

Chapter 1

Introduction

Referral of inquiry

1.1 On 24 November 2010, the Senate referred matters relating to certain air sustainment services contracts to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report by 1 May 2011.¹ The relevant contracts are administered by the Department of Defence and pertain to the provision of air charter services in support of the Australian Defence Force (ADF) in the Middle East Area of Operations (MEAO).

1.2 The committee presented an interim report out of sitting on 27 April 2011. The report informed the Senate that, after due consideration, the committee required additional time to prepare its final report to ensure that the issues raised during the inquiry were addressed thoroughly. The committee reported its intention to table a final report on 23 June 2011.² On 22 June the committee sought and was granted an extension to its reporting date to 25 August 2011.

Terms of Reference

1.3 The terms of reference directed the committee to examine the following matters:

- (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;

1 *Journals of the Senate*, 24 November 2010, pp. 14–15.

2 Senate Foreign Affairs, Defence and Trade References Committee, *Interim Report: Inquiry into the Department of Defence's request for tender for aviation contracts and associated issues* (27 April 2011).

- (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

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- (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.

Conduct of inquiry

1.4 The committee advertised its inquiry on its website and in the *Australian*, calling for submissions by 1 March 2011. The committee wrote to persons and entities known or considered likely to have been involved in matters covered by the terms of reference and invited written submissions. These persons and entities included the 13 suppliers registered on the relevant standing offer panel,³ and relevant ADF personnel.

1.5 The committee also wrote to the Minister for Defence, the Hon Stephen Smith MP (the Minister), requesting his assistance in obtaining background documentation relevant to the inquiry.

Submissions, hearings and additional information

1.6 The committee received seven submissions (including 2 confidential) which are listed at Appendix 1. The committee held three public hearings, in Sydney (28 March 2011) and Canberra (29 March and 28 June 2011). A list of the hearings and the names of witnesses who appeared is at Appendix 2.

1.7 During the inquiry, the committee received additional information and written answers to questions taken on notice by witnesses at the hearings. This documentation is listed at Appendix 3 and is published on the committee's website.⁴ The committee also invited a number of people, including Major David Charlton and Mr Mark Clark to respond to comments made by witnesses during the course of the inquiry. Some of the responses have been received in confidence. Major Charlton accepted the committee's first invitation to give evidence but, because of personal reasons, was unable to attend. He declined the committee's second invitation. Mr Clark declined to attend and give evidence before the committee.

1.8 The MEAO tender process was also discussed during the estimates hearings of the Foreign Affairs, Defence and Trade Legislation Committee on 19 October 2010 and 23 February 2011. At the Supplementary Budget Estimates hearing on 19 October 2010, Defence tabled relevant documentation and subsequently provided the

3 The relevant panel is the Air Transport Standing Offer Panel—DNL09009. It was established by the *Air Transport Deed of Standing Offer*, 2 November 2009 (AusTender SON179438).

4 See: http://www.aph.gov.au/Senate/committee/fadt_ctte/aviation/index.htm (accessed 23 March 2011).

Legislation Committee with responses to questions taken on notice. This evidence is published on the Legislation Committee's website.⁵

Key documents

1.9 The committee has drawn upon several key documents in this report. In particular, it has made considerable reference to the reports of the four process reviews commissioned or undertaken by Defence. These reports are:

- Department of Defence Audit and Fraud Control Division (AFCD), *Final Probity Review Report: Probity Review of Tender Process for Air Sustainment Services to the Middle East Area of Operations*, Review Task 11-058 (September 2010);⁶
- PricewaterhouseCoopers (PwC), *Independent Peer Review of the Department of Defence, Audit and Fraud Control Division's Probity Review Concerning the Provision of Air Sustainment Services to the Middle East Area of Operations* (8 October 2010);⁷
- Deloitte Touche Tohmatsu (Deloitte), *Examination of the Procurement Process for Tender RFT AO/014/09-10* (15 September 2010);⁸ and
- Australian Government Solicitor (AGS), *Legal and Legal Process Review of the Procurement Process for the Middle East Area of Operations Air Sustainment Support Contract* (15 September 2010).⁹

Scope and structure of report

1.10 Although comprehensive, the terms of reference address specific aspects of the tender process for the provision of air support services to the MEAO (RFT AO/014/09-10). They require the committee to examine the procurement methodically from its inception to its current status.

1.11 To perform this task, the committee has organised its report into three parts, which contain 12 chapters. Part I (chapter 2) provides background to the awarding of

5 See: http://www.aph.gov.au/Senate/committee/fadt_ctte/estimates/index.htm. (accessed 23 March 2011).

6 'AFCD Review'. This document was provided to the committee as Department of Defence, *Submission 5*, Attachment E.

7 'PwC Review'. This document was provided to the committee as Department of Defence, *Submission 5*, Attachment B.

8 'Deloitte Review'. This document was provided to the committee as Deloitte Touche Tohmatsu, *Submission 3*, Attachment. Defence also provided a copy of this report to the Legislation Committee at the Supplementary Budget Estimates hearing on 19 October 2010.

9 'AGS Review'. Defence provided a substantially un-redacted copy of this report to the committee under cover of letter to the Committee Secretariat dated 28 March 2011. A version with more substantial redactions was provided to the Legislation Committee at the Supplementary Budget Estimates hearing on 19 October 2010.

the 2010 contract. It briefly outlines the history of air sustainment support to the ADF in the MEAO and identifies the key companies and individuals involved in the tender process in respect of RFT AO/014/09–10 (referred to as the 2010 tender process).

1.12 Part II (chapters 3–7) sets out the factual narrative of events occurring in the lead-up to, during and on completion of the 2010 tender process. The committee drew on these chapters to reach its conclusions about the integrity of the procurement process. In particular, Part II:

- provides the evidentiary basis for the committee's findings and recommendations; and
- progressively identifies the key themes and issues informing the committee's analysis.

1.13 In Part III (chapters 8–12), the committee considers the significance of the evidence before it in light of its terms of reference. In making its findings and recommendations, the committee focuses on three broad issues:

- governance arrangements—particularly in respect of probity risk management;
- the tender specifications—notably whether the tender requirements or conditions were designed to unfairly advantage the successful tenderer; and
- matters of due diligence in respect of the successful tenderer (and its key personnel and associated entities). These matters are relevant to its fitness and propriety to contract with the Commonwealth, and its financial or commercial capacity to deliver the contracted services to the requisite standard.

Potential matters of parliamentary privilege

1.14 Two possible matters of parliamentary privilege arose during the course of the committee's inquiry. Both related to the unauthorised use of confidential committee information. The committee has investigated these matters and is of the view that in drawing attention to its deep concern about such conduct with relevant individuals, it has properly underscored the importance of parliamentary privilege. In one case, which had the potential to adversely affect a witness, the committee and the potentially affected person have received a sincere apology and firm assurances from the offending party that the witness will not be disadvantaged in any way. The committee, however, uses this opportunity to make clear that it takes its responsibility to protect witnesses who appear before it very seriously.

1.15 Although the second case was a flagrant and deliberate breach of trust by publishing private correspondence, the committee is of the view that the disclosure itself did not seriously impede its work in conducting this particular inquiry. Indeed, the publication seemed pointless. Nonetheless, it is disappointed at the lack of regard and respect shown by a journalist with the *Age* newspaper who made public the contents of private correspondence received by the committee. Such unauthorised disclosures have the potential to undermine public trust and confidence in the work of

parliamentary committees and may even discourage people from coming forward to assist committees in their inquiries. The failure of this newspaper and its lawyers to comprehend the importance of parliamentary privilege and of the work of parliamentary committees is a matter of great concern.

Acknowledgments

1.16 The committee thanks all those who contributed to the inquiry by making submissions, giving evidence at hearings and providing additional information.

Note on references

1.17 References to Committee Hansard are to the proof Hansard. Page numbers may vary between the proof and the final versions.

Part I

Background to the tender

The provision of commercial air charter services has characteristics that require close attention when tendering and contracting for such services.

In this part of the report, the committee provides the background necessary to understand the risks involved in the 2010 tender process. It outlines the history of the provision of air sustainment services to the MEAO and identifies the main entities and individuals associated with the 2010 tender process.

