



Maddocks

Lawyers
Maddocks House
Level 1, 40 Macquarie Street
Barton ACT 2600
Australia

Telephone 61 2 6120 4800
Facsimile 61 2 6230 1479

info@maddocks.com.au
www.maddocks.com.au

[REDACTED]

25 January 2024

Dr Kilian Perrem
A/g Secretary
Joint Committee of Public Accounts and Audit
Department of the House of Representatives

Email: jcpaa@aph.gov.au

Dear Dr Perrem

Submission to inquiry of Joint Committee of Public Accounts and Audit into the Procurement of the Permissions Capability

Thank you for your email sent on 14 December 2023 inviting Maddocks to make a written submission in relation to the inquiry of the Joint Committee of Public Accounts and Audit into the Procurement of the Permissions Capability.

Our submission is set out in **Attachment A** to this letter for the Committee's consideration.

We confirm that the submission has not previously been published or shown to anyone.

We confirm that we do not require any part of our submission to remain confidential.

Yours sincerely

[REDACTED]

David Newman
Partner and CEO



Maddocks

ATTACHMENT A

SUBMISSION TO JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT INQUIRY INTO THE PROCUREMENT OF THE PERMISSIONS CAPABILITY

Introduction

1. Maddocks welcomes the invitation to provide a written submission in relation to the inquiry of the Joint Committee of Public Accounts and Audit into the Procurement of the Permissions Capability.
2. Maddocks was contracted in 2018 by the former Department of Immigration and Border Protection to provide probity services in relation to the Visa Reform Project; and in 2020, was contracted by the Digital Transformation Agency (DTA) and, subsequently, the Department of Home Affairs (**Home Affairs**), to provide probity services in relation to the Permissions Capability procurement.
3. However, for the reasons set out in this submission, Maddocks is constrained in relation to the information we can provide in this submission. Nevertheless, for the assistance of the Committee, we have outlined at a general level the types of tasks undertaken by a law firm engaged by a Commonwealth agency to provide probity services in relation to a major procurement.

Engagement as probity adviser

Visa Reform procurement – multi-stage procurement

4. In May 2017, Maddocks submitted a quote to the former Department of Immigration and Border Protection to provide probity advisory services in relation to modernising visa and citizenship business practices and associated procurement processes.
5. This request for quote process appears to have been competitive as Maddocks was not engaged as the probity adviser for the first stage (the request for expressions of interest stage) of the multi-stage procurement.
6. However, Maddocks was subsequently contracted through a work order commencing in May 2018 issued under the previous Commonwealth Legal Services Multi-Use List ¹ to provide probity advisory services in relation to the second (request for tender) stage of the procurement.

Permissions Capability – single stage procurement

7. Contracts with Maddocks for provision of probity services in relation to the Permissions Capability procurement were entered into pursuant to the Whole of Australian Government (**WoAG**) Legal Services Panel Head Agreement between the Commonwealth and Maddocks.²
8. Maddocks submitted a quote to the DTA in June 2020 for provision of probity services in relation to the Permissions Capability procurement process. Maddocks was contracted by the DTA to provide these probity advisory services through a work order that commenced on 7 July 2020.

¹ From 1 June 2012, Australian Government departments were required to procure legal services only from law firms that were included in the Legal Services Multi Use List (**LSMUL**). Maddocks was included in the LSMUL.

² The Panel Head Agreement was executed by the Commonwealth of Australia (represented by the Attorney-General's Department) on 6 August 2019.



Maddocks

9. In September 2020, Maddocks submitted a quote to Home Affairs for provision of probity services in relation to the permissions based workflow processing capability project. Home Affairs contracted Maddocks for the provision of probity advisory services in relation to the open market procurement for the provision of a whole of government workflow capability (also called the 'permissions capability'), through instructions³ that commenced on 26 October 2020.
10. Maddocks is not aware of whether the request for quote processes conducted by the DTA or Home Affairs respectively were competitive.

Material produced by Maddocks in its capacity as probity adviser

11. Maddocks is unable to comment on the substance of the matters that come within the Committee's Terms of Reference. This is because:

- 11.1 ***Home Affairs or DTA own the Intellectual Property in Contract Material*** - Under the WoAG Legal Services Panel deed and, therefore, the contracts between Maddocks and the DTA and between Maddocks and Home Affairs respectively, the DTA or Home Affairs (as relevant) own the intellectual property in anything created or provided by Maddocks under its contract with each agency respectively, or anything derived from that material.

This means that the DTA or Home Affairs (as relevant) own, for example, any and all advices, plans, sign offs, emails, speaking notes, presentations, protocols, comments on documents and file notes that Maddocks created for the purposes of the contract with each agency respectively, and anything derived from that material (such as copies of documents, or versions of draft documents).

As such, Maddocks does not own any of the material it produced, was asked by Home Affairs or the DTA to produce, or that it created for the purposes of each respective contract.

- 11.2 ***Some advice subject to client legal privilege ('legal professional privilege')*** – From time to time, in the course of providing probity services to the DTA and Home Affairs, Maddocks gave legal advice (see paragraph 15). Where legal advice was provided, the advice and communication relating to the advice is likely subject to legal professional privilege belonging to the DTA or Home Affairs, depending on which agency sought and was provided with our legal advice. A lawyer may only disclose privileged communications if they are clearly instructed to do so by their client.⁴
- 11.3 ***Confidentiality - WoAG Legal Services Panel deed*** – The WoAG Legal Services Panel deed provides⁵ that a party (such as Maddocks) must not, without the prior written consent of the other party, disclose any Confidential Information⁶ of another

³ The WoAG Legal Services Panel Head Agreement (clause 11.3.3) permits agency's to issue a standing work order to law firms on the panel for provision of categories of services. These standing work orders are called 'Bundling Arrangements'. Home Affairs and Maddocks entered into a Bundling Arrangement for Corporate and Commercial Law Services (which includes probity services) on 11 February 2020. Under this Bundling Arrangement, Home Affairs can issue instructions to Maddocks seeking provision of specific services in relation to specific projects or matters.

⁴ Law Council of Australia, *Client Legal Privilege* ([https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/client-legal-privilege#:~:text=Client%20legal%20privilege%20\(CLP\)%2C,advice%20about%20their%20legal%20circumstances](https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/client-legal-privilege#:~:text=Client%20legal%20privilege%20(CLP)%2C,advice%20about%20their%20legal%20circumstances))

⁵ WoAG Legal Services Panel Head Agreement, clause 22.1.1.

⁶ 'Confidential Information' is defined in clause 1.1.1 to include, relevantly, material produced under a contract ("Contract Material") and material given to Maddocks for the purposes of a Contract or derived from that material ("Agency Material").



Maddocks

party (such as the DTA or Home Affairs⁷) without that other party's prior written consent. The definition of 'Confidential Information' is such that it includes:

- material Maddocks produced, was asked to produce, or created for the purposes of its contracts with the DTA and Home Affairs respectively ('Contract Material'); and
- material given to Maddocks by the DTA or Home Affairs for the purposes of the relevant Contract or derived from that material ('Agency Material').

This obligation of confidentiality has an exception which permits the Attorney-General's Department or an Agency to disclose Confidential Information in response to a request from a Committee of the Parliament of Australia.⁸

However, this exception does not apply to the legal services provider (such as Maddocks) that is a party to the WoAG Legal Services Panel deed. This means that Maddocks would need to obtain the written consent of the DTA and Home Affairs were it to provide the Confidential Information of the DTA or Home Affairs in these submissions.

- 11.4 **Confidentiality – Solicitor's Conduct Rules** – The Maddocks lawyers who provided probity services to the DTA and Home Affairs were located in Maddocks Canberra office. They are subject to the *Legal Profession (Solicitors) Conduct Rules 2015* (ACT), a legislative instrument made by the ACT Law Society under the *Legal Profession Act 2006* (ACT).

The *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) prohibit⁹ a solicitor from disclosing any information which is confidential to a client and acquired by the solicitor during the engagement to anyone except, in summary, another person in the solicitor's law practice or a barrister who has been contracted by the solicitor's law practice to deliver legal services in relation to the client.

The only relevant exception to this obligation would be where the DTA or Home Affairs, as relevant, expressly or impliedly authorised the disclosure.¹⁰

This means the relevant Maddocks lawyers who provided probity services to the DTA and Home Affairs are under a legal obligation of confidentiality with respect to information that is confidential to the DTA or Home Affairs and was acquired by them during the contracts with the DTA or Home Affairs respectively, unless the DTA or Home Affairs (as relevant) expressly or impliedly authorise Maddocks to disclose that information.

Role of probity adviser in major Commonwealth procurements generally

12. Notwithstanding the above, outlined below for the assistance of the Committee is a general description of the role of a law firm engaged as the probity adviser in relation to major Commonwealth procurements, based on our experience.
13. In terms of our experience in this regard, Maddocks has six partners in the Canberra office who have experience providing probity services to Commonwealth agencies in relation to their procurements. This includes two partners whose practices are almost exclusively focused on delivering probity services to Commonwealth agencies across all their activities,

⁷ The 'other party' to the WoAG Legal Services Panel Head Agreement is the Commonwealth of Australia, of which the DTA and Department of Home Affairs are a part.

⁸ WoAG Legal Services Panel Head Agreement, paragraph 22.2.1(e).

⁹ *Legal Profession (Solicitors) Conduct Rules 2015* (ACT), clause 9.1.

¹⁰ *Legal Profession (Solicitors) Conduct Rules 2015* (ACT), clause 9.2.



including procurement activities, and who have a combined experience of approximately 17 years delivering probity services to Commonwealth agencies.

14. The Department of Finance website describes the role of the probity adviser as typically advising “on probity issues as they arise during a tender process, possibly in accordance with a probity plan that provides guidance on how probity is to be addressed during the procurement”.¹¹ Finance also states that “[s]ign-off by external probity experts cannot replace officials’ own accountabilities and obligations in regard to the proper conduct of procurement activities”.¹²
15. In our experience, the extent to which a probity adviser is involved in a major procurement depends on the extent to which the individual procuring agency keeps the probity adviser updated on progress of the procurement and instructs the probity adviser to undertake tasks. However, the tasks that a law firm engaged as the probity adviser in relation to major Commonwealth procurements generally would expect to undertake include (but are not limited to):
 - Contributing to the development by the procuring agency and the other advisers (see paragraph 16 below) engaged by the procuring agency, of the procurement strategy and approach and the development of the procurement risk assessment to help ensure probity principles are embedded in the procurement and probity risks are captured in the risk assessment and mitigation measures identified.
 - Advising on the application of, and compliance by officials in the procuring agency with, the Commonwealth Procurement Rules (**CPRs**).¹³ Given that the CPRs are contained in a legislative instrument, this advice may constitute legal advice and be subject to client professional privilege (see paragraph 11.2 above).
 - Advising on compliance with the principles underpinning ethics and probity in Australian Government procurements.¹⁴
 - Preparation of a probity plan and probity protocols relating to specific aspects of the procurement (for example, protocols dealing with how officials should communicate with incumbent contractors that may also be tenderers; negotiation protocols; or interactive workshop protocols); delivering probity briefings to help promulgate the probity measures in the probity plan and any protocols; and advising on compliance (or non-compliances) with the probity plan and probity protocols.
 - Advising on whether interests or relationships declared by individuals or organisations involved in the procurement constitute a conflict of interest and, if so, mitigation and management measures.
 - Reviewing and commenting from a probity perspective on draft procurement documentation such as a draft procurement plan; draft RFT; or draft tender evaluation plan; draft evaluation report prepared by the evaluation personnel; draft negotiation plan; draft post-negotiation report; draft briefs to the delegate; draft correspondence with tenderers.

¹¹ See: <https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement> (paragraph 6).

¹² See: <https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement> (paragraph 11).

¹³ The CPRs are contained in a legislative instrument issued by the Finance Minister under section 105B of the *Public Governance, Performance and Accountability Act 2013* (Cth).

¹⁴ The principles underpinning ethics and probity in Australian Government procurement are listed on the Finance website - <https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement> (paragraph 1).



Maddocks

- Advising on ad hoc probity issues including for example, confidentiality and information handling issues; managing complaints by tenderers relating to probity issues; issues relating to whether it is fair and equitable for the procuring agency to exclude a tender (for example, for non-compliance with the RFT); clarification by the agency of aspects of tenders.
 - Attending meetings of the evaluation committee and procurement steering committee to observe deliberations are being undertaken fairly and in accordance with the pre-approved evaluation methodology set out in the tender evaluation plan (in the case of the evaluation committee) or the terms of reference (in the case of the procurement steering committee), and providing advice from a probity perspective as needed.
 - Providing probity sign offs at key points in the procurement. Generally, the sign offs provided include a sign off that the draft procurement documentation (the RFT, tender evaluation plan) are acceptable from a probity perspective; and a sign off that the evaluation report reflects an evaluation process that is acceptable from a probity perspective and complies with the approved methodology outlined in the tender evaluation plan.
16. Maddocks also notes that major Commonwealth procurements generally involve the procuring agency engaging multiple advisers in addition to a probity adviser. This was the case in relation to the Permissions Capability RFT process, as was identified by the Australian National Audit Office in its report.¹⁵ For that procurement, Home Affairs contracted a legal adviser (MinterEllison), a commercial adviser (Deloitte), a strategic adviser (Ngamuru Advisory) and a procurement and contract negotiation adviser (Group 10 Consulting).¹⁶

Maddocks trusts this submission has been of assistance to the Committee and is happy to expand on any aspects of the submission to the extent we can.

¹⁵ ANAO, Auditor-General Report No. 34 2022-23, *Procurement of the Permissions Capability*.

¹⁶ See Auditor-General Report No. 34 2022-23, *Procurement of the Permissions Capability*, paragraph 2.58.