

Chapter 5

Internal review of the 2010 tender process

5.1 In response to Mr Aisen's grievances, Defence initiated a series of reviews of the 2010 tender process. Basically, they were to determine whether there were any legal or policy compliance related reasons that would prohibit Defence from proceeding to contract. Defence stated that the total cost for the reviews was in the vicinity of \$700,000.¹

5.2 This chapter outlines the findings, scope and methodology of the internal review conducted by the AFCD, and the peer review conducted by PwC. It also notes the limitations placed on the reviews and the necessary qualifications to their findings. Chapter 6 then addresses the external reviews undertaken by Deloitte and AGS.

AFCD review

5.3 On 15 July 2010, the Secretary requested Defence's Chief Audit Executive to conduct a probity review of the 2010 tender process. Following preliminary scoping work, the review commenced on 19 July 2010.²

Scope and methodology

5.4 The probity review addressed seven key questions:

- (a) Was the tender process sound and did it comply with Commonwealth and Defence procurement policy?
- (b) Were all tenderers given equal opportunity to respond to the tender and were all tenderers treated fairly and equally?
- (c) Were the tender evaluation and value for money assessment processes thorough, free of bias and was the basis for ranking the tenders a true representation of the tenderers' compliance with the selection criteria?
- (d) Did the request period of eight weeks provide sufficient time for tenderers to provide tenders that could meet all conditions of the tender?
- (e) Did the specified air sustainment support services relate to actual operational needs?
- (f) Did the specifications disadvantage any tenderers?
- (g) Is there anything identifiable in the tender process that would justify re-tender?³

1 Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, p. 87.

2 Department of Defence, *Submission 5*, Attachment A, p. 6.

3 AFCD Review, p. 3.

5.5 The AFCD Review assessed the following steps in the tender process against the policy framework in the Commonwealth Procurement Guidelines (CPGs), the Defence Procurement Policy Manual (DPPM) and the Financial Management Guidance 14 (FMG 14):⁴

- (a) procurement planning and industry engagement;
- (b) development of tender documentation and technical specifications;
- (c) procurement risk and probity management;
- (d) tender evaluation and coordination of the TEWGs; and
- (e) value for money decision making process.⁵

5.6 To undertake this assessment, the AFCD Review accessed documentary evidence and conducted interviews with key personnel. Documentary evidence included the TEP, the 2008 contract, the draft 2010 contract and request specifications, TEWG working papers and notes, an independent probity review relating to the 2005 tender, and various other internal documentation such as briefings.⁶ It also accessed data from sources including the Defence personnel records management system, the Reservists' pay system, electronic document access records, and telephone and email logs pertaining to Major Charlton.⁷ The following personnel were interviewed as part of the review:

- Air Commodore Peter Brennan, Director General Logistics Assurance, on 21 July 2010;
- Mr Alan Scheckenbach, Director National Logistics, Joint Logistics Command, 9 August 2010;
- Financial Investigations Services personnel, 4 August 2010;
- Clayton Utz legal advisors, 4 August 2010;
- Lieutenant-General Mark Evans, Commander Joint Operation Command, 13 August 2010;
- Major David Charlton, 3 August 2010; and
- Mr Mark Clark, Mr Stuart Lee and Mr Anil Pattel, Adagold, 13 August 2010.⁸

4 Australian Government Department of Finance and Deregulation, 'Guidance on Ethics and Probity in Government Procurement', *Financial Management Guidance No. 14* (January 2005). The guide was developed to support the Commonwealth Procurement Guidelines (CPGs), to help officials understand their policy obligations when undertaking procurement activities (p. 2).

5 AFCD Review, p. 6.

6 AFCD Review, p. 6.

7 AFCD Review, pp. 21–22.

8 AFCD Review, pp. 6–7.

Key findings

5.7 In summary, the AFCD Review found that the 2010 tender process was fair and complied with Commonwealth and Defence procurement policy.⁹ Its key conclusions were that:

- (a) the decision to re-tender was based on valid commercial and operational considerations, including the likelihood of an improved value for money outcome following changed aviation industry conditions due to the global financial crisis;
- (b) the above-mentioned decisions could have been better documented;
- (c) the tender specifications—including an increase in the freight capacity—were based on valid and objectively determined operational and technical requirements, and were not specified to advantage or disadvantage any tenderers;
- (d) there was no relevant evidence to support claims that Adagold should have been excluded from the contract due to alleged corrupt behaviour in relation to dealings with the South African Defence Department;
- (e) there was no evidence that Major Charlton had any involvement in, or influence on, the RFT or tender evaluation process;
- (f) no evidence was found to support claims that Major Charlton directly or indirectly had privileged access to any information associated with the tender specifications;
- (g) there was no evidence to support claims that Hi Fly did not meet essential Australian airworthiness requirements or that it had a history of unsafe operations; and
- (h) on the basis of the findings of an independent external probity audit of the 2005 tender process conducted by Phillips Fox (now DLA Piper)—which found that the 2005 tender process was conducted in a fair, open and transparent manner—it was not necessary to perform additional assessment of the 2005 tender process.¹⁰

5.8 Within these broad conclusions, some of the critical findings in response to Strategic's matters of complaint related to the tender specifications, conflicts of interest and the fitness and propriety of the successful tenderer.

The tender specifications

5.9 The AFCD probity review formed the view that:

9 AFCD Review, p. 4.

10 AFCD Review, p. 5.

- The cargo volumetric specifications did not advantage or disadvantage particular tenderers because they were functionally specified, and the preference for a single aircraft solution was based on evidence of logistics complications arising from the existing load-splitting solution.¹¹
- There was no requirement to favour an Australian solution in the tender specifications or evaluation process. While Australian industry participation and the promotion of small-to-medium enterprises are important considerations, the overriding principle is the achievement of value for money. Australian industry participation was appropriately taken into account in the value for money assessment of responses. For example, while the request did not mandate the use of Australian crews, a number of tender responses offered Australian crews and this factor contributed to the overall value for money assessment undertaken by the TEB.¹²
- While the eight-week tender response timeframe was tight, it was achievable, not unusual for the aviation industry and based on operational need.¹³

5.10 Overall, the review found that 'the tender evaluation process was conducted appropriately' and the selection of the preferred tenderer and the second and third ranked tenderer was 'based on objective VFM [value for money] and risk assessment processes'. It noted, however, that there was 'very little difference between the top three ranked tender options'.¹⁴

Conflict of interest and confidentiality issues in relation to Major Charlton

5.11 The AFCD Review considered conflict of interest and confidentiality matters and found:

- Major Charlton immediately and appropriately declared a potential conflict of interest shortly after becoming aware of the release of the request on 29 March 2010, and Defence acted immediately to ensure that he could have no involvement in the tender process.¹⁵
- A review of documentary evidence (including physical and electronic security processes, data from Defence records management systems and ICT access and usage records) and interviews with key personnel indicated that Major Charlton:
 - had no role in the development of tender specifications or the procurement process more broadly;

11 AFCD Review, p. 17

12 AFCD Review, pp. 16–17.

13 The review noted the evidence of an unsuccessful tenderer to this effect: AFCD Review, p. 15.

14 AFCD Review, p. 14.

15 AFCD Review, p. 9.

-
- had no access to the electronic or physical files relating to the tender; and
 - did not appear to have received or communicated any evidence in relation to the tender process (on the basis that no contrary evidence had been identified).¹⁶
 - Adagold was aware generally of increasing load requirements by virtue of industry knowledge of the performance of the 2008 contract, including monitoring separate freight forwarding arrangements.¹⁷
 - There was no evidence to connect the application made by Hi Fly to add a second Airbus A340-300 aircraft to its FAAOC to any inside knowledge acquired by Adagold. Rather, it appeared that Hi Fly had taken a pre-emptive business decision on its own initiative. In light of its strategic partnership discussions with Adagold and its record of servicing previous MEAO contracts, there was a reasonable possibility that it may be approached by any panel member, should the contract be re-tendered.¹⁸
 - No evidence was identified to support the assertion that Major Charlton was approaching Strategic pilots to recruit them to Adagold. Even if evidence did emerge, the AFCD Review considered that it would still need to be established whether they relate to the 2010 tender. It also observed that any such approaches would not necessarily demonstrate impropriety. Given that Strategic was the continuous contract holder since 2005, 'it would be logical that any preferred tenderer might look to target their skilled and experienced workforce upon winning the contract'.¹⁹

The fitness and propriety of Adagold to contract with the Commonwealth

5.12 Finally, in respect of Adagold's fitness and propriety to contract, the AFCD Review found:

- There was no cogent evidence to support allegations concerning tender irregularities involving Adagold (South Africa) or Adajet. There did not appear to be any conclusive findings of wrongdoing by South African authorities, and the outcome of a similar review undertaken by the Danish military was consistent with this finding.²⁰
- Hi Fly met the relevant ADF airworthiness requirements because it is registered by the Portuguese civil aviation authority, INAC. The Portuguese

16 AFCD Review, pp. 21–23.

17 AFCD Review, pp. 17, 23–24.

18 AFCD Review, p. 24.

19 AFCD Review, p. 26.

20 AFCD Review, p. 19.

authority is a recognised National Aviation Authority in accordance with the relevant requirements in the *ADF Airworthiness Manual*.²¹

- As Major Charlton was neither a tenderer nor a subcontractor to a tenderer, his commercial history was not relevant to the tender evaluation process or probity review.²²

Deficiencies in the tender process

5.13 While ultimately concluding that the tender process was sufficient from a technical compliance perspective, the AFCD Review identified several deficiencies in 'the tender planning process, and in the completeness of the tender evaluation methodology and assessment documentation'.²³

5.14 Although it formed the view that these deficiencies were 'not to the extent to cause the tender process to be suspended', the AFCD Review singled out areas for improvement and made several recommendations. These included:

- the panel deed of standing offer was suitable for simple charters, but may not have been suitable for the more complex air sustainment procurement activity being contracted for under the MEAO air sustainment services contract;²⁴
- the Air Transport Standing Offer Panel Administrator should obtain a complex procurement competency as soon as possible, in accordance with the recommendation in the Defence Procurement Policy Manual (DPPM). The AFCD Review further recommended that this competency should be designated as a prerequisite to appointing future personnel to this position;²⁵
- the procurement planning process should be strengthened through the following measures:
 - an improved commercial risk assessment and the appointment of a dedicated, independent probity advisor prior to the release of the request and in lieu of placing excessive reliance on the 'assurance' provided by the standing offer panel risk assessment;²⁶
 - utilisation of standardised ASDEFCON (template Defence contracts and tender documentation) requirements, terminology and templates where practicable;²⁷

21 AFCD Review, pp. 19–20.

22 AFCD Review, p. 25.

23 AFCD Review, p. 18.

24 AFCD Review, p. 10. This matter was further examined in the AGS Review, discussed in chapter 6 of this report. See further, AGS Review, p. 6.

25 AFCD Review, pp. 7–8.

26 AFCD Review, pp. 11, 12.

27 AFCD Review, p. 11.

-
- early consultation with relevant line areas in the development of the TEP—for example obtaining Financial Investigation Service advice on the agreed pricing model and financial evaluation processes;²⁸ and
 - the TEP should provide a detailed outline of the scoring and pricing model to ensure a standardised and complete assessment of tender responses;²⁹
 - the tender evaluation process should be improved through the following measures:
 - the TEB should produce a separate report for its initial compliance assessment against the five evaluation criteria for which it was responsible, in addition to its overall compliance assessment;³⁰
 - improved consultation between elements of the tender team in the evaluation process—particularly between the technical/operational and financial TEWG staff;³¹
 - a clearer explanation of rankings in the SER, to better communicate the processes used, the level of relative risk and the assessed mitigation strategies, as well as clearly communicating the relative compliance aspects of each tender response;³² and
 - on the basis of the number of flights undertaken under the 2008 contract, the contract pricing analysis should be based on 80 flights per annum rather than the figure of 65 originally used by the financial TEWG. (The AFCD Review requested the financial TEWG to conduct a price sensitivity analysis based on 80 flights and concluded that it did not materially affect the preferred tenderer ranking).³³

5.15 The AFCD Review findings on the appointment of a probity advisor are especially pertinent to the committee's inquiry. The review found that:

While the advice not to appoint an independent probity advisor may have been reasonable at the time, with the benefit of hindsight the probity review concluded that a complete risk assessment of the 2010 request by Defence should have identified the desirability for an independent probity advisor, particularly given that the panel is comprised of highly competitive companies within an industry operating on tight margins and offering almost identical services.³⁴

28 AFCD Review, pp. 11, 12.

29 AFCD Review, p. 11.

30 AFCD Review, p. 11.

31 AFCD Review, p. 11.

32 AFCD Review, p. 11.

33 AFCD Review, pp. 11, 13.

34 AFCD Review, p. 12.

5.16 The committee considers a number of these identified deficiencies and weighs up the importance of appointing a probity advisor in chapter 9.

5.17 It should be noted that on 12 August 2010, before the AFCD team had concluded its review, an article appeared in national newspapers that raised serious probity concerns about the 2005 contract. It reported that soon after the 2005 tender process had concluded, Mr Charlton and another Defence member, both of whom had links to the logistics group, were given senior management jobs by the successful tenderer. The author of the article understood that Mr Charlton had been involved in the tender process, creating 'serious conflict-of-interest concerns'.³⁵

Review limitations

5.18 The committee questioned Defence about various limitations in the scope and methodology of the AFCD Review.³⁶ Mr Bromwich, Inspector-General, Defence, acknowledged that the AFCD review team was 'working to a very tight time line'.³⁷ According to Mr Brown:

We were working to try to have a report delivered on the probity around the process of the tender evaluation so that the contract could be signed in time to establish a RIP, a relief in place, which is about moving a lot of troops into and out of theatre.³⁸

5.19 While the committee understands that Defence was under pressure to have the contract in place to save disruption to its air services to the MEAO and the extra costs of putting in place an interim arrangement, it finds this explanation highly unsatisfactory. Surely, the most important and overriding objective was to ensure that the tender process was valid and the contract sound.³⁹

5.20 Other relevant limitations to the review included:

- the decision not to investigate a possible connection between the 2005 and 2010 tender processes, on the basis of the findings of the Phillips Fox (DLA Piper) probity review of the 2005 tender;⁴⁰ and

35 Richard Baker, 'Concerns over Defence contract', *Sydney Morning Herald* and the *Age*, 12 August 2010.

36 *Proof Committee Hansard*, 29 March 2011, pp. 73–83. A number of witnesses referred to time constraints and the need to have the contract in force. See for example, Mr Scala, AGS, *Proof Committee Hansard*, 28 June 2011, p. 6; Mr Brown, *Proof Committee Hansard*, 29 March 2011, p. 86.

37 *Proof Committee Hansard*, 29 March 2011, pp. 75, 77, 82 and 86. See also observation in PwC's *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 (MEAO)*, 8 October 2010, p. 7 and the AFCD Review, p. 6.

38 *Proof Committee Hansard*, 29 March 2011, p. 75.

39 See also paragraph 6.73.

40 AFCD Review, p. 25.

- the fact that the probity review was not a fraud or criminal investigation, but rather a process review focused on the identification of evidence showing why the tender process should not proceed.⁴¹ This emphasis contributed to:
 - the decision not to interview Mr Aisen, in particular to ascertain his basis for making his allegations;⁴² and
 - the fact that the personal telephone and email records of Major Charlton were not examined.⁴³

5.21 The committee also notes that the AFCD team did not interview any of the unsuccessful tenderers. Because of its limitations including the nature of the available evidence, the AFCD Review in some cases could only reach conclusions that still left room for doubt. For example, although it conducted a forensic examination of physical and electronic security processes and records, including Major Charlton's Defence email and storage drives, it could not prove either way whether Major Charlton 'may have or could have had access to relevant discussions'. The committee returns to these limitations in chapter 8.

The PwC review

Engagement

5.22 On 18 August 2010, Defence engaged PwC to conduct a peer review of the AFCD review process to ensure that it was thorough and robust.⁴⁴ PwC was engaged to assess the AFCD process in accordance with the principles outlined in FMG 14⁴⁵ in respect of ethics and probity in Australian Government procurement—namely:

- (a) fairness and transparency;
- (b) consistency and transparency of process;
- (c) use of an appropriately competitive process;
- (d) appropriate security and confidentiality arrangements;
- (e) identification and management of actual and potential conflicts of interest; and

41 Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, pp. 73, 74, 75.

42 *Proof Committee Hansard*, 29 March 2011, pp. 75 (Mr Geoffrey Brown), 76–80 (Dr Raymond Bromwich). This matter was also the subject of comment in the PwC review, detailed below.

43 AFCD Review, pp. 22–23. See further, Dr Raymond Bromwich, *Proof Committee Hansard*, 29 March 2011, p. 83.

44 Department of Defence, *Submission 5*, Attachment A, p. 7; PwC Review, p. 2; Mr Steven Baker, *Proof Committee Hansard*, 29 March 2011, p. 14; Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, p. 83.

45 Australian Government Department of Finance and Deregulation, 'Guidance on Ethics and Probity in Government Procurement', *Financial Management Guidance No. 14* (January 2005). See footnote 4.

(f) compliance with legislative obligation and government policies.⁴⁶

5.23 The PwC review started a month after the AFCD review commenced. Two directors and one partner undertook the work for a fixed amount of \$20,625 (GST inclusive), calculated on an estimated 11 days of work.⁴⁷

5.24 Defence contracted PwC under a co-source internal audit services contract.⁴⁸ Mr Brown explained the process of appointment:

I went and discussed [the peer review] with PricewaterhouseCoopers in my office. They were there because they are normally working on jobs for us at any point in time. I took advantage of that. We had a discussion and I said to the partner at the time, Steve Baker...'Can you construct a terms of reference for me? Whatever you need to do to complete the job and make a thorough review, please do it.' He responded to me with that letter to my assistant, David Anderson. I was aware of the content of that and they undertook the review. The review was done to provide assurance that there were no steps in the process that we were not following. We chose them because I could call on them immediately. I am sure the PricewaterhouseCoopers brand is worth a lot more than any one assignment to Defence, so I had confidence that they would have employed Chinese walls to ensure that the person undertaking the review had not been working on audits in our area—indeed, I know that for a fact.⁴⁹

Methodology

5.25 In conducting the peer review, PwC adopted the following approach:

- conducted interviews with key AFCD executive and probity review team members to ascertain:
 - their understanding of what led to the probity review and the associated risks to the Commonwealth if the allegations proved to have substance;
 - their understanding of the probity review objectives and processes and their roles;
 - the application of the probity principles in FMG 14 to the conduct of the probity review;
 - whether there were any inconsistencies with respect to the information provided by interviewees;

46 PwC Review, p. 2; Department of Defence, *Submission 5*, Attachment A, p. 7; Mr Steven Baker, *Proof Committee Hansard*, 29 March 2011, p. 14.

47 Department of Defence, *Submission 5*, Attachment A, p. 7. See further, PwC Review, Appendix A (terms of reference and quotation as contained in a letter from PwC to Defence dated 18 August 2010).

48 Department of Defence, *Submission 5*, Attachment A, p. 7.

49 Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, pp. 83–84. See also, Mr Steven Baker, *Proof Committee Hansard*, 29 March 2011, pp. 18–21.

-
- whether they had any concerns relating to how the probity review progressed; and
 - whether they were kept informed throughout the review regarding the issues and risks detected; and
 - reviewed relevant source documentation including working papers; and
 - reviewed the processes that AFCD followed.⁵⁰

5.26 PwC emphasised that it did not re-perform any of AFCD's procedures or investigate the basis of any allegations made in respect of the 2010 tender. Nor did it repeat the tender evaluation process or provide an opinion on the tender evaluation decisions or the ranking of tender respondents.⁵¹ PwC indicated that it had placed reliance on the representations made to it by AFCD staff during interviews and on the content of working papers and other documentary evidence provided to it. It did not independently verify any of this information.⁵²

5.27 In its review, PwC indicated further that it had not carried out an audit or other assurance engagement in accordance with applicable professional standards, or had it attempted to detect fraud or accept responsibility for detecting fraud.⁵³

5.28 The observations made in its peer review were discussed with AFCD staff throughout the peer review process, who agreed with, and acted upon, them prior to the finalisation of their AFCD probity review report in September 2010.⁵⁴

Findings and AFCD's response

5.29 PwC concluded that the probity review was conducted in a manner that was consistent with the key principles underlying ethics and probity in procurement.⁵⁵ It considered that the work undertaken by AFCD had not 'identified any significant issues, unreasonable observations or serious deficiencies in their probity review process, which would lead us to conclude that the probity review has not been completed in an impartial manner'.⁵⁶ PwC made six observations about the probity review process, five with accompanying suggestions, which were:

- PwC noted that due to a departure from normal practice as a result of time constraints, a probity review methodology was not documented in a review

50 PwC Review, p. 5.

51 PwC Review, pp. 2, 3.

52 PwC Review, p. 3.

53 PwC Review, p. 3.

54 PwC Review, pp. 2, 7.

55 PwC Review, p. 3.

56 PwC Review, p. 3.

plan prior to commencement. It observed that a methodology was developed by AFCD concurrently with its fieldwork.⁵⁷

- PwC observed that Mr Aisen had not been interviewed by AFCD and suggested that 'in the interest of being seen to conduct a fair and transparent process, consideration should be given as to how to address the issue of not having interviewed [him]'.⁵⁸
- PwC suggested the inclusion of timelines of key dates to 'demonstrate to users what occurred at what point in time, particularly with respect to David Charlton and where and when he was working for Defence';⁵⁹
- PwC suggested the inclusion of commentary detailing the work undertaken by the Inspector-General with respect to investigating Major Charlton's handling of procurement documents or related information;⁶⁰
- PwC suggested the inclusion of commentary addressing the unsolicited bid received from Adagold, since it 'could be seen as a catalyst for the decision to re-tender';⁶¹ and
- PwC suggested the obtaining of statements from two persons who made unsolicited calls to Mr Brown in the course of the probity review—one from an ex-Strategic Aviation finance officer and the other from the CEO of another tender respondent.⁶²

5.30 The first observation was agreed to by AFCD with no further action required.⁶³ The suggestions for the third, fourth and fifth observations were agreed to and included in the AFCD report.⁶⁴ While the sixth was agreed to by AFCD, reference was not made to the relevant phone calls in the report because they were not considered relevant.⁶⁵ AFCD chose not to act on the second observation, as discussed below.

5.31 AFCD was of the view that there was no material benefit in interviewing Mr Aisen, given the limited time available and the scope of the matters to be examined. It explained:

57 PwC Review, p. 7 (observation 1).

58 PwC Review, pp. 7–8.

59 PwC Review, p. 8 (observation 3).

60 PwC Review, p. 8 (observation 4).

61 PwC Review, p. 9 (observation 5).

62 PwC Review, p. 9 (observation 6).

63 PwC Review, p. 7.

64 PwC Review, pp. 8–9.

65 PwC Review, p. 9.

In the lead up to, and during the course of, the AFCD probity review, Mr Aisen sent nine separate emails to Defence in which he clearly set out his concerns. While Mr Aisen's initial email stated that he had 'other' concerns to raise and indicated a preparedness 'to elaborate on them, should you so wish', his subsequent emails detailed his further concerns.

At no time did Mr Aisen seek to be interviewed but adopted the course of detailing his concerns in writing through emails. It was apparent from his emails that he had expressed the totality of his concerns, demonstrated by the fact that in later contacts there was repetition of issues. Consequently the full nature and scope of Mr Aisen's concerns and allegations was self-evident from his various email correspondence.⁶⁶

5.32 The committee pursued this matter with AFCD at its public hearing on 29 March 2011.⁶⁷ Dr Bromwich stated that:

There was nothing in any of the communications that Mr Aisen had with us that indicated he had source material beyond that which he provided us. The nature of the concerns that he raised were by definition speculative and conjecture. He was putting together issues and events and posing questions to say, 'it just seems incomprehensible to me that [Major] Charlton couldn't have had some involvement that advantaged Adagold in the tender process'. They were of that nature... Bearing in mind the time constraints that we were under, the judgment that we made at the time was that we really were not going to get any more productive evidence out of speaking to Mr Aisen directly. We were focused on investigating the allegations that he had made.⁶⁸

5.33 He stated further that:

...had we at any stage...identified what I would call prima facie evidence of fraud—as distinct from merely allegation which, if true, could amount to fraud—I would have had that matter remitted to me in accordance with my responsibilities for fraud control.⁶⁹

5.34 The Secretary of Defence, Dr Ian Watt, stated that, even if AFCD had interviewed Mr Aisen, Defence 'would have, in all likelihood' proceeded to commission the external reviews.⁷⁰ He stated that 'we would still have probably had to do a great deal of work because of the widespread arguments that there were some problems with the tender'.⁷¹ Dr Watt continued:

66 PwC Review, p. 8.

67 *Proof Committee Hansard*, 29 March 2011, pp. 74–79; 87–88.

68 Dr Raymond Bromwich, *Proof Committee Hansard*, 29 March 2011, p. 77. See further p. 82.

69 Dr Raymond Bromwich, *Proof Committee Hansard*, 29 March 2011, p. 79.

70 Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 88.

71 Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 88.

Hindsight is a wonderful thing. We found no evidence of any fraud in the work we did. You can say, 'if you had looked at it differently you might have found something different, or quicker'. I do not think we would have found anything different. Had there been any evidence [of fraud] you can be assured we would have taken it to the AFP immediately.⁷²

5.35 The AFCD concluded its review on 26 August 2010. The committee notes PwC comments on the conduct of the AFCD's review, particularly with respect to its failure to interview Mr Aisen. Despite Defence's view that no material benefit was to be gained from interviewing Mr Aisen, the committee notes PwC advice that to do so would certainly have been in the 'interest of being seen to conduct a fair and transparent process'. It may also have been advisable to comment in the AFCD review on the two unsolicited telephone calls to Mr Brown, if only to discount them on the grounds of irrelevance. The committee returns to the issues raised in the reviews in chapter 8.

Limitations

5.36 It should be noted that the peer review had quite specific and narrow terms of reference. Mr Steve Baker, Partner PwC, informed the committee that they did not conduct an audit under the professional standards. He explained:

The peer review was to perform an assessment of the probity review process by AFCD in accordance with FMG 14. That is what we were approached to do, that is what our terms of reference identified and that we agreed to perform, and that is what we did perform. I can only really comment on the work that I was asked to do and the conclusions based upon that.⁷³

5.37 According to Mr Baker, they were not undertaking a review of the 'underlying tender process in any way' and 'not for the purpose of providing an opinion on the tender evaluation decisions or ranking of the respective tenderers'.⁷⁴ The team relied on representations made to it by AFCD personnel and on the content of working papers and other documentary evidence provided to it.⁷⁵

5.38 Also, although not directed to conduct the review within a set timeframe, PwC was aware of Defence's strong desire to have the AFCD review completed. Mr Baker explained that the PwC team was aware there was 'urgency in regard to the contract'. It was not told that the review had "'to be done within a week", although there was an awareness of urgency'.⁷⁶

72 Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 88.

73 *Proof Committee Hansard*, 29 March 2011, p. 16.

74 *Proof Committee Hansard*, 29 March 2011, p. 14.

75 PwC Review, p. 3.

76 *Proof Committee Hansard*, 29 March 2011, p. 31. See also para. 5.15 and accompanying footnotes.

Conclusion

5.39 While concluding that the procurement was not fatally flawed from a technical compliance perspective, the AFCD review of the procurement identified several shortcomings in the process. These included:

- concerns about the suitability of the panel arrangement for complex air sustainment procurement activities;
- gaps in the training of the standing offer panel administrator in respect of complex procurement competencies;
- the fact that Defence should have identified the desirability of an independent probity advisor during the procurement planning stage; and
- a range of process issues relevant to the procurement planning and tender evaluation stages—better consultation between those involved in developing the TEP, more detail on scoring and pricing models, clearer explanations of rankings in the SER.

5.40 The review also operated under limitations of time and scope, some of which undermine the reliability of its conclusions. These limitations included:

- the decision not to interview the complainant, Mr Aisen, notwithstanding the observations made in the PwC peer review; and
- the determination that the 2005 tender process and Major Charlton's financial history were irrelevant to the consideration of the 2010 tender process.

5.41 Naturally, the pressure placed on the AFCD team to complete its task affected the timeframe and scope of the PwC peer review. Within its limited terms of reference, the PwC identified a number of areas where AFCD could improve and strengthen its review. While AFCD agreed with PwC's six observations, it did not act on the suggestion to interview Mr Aisen.

5.42 Despite the positive findings of the two reviews, they failed to quell the controversy dogging the 2010 tender process. Further events unfolded that led to the establishment of two external reviews in September 2010. These external reviews are considered in the following chapter.

