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28 May 2009

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Mr John Carter
Secretary
References Standing Committee on Education, Employment and Workplace Relations
The Senate, Parliament of Australia
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Our reference: 13182/13183/80075901

Dear Mr Carter

References Standing Committee on Education, Employment and Workplace Relations: Inquiry into the Department of Education, Employment and Workplace Relations (DEEWR) tender process to award employment services contracts

Thank you for your email of 21 May 2009 to Luke de Jong inviting Clayton Utz to provide any information and/or documentation to the References Standing Committee that may assist it in addressing its terms of reference for the inquiry into the DEEWR tender process to award employment services (ES) contracts.

We set out our response to the Committee's invitation below, which we trust will be of assistance.

Our Role as Probity Advisor

We were engaged by DEEWR in May 2008 to perform the role of independent probity adviser for the procurement process for employment services, which culminated in the Request for Tender for Employment Services 2009-2012 (RFT).

Our role as probity adviser was to monitor and advise from a probity perspective on the conduct of the ES procurement process in accordance with the policy framework and business model determined by the Australian Government for the provision of new employment services, including the government's decision to move to a new integrated employment services model, and to procure employment services through an open tender process.

Our probity role, as an independent adviser to the procurement process, was to ensure that the process was conducted by the Department fairly, transparently and in an ethical and equitable manner, and that due process was followed. For example, this included ensuring that the procedures and methodology set out in the RFT documentation and evaluation plans for the assessment of tenders were followed, and properly applied the evaluation and selection criteria. Our role also included ensuring that, within the framework of the law, policy and guidance applicable to Commonwealth government tenders, each tenderer was treated fairly and that no tenderer was unfairly advantaged or disadvantaged in the process.

We also note that in undertaking a probity function in these circumstances, we are required to have regard to, and advise the Department, consistently with its obligations as an agency of the Commonwealth, on the appropriate application of relevant Commonwealth law, policy and guidance on the conduct of government procurements. These include the:

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- *Financial Management and Accountability (FMA) Act 1997*¹;
- *Financial Management and Accountability Regulations 1997*²;
- *Commonwealth Procurement Guidelines (CPGs) - FMG 1 - January 2005*³;
- *Guidance on the Mandatory Procurement Procedures (Mandatory Guidance) - FMG 13 - January 2005*;
- Australian Public Service Code of Conduct⁴; and
- other Commonwealth procurement guidance as appropriate and relevant to the ES procurement process.

The legislation, and these policy and guidance documents, have a significant impact on the way a procurement process is designed and conducted, particularly the requirements of the CPGs and Mandatory Guidance for open and competitive tender processes, and the treatment of tenderers during such processes.

We consider that, in performing our probity role, we have had sufficient visibility of the ES procurement process to arrive at the findings we have made in respect of the relevant and appropriate application of the above requirements, having overlooked the process in its entirety.

More specifically, and consistently with the probity function described above, our role included:

- assisting in the provision of probity briefings to DEEWR staff and contractors;
- reviewing and advising on documentation provided for the public consultation sessions which occurred prior to the release of the RFT
- reviewing and advising on key procurement documentation, including the RFT, Probity Plan and TEP (and attachments) - although not in relation to settling matters of policy contained in those documents;
- attending meetings of DEEWR's Employment Services Steering Committee (ESSC) and Purchasing Sub Committee (PSC) and advising on probity and procurement issues discussed at such meetings;
- reviewing and advising on tenderer communications;
- attending meetings of the Tender Review Committee (TRC) and providing probity advice as required;

¹ See section 44(1) of the FMA Act in particular.

² See eg. sections 8(1) and 9, which are of specific relevance to the CPGs.

³ The 2005 version of the CPGs was the applicable version of the CPGs at the time the RFT was issued, rather than the subsequent (December 2008) version. A similar situation exists with respect to the Mandatory Guidance.

⁴ As established under section 13 of the *Public Service Act 1999*

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- reviewing DEEWR's security arrangements for the process;
- attending a selection of tenderer debriefings; and
- advising on various ad hoc probity considerations that arose as part of the ES procurement process.

Our Findings

Our more detailed findings on the conduct of the ES procurement process are set out in our report to the Department on the process.

In summary, we consider that the ES procurement process has been very well run (and compares favourably, in our experience, with the best managed of other Australian Government procurement processes). To the extent that probity considerations arose, they were properly dealt with by DEEWR and did not impact on the integrity or probity of that process. In addition, we consider that the procurement decisions that DEEWR made were in accordance with the ES RFT and other process documentation. We consider that DEEWR in its management and implementation of the process, treated all tenderers consistently and fairly, and that no tenderer was provided with any unfair advantage or disadvantage in relation to other tenderers.

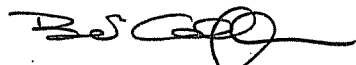
Further, the procurement decisions made by DEEWR under the ES procurement process also, in our view, met all requirements of the Commonwealth law, policy and guidance (as set out above) applicable to the conduct of procurement processes, and to the making of decisions on the outcomes of those processes. We consider that DEEWR's conduct of the ES procurement process represents a high benchmark for the conduct of Commonwealth procurements in that DEEWR not only met, but in many cases exceeded, relevant probity principles and standards.

Further Assistance

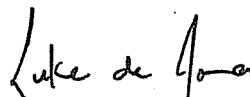
We would be most pleased to further assist the Committee as it requires. In particular, in the context of our role as advisers to DEEWR, we would be happy to assist the Committee regarding this response or otherwise regarding our role as advisers to the ES procurement process, to the extent we can be of assistance.

We thank you for the opportunity to respond.

Yours sincerely



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