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Official Committee Hansard

SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES
COMMITTEE

Requests for tender for aviation contracts

TUESDAY, 28 JUNE 2011

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SENATE
FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

Tuesday, 28 June 2011

Senators in attendance: Senators Bishop, Johnston, Kroger and Trood

Terms of reference for the inquiry:

To inquire into and report on:

(a) all details concerning the Department of Defence's Request for Tender (AO/014/09) for the provision of air support to the Middle East Area of Operations, and other aviation contracts let by the Commonwealth, to ensure that value-for-money will be achieved, including:

(i) the adequacy of the due diligence process around the choice of potential suppliers from Standing Offer Panels and, more specifically, whether there was existing or any subsequently discovered evidence to warrant non-selection of any of the panel members, or whether the information obtained should have resulted in further inquiry and investigation,

(ii) the requirements of tenders and how effectively these will be met,

(iii) whether the preferred respondent decision was influenced by any vested interests, outside influences or any other perceived or actual conflicts of interest,

(iv) the role of departmental personnel in the tender processes and their adherence to the Commonwealth's procurement policy, as well as any conflict of interest issues arising from the tender process and if any perceived or actual conflicts were declared,

(v) the methodology and adequacy of the decision processes and whether the services to be supplied in the contract were determined on the basis of objective and supportable, current and likely future requirements or were structured so as to unfairly advantage a particular respondent,

(vi) the integrity of governance around the development of Request for Tenders and the subsequent evaluation process, and whether the governance arrangements achieved their intended purposes, including the processes to manage perceived and actual conflicts of interests,

(vii) whether the governance arrangements were adequate and in fact did ensure that there were no perceived or actual conflicts of interest, for any people involved in the lead-up to the decision to tender, and during the tender review, assessment and supplier selection processes, and

(viii) whether the respondents, including directors and other key personnel (whether employees, agents or contractors nominated in the tender response) for the proposed contracts, are fit and proper for the purpose of contracting with the Commonwealth and the adequacy and methodology of this process; and

(b) the adequateness and appropriateness of the processes in determining:

(i) whether the respondents and associated companies supplying services to the respondents have the financial and commercial capacity to deliver the services submitted in their responses,

(ii) whether respondents have the capacity to deliver the services submitted in their responses to a quality and standard that meets the requirements of the Commonwealth and its regulatory authorities and, if so, whether the department was fully satisfied with the services provided by their appointed foreign carrier when they last provided such services (Request for Tender AO/014/09),

(iii) whether the department is in a position to guarantee the security status of all foreign personnel involved in the air-transportation of troops between mainland Australia and its deployment base adjacent to a war zone (Request for Tender AO/014/09),

(iv) whether issues relating to respondents, or their related companies of their contracts in South Africa are such as to warrant their exclusion for consideration on ethical or probity grounds (Request for Tender AO/014/09), and

(v) any other matters relevant to the probity of the procurement processes and the respondents, including the appointment of a permanent and independent probity auditor to oversee the awarding of all aviation contracts by the Commonwealth.

WITNESSES

BROWN, Mr Geoffrey Spencer OAM, Chief Audit Executive, Department of Defence 9
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SCALA, Mr John Joseph, Chief Counsel, Commercial, Australian Government Solicitor**Committee met at 09:03**

ACTING CHAIR (Senator Mark Bishop): I declare open this hearing of the Senate Foreign Affairs, Defence and Trade References Committee. The committee is hearing evidence on the inquiry into the Department of Defence's request for tender for aviation contracts and associated issues. This is a public hearing, and a *Hansard* transcript of the proceedings is being made available. Before the committee starts taking evidence I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, a witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

On behalf of the committee, I would like to thank all those who have made submissions and sent representatives here today for their cooperation in this inquiry. Welcome. Is there anything you wish to add about the capacity in which you appear today?

Mr Scala: I am here in my capacity as an adviser to Defence in conducting a legal and legal process review in respect of this procurement exercise by Defence.

ACTING CHAIR: Thank you very much and thank you for making yourself available for this telephone link-up. Do you wish to make a brief opening statement before we go to questions?

Mr Scala: No, other than to thank the committee for allowing me to give the evidence by telephone. Given the fog in Melbourne this morning, I think it would have been problematic for me to get up there.

ACTING CHAIR: I think you may be right. Wise call. Senator Johnston will open up the questioning.

Senator JOHNSTON: Mr Scala, you received instructions from whom with respect to the matter of the air sustainment support contract?

Mr Scala: I was initially contacted by Mr Harry Dunstall, who at the time was the special legal counsel to the Chief Executive Officer of the Defence Materiel Organisation. He contacted me by telephone on about 1 September last year and asked me to attend an urgent meeting in Canberra the following day to discuss the procurement. I then attended in Canberra on 2 September with my colleague Mr Hilton and had a meeting at that time with Mr Dunstall and, I think, Mr David Lloyd from the Defence legal area to discuss the background to allegations that had been made concerning the conduct of the air sustainment contract procurement process. Following that meeting, I then attended at Campbell Park Defence offices and had further discussions about the background to the matter with David Lloyd and Mr Geoff Brown, who was head of Defence audit.

Also on 1 September, I received via email from Mr Dunstall a copy of draft terms of reference for undertaking a legal and legal process review into the procurement and a copy of terms of reference for the separate engagement of Deloitte to undertake a separate investigation into the probity aspects of the procurement.

Senator JOHNSTON: Who was present at the first meeting?

Mr Scala: My memory is that certainly Mr Dunstall and Mr Lloyd were there. I would need to check through my files to see who else was present. From an AGS perspective, there were me and Mr Hilton.

Senator JOHNSTON: Could you take that on notice for me?

Mr Scala: Certainly.

Senator JOHNSTON: Thank you. Were any minutes or notes about what was said taken at that meeting?

Mr Scala: We took some brief notes at the time.

Senator JOHNSTON: What was said with respect to the contract? What were you told?

Mr Scala: We were informed that there had been some allegations made concerning the conduct of the procurement process and provided with a copy of those allegations.

Senator JOHNSTON: So there was a document with allegations on it?

Mr Scala: No, that is just my description of them. I suppose it would be better described as correspondence detailing complaints or concerns relating to the conduct of the procurement process?

Senator JOHNSTON: Who was the correspondence from?

Mr Scala: I think it was Mr Shaun Aisen.

Senator JOHNSTON: So Mr Aisen had a letter with allegations upon it that you were shown at the first meeting?

Mr Scala: That is correct.

Senator JOHNSTON: Who was at the second meeting?

Mr Scala: The second meeting was also with Mr Lloyd and, as I said, Mr Geoff Brown, who was head of the Defence audit area and was, in a sense, overseeing the conduct of the inquiry.

Senator JOHNSTON: You were given terms of reference?

Mr Scala: That is correct.

Senator JOHNSTON: Were they in written form?

Mr Scala: Yes they were. As I indicated initially, I received a draft of the terms of reference via email on 1 September last year from Mr Dunstall's office.

Senator JOHNSTON: Could we have a copy of that please?

Mr Scala: Certainly. I was going to add that in terms of our actual formal engagement, we were engaged off the Defence legal panel and the process for that was that Defence issued to us a request for legal services on 2 September and that request for legal services attached the final terms of reference. So that might be the appropriate document for us to provide.

Senator JOHNSTON: I am much obliged to you, Mr Scala. It would very good if you could give us that. We would appreciate it. What specifically was your brief with respect to this contract?

Mr Scala: We were asked under the terms of reference to inquire or advise on four specific issues. They were: whether the procurement process complied with the deed of standing offer under which the process was let; whether the procurement process complied with Commonwealth and Defence procurement policy; whether the procurement process and the selection of the preferred tenderer was fair defensible; and, in light of the answers we provided to those first three questions, what were the legal risks of not proceeding to contract with the preferred respondent and what options were there for contracting with a different provider.

Senator JOHNSTON: Thank you for that. That is paragraph 2 of your letter of 15 September effectively.

Mr Scala: That is correct.

Senator JOHNSTON: What areas were you specifically told not to entertain in your review?

Mr Scala: In that context we were advised and aware of the fact that Deloitte were also being engaged to conduct a review process. As I indicated, we had been provided with a copy of their draft terms of reference. As a result of that, our review did not seek to address any specific probity issues concerning the conduct of the procurement as it was our understanding that that would be covered by the Deloitte review. Our focus was principally on the actual conduct of the procurement process, the conduct of the evaluation process and compliance with the existing air services deed of standing offer and with Defence and Commonwealth procurement policy. By way of example, we were not asked to look into whether or not it was appropriate to use the deed of standing offer as the starting point for the procurement, nor were we asked to look into issues of alleged impropriety involving Mr Charlton or into allegations concerning any previous tender process in which Adagold may have participated. As we understood it, Deloitte was looking into those issues as well as into other issues, such as whether the preferred respondent decision was influenced by any vested interests or outside influences, whether the services to be supplied under the contract were determined on the basis of objective and supportable defence requirements and whether governance arrangements were adequate to ensure no conflicts of interest. We understood that they were all matters that Deloitte would be specifically looking at. Having said that, during the course of the review we did consult regularly with Deloitte and shared our thoughts and findings with them on a progressive basis. We did not provide, however, a copy of our final advice to Deloitte as that was covered by legal professional privilege and it was a matter for Defence to determine whether or not it wished to pass that on.

Senator JOHNSTON: Do you consider a breach of the Commonwealth procurement guidelines and a breach of the Defence instructions with respect to employment declarations a probity issue or a legal process issue?

Mr Scala: It essentially falls into both categories. One of the initial issues I did discuss at the meeting on 2 September I referred to was the potential for some degree of overlap between the terms of reference that we had and the terms of reference that Deloitte had.

Senator JOHNSTON: Were you specifically instructed that probity related issues were not part of your brief?

Mr Scala: That is correct.

Senator JOHNSTON: How were you instructed in those terms?

Mr Scala: It was on the basis of our understanding by going through the terms of reference with Deloitte and then discussing areas of overlap. As I mentioned in the meeting that we had, it was clear to us that the probity aspects of this were being specifically tasked to Deloitte.

Senator JOHNSTON: In your paragraph 3 of your letter of 15 September you say, 'Based on your instructions, our review has not sought to address a range of probity related issues.' What specific instructions did you receive touching directly the probity related issues?

Mr Scala: That was a reference to our understanding of the split between Deloitte and AGS based on the terms of reference for both advisers as clarified in the meeting on 2 September.

Senator JOHNSTON: So does that mean you did not have specific instructions from Defence not to touch probity matters?

Mr Scala: The instructions we had were to conduct the legal and legal process review, not probity review, in accordance with the terms of reference that we were given.

Senator JOHNSTON: Was probity compliance an issue from your perspective? I have understood what you have said about the overlap, but was it a legal and legal process issue?

Mr Scala: This is where the overlap in our view occurred. The third term of reference that we were specifically looking at was the issue of whether the procurement process and selection of the preferred respondent was fair and defensible. To form a view on that which we were asked to do, we inherently had to have regard to whether the probity of the project was above board.

Senator JOHNSTON: You can take this on notice if you cannot recall: how much was the account you rendered to Defence for your work on this?

Mr Scala: I think I have that information here. Our original quote for undertaking this work was, I believe, in the region of approximately \$54,000, which included GST and disbursements. When I checked the other day, our total fee to date on this matter, including disbursements and GST is now at approximately \$74,000.

Senator JOHNSTON: Did you have at your fingertips and an understanding of the Deloitte review, the Clayton Utz advice, the PricewaterhouseCoopers review and the audit fraud control division review when you gave your opinion and advice on 15 September in writing?

Mr Scala: I will take each of those separately, if I could. I might need to take this on notice. I do not believe we had a copy of a draft of the final Deloitte report at that time, but we had been having progressive meetings which involved Deloitte and we were both sharing information with each other as we were doing our reports in parallel. We also certainly had a copy of the Defence audit and fraud control report of their investigation. I do not believe we had a copy of the PricewaterhouseCoopers report. Senator, could you clarify what specific Clayton Utz advice you are referring to?

Senator JOHNSTON: Sure. An email of 9 July 2010 addressed to Squadron Leader Cole from Clayton Utz, the specifically Mr Stephen Power and Mr Ruben Bowd.

Mr Scala: I would need to check, but I believe we did have access to a copy of that. I think it is referenced in annexure A to our letter of advice under item 25.

Senator JOHNSTON: I think you are right. That is good. You had read that and you knew what Clayton Utz had said about the matter.

Mr Scala: That is correct.

Senator JOHNSTON: Did the probity issues that they raised give you concern as to the legal and legal process surrounding this contract and tender?

Mr Scala: Do you mean all those documents you referred to or just Clayton Utz?

Senator JOHNSTON: Yes, but specifically the Clayton Utz matter as followed up in the other documents including the audit and fraud control division report.

Mr Scala: I might need to take that on notice because I cannot off the top of my head specifically recall the contents of that email from Clayton Utz.

Senator JOHNSTON: Let me assist. The facts are that there was no probity auditor, no probity adviser, no probity plan, no probity arrangements and no documentation of probity risks.

Mr Scala: Thank you. That does refresh my memory of it. Certainly, we looked at that from the perspective of the usual thing to do in a project of this nature which would be to look at engaging from the outset of the project a probity adviser. If I could make a few comments about that more generally, guidance on the use of probity advisers in Commonwealth procurements is found in a number of different areas. There is specific reference to it in the defence procurement policy manual. There is also an ANAO better practice guide entitled *Fairness and transparency in purchasing decisions* which I think was issued in approximately August 2007. There is also a Department of Finance and Deregulation financial management guideline 'Guidance on ethics and probity in government procurement' which I think was issued back in 2005.

Having said that, and notwithstanding that guidance, there is to my knowledge no hard and fast rule and no specific Commonwealth policy requirement that mandates that you must actually use a probity adviser for certain types of procurements. It very much tends to be left up to a decision of the relevant procurement officer. Having said that, the guidance I have just referred to points to the fact that there are a number of relevant considerations to take into account in deciding whether or not to bring on board a probity adviser. They include questions or issues such as the anticipated complexity of the procurement, its value, whether it is likely to be a fairly high-profile or high-risk type procurement activity and also having regard to the nature of the industry that the procurements might be involved in dealing with and whether it is an industry that, for instance, has a background of being fairly litigious. I think it would be fair to say that, with the benefit of hindsight and certainly based on our experience in acting as probity advisers on a large number of Commonwealth procurement activities, it would not be unreasonable to take the view that a prudent approach would have been to appoint a probity adviser, be that external or internal at the commencement of this procurement.

Senator JOHNSTON: Thank you. Were you aware of the history surrounding the 2005 contract and tender?

Mr Scala: Not really. We became aware of it during the course of the review but it was not something that we were specifically focused on.

Senator JOHNSTON: I appreciate that. So in paragraph 46c. of your letter you actually agree with the audit fraud control division's assessment that this was of such complexity that there should have been all of the probity matters carried out as suggested by Clayton Utz.

Mr Scala: That is correct. As I indicated I think looking at this after the event, given the nature of it, the complexity and the sensitivity of it and being aware, as you say, of the previous 2005 procurement process, this would appear to have been a project that would certainly have benefited from having a probity adviser engaged at the very commencement of it.

Senator JOHNSTON: Was it a matter of legal and legal process?

Mr Scala: As to whether a probity adviser should have been appointed?

Senator JOHNSTON: With the benefit of hindsight.

Mr Scala: I think you could say it is a matter of legal and legal process as well as probity.

Senator JOHNSTON: I go to the issue of the lease. You will note that Clayton Utz talk about the 'unequal treatment' of the assessment of the lease and the lease requirements by the evaluation board. The use of the word 'unequal' causes me some considerable concern and unease. Did you see that that matter was a matter of legal and legal process?

Mr Scala: Yes. We identified, as a result of our initial review process, a number of issues concerning the conduct of this tender process. We provided, as a result of our initial review, advice to Defence which identified a range of concerns we had, in relation to the conduct of the tender evaluation process for this procurement, that needed to be rectified and improved. The issue you have mentioned was one of the issues that we identified as an area of concern in the sense that there appeared to be a failure to equitably assess the risk associated with tenderers not having entered into formal leasing arrangements with aircraft owners. That was an issue where it appeared to us that one tenderer who did not have a formal lease in place but more a letter of comfort seemed to be assessed as if, effectively, the lease was in place, not as if the alternative was the case, as other tenderers were. It was an issue that we identified and raised at the time, and our understanding was that that was an issue that was then rectified in the final source evaluation report.

Senator JOHNSTON: And that particular tenderer who was treated differently and erroneously from the other tenderers was, in fact, the preferred tenderer.

Mr Scala: That is correct.

Senator JOHNSTON: You set out the lack of scoring system transparency in 55A of your correspondence. Indeed, the other reviews talk about it—particularly Clayton Utz. Was that a matter of legal and legal process?

Mr Scala: In the context of what our terms of reference were, it was something we certainly looked at. We were focused on questions of whether the procurement process complied with Commonwealth and Defence procurement policy and whether the process for the selection of a third respondent was fair and defensible. So, in looking particularly at the issues of fairness and defensibility in the evaluation process, we focused on reviewing the tender evaluation plan and methodology adopted for the conduct of this procurement and whether that was applied appropriately in the assessments that were undertaken by Defence.

Senator JOHNSTON: With respect to the mandatory requirements, you have set out that there were in the request specific threshold issues that almost appear as conditions precedent to meet the requirements. You say that these mandatory requirements, as is set out also by Clayton Utz and others, whilst expressed in mandatory terms were not ultimately enforced as mandatory. That is a matter of legal and legal process—it is not?

Mr Scala: Yes, and it is something that I believe we commented on in our report. It reflects the drafting of the request documentation and also the original deed of standing offer. In both those documents there are a number of places where terminology is used which is mandatory in nature—for example, references to 'the tenderer must' and the like. Normally, in a tender process where it is proposed to have a mandatory requirement, under the Commonwealth procurement guidelines they are generally referred to as either minimum form and content requirements, conditions of participation or essential requirements. The Commonwealth procurement guidelines set out what would, generally speaking, fall within a valid condition of participation or a minimum form and content requirement. In this particular procurement there was no requirement in the request documentation which was identified as falling into any of those specific categories. The importance of that is that, normally where you have those identified, you also have a sanction that is attached to it—that is, either a discretion to exclude or, in some cases, an absolute exclusion from further consideration of the tender if it fails to meet that requirement. That is usually the case, say, where you are dealing in particular with conditions of participation and essential requirements.

The problem with this procurement was that, although we had things identified as 'must' in the request documentation, and indeed a standing offer, none of those were actually expressly identified as conditions of participation or essential requirements and the like and none of them specifically had any sanction attached to them—that is, 'if you fail to meet this you will automatically be excluded' or 'we reserve a right to exclude'.

Senator JOHNSTON: Can you say categorically that none of the tenderers were excluded or marked down on their scores because they had not complied with any requirement expressed as mandatory?

Mr Scala: I would have to take that on notice in the context of whether people were marked down against these, but these were not treated as a mandatory requirement in terms of whether people were excluded or not.

Senator JOHNSTON: But it is pretty fundamental to the integrity of the whole system here, is it not, that if matters are expressed as a tenderer must and there is a scoring system that is opaque and not transparent, we need to know, in terms of legal process and fairness, that nobody suffered adversely for noncompliance of an express term in the nature that I have set out.

Mr Scala: I am not aware, Senator, of anybody being excluded from consideration on the basis of failing to meet any of the requirements that were expressed in those terms.

Senator JOHNSTON: Did you seek to find out?

Mr Scala: Yes, Senator, we reviewed the source evaluation report for this procurement.

Senator JOHNSTON: And that clearly set out that nobody had been prejudiced by a nonenforcement of a mandatory term?

Mr Scala: As I say, when you refer to nonenforcement of a mandatory term, the sanction for noncompliance with a mandatory term under procurement guidelines is exclusion from the process, and in this particular exercise there was no such sanction provided for.

Senator JOHNSTON: The preferred tenderer also failed to comply with Defence instructions with respect to one of its employees or consultants. Is that not correct?

Mr Scala: That is correct. It was an issue that we identified and drew to the attention of Defence in the conduct of our review process. There were specific requirements relating to employment of former defence

personnel that were included in the Air Services Deed of Standing Offer. We became aware in the course of our review—I think it was not just the preferred tenderer; it may have been more than the preferred tenderer, but I would need to check my notes on that—that they failed to seek Defence approval for the engagement of Mr Charlton pursuant to that requirement in the Air Services Deed of Standing Offer. I think it is referenced in paragraph 45(b) of our report.

Senator JOHNSTON: That is correct. Thank you. I appreciate that. I have two copies of your report here; one is redacted and one is not. Just bear with me for the moment if you would be so kind. You mention in paragraph 10 that Defence has reserved the right to withdraw the request and that you consider there would be a liability attaching to the preferred tenderer were that to be the case. You go on in paragraph 11 to mention that the preferred tenderer would seek to claim back expenses it had already incurred effectively at Defence's request and with Defence's knowledge. Please explain what you understand by the bracketed words 'at Defence's request and with Defence's knowledge'?

Mr Scala: That relates to, I think, what was the fourth term of reference that we were asked to look at, which was in light of the answers to the first three areas we were examining. We were asked to look at what the legal risks would be of not proceeding with the contract with the preferred respondent and what the options were for contracting with a different provider. In that context, we inquired of Defence as part of our review as to whether or not any activity had been undertaken with respect to this tender process by the preferred respondent in terms of effectively mobilising or getting ready to undertake the service and incurring costs and expenses.

The reference in paragraph 11 is a reference to the advice we received back from Defence to that inquiry which confirmed that the preferred tenderer had been undertaking activities to mobilise to be in a position to start providing the services by the required date. The estimate, I think, referred to in that paragraph of a cost of \$500,000 was the estimate Defence gave to us as to what they envisaged the costs of Adagold were that would have incurred up until that stage in preparing to undertake the provision of the services.

Senator JOHNSTON: Thank you for that. So your understanding is, notwithstanding the PricewaterhouseCoopers, the Deloitte and the Audit and Fraud Control Division review, the preferred tenderer was instructed and assisted to continue preparing to fulfil the terms of the contract.

Mr Scala: That is my understanding, Senator, because...

Senator JOHNSTON: I am sorry: could you repeat that?

Mr Scala: That is our understanding. From my recollection, there was quite a constrained time frame in terms of having the service in place as I think the existing contract was due to expire in a relatively short time period. I know from our investigations, Defence were at the time concerned to ensure that, given the nature of this service and its essential nature in terms of getting troops and equipment to the Middle East at the time, they did not have any gap in the provision of the service. Notwithstanding that they were conducting an inquiry, they also, as I understand it, had Adagold preparing to take over the contract. Should the inquiry identify that there were no issues, my understanding that, notwithstanding that Adagold were mobilising, they were told their appointment as preferred was suspended over this period and they were aware that the inquiry was being undertaken.

Senator JOHNSTON: Is it the case that their appointment was suspended yet they were told to continue to expend resources in preparing to fulfil the contract?

Mr Scala: I would need to check in terms of whether they were actually specifically told to do that as opposed to doing it in any event because they knew that if they did not they would not be in a position if they were successful to commence on time.

Senator JOHNSTON: I am looking at paragraph 20, the last sentence in which you say, 'It is understood that Adagold has taken this action, notwithstanding the fact that they have not as yet been advised whether Defence will be proceeding to contract with them.'

Mr Scala: Yes, that is correct.

Senator JOHNSTON: How would Defence have a liability in those circumstances?

Mr Scala: We understood that Defence were aware that Adagold was undertaking that activity and mobilising.

Senator JOHNSTON: Surely, we would have told them: they do it at their own risk.

Mr Scala: That may have been the case but we were not made aware that they had been informed of that. Through our inquiries, we gained the impression that the preparation was being done with the knowledge and consent of Defence and that Defence did not tell them to stop doing it.

Senator JOHNSTON: But in paragraph 59 you actually liquidate their damages. I find that very curious.

Mr Scala: I think in paragraph 59 we indicated what we would expect Adagold would seek to claim, which related to the expenses it had incurred to prepare to commence the services. The figure of \$500,000 was the figure that Defence itself gave to us.

Senator JOHNSTON: That would only be because Defence had acquiesced surely.

Mr Scala: As paragraph 59 indicates and as the advice we received at the time confirmed, the work that Adagold was doing was being undertaken at Defence's request and with their knowledge.

Senator JOHNSTON: So Defence was committed to the contract and the payment of damages?

Mr Scala: No, Defence was not committed to the contract. The issue was whether they may have been liable for damages because of the work being done by Adagold to prepare to undertake the contract if they were deemed to be successful.

Senator JOHNSTON: But they were preparing at Defence's request, notwithstanding all of the problems.

Mr Scala: As I indicated, our understanding was that was because of the time criticality of having this service in place.

Senator JOHNSTON: Okay, thank you. In paragraph 32 you identify the fact that you have assisted Defence in further refining the SER supporting the tender evaluation working group reports. When did you do that?

Mr Scala: That was early on in our review process. Overall this review exercise took not much more than approximately a fortnight to undertake. Probably about a week into our review process we identified a number of areas where the SER needed to be reviewed and improved and sat down with Defence and worked through each of the areas where we had identified some concerns.

Senator JOHNSTON: In doing a review of the legal process surrounding the procurement process, by providing assistance and perfecting these documents aren't you putting yourself in a conflicted position?

Mr Scala: I do not believe so. We identified these as deficiencies in the process at that time and provided advice to Defence in accordance with our terms of reference in relation to that. We were then asked by Defence to assist in relation to rectification of these issues.

Senator JOHNSTON: So you are doing a review for the client and you are also assisting in the perfecting of the deficiencies arising from that review?

Mr Scala: That is the way it played out.

Senator JOHNSTON: When I received a copy of your correspondence that particular paragraph was redacted.

Mr Scala: That is my understanding.

Senator JOHNSTON: Who did the redaction?

Mr Scala: Initial redactions were done by AGS. I discussed them with Mr Lloyd at the time. I believe he is there and he might be able to also comment on it.

Senator JOHNSTON: Very good. Why was that particular clause redacted?

Mr Scala: Our concern was that the advice we provided was covered by legal professional privilege. It also dealt with commercial-in-confidence issues relating to the conduct of Defence evaluation and information relating to the actual tenderers. My understanding is that it was on both of those bases that Defence agreed with our initial advice to redact parts of our advice. It was not a decision for AGS but for Defence as our client; however, the redactions were initially made on the basis of AGS advice.

Senator JOHNSTON: So no legal advice was sought from you as to any of these redactions?

Mr Scala: Only on the initial redactions.

Senator JOHNSTON: Do you know who specifically carried out the redactions?

Mr Scala: Initially AGS made the redactions and they were discussed between myself and David Lloyd at the time.

Senator JOHNSTON: Lastly, did you consider the deed of standing offer panel and the deed that goes with the panel to be a satisfactory basis to go forward with this contract with the benefit of hindsight?

Mr Scala: As I think I indicated, we did not specifically look at that question in the context of our terms of reference. If you are asking for our opinion on that, I think it would be arguable to say that the deed of standing offer appeared to us to be designed more for ad hoc, one-off types of service provision as opposed to this type of service.

Senator JOHNSTON: Correct.

Mr Scala: I understand that, in preparing the request for tender for this off the back of the deed of standing offer, quite a bit of work had to be done to fit it into it.

Senator JOHNSTON: Thank you, Mr Scala.

Senator TROOD: Mr Scala, I have a question about probity. You said in the early part of your evidence that there was some uncertainty, as you understood it, and some overlap as to whether you were looking into probity matters or PricewaterhouseCoopers were? Is that right?

Mr Scala: Or Deloitte, I think.

Senator TROOD: Given that you thought that you did not have any particular responsibility, why did you include a reference to the probity framework at paragraph 49 in your report? Why did you think it appropriate to make mention of that?

Mr Scala: We made mention of that because one of the terms of reference we were looking at was whether there was compliance with Commonwealth and Defence procurement policy. Under the Defence procurement policy manual, there is a requirement for procurement officers to consider and—I think the reference is 'must'—develop a probity plan for what are referred to as complex or strategic procurements.

Senator TROOD: But it seems to me that this is not a particularly flattering reference.

Mr Scala: In answer to Senator Johnston's questions I think I indicated that, in our view, with the benefit of hindsight and being aware of the 2005 tender process, we would have taken the view that it would have been prudent to have a probity adviser and a proper probity framework in place at the beginning of this process.

Senator TROOD: Indeed, you did say that. The only interest I have at the moment is that you were not asked to contemplate that matter, yet you decided that it was appropriate to make reference to it in your report.

Mr Scala: As I say, that is because there is specific reference to the use and development of an overarching probity plan in the Defence procurement policy manual, which is part of Defence policy, which is one of the issues we were asked to look at.

Senator TROOD: So this was for the purposes of completeness?

Mr Scala: That is correct.

CHAIR: Mr Scala, that is the end of questions this morning. I thank you very much for attending this morning's hearing and for answering the questions of senators.

Mr Scala: Thank you.

Proceedings suspended from 09:48 to 10:06

BROWN, Mr Geoffrey Spencer OAM, Chief Audit Executive, Department of Defence

GRIGGS, Vice Admiral Ray, Chief of Navy, Department of Defence

LLOYD, Dr David, Defence General Counsel, Department of Defence

POWER, Mr Steven, Partner, Clayton Utz

WATT, Dr Ian, Secretary, Department of Defence

CHAIR (Senator Kroger): I welcome witnesses. At the outset, I might suggest that we save any in-camera evidence until the end. It might be a little easier to deal with it that way, if the committee is happy with that.

Dr Watt: I am very happy to proceed that way. I have an opening statement to make, but it does deal with the issues about the in-camera witness. While I do not think there is anything in that statement that would prejudice that witness's identity, I am happy to hold that until we move to issues dealing with events around the disclosure, if the committee would prefer.

CHAIR: I do not think it is a problem to deal with it in your opening statement, as long as there is nothing in it that deals with the identification of the witness and so on.

Dr Watt: It does, however, go to how Defence became aware of a person appearing at the hearings—an additional witness, let us say, who was not listed. If you would prefer, I am happy to hold that until we move into that second half.

CHAIR: I might leave it until the second half just in case there is something in that that we would like to explore further.

Dr Watt: I do not believe there is, but clearly the more information that is around the more information that is around.

CHAIR: Yes. Before we commence, does anyone have any comments to make on the capacity in which you appear?

Vice Adm. Griggs: I am appearing as a former deputy chief of joint operations.

Dr Watt: Chair, from the information that we have from the committee, I take it that we will be dealing with the more general contract issues first, starting with questions the committee might have to Mr Steven Power from Clayton Utz and then other Defence witnesses. Then I understand we are going to talk about a few other things and at the end we will deal with the issues around the identification of the witness.

CHAIR: That is correct. Mr Power, do you have an opening statement?

Mr Power: No, I do not.

CHAIR: Dr Watt, do you want to provide yours first?

Dr Watt: No, I will hold mine, Chair.

CHAIR: Okay. Senator Johnston.

Senator JOHNSTON: Thank you for coming along, Mr Power. I hope you have not had to travel too far. I hope you live in Canberra.

Mr Power: I do, yes.

Senator JOHNSTON: Good. Can we start off with the usual questions. You have had a lot of experience with advising Defence, or maybe just the Commonwealth—don't let me put words in your mouth—as to tendering, probity and compliance with the manual, the defence instructions and those sorts of things.

Mr Power: Sure. I have been a lawyer since 1996 and I have been doing government procurement for approximately seven or eight years and particularly defence procurement since about 2006. At the moment, I primarily focus on defence procurement.

Senator JOHNSTON: Very good. When did you first get instructions and what form did they take with respect to this particular tender?

Mr Power: I received an email from Ben Cole and, off the top of my head, I think it was 13 January.

Senator JOHNSTON: Do you usually get your instructions via an email? Do you have any formal process? Do you have a retainer? How does the system work with respect to Clayton Utz?

Mr Power: For us to be engaged in relation to a defence matter, we are engaged through Defence Legal. I had previously been engaged through Defence Legal to establish the Standing Offer Panel and Ben Cole sent me an email directly in relation to it. I then had to subsequently clear my involvement through Defence Legal.

Senator JOHNSTON: Who do you go to in Defence Legal?

Mr Power: The legal service coordinators at the time.

Senator JOHNSTON: Do you remember a particular contact that you—

Mr Power: I think on this one it was Ted Bilton in Defence Legal.

Senator JOHNSTON: What goes between you and Mr Bilton as to your brief and the acceptance of instructions?

Mr Power: We typically receive a request for legal services. That is a proforma document which provides an outline of the role that we are going to perform on that matter.

Senator JOHNSTON: Is that document drawn by a lawyer?

Mr Power: My understanding—and this would need to be clarified with Defence—is that the particular project, or project area within Defence, would provide the relevant information and it would be cleared by the legal services coordinator in Defence Legal.

Senator JOHNSTON: Do you have any objection to producing for the committee a copy of that document pertinent to this particular contract?

Mr Power: Personally, no. That would be a matter for Defence.

Senator JOHNSTON: You received it; it is your brief. Is there no legal professional privilege attaching to any of that?

Mr Power: I would have to have a look at it, but I do not believe so.

Senator JOHNSTON: If you are satisfied, I think that we would like to see—

Dr Watt: Perhaps Dr Lloyd can help you on that.

Dr Lloyd: Usually legal and professional privilege can attract to a request for legal advice. I am not sure that we can make a blanket statement that there would be no legal professional privilege. I have not seen that particular one so I think that it would be a question of just having a look at it, but in principle I think there would not be a problem. But we would need to have a look at it.

Senator JOHNSTON: On that basis, I am quite impressed that Squadron Leader Cole can just email you and you are at his fingertips, so to speak, to provide him with advice. Is that the way things go?

Mr Power: No that is not right.

Senator JOHNSTON: I am looking at this particular email of 8 July, and the conversations all appear on email, and you said that on 7 June he emailed you.

Mr Power: At that point we had been engaged for the duration of this procurement to provide advice for this procurement—

Senator JOHNSTON: Pursuant to the request for legal services?

Mr Power: Until that procurement was over. Whoever was involved could ring me up at will, because that was part of our engagement.

Senator JOHNSTON: That is what I am getting it. Excellent, I am pleased about that. So you did not have a term of reference or a specific brief; you were just available to provide advice when someone thought there might be some issues?

Mr Power: Aspects of our engagement were specific. For example, our key role was to draft the request document and have it ready to issue to the panel. We had primary carriage for that in relation to that task so we were responsible for getting that in a form ready to release to market.

Senator JOHNSTON: That is important. Did you offer some advice with respect to the appropriateness and suitability of a deed to the panel per se?

Mr Power: The very first email which I received in relation to the matter had a draft request attached to it.

Senator JOHNSTON: All right. What date was that?

Mr Power: I understand that was 13 January. It was in January.

Senator JOHNSTON: The thirteenth of January?

Mr Power: Yes.

Senator JOHNSTON: Goodness! That is pretty early. This is 2009?

Mr Power: It was 2010.

Senator JOHNSTON: Sorry. Good. Yes, I am with you. It was still very early. Could we have a copy of that, please.

Mr Power: Again, that is a matter for Defence.

Dr Watt: Again, we will talk, Senator.

Senator JOHNSTON: So who was the email from?

Mr Power: Ben Cole.

Senator JOHNSTON: And it had what attached to it?

Mr Power: A draft request.

Senator JOHNSTON: A draft request?

Mr Power: Effectively, a draft approach to the panel for this provision of their charter services.

Senator JOHNSTON: Were you asked to adjudicate or advise on the suitability of that document?

Mr Power: Yes, we were.

Senator JOHNSTON: And what did you do?

Mr Power: I reviewed the document. I had various conversations with Ben Cole. We then took the document and, in light of the deed, we then started amending the document and slowly developed the document through an iterative process—a series of meetings and a series of drafts—and put it into a form that was suitable for release.

Senator JOHNSTON: What was the date of this again?

Mr Power: That happened over the next two or three months.

Senator JOHNSTON: When did you receive the email again? I am sorry.

Mr Power: On 13 January.

Senator JOHNSTON: What was the detail contained in the document? Were there weights, trips, passenger numbers or those sorts of things?

Mr Power: I do not have a copy in front of me, but I recollect that there may have been the capacity requirements for the aircraft in that document.

Senator JOHNSTON: Were you familiar with the existing contract?

Mr Power: No, I was not.

Senator JOHNSTON: Did you alter any of those details?

Mr Power: I think the final request was issued in approximately late March. Over that two-month period, amendments were made to the capacity requirements of the aircraft. Some of those amendments, from memory, would have related to legal drafting to put it in a form that was legally enforceable. There may have been amendments to the actual numbers over time.

Senator JOHNSTON: I am very interested in the changes of the numbers and when they were made. I do not expect that you will have those dates and times and precisely what happened at your fingertips, but I think that, if you could take it on notice, I would like to see any documentation that suggests there should be a change to any of the carrying freight capacity, the number of passengers, the number of trips, the nature of the crew in terms of nationality or any of those things that would normally be categorised as variables within the document.

Mr Power: Sure.

Senator JOHNSTON: I would like you to tell me what transpired with respect to their cementing into the contract in terms of time and the changes that they brought. They were all from Squadron Leader Cole?

Mr Power: From recollection, yes.

Senator JOHNSTON: Very good. That went on for, obviously, a number of months, and then we start to see around June a request from Squadron Leader Cole; he starts talking about probity and other issues.

Mr Power: Yes.

Senator JOHNSTON: I think we would really like to see all of the documentation transpiring between January and June. I have a document here called 'Summary of advice provided by Clayton Utz to Defence in relation to the appointment of probity auditor'. Have you seen that document?

Mr Power: I drafted it.

Senator JOHNSTON: So that reference in the bottom left-hand side—'Legal/303721074.1'—is what?

Mr Power: That is a document management number to save the document on outline to our system so we can locate it in the future.

Senator JOHNSTON: And you can go straight to the file and pull that up if you have that number?

Mr Power: Yes.

Senator JOHNSTON: Electronically?

Mr Power: Yes.

Senator JOHNSTON: Very good. I would really like to see what has transpired between you and any other member of the firm and Defence up to this date of 7 June with respect to this contract in terms of your advice and the preparation of the matter. Obviously we will have to haggle with Mr Lloyd if he says no, but we will cross that bridge when we come to it. Things begin ostensibly for the matters I have talked about on 7 June when the squadron leader says to you, 'I have been thinking about the possibility of ministerials.' What did you understand he meant by that?

Mr Power: When I received the email I did not know. Effectively I assumed that he had realised that unsuccessful tenderers may kick up a fuss if they are not successful in the process.

Senator JOHNSTON: Which is pretty well par for the course. That is your bread and butter to some extent.

Mr Power: Yes.

Senator JOHNSTON: Do you know what a ministerial is?

Mr Power: Yes.

Senator JOHNSTON: Did you talk to him on the phone about this email or have a personal discussion with him at all?

Mr Power: That is the summary of the telephone conversation.

Senator JOHNSTON: It was a telephone conversation that you have annotated here. It was not an email.

Mr Power: That is right.

Senator JOHNSTON: So he is pretty nervous about the probity issues?

Mr Power: That was not the impression I got from my conversation with him.

Senator JOHNSTON: He has raised probity issues with you and you are providing legal advice to him.

Mr Power: No, he did not raise probity issues. He raised the prospect of ministerials. I then explored that with him in further detail. During that conversation I asked him, 'Do you have any particular probity concerns to warrant the appointment of a probity auditor?' and he said no.

Senator JOHNSTON: Why did you ask him that question?

Mr Power: Because, as a legal adviser, I would be concerned if he had identified probity issues.

Senator JOHNSTON: So probity issues was one of your first considerations?

Mr Power: Yes.

Senator JOHNSTON: The next telephone discussion is on 9 June.

Mr Power: There was only one telephone discussion. That was on 9 June. The email was sent on the 7th and the telephone discussion was on the 9th.

Senator JOHNSTON: So the top bracket of this document you have prepared is in fact word for word the email.

Mr Power: Yes.

Senator JOHNSTON: In the telephone discussion it was you who raised probity and you wanted to know what he was doing in terms of managing that as an issue with respect to this contract.

Mr Power: No. In his email he raised the prospect of whether Defence should appoint a probity auditor.

Senator JOHNSTON: Where do you say that?

Mr Power: In his email.

Senator JOHNSTON: You have not put that down here though.

Mr Power: Yes, it is—

Senator JOHNSTON: Sorry, here it is: 'I think it would be best to have some form of probity audit at the conclusion of the tender evaluation.' Did that cause you concern?

Mr Power: Yes. That is why I spoke to him. My first question was, 'What do you mean by a probity auditor? What are you proposing?' He responded by saying that he was proposing that a probity auditor be appointed at the conclusion of the procurement to conduct an audit of the procurement. I then explained to him the difference between a probity adviser and a probity auditor. I discussed the limited role of a probity—

Senator JOHNSTON: Did he know the difference?

Mr Power: I explained it to him.

Senator JOHNSTON: Could you tell from his response whether he understood the difference?

Mr Power: I believe he did. I deliberately explained to him that a probity auditor came in at the end and did a retrospective audit.

Senator JOHNSTON: When he raised the issue of some form of probity audit at the conclusion of the tender evaluation, were you concerned about that?

Mr Power: Yes.

Senator JOHNSTON: Why?

Mr Power: Because I assumed that he had identified a potential probity issue. That is why I asked him, 'Do you have any specific probity issues that you have identified?'

Senator JOHNSTON: And he said no.

Mr Power: That is right. That is where it comes back to his comment at the beginning about the possibility of ministerials. I thought he was more concerned about a ministerial.

Senator JOHNSTON: Are you familiar with the history of this contract in its pre-tender form?

Mr Power: As in the 2005—

Senator JOHNSTON: Yes.

Mr Power: No I am not.

Senator JOHNSTON: Are you familiar with the news media surrounding certain personalities attaching to this contract and tender process?

Mr Power: I have subsequently become aware of that.

Senator JOHNSTON: When he said to you that he was not concerned about probity issues, with the benefit of hindsight, is that a good answer to have given you?

Mr Power: I can only speculate on that.

Senator JOHNSTON: Well, you have seen—

Mr Power: I do not know what Ben Cole knew so I cannot speculate.

Senator JOHNSTON: Okay, that is fair enough.

Dr Watt: Senator, hindsight is a wonderful tool, as we all know—

Senator JOHNSTON: It sure is.

Dr Watt: and we have had a lot of that this morning, I have noticed.

Senator JOHNSTON: You discussed with the squadron leader the difference between a probity auditor and a probity adviser. Did you have a preference?

Mr Power: I believe that, at the point in time that that conversation was had in the procurement, there was no real choice. A probity adviser is typically engaged at the beginning of the procurement. A probity auditor is someone engaged typically at the end of the procurement. We were primarily discussing whether an auditor should be appointed at the end of the procurement.

Senator JOHNSTON: Did you provide him with specific advice as to whether there should be a probity auditor appointed?

Mr Power: I asked Ben whether he had identified any probity issues. The answer was no. Given that a probity auditor would be appointed at the end, I indicated to him that it was always open for him or for Defence to

appoint a probity auditor, and in fact that is effectively what happened, and that that decision did not need to be made at that point in time. They could finish the process and then choose to appoint a probity auditor.

Senator JOHNSTON: You were present at the briefing of panel members?

Mr Power: No, I was not. Another person in the Clayton Utz team was present then.

Senator JOHNSTON: Are you aware of the value of the tender?

Mr Power: I am. I understand that it is \$70 million.

Senator JOHNSTON: With extension?

Mr Power: There is an extended term but I do not know the value after the extension.

Senator JOHNSTON: From what you have written here in dot point 4, he asked you whether you would be available to provide advice to the tender evaluation board.

Mr Power: That is right.

Senator JOHNSTON: Your response was?

Mr Power: Yes.

Senator JOHNSTON: What was his role in the whole process?

Mr Power: Ben?

Senator JOHNSTON: Yes.

Mr Power: He was our primary point of contact.

Senator JOHNSTON: Did he have a particular acronym or team that he was a member of?

Mr Power: I do not believe so.

Senator JOHNSTON: Tender evaluation working group—one of the members?

Mr Power: I do not know who was on the tender evaluation board. Ben may have been.

Senator JOHNSTON: We will come to the board in a minute. Was he on the board?

Dr Watt: I think you might be better off, Senator, if we get Vice Admiral Griggs to try to answer those questions.

Senator JOHNSTON: I am not sure he knows the answers. If the vice admiral will take a moment to note the question, I will come back to it if it is convenient to him. If he wants to answer it now—

Vice Adm. Griggs: I will get some clarity, Senator.

Senator JOHNSTON: So you are not actually sure what Squadron Leader Cole's role in the scheme of things was?

Mr Power: No. In the procurement he was our primary point of contact. I am not aware of his specific role in the evaluation.

Senator JOHNSTON: Or title in terms of the process?

Mr Power: That is right.

Senator JOHNSTON: But you said, 'Yes, we can advise the board.'

Mr Power: What I said was that we would be available on an as required basis to provide assistance.

Senator JOHNSTON: That is legal advice, in a technical sense, to the board?

Mr Power: That is right.

Senator JOHNSTON: You then had a general discussion as to the role of a probity adviser as distinct from a probity auditor. How long do you think this conversation on the telephone on 9 June went on for, approximately?

Mr Power: Probably five minutes.

Senator JOHNSTON: You told him that it is not common for agencies to appoint probity advisers when establishing standing offer panels. Had you made any evaluation of whether a standing offer panel deed was appropriate at that stage for this particular contract?

Mr Power: We believed that using the existing panel to conduct this procurement was appropriate.

Senator JOHNSTON: Do you still maintain that view?

Mr Power: Yes I do.

Senator JOHNSTON: When did we introduce the issue of the performance bond?

Mr Power: The request that was issued to the panel did not include a requirement for a performance security. It was introduced, I understand, during discussions with the preferred tenderer.

Senator JOHNSTON: Do you remember the date?

Mr Power: No, I do not.

Senator JOHNSTON: Would it have been after the preferred tenderer had been advised that he was in fact the preferred tenderer?

Mr Power: I understand it was.

Senator JOHNSTON: So there had been a change in circumstances such that a performance bond was injected into the process?

Mr Power: Yes.

Senator JOHNSTON: Do you know why that was?

Mr Power: Not specifically, no.

Senator JOHNSTON: Were you consulted to provide advice upon the performance bond?

Mr Power: I was asked to draft the performance bond and put the relevant provisions into the request document.

Senator JOHNSTON: I am told it is a \$2 million performance bond.

Mr Power: That is right.

Senator JOHNSTON: When did you obtain its execution?

Mr Power: It was provided by a bank and it would have been provided at or shortly after signing the request document.

Senator JOHNSTON: Just broadly, can you tell us what the nature of the performance bond is in terms of the Commonwealth's security for performance?

Mr Power: A performance bond is an irrevocable undertaking by a financial institution to pay an amount up to the maximum amount—in this case, \$2 million—on demand by the Commonwealth. Effectively, one of the benefits of a performance bond is that you can make a claim under the performance bond without having to institute legal proceedings. So it facilitates a—

Senator JOHNSTON: Is it with one of the four big banks?

Mr Power: Yes.

Senator JOHNSTON: What performance has to be met such that no claim will be made upon the bond?

Mr Power: Compliance with the contract.

Senator JOHNSTON: In terms of price?

Mr Power: Just general compliance. If Defence suffers a loss under the contract, it is entitled to make a claim under the performance security.

Senator JOHNSTON: Without a judgment?

Mr Power: The banks will typically not ask a question. But, if you make claim when you are not entitled to, Defence would potentially be in breach of contract with the contractor.

Senator JOHNSTON: And the contract sets that out?

Mr Power: Yes.

Senator JOHNSTON: So the contract's remedy is to sue Defence for breach of contract for claiming upon the bond wrongfully?

Mr Power: Yes.

Senator JOHNSTON: Let's go back to 9 June. What was the resolution at the end of the discussion of 9 June with the squadron leader regarding probity?

Mr Power: I do not think there was a resolution as such. I had given him advice. It was then ultimately a matter for Defence to take on board that advice. As there were no specific probity issues identified during the discussion, I did not believe that there needed to be immediate action taken to appoint a probity auditor.

Senator JOHNSTON: I have the benefit of a document that you sent by email on 9 July—the same day as the conversation—you sent to the squadron leader with a cc to Mr Alan Scheckenbach, Mr Bowd and Mr Reuben. Approximately what time was the phone call?

Mr Power: I do not recall.

Senator JOHNSTON: This is quite a detailed, 3½ page document. It must have been early in the day, was it?

Mr Power: I cannot recall.

Senator JOHNSTON: You would have a note of that, wouldn't you?

Mr Power: Is the email you are referring to the advice in relation to the source evaluation report?

Senator JOHNSTON: It is from you to Squadron Leader Cole, sent Friday, 9 July at 7.57 pm. The attachments are 'Letter to Ben Cole re insurance issues, 8 July'—and we will come to the insurance issues in a minute: 'Ben, please see attached. Steven'. It is a formal letter. I have two on my file—one, I think, was informally emailed with general comments probably pretty quickly after the phone call. You then drafted a formal letter. It does not have a time on it, I do not think. It is a formal letter. I have two on my file. One I think was informally emailed with general comments, probably pretty quickly after the phone call. You then drafted a formal letter. It does not have a time on it, I do not think.

Mr Power: We were asked by Ben to provide two forms of written advice. The first was in relation to a review of the source evaluation report. The second was in relation to an overview of the insurances. We provided that advice in a written format earlier in the week, I understand, by way of email. Then Ben requested me to make the advice more formal and to put it into a letter format, and so that email there is me putting the previous written advice into a letter format and sending it to Ben.

Senator JOHNSTON: So the discussions of several days prior is contained in the 9 July—

Mr Power: No. There weren't discussions. I had provided a more informal email advice earlier, and this is formalising it into a letter format.

Senator JOHNSTON: That fits perfectly with what I have on the file. Now why did he want a review of the SER? I am sorry, I am interrupting. Why did squadron leader want a review of the SER?

Mr Power: I am not sure exactly why. It is quite difficult for a client to ask the lawyer involved in the process to do a review of the SER.

Senator JOHNSTON: To what end? What was the problem? What were you looking to do?

Mr Power: We were instructed to carry out a high-level review of the SER, and we did that. We were not, I guess, second-guessing the evaluation. For example, we were not going back to source documents to check whether they had got the evaluation right. We were just doing a review. As a legal adviser, when you are reviewing a document like that, you are making sure that there is sufficient detail in there. You are making sure that you can follow the reasoning leading up to the ultimate conclusion.

Senator JOHNSTON: But there was no disclosure of any motivation as to why he wanted you to do that.

Mr Power: No. One would assume it was just part of the normal course of obtaining legal advice.

Senator JOHNSTON: And he also wanted you to review insurances.

Mr Power: Yes. That was not, I guess, a technical review of the insurances; it was more a review to identify which of the bidders had provided the relevant insurances, where there were gaps and what would have to be done in the future to follow up those gaps.

Senator JOHNSTON: Did you render an account with respect to all of the work you did on this particular contract?

Mr Power: Yes, we did.

Senator JOHNSTON: Do you remember how much that was for?

Mr Power: I would have to check that. I understand that our account for our total involvement in this matter would have been in the vicinity of \$100,000.

Senator JOHNSTON: Feel free to correct that if you have not checked it, but I am happy with that answer. Let us go to the 9 July email formal advice. You did not verify any of the conclusions reached by the Tender Evaluation Board, but paragraph 2D states: 'The SER does not appear to have treated tenders equally on the point referred to in paragraph 2(c) above'—that is the leasing arrangements.

Dr Watt: Mr Power is suggesting that we might need to go in camera if we are going to discuss these details.

Senator JOHNSTON: If the chairman is happy and the rest of the committee members are happy, I am more than happy.

CHAIR: Senator Johnston, we were going to go in camera at the end of the hearing, but if you want to go in camera now, I am happy to oblige that.

Senator JOHNSTON: I think most of it will probably be in camera and, if it is not, it does not really matter. It is better that it be in camera, I suppose.

CHAIR: We will now go in camera.

Evidence was then taken in camera but later resumed in public—

Senator JOHNSTON: This question is either to the group captain, the admiral or the secretary, as the case may be. Sitting here today looking back over the history of this particular matter, does Defence accept that this particular process and the reviews attaching to it have thrown up a raft of deficiencies in both the planning and evaluation stages?

Dr Watt: There is a tradition in our place: once a senior officer speaks, you cannot differ. Do you want to start?

Vice Adm. Griggs: I think it is clear from the reviews that the process could have been improved. I do not think anyone disputes that fact.

Dr Watt: I think you should hear my answer too. I would agree with that. I think the process could have been improved. One thing that we have never endeavoured to say was that we had a perfect process. We did not. We know that. That came through right from the start of our inquiries into how the tender was done. It is apparent in everything from Mr Brown's report going forward. We do not dispute that. We certainly could do better in that respect. That is why, last time we were here, I talked about a number of changes we were making to our nonprocurement processes to endeavour to do better.

Vice Adm. Griggs: As a result of this process I believe that the processes in place now in Joint Movement Group are much better as a result. We have had two contracts in the last six months: the interim contract that took place between October and November for the MEAO air sustainment contract and the rotary wing contract for Afghanistan where the probity adviser was used. So I think there is evidence here of us learning from what happened and improving our process as a result.

Dr Watt: I think it is also true, again, as we have acknowledged, that there were deficiencies in the tender. But also none of our reviews found a fatal flaw.

Senator JOHNSTON: It depends how you define 'fatal flaw'. And that is unequal treatment—

Dr Watt: That is a judgment.

Senator JOHNSTON: I always think it is a little bit fatal when we are talking about \$70 million plus.

Dr Watt: Again, the question is that what the reviews did not establish is that that determined the outcome. I think Mr Brown can talk about that.

Mr Brown: As I mentioned previously, it was not that people were scored down—the issue was taken evenly across all of them—but the grading of the outcomes. There was not a specific score of five out of 10 if they were graded through the process. If we take the leasing as an example, no-one was disadvantaged by that. It would be extremely unusual to have a broker come into the process with a signed lease.

Senator JOHNSTON: What if the mathematical error that re-designated two and three was on one, if you follow me?

Mr Brown: That is a good point. If it had been close, which it was not—and thankfully we found it before the contract was awarded, as a result of this investigation—the gap was such that it did not matter, but it did swap two to three on a fuel calculation. It was a computation within the spreadsheet where the error was found. Again, it goes to the point of the probity advisor, 'Have you had an audit done of the Excel spreadsheet?' I reiterate: we are in violent agreement across all the reviews of the probity advisor process.

Senator JOHNSTON: I used the expression 'raft of deficiencies' and nobody really wants to take much issue with that.

Dr Watt: We have acknowledged that there were several deficiencies. Whether that is a raft or not, I do not know.

Senator JOHNSTON: All I wanted to ask you was whether they were to be anticipated in this contest. This is a hot contest and has been so since prior to 2005. We had an argy-bargy over that. We then had an unsolicited offer. We then went to tender. We had someone losing the job and someone getting the job. There are always going to be a lot of problems surrounding the administration of this process. The alarm bell was ringing long before we commenced walking down this path and we still got it wrong.

Dr Watt: Let me take issue with the use of the word 'wrong'. We had a tender that had some problems. We acknowledge that and it is not disputed. Did we get it wrong in that we got a very competitive tender, and I have

not heard or seen anything to suggest that we did not, that certainly saved money for the Commonwealth and performed the role it was supposed to? No, we did not get that wrong. Did we get it wrong that we had somehow got one where two should have been and two where one should have been? No, we did not get that wrong.

Senator JOHNSTON: Is that more by luck than by good management?

Dr Watt: I do not think so. The real difference is that the tenderers were chalk and cheese. That is the thing that is hard to get away from in all of this. Did we make a mistake at the start in not putting more arrangements in place, given the history of the industry? I think we would all acknowledge with hindsight that we would have done that.

Senator JOHNSTON: It is a question of confidence and, given what we now know, we all want to be confident that exactly what you have just said is in fact the case, but I think that confidence is dented and may not be there to the extent that we would all hope—you and us.

Dr Watt: All I can say is that, from what I am told, Vice Admiral Griggs has already highlighted some of the things that have changed in the way the joint movement group is doing tenders. It is a small example, but nevertheless it is symptomatic of some of the difficulties we have had. From what our people in the centre of excellence for non-equipment procurement tell me about what is happening now that they have greater involvement, we are solving the problems or avoiding the problems before they occur. That is our ambition.

Senator, you and I both know that we are not going to avoid them all. It is a big organisation with all sorts of different demands on it and there are people with a variety of skills that do not all relate to doing tenders perfectly. But I do think we are working hard on the changes to minimise them, and we will go on doing that. There are lessons learned. As much as I would like to, I cannot magically say 'Yes, we will never make mistakes in tenders again.' Of course we will; that happens. What I can say is that the lessons we have learned out of this mean that we will be a lot more sensibly careful in approaching tenders in the future. I think that is the experience of the people along this table and I think it is also the experience of the SES and star ranks in Defence.

Senator JOHNSTON: Secretary, I have no further questions. I want to thank you for the way that you brought all your team to give evidence to the committee. The other issue that we did not raise in camera was the AFP report, but I think that can wait for another day.

Dr Watt: I do not think we have any further updates to offer.

Senator MARK BISHOP: One issue arises directly out of your most recent remarks, Secretary. I have similarly been lobbied extensively on another major procurement item and a similar set of allegations has been made to me consistently over time. They are just as serious as the matters raised here. I have not yet been authorised to pursue it publicly and I do not know that I am going to. Having said that, I want to ask this question: when tender proposals are put out and guidelines are issued publicly for the tenderers to comply with and then the relevant organisation, DMO or Defence, applies those guidelines to the material proffered by the tenderers, is it entirely permissible or proper for the determining agent in DMO or Defence, as appropriate, to apply a completely new set of guidelines without notice to any of the tenderers as the major source of determining who will receive the contract? That is, completely blindside one or more of the tenderers and, when they ask for an explanation, they are advised, 'That is our process. We're permitted to do it and we stand by our interpretation.'

Dr Watt: It is very difficult for me to answer that as I do not have any idea at all of the particular tender you are talking about. I could make two points about it. One is what I might call the presentational issue. Presentationally, it does not look very strong to me. The other is that I do not know what was actually in the tender documentation and whether that allowed that sort of thing. I just have no idea. I take your point, Senator. There is a pub test issue at the very least.

Senator MARK BISHOP: Yes. It is almost an ethical question. I have had a number of private and public discussions with Mr Brown on his role and how business should be done and might be done in the future. It just struck me from my experience in previous lives that, with multi-hundred-million-dollar contracts over time, for the determining test to be an out-of-the-blue surprise to major tenderers—

Dr Watt: It is difficult for me to comment because I do not know enough about the circumstances or the nature of the tender documentation, but it does appear to be a pub test issue. No doubt, we will find out about that in due course.

Senator MARK BISHOP: We might or we might not. Thank you, Dr Watt.

CHAIR: That concludes matters for today's public hearing. I thank all the witnesses for attending this morning and into the late afternoon. There were questions taken on notice that need to be provided, so I note that

they need to be returned by close of business on Friday, 7 July 2011. There were no documents to be tabled before I arrived this morning. That concludes the session. Thank you very much.

Dr Watt: Thank you, Madam Chair, and thank you for putting up with us so often.

Committee adjourned at 12:03