

## Auditor Report No. 20 2009-10

# The National Broadband Network Request for Proposal Process

## Introduction<sup>1</sup>

6.1 In March 2007, the Australian Labor Party (Labor) released its broadband election policy to increase broadband internet speeds for 98 per cent of Australians by up to forty times. Labor considered that its national broadband network (NBN) would deliver significant national economic benefits and new services for the benefit of many consumers, particularly those in rural and regional areas. Labor committed that, in government, it would:

- partner with the private sector to deliver a fibre-to-the-node (FTTN) NBN over five years to 98 per cent of the population with minimum speeds of 12 megabits per second (Mbps);
- within a six-month timeframe, undertake a competitive assessment of proposals from the private sector to build the network;

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<sup>1</sup> The following information is taken from Audit Report No. 20 2009-10, *The National Broadband Network Request for Proposal Process*, pp. 13-16.

- ensure competition in the sector through an open access network that provides equivalence of access charges and scope for access seekers to differentiate their product offerings;
  - put in place regulatory reforms to ensure certainty for investment; and
  - make a public equity investment of up to \$4.7 billion.<sup>2</sup>
- 6.2 To meet the new Government's tight timeframe, the then Department of Communications, Information Technology and the Arts (now the Department of Broadband, Communications and the Digital Economy (DBCDE or the department)) provided early advice to the Government on the implementation of its broadband election commitments. The Government agreed in January 2008 to conduct a Request for Proposal (RFP) process to select a proponent(s) to build, operate and maintain the NBN. The Government's broadband policy reflected its election commitments, but broadened the technology choice to any fibre-based solution (using FTTN or fibre-to-the-premises (FTTP) architecture). Further, it did not specify a preferred form for the Government's investment in the network, that is, the contribution could have been as an equity investment or some other form of funding. In parallel with the NBN RFP process, the Government invited proponents, industry and public interest groups to provide submissions to the Commonwealth on regulatory issues associated with a fibre-based network, including consumer safeguards.
- 6.3 There was significant public and industry interest in the NBN RFP process and its potential outcome. The department assessed the potential for litigation during the process and at its conclusion as high. Consequently, the department identified the need for the process to be conducted within a strong probity framework and for decisions to be informed by appropriate specialist advice. In the first half of 2008, the department progressively engaged specialist advisers to assist in developing and conducting the RFP process, including: probity adviser; investment, financial and commercial adviser; technical adviser; legal adviser; and regulatory economic adviser.
- 6.4 On 11 March 2008, the Minister announced the membership of the Panel of Experts (Panel), chaired by the department's then Secretary, that would assess the NBN proposals and put forward recommendations to the

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2 Australian Labor Party 2007, *New Directions for Communications: A Broadband Future for Australia – Building a National Broadband Network*, pp. 4 and 19. Before the 2007 election, the current Minister for Broadband, Communications and the Digital Economy also announced (while in Opposition) a six-month timeframe to undertake the competitive assessment process.

Minister for the preferred proponent(s). The Minister also invited industry and public submissions to assist in the development of the RFP document. The RFP document was approved by the Minister and released on 11 April 2008. The document expressed the Government's broadband policy parameters as criteria against which proposals would be assessed, rather than as mandatory requirements. The RFP sought both national proposals and State/Territory-based proposals, covering individual States or Territories, as part of a national solution. Potential proponents were required to meet pre-qualification requirements by 23 May and lodge proposals by 25 July 2008. A subsequent addendum to the RFP process extended the closing date to 26 November 2008.

- 6.5 Eight parties met pre-qualification requirements<sup>3</sup>, although one party subsequently withdrew. The department and the proponents held four rounds of bilateral meetings between June and November 2008 to outline the progress of proposal development, and to clarify aspects of the RFP process and its requirements.
- 6.6 On 26 November 2008, proposals were received from six proponents – four national proposals and two State/Territory-based proposals. The national proposals generally put forward FTTN as the principal technology for providing connections to premises. The department determined that five of the six proposals met the RFP's minimum conditions for participation, and these proposals proceeded to the assessment phase. Telstra's proposal was excluded from the RFP assessment process because it did not meet minimum conditions for participation. The proposal did not include a Small and Medium Enterprise (SME) Participation Plan.<sup>4</sup>
- 6.7 On 20 January 2009, the Panel's Evaluation Report to the Minister advised that the three remaining national proposals had been assessed in accordance with the RFP document and that none offered value for money for the Commonwealth. The panel further concluded that there was no prospect that the proponents would be able to refine their proposals sufficiently to provide value for money. As a consequence, and in accordance with the RFP document, the Panel's assessment of

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3 To be eligible to lodge a proposal, potential proponents were required to lodge with the department a \$5 million bid bond and sign a confidentiality agreement by 23 May 2008. For ease of reference, those potential proponents that met pre-qualification requirements have been referred to as proponents in the report.

4 The RFP minimum conditions of participation were that proposals: be in English; use Australian legal units of measurement; include a completed and signed proponent's declaration; meet the conditions relating to the submission of multiple proposals; and include a SME Participation Plan.

State/Territory-based proposals did not proceed beyond a preliminary review. In conjunction with its Report, the Panel submitted separate advice to the Minister on how the Government's objectives might be achieved outside the parameters of the RFP. Its primary proposition was that FTTP was a preferable, albeit more costly, technology to FTTN, and that the Government should explore incentive schemes to encourage the roll-out of FTTP.

6.8 On 7 April 2009, the Minister terminated the RFP process. All proponents were immediately advised of the Minister's decision and the Government's new policy approach. The Prime Minister, the Treasurer, the Minister for Finance and Deregulation and the Minister jointly announced the establishment of a new company to build and operate a new super-fast NBN (National Broadband Network Company Ltd). At the same time, the Minister released the Panel's observations from the Evaluation Report. The Panel observed that each proposal contained attractive elements and, collectively, they provided a good evidence base for the Government to move its policy agenda forward. The Panel also observed that:

- proposals lacked committed private sector funding;
- none of the national proposals was sufficiently well developed to present a value-for-money outcome;
- no proposal submitted a business case that supported the roll-out in five years of a NBN to 98 per cent of Australian homes and businesses with a Government contribution of \$4.7 billion;
- FTTN is unlikely to provide an efficient upgrade path to FTTP;
- there was a risk of liability to pay compensation to Telstra for exclusive or near-exclusive access to Telstra's customer access network; and
- proponents sought excessive regulatory restrictions on competitors building and operating their own fibre-based networks in competition with the NBN (that is, overbuild protections).

6.9 The department offered oral debriefings to all proponents that met the minimum conditions for participation and returned bid bonds to all proponents, although there was some delay in one instance.

## The Audit

### Audit objective<sup>5</sup>

- 6.10 On 21 April 2009, Senator the Hon. Nick Minchin, then Shadow Minister for Broadband, Communications and the Digital Economy, wrote to the Auditor-General requesting consideration be given to conducting an audit of the NBN RFP process. Issues raised included the outcome of the process; whether amendments were made to the RFP documents relating to non-compliant bids; Telstra's exclusion from the process; the costs associated with the RFP process for both the Government and bidders; and the refund of bonds paid to bidders.
- 6.11 After conducting a preliminary review, the Auditor-General decided to undertake a performance audit into the NBN RFP process. The objective of the audit was to examine key aspects of the process, including:
- the background to and conduct of the RFP process;
  - management of key risks associated with the process and outcomes; and
  - stakeholder consultations.
- 6.12 The audit examined DBCDE's management of key aspects of the:
- implementation of the NBN RFP process from the time of the election of the new Government on 24 November 2007 to the release of the RFP document on 11 April 2008; and
  - conduct of the NBN RFP process after the release of the RFP document to the termination of the process on 7 April 2009.

### Overall audit conclusion<sup>6</sup>

- 6.13 Labor went to the Federal Election in November 2007 with a commitment to create a national FTTN broadband network, with construction to begin by late 2008. Following the swearing in of the new Government in December 2007, the department gave priority to developing and implementing this election commitment. The Government's approach was to pursue a process that maximised competitive tension between potential proponents and promoted innovation to achieve the best outcomes and

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5 The following information is taken from Audit Report No. 20 2009-10, pp. 16-17.

6 The following information is adapted from Audit Report No. 20 2009-10, pp. 17-23,

best use of up to \$4.7 billion in government funding. It has been generally acknowledged within the telecommunications sector that this amount was the level of funding sought by Telstra from the former Government in 2005 to upgrade its equipment to build a FTTN network covering 98 percent of Australia's homes and businesses at speeds of 12 Mbps.

- 6.14 After considering advice on the pros and cons of conducting the process in one rather than two stages, the Government concluded that a one-stage process was appropriate and its risks could be managed. The alternative, adopting a multi-stage process, would have been the more conventional approach for conducting tender processes of this size, nature and risk, particularly when seeking innovative solutions. Proponents contacted by the ANAO considered that the two-way dialogue an expression of interest stage in a two-stage process generates, would have better informed the RFP process and the RFP document, increasing the likelihood of a successful outcome. The main disadvantage of multi-stage tendering is the additional time required to approach the market, or particular proponents, more than once, which was a factor considered by the Government given the tight timeline envisaged for the assessment process.
- 6.15 The department identified the likelihood of many of the key risks to a successful outcome to the RFP process when assisting the Government to settle the details of its broadband policy, although some were not fully analysed at the time. These risks included the sufficiency of government funding to attract commercially-viable proposals capable of acceptance, the potential payment of 'just terms' compensation to Telstra for the compulsory acquisition of the right to use its assets should a non-Telstra proposal be successful,<sup>7</sup> and the uncertain regulatory environment. The primary means of addressing these and other risks was to design the RFP process to maximise flexibility, minimise mandatory requirements and allow proponents to offer innovative solutions.
- 6.16 National proponents were asked to submit binding proposals against the 18 Commonwealth objectives for the NBN and other evaluation criteria, and outline the regulatory changes necessary to facilitate their proposals. The process left open the prospect that a proposal may be acceptable even though it did not meet all objectives and criteria. The competitive assessment process was expected to determine the NBN that the market could build and operate. Although the RFP document met the requirements of the Commonwealth Procurement Guidelines (CPGs), there was insufficient time to fully address specialist advisers' concerns

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7 Section 51 (xxxi) of the Australian Constitution provides the Parliament with the power to make laws with respect to the acquisition of property on just terms.

that a lack of detail in the RFP put at risk attracting binding offers. Nevertheless, the RFP document was drafted so that it could be varied to address risks and issues as and when they arose during the process.

- 6.17 Throughout the process, the department kept the Minister informed of progress, including:
- updated appraisals of most risks to the process, and the likelihood of a successful outcome;
  - possible scenarios including their likelihood and consequences; and
  - summarised feedback from proponents on the elements likely to feature in their proposals and the challenges posed by the RFP.
- 6.18 After the announcement of the RFP process, potential proponents were initially concerned that the proposed timeframe would be insufficient to prepare and lodge fully developed proposals. However, the proponents considered that their concerns were addressed when the RFP timeline was extended to allow them time to consider carriers' network information. Proponents advised that the RFP's flexibility gave them significant scope to submit eligible proposals with innovative technical solutions. However, they found it difficult to develop competitive and commercially-viable proposals that would be acceptable to the Government, while not necessarily meeting all the objectives and other criteria.<sup>8</sup>
- 6.19 Proponents requested guidance on the relative importance of the Commonwealth's objectives, evaluation criteria and the regulatory changes that would (or would not) be accepted. However, as the Government had no determined preference for the NBN within its stated objectives, further advice on these issues was not forthcoming beyond that included in the RFP document. As a consequence, proponents found the bilateral meetings with the department and its specialist advisers of limited value. State/Territory-based proponents considered that the late clarification of the way their proposals would be assessed under the RFP disadvantaged their proposals and, if received earlier, may have influenced their decision to participate in the RFP process.
- 6.20 The RFP document saw FTTP as the future platform of the network to meet future customer demand and service developments to at least 2020

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8 The objectives were competing and, at times, conflicting. For example, the RFP asked proponents to build and operate an NBN that: covered 98 per cent of all Australian homes and businesses; offered speeds of 12 Mbps; enabled low access prices while allowing proponents to earn a return on investment commensurate with risk; and provided the Commonwealth with a return on its investment (Objectives 1, 2, 11 and 13).

and beyond. However, after the RFP had been issued, the department received unsolicited advice from the Australian Competition and Consumer Commission that FTTN was not a stepping stone towards FTTP. Most FTTN expenditure would be on equipment that becomes obsolete under a FTTP network platform. A FTTN network could also serve to delay FTTP if the successful proponent was not under significant competitive pressure and could therefore delay further investment until they had fully recovered their initial investment.

6.21 As the RFP open period progressed, it became increasingly obvious to the department that the likelihood of a successful outcome was reducing. Initially, the department and its advisers considered offers capable of acceptance, necessitating some form of 'second stage'. In mid-August 2008, the department first noted possible options for progressing the Government's broadband policy within, subsequent to, or outside of, the RFP process. By late-October 2008 and prior to the RFP closing date, alternative methods of delivering the Government's broadband policy began to be looked at more formally, should the RFP process not result in any acceptable proposals. By this time, it had become apparent that:

- the global financial crisis was having an adverse impact on proponents' ability to attract funding for their investment in the NBN;
- Telstra was seeking certain assurances from Government, including in relation to the confidentiality of its bid information and potential regulatory solutions, before committing to lodging a proposal;
- some members of one pre-qualified consortia announced their withdrawal from the consortia; and
- non-Telstra proponents were unlikely to propose a national technical solution that would not require Telstra's equipment, or submit a viable business model that took into account potential compensation to Telstra of some billions of dollars for the compulsory acquisition of the right to use its equipment.<sup>9</sup>

6.22 Although not guaranteeing a successful outcome, the flexibility within the RFP process meant that the Government could have varied the RFP document and process when it became apparent that:

- proponents were looking for clearer direction and were unlikely to submit proposals that met all the Commonwealth's objectives and other evaluation criteria; and

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9 The ANAO has not disclosed the range of potential compensation in view of the commercial sensitivities attaching to such estimates.



- the global financial crisis was affecting the proponents' ability to finance their proposals.
- 6.23 Proponents would have had an opportunity to submit better developed and more competitive proposals had they received:
- greater clarity as to how the information requested was to be used when assessing proposals against the RFP's multiple objectives and criteria;
  - guidance as to the relative importance of the evaluation criteria and Commonwealth's objectives; and/or
  - a clearer understanding of the Government's regulatory intent for the NBN.
- 6.24 Providing the clarity and guidance proponents sought would most likely have necessitated an extension to the Government's timetable for the RFP process.
- 6.25 The NBN evaluation plan, which was approved by the Panel and the Minister before the closing date for proposals, comprehensively set out the assessment process and aligned with the RFP document. Nevertheless, its development proved to be a complex and time-consuming exercise. The Panel, assisted by the department, specialist advisers and other Australian Government departments and agencies, assessed NBN proposals in accordance with the evaluation plan. The then Secretary's decision to exclude Telstra's 12-page proposal from the assessment process was informed by comprehensive legal advice. The Panel assessed the remaining national proposals against the six evaluation criteria and determined that nearly all criteria were either met to a marginally acceptable standard or failed.
- 6.26 The ANAO found that conclusions and recommendations in the Panel's Evaluation Report were supported by appropriate evidence. The Panel's published observations of the process generally represented the reasons for the non-selection of a national proponent, as well as providing some advice to the Government on policy options for going forward. In separate advice to Government at the conclusion of the Panel's role in the RFP process, the Panel identified FTTP as the preferred technology for the NBN. Although more expensive, the Panel identified a number of 'hidden' costs in FTTN proposals, including potential compensation to Telstra, risk of obsolescence and reduction in competition through requested regulatory changes.

- 6.27 The Government's choice of a fibre-based technology platform for the NBN and the quantum of government funding available to the successful proponent(s) meant that Telstra's assets, including its customer access network and ducts from the exchange, were a critical dependency for the success of the NBN RFP process. It was generally accepted that the only other technology for a national fibre-based network, FTTP, would require a significantly greater government contribution to be commercially viable. Analysis by DBCDE as the RFP progressed determined that, although a FTTN network could co-exist with copper-based broadband networks, the amount of government assistance on offer meant it was unlikely to be commercially viable for reasons that included its ability to attract enough customers to cover its costs and that it would still require access to Telstra's customer access network.
- 6.28 As a consequence, Telstra was inherently well-placed to lodge a competitive (and potentially successful) proposal. Non-Telstra proposals were likely to present significant risks, including:
- the payment of substantial levels of compensation to Telstra for the compulsory acquisition of the right to use its assets; and
  - potential regulatory changes that would restrict other entities (mainly Telstra) building a parallel fibre-based broadband network (which could be inconsistent with Australia's international trade obligations, and therefore at odds with the Government's broadband policy).
- 6.29 Despite the RFP process's complexity and short timeframe, the ANAO found that the Panel and the department conducted the formal process well, within the parameters of the Government's broadband policy and in accordance with the CPGs. As the RFP process progressed, the department advised the Minister that the prospects of a successful outcome were reducing. At the end of the RFP process, there were no successful proposals.
- 6.30 The RFP process has come at a significant cost to the Government and proponents, with costs incurred being in excess of \$30 million. DBCDE's costs were some \$17 million and the proponents' costs (where advised) ranged between \$1 million and \$8 million. In reviewing the process employed and in light of the outcome, the ANAO made a number of observations:
- early in the process, most NBN stakeholders considered that a two-stage process to select proponent(s) for the NBN would have improved the prospects of a successful outcome and may have reduced proponents' costs;

- requesting proponents to outline their preferred regulatory environment for their NBN was unusual for an RFP process and made a complex commercial transaction considerably more complicated;
- the global financial crisis significantly reduced the prospects of a successful outcome by affecting the viability of the proposed NBNs; and
- using FTTN technology for the network limited its potential scalability.<sup>10</sup>

- 6.31 The department informed the ANAO that the Government was made fully aware of all of the key risks and their significance for a successful outcome to the RFP process. The ANAO found that while it is the case that the key risks and their broad significance were identified in early advice to the Government, the department did not fully assess the consequences of some of these risks until relatively late in the RFP process. These included, in particular, the possible magnitude of: the potential payment of compensation to Telstra should a non-Telstra proposal using FTTN technology be successful; and the consequences for investment in FTTN equipment, which largely would become obsolete, should the network be upgraded to FTTP technology. The design of the Government's approach to the market would have been better informed had the department provided timely advice on these issues ahead of the RFP process being settled.
- 6.32 As it was, the Government decided to seek binding offers from the market through a one-stage RFP process and give proponents wide scope to request regulatory changes to facilitate their proposals. This approach was not conventional for a competitive assessment process of this size, nature and risk. Given the amount of government funding on offer, Telstra was the proponent most likely to be in a position to build and operate a viable fibre-based NBN. The likely impact on the prospects of a successful RFP outcome had Telstra lodged an eligible proposal, is indeterminate. As the outcome of the RFP process showed, no other proponents were successful either.
- 6.33 The audit did not make any recommendations to the department as the RFP process had been finalised. Nevertheless, the audit emphasises the importance of departments gaining, as early as possible, a sound understanding of the implications of those risks that are critical to the success of major tender processes, amongst the many risks that are

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10 Audit Report No. 20 2009-10, p. 22.

required to be managed. This is particularly challenging in a one-stage process that is seeking binding offers.

## **The Committee's review**

- 6.34 The Committee held a public hearing on Thursday 11 March 2010, with the following witnesses:
- Australian National Audit Office (ANAO); and
  - Department of Broadband, Communications and the Digital Economy (DBCDE).
- 6.35 The Committee took evidence on the following issues:
- identification and evaluation of risk;
  - specialist advisers;
  - the reducing likelihood of a successful outcome;
  - options to change RFP;
  - Telstra's bid; and
  - lessons learned.

## **Identification and evaluation of risk**

- 6.36 The ANAO found that the DBCDE had conducted the RFP process well, within the parameters of the government's broadband policy and in accordance with the Commonwealth's procurement guidelines.<sup>11</sup> The ANAO also found that the department identified the 'key risks and their broad significance' early in the process and advised the Government accordingly.<sup>12</sup> However, the ANAO found that the department had not assessed the impact of two of those risks until relatively late in the process:
- the potential payment of compensation to Telstra should a non-Telstra proposal using FTTN technology be successful; and
  - the consequences for investment in FTTN equipment, which largely would become obsolete, should the network be upgraded to FTTP technology.<sup>13</sup>

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11 Audit Report No. 20 2009-10, p. 22.

12 Audit Report No. 20 2009-10, p. 23.

13 Audit Report No. 20 2009-10, p. 23.

6.37 The ANAO identified the first of these, the amount of compensation that may have to be paid to Telstra, as a significant key risk. While the ANAO acknowledged that the department had kept the Minister and the Government fully informed of the possibility of this risk throughout the process, it considered that an attempt should have been made earlier in the process to quantify the risk.<sup>14</sup> The ANAO maintained that:

... earlier advice to Government on the possible magnitude of the potential Telstra compensation would have provided the Government with a greater appreciation of the consequence of this key risk, including its relativity to the likely cost of the network, and potential impact on a successful outcome. This information would have better informed, and may have influenced, the Government's approach to delivering the NBN.<sup>15</sup>

6.38 In its written response to the Audit Report the DBCDE said that estimating a compensation figure early in the process was problematic for a number of reasons:

Until there was some measure of clarity as to both the intended approach of non-Telstra proponents to utilising Telstra infrastructure and to the proposed arrangements to recompense Telstra for that use, meaningful compensation estimates could not be developed.<sup>16</sup>

6.39 The Committee requested further explanation as to why DBCDE were reluctant to quantify the risk earlier and provide more specific advice to the Government. The department defended its position, telling the Committee that, in hindsight, it is easy to speculate that the process could have been handled differently but at the time a reliable compensation assessment could not be undertaken until the proposals were received.<sup>17</sup> To have any level of accuracy, a compensation estimate would have to take into consideration what proponents were proposing:

... it was very difficult to assess the compensation without fully understanding the extent to which proponents were proposing to make use of Telstra's network and the extent to which they were proposing to pay Telstra for using that infrastructure. We certainly had proponents who were representing to us that they considered

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14 Audit Report No. 20 2009-10, p. 58.

15 Audit Report No. 20 2009-10, p. 58.

16 Audit Report No. 20 2009-10, Appendix 1, p. 93.

17 Mr Harris, Department of Broadband, Communications and the Digital Economy (DBCDE), p. 15. All references to witnesses' evidence comes from the Committee's hearing into this audit dated 11 March 2010, with page numbers relating to the Proof Committee Hansard.

that they were intending to pay Telstra for access to their infrastructure [an amount] that would be sufficient to mitigate their compensation risks and we had other proponents who were indicating to us that they had technology solutions that meant that the compensation would not become payable because it would not be a mass cutover, so it would be done on a customer choice basis.<sup>18</sup>

- 6.40 The Committee asked at what date DBCDE were able to quantify the compensation risk to Telstra. The Department told the Committee that in September 2008 the direction being taken by non-Telstra proponents was becoming clearer and Frontier Economics was able to develop 'preliminary estimates of the ranges of compensation that might be payable to Telstra' under a variety of scenarios.<sup>19</sup>
- 6.41 The Committee acknowledged that the Department had informed the Minister of the potential risk posed by a compensation payment to Telstra in the Department's Incoming Government Brief and continued to scrutinise this area of risk at regular briefings with the Minister.<sup>20</sup> However, the Committee asked when the Minister had been advised of the possible amount of the compensation risk and DBCDE informed the Committee that the advice from Frontier Economics was 'incorporated in subsequent documents and presentations prepared for the Minister' after the Department received the report in September 2008.<sup>21</sup>

## Specialist advisers

- 6.42 The ANAO found that DBCDE had engaged a number of specialist advisers to provide 'commercial, technical, economic, regulatory and legal advice during the competitive assessment process for the NBN' in line with the Commonwealth Procurement Guidelines (CPGs).<sup>22</sup> However, the ANAO noted that the advisers were not appointed until mid-March 2008.<sup>23</sup> The ANAO points out that this was less than one month before the release of the RFP and allowed little time for the draft RFP document to be scrutinised by the specialist advisers or the department to revise the document in light of the advisers' comments.<sup>24</sup>

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18 Ms Cullen, DBCDE, p. 16.

19 DBCDE, submission no. 10, p. 4.

20 DBCDE, submission no. 10, p. 3.

21 DBCDE, submission no. 10, p. 4.

22 Audit Report No. 20 2009-10, pp. 44-45.

23 Audit Report No. 20 2009-10, pp. 45 and 48.

24 Audit Report No. 20 2009-10, pp. 48 and 51.

- 6.43 The Committee expressed concern that the lack of timely expert appraisal may have adversely affected the advice provided to government, particularly with regard to risk. The ANAO suggested that the delay in appointing the expert advisers may have contributed to not providing risk assessment earlier and considered that DBCDE could have sought outside expert legal advice earlier, specifically on the compensation risk to Telstra.<sup>25</sup> Such an expert could have drawn on available information to provide an estimate to Government that 'could have been updated over time when better information became available on compensation factors'.<sup>26</sup>
- 6.44 The Department maintained that there was sufficient expert advice available but conceded that the timeframe was shorter than normal for an RFP process.<sup>27</sup>

### Reducing likelihood of a successful outcome

- 6.45 The Committee asked the ANAO when, from the audit, it had become clear that the RFP process would not produce a successful outcome. The ANAO replied that the Department had informed the Minister in July 2008 that there may need to be more than one stage to the process and that:
- ... in mid-August (2008) the department first noted there were possible options they were putting forward. By late October (2008) alternative methods were being looked at as to how the process may continue ...<sup>28</sup>
- 6.46 The Committee asked DBCDE to clarify why the process was continued after July 2008 when it became clear that the chance of a successful outcome was unlikely. The Department explained that at that stage a bid from Telstra was still possible which could provide a successful outcome and that:
- ... the minister had a view that notwithstanding that there was a chance that it would not result in a successful proposal that he wanted the process to continue so that we actually could test the market.<sup>29</sup>
- 6.47 The ANAO added that the process had not 'failed' even though there had been no successful tenderer as:

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25 Mr Cahill, ANAO, p. 17; Audit Report No. 20 2009-10, p. 57.

26 Audit Report No. 20 2009-10, p. 57; Ms Cass, ANAO, p. 17.

27 Mr Harris, DBCDE, pp. 17 and 20.

28 Ms Cass, ANAO, p. 24. See also Audit Report No. 20 2009-10, p. 82.

29 Ms Cullen, DBCDE, p. 25.

The process was followed in accordance with the Commonwealth procurement guidelines. The evaluation was done correctly, the process was done correctly. There was no successful outcome, because none of the proponents met the criteria or the objectives.<sup>30</sup>

## Options to change RFP

6.48 In light of the reducing likelihood of a successful outcome, the Committee asked DBCDE if it had considered changing the RFP. The department said it had the flexibility to amend the process but that such change presents problems as it can have a significant impact on proponents.<sup>31</sup> DBCDE explained that, if such a change is contemplated, the proponents would need to be invited to 'discuss the possibility of amending the process and ask[ed] for impact assessments'.<sup>32</sup>

## Telstra's bid

6.49 The Committee asked the ANAO if the risk of Telstra not submitting a proposal had been identified and, if so, at what stage of the process. The ANAO found that early in the process there was an expectation that Telstra would lodge a proposal. It was not until approximately one month before the closing date for submissions that DBCDE became aware that Telstra 'may decide to withdraw from the process'.<sup>33</sup>

6.50 DBCDE noted that Telstra did put in a proposal but that the proposal did not meet the minimum mandatory requirements and was subsequently excluded from the process.<sup>34</sup> The Committee queried whether or not Telstra had been asked why it had submitted an incomplete proposal. DBCDE told the Committee that, as the Telstra proposal did not comply with the minimum mandatory requirements it was not assessed.<sup>35</sup> The Department added that it had taken legal advice from six separate sources before making the decision to exclude the proposal.<sup>36</sup>

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30 Ms Cass, ANAO, p. 27.

31 Mr Harris, DBCDE, p. 33.

32 Mr Harris, DBCDE, p. 33.

33 Ms Cass, ANAO, pp. 27-28. See also Audit Report No. 20 2009-10, p. 79.

34 Mr Harris, DBCDE, p. 28. The minimum mandatory requirements for a proposal were: the proposal should be in English, use Australian legal units of measurement, include a completed and signed proponent's declaration, meet the conditions relating to the submission of multiple proposals and include a Small Business Enterprise (SME) Participation Plan.

35 Ms Cullen, DBCDE, p. 29.

36 Ms Cullen, DBCDE, p. 29.



## Lessons learned

6.51 The Committee asked the ANAO what lessons could be learned from the NBN RFP process with regard to mitigating both foreseen and unforeseen risks. The ANAO reaffirmed the findings of the audit, emphasising the need for early identification of risks:

... the importance of departments gaining, as early as possible, a sound understanding of the implications of those risks that are critical to the success of major tender processes, amongst the many risks that are required to be managed. This is particularly challenging in a one-stage process that is seeking binding offers.<sup>37</sup>

6.52 The Committee asked DBCDE if it had undertaken a review in light of the audit findings and if there had been any changes to protocols. The Department reiterated that the audit report had found that DBCDE had run the process well, conforming to the Commonwealth Procurement Guidelines. DBCDE added that it has held discussions with other departments and with the Auditor-General regarding the difficulties inherent in varying a process once it has begun:

I have said to the agencies involved that the greatest difficulty we have here is the need to effectively [give] permission to take risk. It is actually risk inside the process. ... if part of the way through the process you think, 'It's a judgement call but it's likely that the proponents will (not be) able to satisfy us, should we pull the plug, should we vary it?' that is actually a very difficult proposition because of the response of proponents. In other words, one or two proponents might be very happy for you to alter this and others will be very angry with you.<sup>38</sup>

## Conclusion

6.53 Considering the size of the budget for this project and the apparent lack of a positive outcome, the Committee shares the ANAO concerns regarding risk management for the project. The Committee encourages all agencies and departments to ensure that risks are identified early in the tender process and, where possible, quantified.

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37 Audit Report No. 20 2009-10, p. 23.

38 Mr Harris, DBCDE, pp. 34-35.

