Chapter 5

Tenders and contracts

> If we could off–set the horrific costs of tendering and administering the tendering process and put that into the research and development and the ongoing production of a continuing build, I think that as a nation we would be a lot better off.[1]

> Industry's concerns are the ones that I attempted to address when I first came to the DMO. They are about the cost of tendering and doing business with the government… A whole raft of the reforms that we were putting in place were directed to that end. We changed our contracting arrangements. They said our contracts were unreasonable, oppressive, too detailed et cetera. So we redid the whole structure of our contracting arrangements and we did it in consultation with industry… So it is with contracting; it is with the nature of the tenders that we put out; it is with the length of time that we take; it is about getting people out of the process early; it is about moving platoons of our people out of shipyards and letting the classification societies get on and do the job. A whole raft of those things are designed to make it cheaper to do business with the government.[2]

5.1 The above extracts from evidence convey the essence of the issue that was identified for action in the 1998 Defence and Industry Strategic Policy Statement.

5.2 That statement, *Team Australia,* declared that 'Defence's goal is for a procurement process which is flexible, responsive and efficient' and specified as a key step in achieving that goal action 'to minimize business costs to Defence and industry.'[3] Such actions were to include the use of panels, short–listing of tenderers, use of restricted tenders, standardization of tender documents and streamlined processes across all purchasing activities.

5.3 The Committee notes that the *Capability Systems Life Cycle Management Manual* gives procedural effect to these goals and actions. Section 4–4 of the *Manual* sets out various mechanisms by which procurement can be facilitated from the earliest phases of a tendering process. For example, in requesting offers from potential suppliers four options are available, each designed to enhance the ease and efficiency of Defence–industry business:

- *Invitation to Register Interest*—firms can register their interest with minimal documentation compared to preparing a detailed tender.

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1 *Committee Hansard,* p. 321 (Mr Don Fry)

2 *Committee Hansard,* p. 334 (Mr Michael Roche)

3 *Team Australia,* p. 23

Registrants who are clearly ineligible can withdraw or be passed over before incurring the additional expense of developing a formal, detailed offer at a later stage.

- *Request for Proposal*—invites potential suppliers to provide an innovative and cost effective idea, concept or solution, along with only an indicative price. If the idea or solution is accepted, specifications are then prepared against which a firm price can be quoted.

- *Request for Tender*—presents a formal written, detailed request for the supply of goods or services. RFT may be by public invitation or by invitation to selected potential suppliers. Where there are complex or strategic procurements, opportunities are provided to industry to comment on draft versions of the RFT before the Request is formally launched.

- *Request for Quotation*—requests prices from potential suppliers for materiel items or services. This is often more cost–effective than a full RFT, and can be used in conjunction with a qualified supplier list.

5.4 In both their written submission and in oral evidence to the Committee, DMO officials stressed their commitment to efficiency in procurement methods, and described in some detail a variety of improvements upon past practice.

> We have made major changes in the processes that we go through. We are tailoring the process to the requirement. I think that before we were accused of doing the full mil–spec treatment for any project, regardless of complexity. We have shifted away from detailed specifications to more functional requirements. The requirement for the patrol boats, for example—the guts, if you like, of that requirement—runs to 50 pages, and it does not even define the number of patrol boats. It tells industry what we want to achieve in terms of effective patrol boat days. It leaves a very great part of the solution to industry, to allow them to provide their best offer—and that is shown up in the final three tenderers that are now alive in that project, where we have three quite different solutions to the problem.[4]

> We have moved to faster contracting. Typically we would spend six and sometimes 12 months after down–selecting to actually get into a contract, and that was not sensible because we were not in a terrifically strong negotiating position at that time. We have revised all of our contractual forms and templates. We put that out at the start of the project and we now negotiate with the final short list of tenderers to get a contract that is pretty close to finality when we down–select. In the case of the armed reconnaissance helicopter I think we were in contract within four to six weeks of selecting Eurocopter, and that would be the sort of time frame that we are looking to do in the future.[5]

4 *Committee Hansard,* p. 144 (Mr Michael Roche)

5 *Committee Hansard,* p. 146 (Mr Michael Roche)

> We are also using RFIs—requests for information, requests for proposal approaches—which try to sort out the field at an early stage at a cheaper rate. The second thing is that we are doing it faster, and that helps. One of the costs to companies is the cost of keeping a project team fired up. If you have a tender process that runs over 2½ years and the company has a project team of 10 to 15 people tied up for that time, that is a fairly big expense… What we are doing now with faster processes is cutting the length of time that companies, even the unsuccessful ones, have to stay in the bid.
>
> Thirdly, we are excusing people early from the process. Where somebody is not competitive, we will tell them as soon as we have determined that they are not competitive rather than wait until the down-select stage. That is exactly what we did in Air 87, where we released the first tender, I think, within one month of the tenders closing. We said, 'You're not competitive. You should stand down your team.' Three months later we excused a second one and, at the same time, we said to the third one, 'We're holding you in reserve. You're not our preferred candidate. You should stop spending money.' They were at that point about to commission some quite expensive test flying for us and we said, 'You should draw a line under that,' and I think we saved the company probably, straight off, $100,000.[6]

5.5 The Committee is encouraged by these reports, and notes that the actions described are consistent with the requirements of the *Manual* described earlier.

5.6 Some industry witnesses have yet to be satisfied that sufficient progress has been made in refining tendering processes. One witness drew the Committee's attention to the relative costs of tendering in commercial and Defence projects.

> The amount of documentation sought remains the major cause of the excessive cost of tendering—a cost that is borne ultimately by the Australian taxpayer. Typical marketing and tendering costs borne by industry are 2% to 3% of project costs. Tendered prices must recover the cost of bidding the particular project but also the costs of previously unsuccessful bids. If the average tender short-list is three, then 6% to 9% of the defence acquisition dollar (i.e. as much as $200 million per annum) is being spent on the tender process… Defence has always demanded much more data than industry needs to generate to define prices and reduce risk to an acceptable level. The principal causes appear to be an attitude of "let's ask for it, just in case" which arises from the fact that tenders are not funded and therefore the cost to Defence of demanding more than it needs is not immediately evident. [7]

6 *Committee Hansard,* p. 152 (Mr Michael Roche)

7 *Submission* 11, p. 4 (SAAB Systems Pty Ltd)

Refining the paperwork

5.7 One of the most significant initiatives in reforming the tendering process has been the adoption of Smart Acquisition principles—a methodology developed by the UK Ministry of Defence.

> The Smart Procurement Initiative (SPI) was a fundamental review of the way [UK Ministry of Defence] procured equipment for our Armed Forces and was a key element of the 1998 Strategic Defence Review. Its aim of providing better, cheaper equipment more quickly has since been sustained and broadened and, as a result, it has been renamed Smart Acquisition. Smart Acquisition applies not only to the procurement of new equipment, but to its support in service, and to stores and supplies. The principles of Smart Acquisition are currently being extended to the non–equipment areas of the MOD, such as the infrastructure and services of the defence estate.[8]

5.8 Drawing on the successful UK experience, Defence has applied Smart Acquisition principles to develop its SMART 2000 contracting template (now replaced by ASDEFCON). Comments on SMART 2000/ASDEFCON received by the Committee were consistently favourable. The Committee commends DMO for its careful engagement with industry in developing the template.

> Some significant improvements were made in the standard forms of contract under the SMART 2000 Contract initiative which included extensive consultation with industry.[9]

5.9 The DMO has sought to achieve a similar outcome with the development of a contract template specifically for software intensive projects.

> The new proforma we call ASDEFCON (Strategic Materiel) for software intensive systems. It is developed to provide a standard approach on which we approach industry in our tenders and then contract on. The template was developed in consultation with the technical directors of the companies that we do a lot of defence business with in software. They assisted with us by identifying what they believed to be best practice in the approaches that we were using across each of the divisions. They said, 'We think Air Force has got best practice in this part of it; Navy does it best in this area.' So we brought those together using not only the technical directors of those companies but also some highly experienced software people whom we brought in on contract. As a result, the proforma is intended to try to introduce best practice approaches in acquiring software. We are also aiming to reduce the cost of tendering by standardising the type of information that we seek. So when we ask for a project plan, a project plan will always contain this sort of information, rather than having individuals

8 http://www.mod.uk/aboutus/factfiles/smart_acquisition.htm

9 *Submission* 11, pp. 3–4 (SAAB Systems Pty Ltd)

> create their own new requirements. In that fashion, industry can know exactly what we are expecting well before they put in a tender. [10]

5.10 On the general issue of walking the fine line to ensure that tendering processes and contracts are flexible but rigorous, the USDM told a Defence Watch Briefing in April 2002 that:

> So far we have introduced the SMART 2000 derivative contract pro forma, we have put out the first Software Intensive Statement of Work and more is in the pipeline. All this has been done with industry. Some of the lawyers say we've gone too far—that we've rolled over for industry. Industry, on the other hand, says that there's still some distance to go, so maybe we've got the balance about right. As a result of these changes, we now expect to settle contracts more quickly from the time of source selection, than the current six or more months. [11]

5.11 The Committee is inclined to agree with USDM that the balance achieved in these contract proformas are 'about right'. At least one witness begged to differ on that assessment, especially with respect to the software template ASDEFCON, and the SMART 2000 Statement of Work template.

> Industry was… consulted on the SMART 2000 Statement of Work but its advice that the document was over–prescriptive and would increase costs was largely ignored. The Under Secretary noted in his April speech that "Some of the lawyers say we've gone too far—that we've rolled over for industry. Industry, on the other hand, says that there's still some distance to go, so maybe we've got the balance about right." Unfortunately the lawyers appear to have prevailed and the most recent document (ASDEFCON) has dropped a number of the more sensible initiatives. The result will be more protracted contract negotiations with hardened attitudes and the probability of inferior outcomes for both Defence and Industry.[12]

5.12 The Committee did not have the benefit of a wide range of views on this particular matter, but notes the following advice submitted by the Australian Industry Group Defence Council:

> Importantly, attempts have been made to speed up the acquisition process. For example, the procurement process for AIR 87 made use of the SMART 2000 contracting documentation and effectively used the guidance provided by Getting Smarter about Knowledge Rights … and the revised Australian Industry Involvement (AII) guidance.[13]

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10 *Committee Hansard*, pp. 248–249 (Ms Shireane McKinnie)

11 Speech available at http://www.defence.gov.au/dmo/DMO/function.cfm?function_id=100#group48

12 *Submission* 11, pp. 3–4 (SAAB Systems Pty Ltd)

13 *Submission* 20, p. 2 (Australian Industry Group Defence Council)

5.13 The Committee explored the tension between industry's preference for optimum flexibility and minimal paperwork and government's requirement for a level of specificity that satisfies the requirements of accountability and audit. A particularly useful account of this tension was provided by DMO's Dr Ian Williams.

> In the past, on occasions we had specifications that were far too detailed and we tried to tick them off individually. That does require respondents to go into a lot of detail. Under the DMO, one of the reform processes is to try to move to more functional specifications, but that is a double–edged sword. If you go to functional specifications, that also opens up a bit of flexibility. Without going into projects, some of the ones that caused me the greatest problem were the ones we did not pin down. For example, if you want to test that you have had a product delivered to the standard that you want and you have a broad functional specification—take a vehicle, for example—you can say that the vehicle must be able to operate off road. Unless you specify the conditions and the times and you go through a fairly elaborate process, you find that the conditions can be met in functional terms but do not do what you want. So there is a swing and roundabout situation and we need to be a little careful.[14]

5.14 The Committee is satisfied that the refinements to contract proformas made under the banner of SMART/ASDEFCON have produced an eminently sound basis for procurement. It is apparent to the Committee that the DMO is committed to, and has the capacity to provide for, business practices that address industry's request for flexibility and functional rather than over–prescriptive specifications.

5.15 The only caveat that the Committee might apply to these remarks goes, as on other occasions, to the question of whether officials' actions will consistently match the reform's intentions. That is, have the attitudes required to eschew adversarial for more accommodating approaches to contracting been sufficiently embedded in the DMO? One witness from industry suggested that this process is reasonably well advanced, but not completed:

> There is a growing realisation in Defence and industry that the old-fashioned adversarial form of contracting, where you signed the contract, the contractor immediately tried to deliver as little as possible and get the maximum price and Defence tried to hold the contractor to ticking every box and doing everything, if it was wanted or not—there is, I think, a shared recognition between the two parties that that does not make sense. If you are in a business relationship you need to concentrate on what is needed to be delivered and get on with the job. That is a positive change. You would not say that every project officer with DMO has that attitude, but I think more now have it than had it before.[15]

14 *Committee Hansard,* p. 333 (Dr Ian Williams)

15 *Committee Hansard,* p. 189 (Mr Nicholas Hammond)

Partnerships and alliances

5.16 The Committee has examined elsewhere the policy basis for Defence's interest in partnerships and alliances with industry, and for promoting alternative forms of contracting which reflect this. The 1998 *Team Australia* Strategic Policy Statement was quite explicit in its support for what it called 'partnering'—but was very clear about what the concept entailed:

> Partners need to be chosen following a rigorous process of competition. Each side needs to be confident that it can place its trust in the other. However, there is no single template for these kinds of relationships—especially in Defence, which contracts with so many different local and overseas companies for a vast and complex array of products…
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> Transparency and communication … include, for larger contracts, full visibility of costs and earned value around a shared cost and schedule control system; there should not be separate books for internal and external reporting. In all cases, it should mean real habits of dialogue at all levels of the relationship in which there are no surprises or recriminations…
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> Experience indicates that partnering will only work in organisations that are prepared to accept cultural change. The implementation of partnering culture will require experimentation. There may be other forms of partnering initiatives that both sides will wish to explore, including models used in other areas of federal and state governments as well as overseas.[16]

5.17 This strong interest in partnering arrangements, and the distinctive qualities that must be brought to it, is reflected in the advice on contracting contained in the 2002 *Capability Systems Life Cycle Management Manual*, which points out:

> 4.41 A **contract** establishes a legal relationship between a supplier and Defence. Experience shows that this relationship can become excessively adversarial and detrimental to the interest of both parties. This can be prevented by establishing a complementary **partnering** arrangement which determines how Defence and a supplier will work together to achieve contract deliverables.
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> 4.42 Parties to a partnering arrangement need to be skilled in that technique if it is to work effectively…
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> 4.47 [A]n alliance contract reflects a long term commitment between two or more parties for the purpose of achieving clearly stated business objectives by maximising the contribution of each participant's competencies. In essence an alliance contract is an agreement to:
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> a. work together for a common goal; and
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> b. share risks and rewards, the reward to the customer being the achievement of goals, and the reward to the contractor being profit.

16 *Team Australia,* p. 25

> Alliance contracts can be established for delivering a Major Capital Equipment project of defined scope and finite length, or for delivering services over a long period… [17]

5.18 It appears to the Committee that there is a burgeoning of genuine interest from several quarters in pursuing the 'longer term synergistic and flexible partnering arrangements with industry' that were envisaged in the 1998 Strategic Policy Statement.

5.19 Referring to the strategic goals of capabilities with a 'knowledge edge', the submission from the Australian Industry Group declared:

> Both Defence and industry must acknowledge that they bear joint responsibility and work together, as partners, to improve the outcome.[18]

5.20 The Committee explored partnering and alliances at some depth with both Defence and industry witnesses. The merits of partnerships and alliances are broadly recognized, but it is equally well understood that the partners need to be well skilled in managing and negotiating the joint enterprise.

> Alliance contracting represents a fundamental change to traditional contracting, as the parties assume a degree of joint management responsibility for the acquisition of a capability. Alliance concepts involve open-book accounting, target cost identification, risk/reward payment structures, risk sharing, integrated project team structures, and the sharing of rewards.[19]

> Partnering was the forerunner, if you like, to alliance contracting… The difference between partnering and alliance contracting is that the alliance contracting provides a contracting mechanism that ensures that that alignment is maintained… If it fails, it all fails. The Commonwealth has to pay more money and the industry partners take a loss.

> The difference between that and the normal contracting hierarchy with prime and subcontractors is that if something goes wrong everybody is in the same boat and everybody tries to fix it… That is a fundamental difference between alliance contracting and traditional contracting which does make a difference. I am not saying it is a panacea, I am not saying all alliance contracts are wildly successful, but I am saying that the mechanism of it, applied appropriately, has a lot of potential.[20]

17 *Capability Systems Life Cycle Management Manual,* paras 4.41 and 4.47

18 Submission 20, p. 7 (Australian Industry Group Defence Council)

19 *Submission* 10, p. 11 (Department of Defence)

20 *Committee Hansard* p. 185 (Mr Nicholas Hammond)

5.21 Defence has signed two alliance contracts—one for its lightweight torpedo project, and the second for ANZAC Frigate Ship in–service–support. Both of these projects are eminently suited to alliance arrangements.

5.22 While alliance contracting seems likely to be effective with respect to substantial, well–defined projects involving major Tier 1 companies, the Committee sought advice as to whether partnering arrangements were feasible at the level of SMEs. The President of the Australian Industry and Defence Network (Mr Turner) regarded it as a 'complex issue', and gave the following illustration:

> If the industry player has to research and develop a technology for a specific purpose, and that purpose has no relevance to civilian marketability, then it would be of value for Defence and for that industry player to enter into a long-term partnership arrangement because that then ensures that the industry player is able to get a reasonable return on the investment made in developing that technology for the express purpose.[21]

5.23 The Committee is satisfied that the potential benefits from partnering arrangements are significant, while at the same time acknowledging that they must be entered into and managed with exquisite care. For the Committee, 'cultural change' is a fundamental issue here, as parties transform their usual way of doing things from the 'black–letter–contract–with–adversarial–mindset' approach to the 'we–are–mutually–responsible–for–goals–and–all–problems–are–our–problems' business marriage.

Evolutionary acquisition

5.24 On several occasions during the inquiry, discussions about partnering arrangements turned to the merits (and risks) of one–step–at–a–time approaches to acquisition. The *Capability Systems Life Cycle Management Manual* devotes a section to this so–called 'evolutionary acquisition'. The *Manual* notes that:

> 3.49 Evolutionary Acquisition (EA) enables capabilities to be upgraded in a planned way from the delivery of a specified initial capability to eventual achievement of a full capability
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> 3.50 The advantages of EA are:
>
> a. the sponsor, provider and the customer can learn from experience with the initial capability and its subsequent increments;
> b. a reduction of the risk inherent in introducing major technological improvements through a single step;
> c. a capability can incorporate evolving technology as it becomes available;
> d. by avoiding early commitment to the final capability system, the acquisition of obsolescent items can be avoided. [22]

21 *Committee Hansard,* p. 230 (Mr Michael Turner)

22 *Capability Systems Life Cycle Management Manual,* paras 3.49 and 3.50

5.25 If Defence's procurement policy is meant to be 'flexible, responsive, innovative and efficient', then evolutionary acquisition seems to be ideally suited to effecting those qualities.

5.26 The Committee notes the *Manual*'s admonition that evolutionary acquisition 'requires very tight management and a particularly close relationship between all stakeholders.' This is needed 'to inform decisions as to the definition of subsequent increments of capability and the performance of the project in relation to its approved project envelope.'[23]

5.27 The appeal of an evolutionary approach to acquisition was highlighted in the evidence of a witness (Mr Don Fry) who has had several decades of experience in shipbuilding—including for the Navy.

> I am a firm believer that the defence forces would be far better served and the Australian taxpayer would be far better protected if we could adopt a different culture for the way we go about ordering things like patrol craft, Anzac type frigates or watercraft. We should change from buying them all up–front in a block and causing somebody to create a machine that can punch out a whole series of craft in a very short time to a progressive delivery where the expertise to build is retained continually and the advantage is taken over the period bill to continually upgrade those vessels to incorporate the latest in technology. If we did a thing like that, for example, on a patrol craft, you would have a patrol craft builder in this country—as the Swedish do with Kockums or Karlskronavarvet—where there is interaction between industry and Defence and where the product is under continuous development and build.[24]

5.28 The Committee acknowledges the attractions of such an approach which is consistent with the policy of developing a strategic capability for the nation by ensuring that key industries can function productively over the long term. With the development of the sectoral plans for Australian defence industry the opportunities for evolutionary acquisition will be even more abundant.

5.29 The Committee has referred elsewhere to the issue of scale as a significant determinant of how Australia manages, in a strategic sense, the development of viable defence industry sectors. Given the relatively limited pool of 'knowledge edge' skills and facilities in this country, a major Defence–supplier partnership may in fact require contributions from an array of sub–contracting firms, and thereby spread the available work more widely that might have been anticipated. However, the Committee is alert to the potential dangers of exclusive partnering relationships. They can discourage competition and dampen innovation.

5.30 This may be the case especially for major projects where Defence enters a relationship with a single supplier for the long haul. Such an arrangement keeps other

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23 *Capability Systems Life Cycle Management Manual,* para 3.54

24 *Committee Hansard,* p. 320 (Mr Don Fry)

potential suppliers at bay. As a major shipbuilder himself, Mr Fry appreciates this problem. As he put it:

> [Evolutionary acquisition] does away with the need to constantly call tenders. It probably is not in my best interests, because another company might get that job, but I am looking at what is best for Australia and how we could manage this more efficiently. If we did it like that, we would be able to have the world's best boat always coming out at the end of our production line, and we would always have a boat coming off the line at a delivery rate equal to the attrition of the boats that are becoming obsolete…[25]

5.31 On balance, the Committee considers that the merits of evolutionary acquisition are sufficient to warrant proceeding with caution. The question of ensuring that the supplier remains focused on delivering a quality product and that the Commonwealth receives value for money is an important one. But as the following extract indicates, there are probably suitable ways to address these requirements.

> I accept [that EA excludes other suppliers once the original contractor has been signed] and that is the downside of it. It can, however, be brought more into the commercial world to be competitive, by two mechanisms. Here I draw a parallel to refit contracts I once did for a long period under a period contract where we offered a schedule of rates which were cost investigated. We were kept on the ball by the cost investigation system. We had to prove our overheads and all of our costs constantly. Whilst that was tedious, it was a very effective means of controlling our involvement on a do–and–charge basis for refits. That could be reintroduced for such a long-term period build. It could also be written into an arrangement where the major work for that particular contractor was required to be tendered for by other industries under subcontract to the principal organisation that is putting together the boat. To some extent, the Anzac project with Tenix is running along lines like that where they have a lot of subcontractors out there feeding into them, although they seem to have taken over some of them in recent times.[26]

5.32 This witness's optimistic view about these kinds of close partnerships was not shared by at least one witness who emphasized the difficulties of achieving the degree of cost transparency required.

> I believe that partnering will most certainly lead to cost–plus contracting with Defence having no insight into the contractor's real costs. How could one expect Defence cost investigators to really understand contractors' accounts—we heard this morning that Defence has trouble managing its own accounts—when highly trained and paid public company auditors tasked with reviewing accounts can miss critical information? In the current HIH situation, a public authority was specifically tasked to monitor the financial matters of insurance companies and it showed itself unable to do

25 *Committee Hansard,* p. 320 (Mr Don Fry)

26 *Committee Hansard,* p. 321 (Mr Don Fry)

> so. I put it to you that I think it would be very hard for Defence to get a good insight into tier 1 companies' financial and cost structure.
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> Partnering and expecting the tier 1 companies to consistently subcontract to SMEs is unrealistic. Experience has shown that in any downturn in workload the tier 1 companies bring work back in house. It is a most common practice in the US. The other way to go about it is if the subcontractors are making good money, buy out the subcontractors and retain the monopoly. Partnering can eliminate competition and dampen innovation.[27]

5.33 The issues raised here cannot be dismissed as unimportant. The Committee is keenly aware of the kinds of risks that attach to partnering arrangements. But if the partnership is properly established at the outset, and the forging of that partnership has come about only after a rigorous process of competition to determine the most appropriate and competent partner, the risks can be managed and mitigated. Defence is an experienced customer, and should have little trouble—in a globally competitive environment—benchmarking the costs of services or of developing and manufacturing materiel. The requirements of an 'open book' approach, with only one set of books for both internal and external reporting must also provide a reasonable measure of security for the Commonwealth.

Recommendation

5.34 **The Committee recommends that, in the event of Defence entering a long term partnership with a particular supplier, the DMO should remain in regular contact with the unsuccessful bidders. The DMO should report progress with the partnership, update potential suppliers on any changes to capability requirements emerging during the course of the partnership, and keep them abreast of strategic developments. The DMO should assist potential suppliers to be in a competitive position if and when an existing partnership expires and renewal is sought.**

Transparency in tendering and contracting

5.35 In a situation where tender bids are hotly contested, and the amounts of money involved are often quite substantial, the rigour of tendering processes must be assured. Commercial–in–confidence considerations—especially with respect to things like intellectual property—occupy a significant place in a properly conducted tender process.

5.36 However, the Committee believes that there may be room for introducing greater openness in contracts, particularly after the successful contractor has been publicly announced. The issues raised by such a proposal were canvassed in some detail by the ANAO in its submission to the Committee:

27 *Committee Hansard,* p. 236 (Mr Joseph Moharich)

> The ANAO suggested to Defence, in 1999, that it would be in the public interest to disclose terms and conditions in major Defence acquisition contracts, when signed, and that this would encourage improved management of the contract and monitoring of contractor progress, which in turn would enhance the prospects of achieving successful outcomes from the particular acquisition project. It would also prompt improved negotiation of contracts from the Commonwealth's viewpoint and better protection of Commonwealth's interests.
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> Defence considered, however, that disclosure would be contrary to the Commonwealth's interests because any concessions agreed for a particular contract would be revealed to industry, which would seek to adopt such modified terms and conditions as baseline negotiations points on later acquisition projects. Defence would prefer to continue to disclose only its preferred standard contract terms and conditions.
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> The ANAO accepted that disclosure of actual contract details raises issues beyond the Defence portfolio and which would need to be dealt with in the broader context of accountability by the Government and the Parliament.
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> More recently, the ANAO reported, in response to a Senate motion, on the use of confidentiality provisions in Commonwealth contracts. The report supported the principle that Government accountability obligations are such that contractual material should be protected as confidential only if there are sound reasons to do so. In recognising that there was an absence of comprehensive material to assist agencies in determining whether contractual provisions should be treated as confidential, the ANAO developed criteria to assist in such decisions. The criteria included that:
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> - the information to be protected must be identifiable in specific rather than global terms;
> - the information must have the necessary quality of confidentiality; and
> - detriment to the confider of the information is generally necessary.[28]

5.37 The Committee sees considerable merit in the disclosure of contract details beyond the reasons already advanced by the ANAO. Assuming that the process has been carried out properly, the publication of the winning bid should reveal to the losing contractors the justification for Defence's preferred choice. Such publication should reveal starkly if mischief or malpractice has taken place. As long as the details of winning bids are kept secret, gossip, rumour and 'leaks' are likely to foment dissatisfaction amongst losing bidders, probably leading to a round of representations and complaints that simply weigh the system down.

5.38 The Committee has been advised that in the United States it is the usual practice 'to announce the content of all bids received for a particular contract, and to explain why one proposal is preferred to others'.[29]

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28 *Submission* 2, p. 11 (ANAO)

5.39 It seems to the Committee that to reveal 'the content of all bids' is excess to what is warranted by the level of transparency that the Committee would regard as desirable. The ANAO's suggestion—being to disclose the details of contracts as far as possible, with confidentiality being accorded only to specific matters the publication of which would be detrimental to the confider—seems eminently sensible and workable. Here, the Committee would regard the 'detrimental to the confider' clause as extending to both specific information supplied by the contractor, and specific concessions granted by Defence.

Recommendation

5.40 **The Committee recommends that:**

(a) once a contract has been awarded for a Defence project valued at over A$100,000, the details of the winning bid should be published, with the provision that information about specific matters which bear the necessary quality of confidentiality may be withheld from publication where detriment to either the contractor or Defence would ensue. Prior to publication of the details, Defence should seek a formal opinion from ANAO as to whether that publication meets the appropriate standards of transparency; and

(b) Defence should publish, with the contract details, a brief statement setting out its reasons for selecting the winning bid.

29 *Submission* 4, p. 3 (Rear Admiral (Retired) W J Rourke)