The ANAO examined the circumstances surrounding the Government's decision to terminate the tender, including the advice on which the decision was made, and the subsequent policy decision that the Australia Network service would be provided by the ABC on a permanent basis.

Termination of the tender

Media coverage of the tender

5.3 During the course of the Australia Network tender process, there was a high level of media interest and public scrutiny in the developments of the process. In general, coverage of the tender process was based on publicly available information.¹³⁵ However, a number of articles in May and June 2011 included reference to confidential aspects of the tender process, including:

- the timeline to assess and decide on a preferred tenderer¹³⁶;

¹³³ S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Government terminates Australia Network tender process*, media release, Parliament House, Canberra, 7 November 2011.

¹³⁴ S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Government decides future for Australia Network*, media release, Parliament House, Canberra, 5 December 2011.

¹³⁵ Early media coverage of the tender process related to tender requirements, the likely tenderers, and the level of programming control able to be exercised by government.

¹³⁶ M Bodey, 'ABC is confident of retaining the Australia Network', *The Australian*, 2 May 2011.

- the decision to add an evaluation criterion in late June 2011¹³⁷;
- the initial May 2011 tender evaluation¹³⁸; and
- details of the July 2011 RFT amendments.¹³⁹

5.4 While the Communications Minister and DFAT considered that earlier media articles contained a number of inaccuracies, later media articles were considered to contain detailed references to confidential information related to the tender process. In particular, a newspaper article on 17 October 2011 contained specific references to the TEB's August 2011 supplementary tender evaluation¹⁴⁰, and a further newspaper article on 24 October 2011¹⁴¹ referred to the 2010 ABC Performance Review (*Review of the Australia Network*). The review report had not been publicly released.

5.5 As noted in Chapter 4, formal complaints were lodged by both tenderers with DFAT, relating to information that was considered to be confidential to the tender process that was subsequently reported in newspaper articles.

Initiation of an Australian Federal Police investigation

5.6 At a meeting with departmental officials¹⁴² on 17 October 2011, the Communications Minister raised concerns regarding the apparent leaking of confidential tender information, particularly in light of the recent newspaper article that had directly referenced the supplementary TEB report.

¹³⁷ L Taylor, 'More questions over network', *The Sydney Morning Herald*, 22 June 2011.

¹³⁸ D Flitton, 'Late rule change undercuts bid for national TV service', *The Age*, 4 July 2011 and D Flitton, 'Once firm Sky bid up in the air', *The Age*, 14 July 2011.

¹³⁹ D Flitton, 'Questions on TV Tender' *The Age*, 7 July 2011.

¹⁴⁰ M Day and D Shannahan, 'Sky backed for Australia Network as second tender process call for move away from Aunty', *The Australian*, 17 October 2011. This article included: 'The second tender process to award the \$223 million Australia Network contract has again recommended Sky News. It is understood the four-member assessment panel unanimously supported the Sky News tender over the ABC, citing its superior plans to establish special programming services to China and the Middle East.'

¹⁴¹ D Flitton, 'Rudd forced TV tender', *The Age*, 24 October 2011. This article included: 'The detailed "mid-term" report by the Foreign Affairs Department was never released to the ABC but was prepared last year to help decide the future of the \$223 million service. A final draft of the official review, obtained by The Age, states the ABC "consistently met or exceeded" the performance markers set out in the existing contract. "The quality of the programming was assessed as good, credible and timely and provided far better coverage of the region than other international broadcasters," it said.'

¹⁴² Officials attending the meeting included the Secretary of DFAT, other departmental officials, and an adviser from the AGS.

The Minister also indicated that he had previously sought assurances from DFAT regarding arrangements to ensure the confidentiality of the process.

5.7 In response to the Minister's concerns, the Secretary of DFAT advised the Minister that it was his considered view that, in circumstances where it is believed an unauthorised disclosure of official information had occurred, the matter should be referred to the AFP. The Minister informed the ANAO that he subsequently discussed this matter with the Prime Minister, the Deputy Prime Minister and the Cabinet Secretary, who agreed with the Secretary of DFAT's advice that the appropriate action would be to refer the matter to the AFP. The Minister also requested probity advice on options available to the Government, to respond to the apparent disclosure of confidential tender information. This advice was provided to the Minister on 18 October 2011.

Legal advice relating to the disclosure of confidential information

5.8 The probity advice prepared by the AGS for the Minister noted that the Government was considering requesting an AFP investigation into the source and extent of the leaks. The advice noted that the Auditor-General could be requested to undertake an investigation into the conduct of the tender process, but stated that potential breaches of the *Public Service Act 1999* and the *Commonwealth Crimes Act 1914* may be most appropriately investigated by the AFP. The advice further noted that the matter could be discussed with both the AFP and the Auditor-General before a decision was made on how to proceed.¹⁴³

5.9 The advice outlined the following considerations to be taken into account as part of any response to the suspected release of confidential information:

- should it be decided to conduct an investigation into the leaks, the current process could and probably should be halted until the investigation findings could be considered, but that this assumed that an investigation could be conducted within a short period of time;
- until the source and extent of the leaks was known, there was a possibility that the current process may in some way be tainted/corrupted such that it would not be possible for a fair and equitable outcome to be achieved;

¹⁴³ The matter was not discussed with the Auditor-General or other ANAO officials.

- the recent leaks could be seen to have undermined the integrity of the tender process given that it was not possible to determine at what stage what, if any, other information concerning the tender evaluation process may have been leaked and to whom that information may have been leaked. This would include whether any information may have been leaked to a tenderer; and
- if it appeared that an investigation may take some time to undertake, it was open for the Government to decide to terminate the process on public interest grounds on the basis that a fair and defensible tender process outcome may not be able to be achieved. The advice noted that a decision to terminate would not be without criticism given the delays.

5.10 The advice from the AGS did not specifically recommend the options the Government should adopt. The advice did however note that:

- terminating the tender process would be a significant step given the time, effort and resources (including costs) which had to that date been expended on the project. Termination could, however, be justified on the basis that: (i) evidence suggested that the tender process may have been corrupted or tainted in such a way as to mean that a fair and defensible outcome could not be assured; and (ii) that any investigation was likely to take some time to be completed;
- if there was no investigation into the leaks, a termination of the process would be somewhat difficult to defend—if there were insufficient grounds to warrant an investigation then it would be difficult to justify a termination of the process; and
- continuing on with the tender process would imply that the Government was satisfied that the apparent leaks had not in any way undermined the integrity of the tender process. This was considered to be the least defensible option in the circumstances.

5.11 On 27 October 2011, following consultations between the Secretaries of DFAT, DBCDE, and PM&C, the Secretary of PM&C wrote to the Commissioner of the AFP requesting an investigation into the possible unauthorised disclosure of tender information in the two October 2011 media reports (outlined in paragraph 5.4). An investigation into the possible disclosure of confidential tender information prior to October 2011 was not requested.

5.12 In a subsequent statement to the Senate, the Communications Minister noted that:

During my consideration of the independent panel's report it became apparent that some elements of that report had been leaked to the media.

The leaking of this information clearly compromises the process. The Government regards the leak as serious, so serious as to justify requesting in the Australian Federal Police to investigate the leaks.¹⁴⁴

Grounds for termination

Commonwealth Procurement Guidelines requirements

5.13 Consistent with the CPGs¹⁴⁵, the Australia Network RFT set out the circumstances under which the Government had absolute discretion to terminate the tender process, including where: tenderers did not conform to the requirements of the tender; or the Government considered that terminating the tender was in the public interest.¹⁴⁶

5.14 While the CPGs do not define 'public interest', guidance issued by the Department of Finance and Deregulation indicates that:

- public interest grounds generally arise in response to unforeseen events or new information which materially affect the objectives or reasons underlying original procurement requirements as specified in request documents; and
- the termination of a tender process may be compelled in order to protect the integrity of procurement processes and avoid the awarding of a contract in a manner inconsistent with an announced process.¹⁴⁷

5.15 The Department of Finance and Deregulation guidance also states:

Termination of a procurement process is not appropriate where it is due to dissatisfaction with the outcome of competitive assessment of suppliers through a submission evaluation process conducted in accordance with the

¹⁴⁴ *Communications—Australia Network—Ministerial Statement by the Minister for Broadband, Communications and the Digital Economy*, dated 23 November 2011, Journals of the Senate No. 73, 7 February 2012.

¹⁴⁵ *Commonwealth Procurement Guidelines*, op.cit., paragraph 8.70.

¹⁴⁶ DFAT, *Request for Tender for the provision of an international Australian television service and associated digital media services*, op.cit., clause 4.7.1.

¹⁴⁷ Department of Finance and Deregulation, Financial Management Guidance No.13, *Guidance on the Mandatory Procurement Procedures*, January 2005, p. 51.

stated rules, conditions and criteria set out in the request document and submission evaluation plan.¹⁴⁸

Termination decision and announcement

5.16 On 7 November 2011, the Communications Minister briefed the Government on the tender process, including the suspected unauthorised disclosure of confidential information, the AFP investigation, and the probity advice. The Government subsequently decided to terminate the tender process. In the early evening of 7 November 2011, the Minister announced that, based on probity advice from the AGS, the Government had decided to terminate the Australia Network Tender process on public interest grounds. Specifically, the Minister stated:

The advice which the Government has received is that due to significant leaks of confidential information to the media, the Australia Network tender process has been compromised to such a degree that a fair and equitable outcome may no longer be able to be achieved.

As a result, the Government has taken the decision that it is in the best interests of both tender parties, and the Government, that the process be terminated. The Government has asked the Australian Federal Police to investigate the leaks.¹⁴⁹

5.17 The Minister also announced that the Government would make a decision on the long term arrangements for the operation of the Australia Network no later than March 2012. In the interim, the existing contract with the ABC was to be extended for a further six months (to August 2012) to ensure the continued delivery of the Australia Network service.¹⁵⁰

5.18 The Communications Minister's office issued a press release at 5:56 pm.¹⁵¹ The Minister also advised the ABC and the ANC of the termination by telephone, and DFAT provided written confirmation of the decision by email that evening.¹⁵²

¹⁴⁸ *ibid*, p. 51.

¹⁴⁹ S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Government terminates Australia Network tender process*, *op.cit*.

¹⁵⁰ *ibid*.

¹⁵¹ Email provided by the Communications Minister's office.

¹⁵² Departmental documentation indicates that a telephone message was left for the CEO of ANC, and the Minister spoke to a representative of the ABC. Emails were sent to each tenderer by DFAT at 8:41pm that evening.

5.19 On 23 November 2011, the Minister presented a statement to the Senate¹⁵³ expanding on the reasons underpinning the Government's decision to terminate the tender. The statement outlined that the Government was in the process of undertaking contractual negotiations to confirm, in a binding fashion, the ability to deliver the services as tendered, and that negotiations were made completely untenable by the leaking of confidential information to the media. The Minister further stated that:

There was no way for the Government to assure itself that the final result of its commercial negotiations would not be open to challenge.

Therefore the Government was left with no alternative but to cancel the tender process.

It was not in the public interest for the tender process to continue.

I want to make clear that the Government, after considering legal advice, decided to terminate the tender process on public interest grounds, on the basis that a fair and defensible tender process outcome may not have been able to be achieved. The decision was entirely consistent with the Government's established procurement practices.¹⁵⁴

Impact of the termination

5.20 In response to the Government's decision to terminate the tender, there was significant Parliamentary, public and media commentary surrounding the decision. This commentary was largely focused on the time and financial costs expended by parties to the tender process; the possible impacts on the Australia Network 'brand'; and perceptions of damage to the integrity of public sector procurement processes.

Costs of participation in the tender process

5.21 Key stakeholders, such as the tenderers, DFAT as the tender administrator, advisers to the Government, and TEB members, had invested a substantial amount of time in the tender process over an extended period. In addition, key stakeholders incurred significant costs.

¹⁵³ Senator Conroy presented the Statement to the President of the Senate after the Senate adjourned on 23 November 2011 and the Statement was subsequently tabled by the President of the Senate on 7 February 2012.

¹⁵⁴ *Communications—Australia Network—Ministerial Statement by the Minister for Broadband, Communications and the Digital Economy*, op.cit., p. 3.

5.22 The ABC informed the ANAO that the direct cost of participation in the tender was around \$475 000. The ABC also outlined the substantial involvement of its senior executives throughout the process, noting that this amounted to an ‘opportunity cost of participating in the process’ that the ABC was not able to estimate.

5.23 The ANC has estimated the direct cost of its participation in the tender at around \$1.4 million. The ANC had also incurred costs in preparation of its possible uptake of the Australia Network service, such as options on leasing building space, satellite access and re-broadcasting arrangements. The ANC stated that it had also incurred significant indirect costs. The ANC has approached the Government to seek compensation for the direct costs of participation in the tender.

5.24 In the period 22 November 2010 to 20 March 2012, the costs incurred by DFAT to administer the tender process were around \$770 000 (as noted in Chapter 2, the original budget to administer the tender was \$355 500 and the current budget is \$1 073 976).¹⁵⁵ DFAT’s costs to administer the tender primarily related to fees for the external probity, legal and technical advisers. The cost of administering the tender does not include the costs for DFAT officials involved in the process, or officials from other departments, including the TEB members.

Impact on the Australia Network

5.25 As the Australia Network is a key ‘soft diplomacy’ platform on which Australia’s image is promoted internationally, maintaining the integrity of the ‘brand’ is an important consideration for government. Stakeholders and commentators noted that the protracted and unusual nature of the tender process for the Australia Network service had potentially damaged the Australia Network brand overseas, particularly in those countries that receive broadcast services.

5.26 The ABC informed the ANAO that during the tender process, with agreement from DFAT, marketing activities in the Australia Network broadcast regions had been curtailed, due to the ongoing uncertainty about the Network’s future operations. Further, the ongoing uncertainty meant that

¹⁵⁵ As the tender process progressed and the original envisaged timeline was not met, DFAT sought approval for additional funding to administer the process, as was required under the *Financial Management and Accountability Act 1997*.

opportunities to maximise value-for-money, such as securing long-term re-broadcasting rights or licensing arrangements, had been foregone.¹⁵⁶

Procurement guidance

5.27 In its guidance on the CPGs' mandatory procurement processes, the Department of Finance and Deregulation notes that:

The termination of a procurement process is a serious step with potential legal and management risks that should be considered and addressed before any decision is made. At the least, it can harm an agency's credibility with suppliers that, in turn, may discourage suppliers' participation in future procurements.¹⁵⁷

5.28 The advice to government regarding termination of the tender noted that, while it was allowable under the CPGs, it would 'not be without criticism', particularly given the delays in the process and the investment by the two tenderers. There was also the potential for damage to the credibility of government procurement processes more generally.

5.29 In the wake of the termination, media and public commentary focused on the integrity of the process. In particular, it was noted that the high-profile tender process, which had been amended and subsequently terminated without an outcome, could be viewed unfavourably by key intended audiences of the Australia Network.¹⁵⁸

Future arrangements for the operation of the Australia Network

Advice to government

5.30 In late November 2011, the Government requested the Communications Minister to prepare a submission on options for the future delivery of the Australia Network service. The submission was to be considered by Government on 5 December 2011. The submission, prepared by

¹⁵⁶ ABC, advice provided to the ANAO, 9 December 2011.

¹⁵⁷ *Guidance on the Mandatory Procurement Procedures*, op.cit., p. 51.

¹⁵⁸ *Australian Financial Review* (editorial), 'Asia TV saga fit for a sitcom', 7 December 2011, p. 54, R Gluyas, 'Reputation as safe haven put at risk', *The Australian*, 7 December 2011 and L Taylor, 'TV drama upstaged by political soap opera', *The Age* (opinion piece), 10 December 2011.

DBCDE and informed by legal advice, canvassed a range of options including:

- initiating a new tender process for a 10 year contract, either through a select tender process involving only the previous tender participants, or an open tender process;
- direct negotiation with the ABC to roll over the existing contract (for a maximum of five years);
- direct negotiation with the ABC for a new 10 year contract; and
- a policy decision that the Australia Network service would be no longer contestable, becoming an ongoing function of the ABC, consistent with its operation of Radio Australia and its charter under the *Australian Broadcasting Corporation Act 1983*.

5.31 The submission recommended the final option to government, (together with in-principle support for reimbursement of reasonable costs to the participants in the terminated tender.) There was, however, a different view expressed by departments that provided comments on the Minister's submission. PM&C, the Treasury, the Department of Finance and Deregulation, and DFAT did not support the recommendation for the Australia Network service to become an ongoing function of the ABC¹⁵⁹, instead favouring a competitive open tender to obtain ongoing cost effectiveness and value-for-money service delivery. While departmental views of this kind are intended to inform government consideration of significant policy matters, it is also well accepted and understood by departments that decisions on such policy matters ultimately rest with government.

Decision and announcement

5.32 On 5 December 2011, the Government decided that the provision of the Australia Network service should be removed from further contestability and, in future, be provided by the ABC. In announcing the Government's decision, the Communications Minister stated that:

Having reflected upon the process to date, and what the service really needs to provide, the Government has determined that Australia's international broadcasting service should be delivered by the national broadcaster.

¹⁵⁹ The Attorney-General's Department also commented on the submission, but only on the proposed use of a select tender.

The Australia Network is a major public diplomacy platform, and, as is the case with comparable operators such as the UK's BBC World Service and Germany's Deutsche Welle, the Government believes the service should be provided by Australia's national broadcaster, the ABC.¹⁶⁰

5.33 AGS advice to government indicated that the articulation of the Government's policy position had the effect of removing the need to comply with the mandatory procurement procedures (such as the requirement to undertake a tender process) identified in the CPGs.¹⁶¹ The decision reflected a change in policy direction, given the Government's original announcement indicated that a competitive open tender process would ensure the best possible service in return for the Government's investment.¹⁶²

5.34 The Government considered that the early resolution of the future operating arrangements for the Australia Network, prior to the conclusion of the AFP investigation and this audit, provided the ABC with greater scope to progress and finalise longer-term plans for delivering the service including:

- resolving the ongoing uncertainty about the futures of existing Australia Network staff; and
- long-term contracts for Australia Network content and the transmission and distribution of the service.

Future operating arrangements

5.35 While the Government's decision assigned responsibility for the operation of the Australia Network to the ABC, the arrangements to implement the decision had not been finalised, including any:

- new funding and/or contractual arrangements that may be required to support the delivery of the service;

¹⁶⁰ S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Government decides future for Australia Network*, op.cit.

¹⁶¹ The AGS advice notes that if contractual arrangements were to be used, Appendix A of the *Commonwealth Procurement Guidelines* provides an exemption from the Mandatory Procurement procedures in cases where procurement relates to 'property or services ... where legislation or general government policy requires the use of a government provider (for example tied legal services)'. The advice also indicated that the CPGs would not apply to other forms of arrangements that could be used, such as a funding agreement.

¹⁶² K Rudd, (Minister for Foreign Affairs), *Australia Network for the future*, op.cit.

- roles for departments in establishing or agreeing performance indicators and monitoring and reviewing the ABC's performance in delivering the service; and
- changes that may be considered necessary or desirable to the *Australian Broadcasting Corporation Act 1983*, including changes to allow the Commonwealth to preserve or incorporate powers previously contained in the Australia Network contract.

5.36 The implementation model for the new operating arrangements was to be determined in early 2012.

5.37 At the time the decision was made to award the operation of the Australia Network to the ABC, the Government also considered the issue of reimbursement of tenderers' costs. The process to determine and approve any claim for reimbursement had not been determined at that time. The Government subsequently agreed the process for considering the reimbursement of any claims for costs incurred by tenderers through participation in the Australia Network tender. Under these arrangements, the Communications Minister, supported by DFAT, was to be responsible for taking forward any claim.

Concluding comments

5.38 As a substantial public sector media contract and a key element of Australia's 'soft diplomacy' efforts, the conduct of the Australia Network tender was subject to considerable scrutiny. In general, early media coverage of the tender process related to tender requirements, the likely tenderers, and the level of programming control able to be exercised by government. However, during the latter stages of the tender process, particularly following the Government's decision to change the tender process in June 2011, media coverage increasingly referred to confidential aspects of the tender process.

5.39 While concerns regarding the disclosure of confidential tender information were raised by tenderers as early as June 2011, references in October 2011 newspaper articles to specific aspects of the tender process and internal government documents prompted the Government to request an investigation by the AFP.

5.40 The Government also sought legal advice regarding the potential impact on the tender process from the unauthorised disclosure of confidential tender information. The advice provided to government outlined a range of options, including termination of the process, and the risks that may arise from

each option. On the basis of the advice received, and prior to the conclusion of the AFP investigation, the Government decided on 7 November 2011 to terminate the tender process. The Government considered that: the disclosure of confidential tender information had compromised the process to such a degree that a fair and equitable outcome may no longer be achieved; and the termination was justified on public interest grounds. The Government indicated that the future arrangements for the operation of the Australia Network service would be settled by April 2012.

5.41 The Government's decision to terminate the Australia Network tender brought to a close a protracted and, at the point at which the decision was made, a controversial process. While the process had been ongoing for almost 12 months¹⁶³, an outcome was not achieved and there remained uncertainty regarding the future arrangements for the operation of the Australia Network service.

5.42 In an effort to remove the uncertainty surrounding the arrangements for the future operation of the Australia Network service, the Government brought forward the timeline for settling arrangements and announced on 5 December 2011 that the ABC would provide the service on a permanent basis. The Government's policy decision clarified operational responsibility for the service, although the arrangements under which the ABC would operate were not finalised at the time of the decision. These arrangements were to be settled by early 2012.



Ian McPhee
Auditor-General

Canberra ACT
3 April 2012

¹⁶³ On 23 November 2010, the Government announced that the Australia Network contract would be awarded through a competitive tender process. The tender was lodged on AusTender on 4 February 2011.

Appendices

Appendix 1: Full responses to the proposed report

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Ms Barbara Cass
Group Executive Director
Australian National Audit Office
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AUSTRALIA

23 March 2012

Dear Ms Cass

Re: FORMAL COMMENTS UNDER S19(5) AUDITOR GENERAL ACT 1997

Summary

The Australia Network tenders represent a failure of public administration and highlight the potential risk to a commercial organisation of engaging in business with the Commonwealth, particularly when a government owned entity is the competitor. No Australian business, regardless of industry or size, should be exposed as ANC was by participating, not once but twice, in tender processes that were ultimately cancelled through no fault of their own. This cannot be in the national interest.

Background

In 2005, ANC participated in the previous tender for the Australia Network service. So far as could be observed by ANC, that tender was conducted appropriately and the general and specific tender conditions were observed. ANC was not the successful bidder and the service was awarded to the then, and current, incumbent, the ABC.

We learned from that loss. When over the next five years the quality of the Australia Network service did not improve, and the opportunity to tender again arose, ANC decided after careful deliberation to participate in the 2011 tender process. We believed ANC could provide a superior product more efficiently and better meet the Commonwealth objectives in the interest of all Australians.

The decision to tender was not a decision that was taken lightly. Our two tender bids of 2011, were the product of eight years of research, innovation and financial commitment. For an organisation of our size, participation in the tender meant marshalling external resources and foregoing other business opportunities. This would not have been the case for the only other tenderer, the ABC, who also had the advantage of incumbency.

Australia Network Tender 2011

In my view, the 2011 tender was conducted properly during its initial stage. In retrospect, there were earlier indications that all was not right but the turning point was the Sydney Morning Herald article of 22 June 2011. That article foreshadowed that the tenderers were going to be asked for additional criterion and that the ABC's contract would be extended. It proved remarkably prescient.

Despite the tender being closed, despite the date for notification of the preferred tenderer having passed, despite media reports (not contradicted by government) that ANC was the preferred tenderer chosen by an independent panel, the tenderers were informed on 24 June 2011 that they would need to address additional criterion because of "changed international circumstances", that the decision would receive "Ministerial consideration" and that the ABC's contract would be extended.

The additional criterion related to matters that ANC had already addressed in its initial bid and the Approver or tender decision-maker was also changed to the Minister for Broadband, Communications

and the Digital Economy, Senator Conroy (**Minister**). It was previously a senior officer of the purchasing department, DFAT.

ANC believes that it was treated unfairly vis a vis the only other tenderer the ABC and in the manner the government conducted the tender and handled ANC's various complaints. Our concerns are exacerbated because:

- the Australia Network tender was terminated prematurely through no fault of ANC's while an investigation initiated by the Minister remained underway (and to date does not appear to have reached any public conclusion);
- provision of the Australia Network service was ultimately awarded in perpetuity to the only other tenderer, the ABC.

Process Concerns

ANC made its concerns about the way in which the tender was conducted, and the conduct of the alternative tenderer the ABC, well known to DFAT and later to the Minister. All of ANC's concerns were ultimately dismissed or ignored.

In summary, ANC raised the following issues:

- **The impropriety of the tender process, including media speculation about that process, particularly in advance of specific government announcements.**

References: Sydney Morning Herald article of 22 June 2011 and correspondence from ANC to DFAT of that same date; correspondence from ANC to DFAT of 20 October 2011; Australian Financial Review articles of 4 and 5 November 2011 and correspondence from ANC to DFAT of 4 November 2011, 8 November 2011 and 24 November 2011
- **ABC initiated contact with government Ministers in breach of its tender declaration.**

References: correspondence from ANC to DFAT of 15 July 2011, 19 July 2011, 10 August 2011, 9 September 2011, 15 September 2011, 4 November 2011, 8 November 2011 and 24 November 2011
- **ABC corporate and editorial public comments made in breach of the tender process, including an allegation that an ABC radio program made comments about the tender, with the aim of influencing the decision-making process.**

References: correspondence from ANC to DFAT of 7 July 2011, 14 July 2011, 15 July 2011, 19 July 2011, 29 August 2011, 9 September 2011, 15 September 2011 and 24 October 2011, 4 November 2011 and 8 November 2011
- **Apprehended bias of Senator Conroy as the nominated Approver for the amended tender process due primarily to the fact that he is Minister for the ABC, the only other tenderer for the Australia Network, and to statements he had made in that capacity.**

References: correspondence from ANC to DFAT of 3 June 2011 attaching Senate Committee Minutes of 26 May 2011; correspondence from ANC to DFAT of 26 July 2011, 10 August 2011, 5 September 2011, 9 September 2011, 15 September 2011, 2 November 2011, 8 November 2011 and 15 November 2011
- **Prejudice to ANC of the first tender process being cancelled after the tenders were submitted and the tender board had reported and prejudice to ANC due to the changed tender process and delay.**

References: correspondence from ANC to DFAT of 14 July 2011, 15 July 2011, 27 September 2011, 20 October 2011, 8 November 2011, 12 November 2011, 24 November 2011 and 6 December 2011

- **Prejudice to ANC by the lack of proper response, or at times any response, to the numerous concerns raised by ANC.**

References: correspondence From ANC to DFAT of 14 July 2011, 19 July 2011, 26 July 2011, 29 August 2011, 5 September 2011, 9 September 2011 and 15 September 2011, 8 November 2011, 15 November 2011, 18 November 2011, 19 November 2011 and 24 November 2011

Outstanding Complaints and Requests for Information

The following issues remain substantively unresolved or unanswered:

- Why were changes to the tender process first transmitted through the media rather than directly to tenderers, both in June and November;
- Why was the approver changed to the Minister, after the initial tenders were received, given his role as responsible Minister for the sole alternate tenderer and incumbent service provider, the ABC, and given his department was not the procuring department;
- Whether the Minister or any of his staff met with or had any discussion with a Financial Review journalist in the period 27 Oct 2011 to 4 Nov 2011;
- Why were the news reports about the first tender board's report not referred to the Australian Federal Police (AFP)? Were the various complaints made by ANC about the conduct of the ABC also to be referred to the AFP? What was the scope of the AFP referral;
- Whether negotiations had commenced with the incumbent with a view to finalising the contract prior to the termination of the tender process;
- What reasons underpinned the determination that the ABC had not breached the tender conditions and what materials were considered in making the determination, given significant evidence provided by ANC to the contrary (also whether ABC were counselled about their breaches);
- Request for the copy of the Australian Government Solicitor advice referred to in the Minister's announcement of 7 November 2011 in which privilege was waived; and
- Whether ANC was recommended as the preferred service provider for the Australia Network by each of the two independent tender boards?

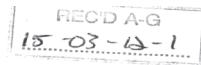
Thank you for considering these formal comments.

Yours sincerely



Angelos Frangopoulos
Chief Executive Officer
Australian News Channel Pty Ltd

The Hon. Martin Ferguson AM MP



THE HON MARTIN FERGUSON AM MP
MINISTER FOR RESOURCES AND ENERGY
MINISTER FOR TOURISM

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Mr Ian McPhee
Auditor General
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27/3/12

Dear Mr McPhee,

Thank you for your correspondence of 20 February 2012 regarding the administration of the Australia network tender process.

I note that the use of the word "confirmed" in the second last sentence of the paragraph numbered 4.18 in the extract of the draft Audit Report supplied to me suggests that the expectations of the person undertaking the audit were confirmed by the interviews undertaken i.e. that the issue was prejudged. It would be unfortunate if the report conveyed such an impression.

The meaning of the balance of the sentence is unclear, and as worded has the potential to be interpreted in a way adverse to my reputation.

There are two relevant aspects to the telephone conversation Mr Scott and I had - first what was said and second the import or purpose of what was said. The Audit Report as drafted does not distinguish these two issues.

If there is agreement concerning what was said the Report should say so.

Alternatively if your enquiries indicate there are differing recollections of what was said, then the Report should state, after detailing those differing recollections, that you were not able to resolve this difference, but that the incident indicates the importance of keeping notes of telephone conversations.

As to the purpose of Mr Scott in making the telephone call the same approach should be taken i.e. there should be a summary of Mr Scott's stated reason for contacting me and a summary of my conclusions as to his reason. Based upon the draft Audit Report supplied to me I would expect you would then observe that you were not able to reach a conclusion either way and that the incident is a timely reminder of the care that needs to be taken in any dealings by parties or prospective parties to government tender processes.

Yours sincerely

Martin Ferguson
9 March 2012

Department of Broadband, Communications and the Digital Economy



Australian Government
Department of Broadband, Communications
and the Digital Economy

Peter Harris

Secretary

Mr Ian McPhee PSM
Auditor-General
Australian National Audit Office
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BARTON ACT 2600

Dear Auditor-General *Ian*

I refer to your letter of 20 February 2012 which covered a copy of the draft report on the Australia Network Tender process.

A number of editorial comments have been provided separately to your officers. The comments below represent the DBCDE response to the report.

At Attachment 1, I include a short version of these comments for publication in the body of the report.

DBCDE is appreciative of the fact that this was a complex process to review. I have two points of comment for the record.

First, I am of the view that the briefing process on 14 June has received somewhat more scrutiny and judgement in the report than is justified by the necessary actions on the day. This Department, unlike others scrutinised, was not involved in the preparation of the Cabinet papers and so received all its information on the subject of the Cabinet meeting via the Minister's office in a few hours prior to the Cabinet meeting. In these circumstances, more officers and Ministerial staff become involved than may perhaps appear desirable after the event. Comments on the number of people who received the brief implies that some could have been removed from circulation of the brief on this occasion. My review of the actions in the particular circumstances on the day is that this could not have been the case.

However, I agree that in more normal circulation processes, fewer recipients of the brief could have and would have been arranged.

Second, I endorse the view that where it can be reasonably expected that Cabinet will be briefed on a tender, the arrangements between Departments who second officers to a Tender Evaluation Board should at the outset explicitly allow for the Departments to brief their Ministers.

This would be consistent with the principle of Cabinet members being thoroughly informed, including being in possession of knowledge related to a TEB report where it is the subject of discussion, before action is taken by Cabinet or a decision is made.

Since these comments bear on Cabinet process in future tender evaluations, I am copying this letter to the Secretary of the Department of Prime Minister and Cabinet.

Thank you for the opportunity to comment.

Yours sincerely



Peter Harris
22 March 2012

Cc:
Dr Ian Watt AO
Secretary
Department of the Prime Minister and Cabinet

Australian Government Solicitor

the leading lawyers to government



Your ref. PAR11163 Our ref. 10075800

26 March 2012

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Dear Ms Cass

Administration of the Australia Network Tender Process

1. We refer to the above matter and to your letter to John Scala and Lynette Lenaz dated 20 February 2012.
2. Thank you for providing us with a copy of the proposed report together with updated extracts.
3. Please find enclosed AGS' formal comments on these updated extracts for inclusion in the final report.
4. Should you have any queries, or wish to discuss this matter further, please do not hesitate to contact the undersigned.

Yours sincerely


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Proposed Audit Report-Administration of the Australia Network Tender Process

Our comments on the extract of the Draft Report provided to me pursuant to subsection 19(3) of the *Auditor-General Act* 1997 are as follows:

(i) Paragraphs 2.27-2.29- these paragraphs include the following statement:

“The tender involved officers from several departments, principally as members of the TEB, which brought a broader perspective to the evaluation but added to the complexity of the tender process. In this circumstance, there would have been merit in the Probity Plan providing guidance to members of the TEB in managing conflicts of interest which may have arisen between their role as members of the TEB and their substantive departmental role.”

Response: **Not Agreed.** The Probity Plan should not be viewed in isolation. This was an issue which all TEB members were acutely aware of. All members of the TEB were senior career public servants and were very much aware of their responsibilities and obligations as APS officers.

As acknowledged by ANAO, the Probity Plan provided for access to tender material to be restricted to the Steering Committee, TEB, DFAT Secretariat and advisers on a “need to know” basis and at the sole discretion of the TEB Chair.

The Probity Plan specifically recognised that the Minister's office may wish to contact DFAT for a briefing about the conduct of the tender process and made it clear that briefings were to be restricted to updates on progress, and were not to disclose details about the tender or evaluation.

If any member of the TEB felt under an obligation to pass sensitive information concerning the evaluation process on to their Minister, their Minister's staff and/or on to other departmental personnel the probity Plan made it clear that this would at first instance be raised with the TEB Chair who would then consult as required with both the Probity and Legal Adviser. As noted by ANAO the Probity Plan also specifically provided for all contact between Ministerial offices and DFAT to be recorded.

The requirement to protect the confidentiality of tenders and tender evaluation material was emphasised at the initial and subsequent probity briefings provided by the Probity Adviser to all TEB members. The Probity Plan should not be looked at in isolation from these associated probity briefings.

The issue of possible Ministerial/Departmental requests for information on the conduct of the tender process was again specifically revisited following the Government's decision to appoint the Communications Minister as the Approver for the AN Tender process and was at that time the subject of further TEB discussion (refer TEB minutes of 29 July 2011).

It is not clear what further guidance as such could have been provided in these circumstances, via the Probity Plan, to TEB members.

ANAO comment: While arrangements for briefing 'the Minister' were outlined in the Probity Plan, the first documented reference of a discussion occurring within the TEB about this matter was 29 July 2011 (paragraphs 3.53 to 3.57 discuss the release of confidential tender information to the office of the former Foreign Minister, Communications Minister and PM&C).

(iii) Paragraphs 2.29-2.30/2.46- these paragraphs also include the following statement:

“APS officers are bound by confidentiality obligations in the course of their employment, and accordingly, DFAT did not require these officers to provide confidentiality undertakings. While the need for the confidentiality of information relating to tenders and their assessment was stressed to all involved in the tender process, requiring members of the TEB or other APS officers to formally acknowledge the confidentiality obligations as outlined in the Probity Plan, or alternatively complete confidentiality undertakings would have highlighted to each individual, in addition to oral advice, the sensitivity of the tender and the need to control disclosure of tender related information.”

Response: **Partially Not Agreed.** In our experience it would be fairly unusual to require APS personnel who are participating in a tender process to execute personal confidentiality undertakings.

When acting as probity advisers we are guided on this issue by the views of our instructing Client Departments. Such a requirement has generally not been something which Client Departments have in our experience been keen to adopt. Reliance is usually placed on the existing obligations on APS personnel to protect the confidentiality of Commonwealth information as set out in the Public Service Act and s.70 of the Commonwealth Crimes Act.

These obligations were reinforced in the Probity Plan and all tender personnel were provided with a detailed probity briefing which further stressed the importance of maintaining confidentiality. Given the seniority of the APS

personnel involved in the TEB, (in the case of the Australia Network all the members of the Evaluation Board were career Public Servants at SES level) on this occasion it was not felt to be necessary to require individual TEB members to provide a written acknowledgement (in addition to their oral undertaking) to comply with the confidentiality arrangements adopted for the AN Tender process.

The draft ANAO Report also notes that the need for the confidentiality of information relating to the tenders and their assessment was stressed to all involved in the tender process.

It is nevertheless agreed that there may be some cases where obtaining a written acknowledgement is appropriate and this is practice which AGS often adopts.

Requiring APS personnel to execute personal confidentiality obligations adds an extra layer to these already pre-existing requirements.

It is also noted that the ANAO Better Practice Guide—*Fairness and Transparency in Purchasing Decisions-Probity in Government Procurement* dated August 2007 specifically states that it is not necessary for APS personnel involved in a procurement activity to execute confidentiality undertakings. The approach adopted for the Australia Network tender process was in compliance with this Better Practice Guide.

(iv) Paragraphs 2.34-2.36 include the following statement:

“The Probity Plan, while updated, did not adequately recognise the involvement of the Communications Minister or the changed role of the Foreign Minister. The Plan specified the arrangements for managing communication with the “Minister” (being the Foreign Affairs Minister)”, but failed to consider the practical application and workability of the previous arrangements, as they were now to be applied to the amended tender process. The cross-portfolio nature of the tender process, combined with the expectation that the Communications Minister would be the approver after consulting with his Ministerial colleagues, increased the complexity and risks associated with the tender process.”

Response: **Partially Agreed.** It is acknowledged that the cross-portfolio nature of the tender process, combined with the expectation that the Communications Minister would be the decision-maker after consulting with his Ministerial colleagues, increased the complexity and risks associated with the tender process.

At no stage however did the Probity Plan specifically define the “Minister” to be the Foreign Affairs Minister as is suggested in the ANAO draft and it is not clear to AGS why the arrangements described in the Probity Plan when read in conjunction with the Tender Evaluation Plan (which was amended to specifically reflect the role of the Communications Minister as the Approver) are viewed by ANAO to be in some way deficient. The Probity Plan should not be looked at in isolation. The Tender Evaluation Plan provided clarity and guidance to the TEB in relation to the role of and the TEB's interaction with the Communications Minister. As the Approver, the Communications Minister also received a specific probity briefing from AGS.

ANAO comment: When the tender process was amended there would have been benefit in the Probity Plan being updated to reflect the cross-portfolio nature of the tender process. Paragraphs 2.35 and 2.27 discuss this matter in more detail.

(v) Paragraphs 3.47-3.49 include the following statements

Nonetheless the interpretation of the advice from the probity adviser, and earlier advice provided by PM&C to the Prime Minister had the potential to constrain Cabinet's ability to consider the option of it acting as the decision-maker for the tender process.

Response: Not agreed.

The advice that was provided by the probity Adviser to DFAT did not say at any point that an approver must be an individual. It refrained from making any such statement of legal principle even when the question of whether an approver must be a single individual was directly asked by [a DFAT officer by] e-mail [on] 24 May 2011.

ANAO has assumed that when AGS said the Minister/Chief Executive 'will need to be the designated “Approver” in the e-mail of 25 May 2011 that AGS thought that necessity flowed from a belief that only an individual could be an approver. The ANAO's assumption on this point seems incorrect.

As now reported by ANAO in the draft report, AGS was not making any general statement of law about whether a group of officials could approve a spending proposal for the purposes of FMA reg 9. Rather, in the specific context of this particular matter AGS was saying that either the Minister or the Chief Executive would 'need' to be the approver because Cabinet would not be well placed to perform the role of approver given what an approver needs to

certify to satisfy the requirements of reg 9.

The ANAO has made an incorrect assumption as to basis upon which we said that the Minister or Chief Executive would ‘need’ to be the approver.

ANAO comment: The ANAO made no assumptions about the advice provided by AGS. Paragraphs 3.47 to 3.49 outline the request from DFAT, the initial advice from AGS and the subsequent advice provided by the AGS to the ANAO.

The advice in the 25 May 2011 email was made in the knowledge that following the decision on a preferred tenderer potentially lengthy contract negotiations would still need to be undertaken to finalise an acceptable agreement in what would be a very tight timeline for contract signature. Earlier paragraphs in the advice not quoted by ANAO do set out the procurement process and the statement is made within that context.

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