

The Senate

Foreign Affairs, Defence and Trade
References Committee

Defence's request for tender for aviation
contracts

August 2011

© Commonwealth of Australia 2011

ISBN 978-1-74229-472-8

Printed by the Senate Printing Unit, Parliament House, Canberra.

Members of the committee

Core members

Senator Alan Eggleston, LP, WA (Chair) from 7.7.2011
Senator the Hon Ursula Stephens, ALP, NSW (Deputy Chair) from 7.7.2011
Senator Mark Bishop, ALP, WA (Deputy Chair until 7.7.2011)
Senator David Fawcett, LP, SA – from 1.7.2011
Senator Helen Kroger, LP, VIC (Chair until 7.7.2011)
Senator Scott Ludlam, AG, WA

Senator the Hon Alan Ferguson, LP, SA – until 30.6.2011
Senator Michael Forshaw, ALP, NSW – until 30.6.2011
Senator Russell Trood, LP, QLD – until 30.6.2011

Participating members who contributed to the inquiry

Senator the Hon David Johnston, LP, WA

Secretariat

Dr Kathleen Dermody, Committee Secretary
Ms Christina Raymond, Senior Research Officer – until 29.6.2011
Ms Angela Lancsar, Administrative Officer

Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: + 61 2 6277 3535
Fax: + 61 2 6277 5818
Email: fadt.sen@aph.gov.au
Internet: www.aph.gov.au/Senate/committee/fadt_ctte/index.htm

Table of contents

Members of the committee	iii
Acronyms and abbreviations	ix
Executive summary and recommendations	xi
CHAPTER 1	
INTRODUCTION	1
Referral of inquiry	1
Terms of Reference	1
Conduct of inquiry	3
Submissions, hearings and additional information.....	3
Key documents	4
Scope and structure of report.....	4
Potential matters of parliamentary privilege	5
Acknowledgments	6
Note on references	6
PART I	
BACKGROUND TO THE TENDER.....	7
CHAPTER 2	
BACKGROUND TO THE 2010 TENDER PROCESS	9
The delivery of air sustainment services to the MEAO	9
The move to a single contract for air sustainment services from 2005	10
Re-test the market in 2009	11
The nature of the Australian air charter industry.....	12
Controversies associated with previous air sustainment contracts.....	13
Companies involved in the 2010 tender process	14
Strategic Aviation Pty Ltd	15
Adagold Aviation Pty Ltd	17
Hi Fly Transportes Aereos, SA	19
Individuals involved in the 2010 tender process	22
Mr Shaun Aisen, Strategic.....	22
Major David Charlton.....	22
Relationship between Mr Aisen and Major Charlton.....	25
Mr Mark Clark, Adagold.....	26
Conclusion	28
PART II	
FACTUAL NARRATIVE OF EVENTS.....	31
CHAPTER 3	
THE CONDUCT OF THE 2010 TENDER PROCESS	33
The lead-up to the tender	33
Decision to re-test the market.....	33
Preparation for re-tender.....	34

Establishment of the Air Transport Standing Offer Panel	34
The Air Transport Deed of Standing Offer	36
Development of the procurement strategy	38
Consideration of probity issues in the tender planning stage.....	40
Contemporaneous events during the lead-up to the tender	41
The approach to market.....	42
The RFT—AO/014/09–10.....	42
Preliminary probity concerns	43
Industry briefing	45
Contemporaneous events during the tender response period	45
Tenders close and evaluation.....	46
Evaluation criteria and process.....	46
Conflict of interest management	48
Confidentiality	49
Probity risk management during the tender evaluation stage.....	50
Identification of preferred tenderer and the source evaluation report (SER)	52
Conclusion	54
CHAPTER 4	
COMPLAINTS ABOUT THE 2010 TENDER PROCESS	57
Complaints about the tender process	57
Conflicts of interest and confidentiality	57
The tender specifications	59
Adagold's fitness and propriety to contract with the Commonwealth	60
Investigation of complaints	60
Conclusion	61
CHAPTER 5	
INTERNAL REVIEW OF THE 2010 TENDER PROCESS	63
AFCD review.....	63
Scope and methodology	63
Key findings	65
Deficiencies in the tender process	68
Review limitations.....	70
The PwC review	71
Engagement	71
Methodology.....	72
Findings and AFCD's response	73
Limitations.....	76
Conclusion	77
CHAPTER 6	
EXTERNAL REVIEWS OF THE 2010 TENDER PROCESS.....	79
Correspondence with Strategic on completion of the internal review	79
Consideration of internal review findings	80
Commissioning external reviews	81
Deloitte review	81
Terms of engagement	81

Methodology.....	82
Key findings	83
AGS Review.....	88
Terms of engagement	88
Methodology.....	89
Key findings	89
Allegations concerning the 2005 tender and AFP investigation.....	95
Defence responses to the external review findings	95
Limitations of the external reviews	96
Limitations on the AGS Review.....	99
Conclusion	99
CHAPTER 7	
THE AWARDING AND PERFORMANCE OF THE 2010 CONTRACT	101
Awarding of contract.....	101
Performance of contract.....	101
Contractual performance management.....	101
Compliance with tender specifications.....	102
Lessons learned.....	104
Reforms to Defence procurement practices	104
Reforms to conflict of interest management policies	105
Conclusion	107
PART III	
COMMITTEE'S CONSIDERATION OF THE EVIDENCE.....	109
CHAPTER 8	
TAKING STOCK.....	111
The committee's approach to assessing adequacy and appropriateness.....	111
Achieving the objectives of good probity management.....	111
The scope of the committee's findings and recommendations.....	113
Areas for improvements	113
The reviews and the reliance on their findings.....	114
Conclusion	116
CHAPTER 9	
GOVERNANCE ARRANGEMENTS—PROBITY	117
Terms of reference.....	117
Matters of concern.....	117
Probity risk management.....	118
The appointment of an independent probity advisor to all Commonwealth aviation contracts.....	128
Terms of reference.....	128
CHAPTER 10	
GOVERNANCE ARRANGEMENTS—CONFLICTS OF INTEREST AND CONFIDENTIALITY	131
Defence policies on the disclosure and management of conflicts of interest.....	131

The contractual management of conflicts of interest	133
Adherence to risk management measures documented in the tender evaluation plan	134
Conclusion	136
CHAPTER 11	
FINDINGS ON TENDER DESIGN.....	139
Decision to re-tender, specifications and timeframe	139
The evidence.....	139
Areas for improvement—documentation, consultation and certification	141
Procurement Planning.....	141
Communication with potential tenderers.....	142
Tender evaluation	142
Conclusion	145
CHAPTER 12	
FINDINGS ON DUE DILIGENCE AND OTHER RELEVANT MATTERS ...	147
Due diligence on tender respondents.....	147
Matters of concern	148
Fit and proper persons	148
Financial and commercial capacity	150
Capacity to deliver the contracted services to the requisite quality and standard	151
Independent, expert scrutiny and continuing monitoring.....	152
Broader application of the committee's recommendations.....	153
Conclusion	153
APPENDIX 1	
PUBLIC SUBMISSIONS.....	157
APPENDIX 2	
PUBLIC HEARINGS AND WITNESSES.....	159
APPENDIX 3	
TABLED DOCUMENTS AND ANSWERS TO QUESTIONS ON NOTICE ...	161
APPENDIX 4	
LIST OF KEY PERSONNEL	163
APPENDIX 5	
CHRONOLOGY OF SIGNIFICANT EVENTS 2005-2011.....	165

Acronyms and abbreviations

Adagold	Adagold Aviation Pty Ltd
ADF	Australian Defence Force
AFCD	Audit and Fraud Control Division, Department of Defence
AFP	Australian Federal Police
AGS	Australian Government Solicitor
AIS	Aviation Integration Services Pty Ltd
ANAO	Australian National Audit Office
AOC	Air Operator's Certificate
ASDEFCON	Australian Defence Contracting
CAE	Chief Audit Executive, Department of Defence
CASA	Civil Aviation Safety Authority
CDF	Chief of the Defence Force
CPGs	Commonwealth Procurement Guidelines
Defence	Department of Defence
Deloitte	Deloitte Touche Tohmatsu
DPPM	Defence Procurement Policy Manual
DRMS	Defence Records Management System
DSO	Deed of Standing Offer
FAAOC	Foreign Aircraft Air Operator's Certificate
FIS	Financial Investigation Service
FMG 14	Financial Management Guidance on Ethics and Probity in Government Procurement
Hi Fly	Hi Fly Transportes Aereos SA of Lisbon
HQJOC	Headquarters Joint Operation Command
HQ1JMOVGP	Headquarters, 1st Joint Movement Group, Defence
JMCO	Joint Movement Control Office
MEAO	Middle East Area of Operations

NEP	Non-Equipment Procurement
NECPO	Non-Equipment Chief Procurement Officer
OC	Officer Commanding
PwC	PricewaterhouseCoopers
RAAF	Royal Australian Air Force
RFT	Request for Tender
SER	Source Evaluation Report
SOP	Standing Offer Panel
Strategic	Strategic Aviation Pty Ltd
TEB	Tender Evaluation Board
TEP	Tender Evaluation Plan
TEWG	Tender Evaluation Working Group

Executive summary and recommendations

In October 2009, the Department of Defence (Defence) elected to re-test the market and commence a new procurement process for air sustainment services to the Middle East Area of Operation (MEAO).

From the start, there were clear indicators that this tender required particular and special attention. Indeed, both past experiences and current circumstances signalled significant probity risks, particularly in respect of conflicts of interest, breaches of confidentiality and proponent grievances about these matters, including:

- a notorious history of controversy associated with the MEAO contracts, particularly proponent grievances about the probity of an earlier tender process in 2005 and a record of personal animosity between some companies as played out in the national media;
- the small and extremely competitive nature of the commercial air charter market—in the lead up to the 2010 tender there had been active market monitoring and lobbying activities of suppliers, including an unsolicited proposal;
- the high value of the contract and the limited timeframe for the procurement; (just over eight weeks);
- the movement of personnel between tenderers and between Defence and tenderers;
- prior to the release of the request, the incumbent contractor raised concerns about probity matters involving the alleged disclosure of confidential tender information by a Reservist who, in his civilian capacity, was employed as a consultant to a potential tenderer;
- the Reservist's continuing association with that tenderer after the release of the request;
- early concerns raised by the incumbent contractor about the changed tender specifications, particularly the increased cargo volumetric capacity and the preference for a single aircraft solution with suggestions that the changes could advantage a particular tenderer; and
- the complexity of the proposed procurement arrangements, particularly the use of the standing offer panel to purchase longer term, scheduled air sustainment services.

Although Defence had at least constructive knowledge of these circumstances and the associated probity risks, it failed to implement measures to enable the systematic identification and management of potential probity risks arising from these circumstances—for example, documenting a probity plan, integrating probity issues into the risk assessment framework and appointing a probity advisor.

Confronted by serious allegations of impropriety and before the contract was finalised, Defence initiated four separate reviews of the tender process by the Audit and Fraud

Control Division in Defence, PricewaterhouseCoopers, Deloitte and the Australian Government Solicitor. They identified a raft of serious deficiencies in the process but, overall, concluded that the flaws were not sufficiently material to render the process unsound.

While not fully convinced, the committee agrees with their findings. It could find no compelling evidence of outright fraud; of the use of insider knowledge; of designing the tender to unfairly favour a preferred tenderer; or of the successful tenderer's inability to deliver services as specified under the contract. Finally, there was no concrete evidence to suggest that the successful tenderer was not fit and proper for the purposes of contracting with the Commonwealth.

The committee is strongly of the view, however, that Defence should not take comfort from these findings. This tender was not only valued at over \$122 million but provides a critical service to Australian forces serving in the Middle East Area of Operations.¹ Aspects of the tender process were plain sloppy and, in light of the nature of the industry and the behaviour of people in the industry, Defence was notably inattentive when it came to identifying and managing probity risks, especially conflicts of interests. Thus a cloud of uncertainty lingers over the integrity of this tender.

The reviews and the committee also uncovered weaknesses in the procedures for preparing and evaluating the tender. For example, inadequate documentation, poor consultation and lack of certification gave rise to confusion, inconsistency and a failure to correct an error in calculations during the evaluation. Although the Source Evaluation Report was re-validated and confirmed the successful tender as top ranked, the problems identified in the process cannot help but undermine the committee's confidence in the robustness of the decision-making processes.

Undoubtedly, the circumstances which prompted the significant parliamentary and public scrutiny of the 2010 tender process have damaged Defence's image and reputation. It must also have undermined the industry's confidence in the integrity of the process. While the lessons emerging from this incident need not have been learned at such significant cost, the committee welcomes the reforms announced by Defence during the inquiry. These measures may go some way towards addressing the governance and procedural shortcomings evident in the 2010 tender process. The committee has made recommendations for further reforms to enhance those already in train. It has also requested the Auditor-General to conduct a review of the tender process and the reforms announced by Defence, to identify any additional lessons to be learned.

The committee has also highlighted the need for ongoing monitoring of the implementation and effects of these reforms to avoid an 'implementation gap' between documented policy reforms and procurement practice and has recommended that Defence provides the committee with periodic updates on these matters.

1 The estimated annual contract price is approximately AUD \$30.937 m (exclusive of fuel costs) with a contract period of two years, plus two one year options.

The committee's recommendations are listed below.

Recommendation 1

paragraph 9.28

The committee recommends that Defence:

- requires the documentation of a dedicated probity plan for all future procurements of air sustainment services to the MEAO;
- ensures probity plans for all future procurements of air sustainment services to the MEAO identify expressly and address the risks associated with:
 - (i) proponent grievances and
 - (ii) the small and highly competitive nature of the commercial air charter market;
- implements its proposed policy of appointing probity advisors to all complex and strategic procurements and monitors closely the implementation progress and impact of this policy—in particular, ensures that a probity advisor is appointed to all future procurements of air sustainment services to the MEAO; and
- amends chapter 3.2 of the Defence Procurement Policy Manual on risk management in procurement to include references to probity risks. In particular, Defence should consider cross-referencing chapter 3.13 on ethics and probity in procurement.

Recommendation 2

paragraph 10.9

The committee recommends that Defence reviews all Defence Instructions and related documents in respect of Reservists, full or part time, to ensure that real and potential conflicts of interest that might arise as a result of past, current or post separation employment are identified, reported and managed appropriately. In particular:

- a) Defence considers whether Defence Instructions DI(G) PERS 25-2 (Employment and voluntary activities of ADF members in off-duty hours) and DI(G) PERS 25-3 (Disclosure of interests of members of the ADF) should be extended to Reservists who are not engaged in continuous full-time service; or
- b) if there is no intention to extend the application of DI(G) PERS 25-2 and DI(G) PERS 25-3 to Reservists who are not engaged in continuous full-time service, Defence develops specific policies covering the civilian employment of, and the disclosure of conflicts of interests by, those personnel.

Recommendation 3

paragraph 10.21

The committee recommends that, prior to the re-tendering of any future contracts for the provision of air sustainment services to the MEAO, Defence ensures that:

- a) all Reserve personnel involved in the procurement complete a conflict of interest declaration; and

- b) commanding officers or supervisors in 1JMOVGP:
- (i) make a risk-based assessment as to which other Reserve personnel must complete a conflict of interest declaration and which personnel do not;
 - (ii) in making a risk-based assessment, give consideration to identifying and obtaining conflict of interest declarations from Reservists who have associations with the commercial air charter industry. Such associations may include:
 - present or previous civilian employment with air transport providers;
 - financial interests in these companies or related companies; or
 - professional or social relationships with members or employees of these companies; and
 - (iii) document their decisions whether or not to require these Reservists to complete a conflict of interest declaration.

Recommendation 4

paragraph 10.22

The committee recommends Defence ensures that, in all future procurements of air sustainment services to the MEAO:

- All members of tender evaluation boards and working groups, and all persons involved in the development of requests, sign conflict of interest declarations. Such declarations:
 - a) should be signed prior to the commencement of the tender evaluation process or the development of the request (as applicable); and
 - b) include declarations about possible conflicts of interest arising from their employment, prior employment, financial interests in potential suppliers or relationships with persons who have interests in potential suppliers.
- All members of tender evaluation boards and working groups receive specific briefings on conflicts of interest and other probity matters, prior to the commencement of tender evaluations.

Recommendation 5

paragraph 11.20

The committee recommends that Defence:

- In line with the findings of the AFCD Review, considers strategies for the improved documentation of the business case for any future decisions to re-test the market for the provision of air sustainment services to the MEAO.
- Reviews its procurement plan for the current MEAO contract, to ensure that sufficient lead time is provided for the making of any future decisions to re-test the market, and the planning and execution of a procurement process.
- In all future procurements of air sustainment services to the MEAO:

- a) continues to include in procurement strategies a requirement that members of the Air Transport Standing Offer Panel are given advance notice of any decisions to re-tender the contract, prior to the release of the RFT; and
- b) ensures that such requirements are implemented.
- Implements strategies to ensure that potential tenderers have a clear and accurate understanding of how Australian industry participation is taken into account in the evaluation of tender responses, as part of the overall value for money assessment.
- On the release of future requests for air sustainment services to the MEAO, implements the following actions to minimise the risk of potential proponent grievances:
 - a) provides potential tenderers with an explanation of the reasons for re-tendering the contract and any changes to tender requirements from the previous request;
 - b) provides potential tenderers with an explanation of how the evaluation criteria in the request documentation will be assessed; and
 - c) includes in the request documentation, where applicable, an express statement of Defence's:
 - (i) preferred solution for meeting tender requirements, including technical specifications; and
 - (ii) intention to consider alternative solutions.
- As a matter of priority in future tender processes for the provision of air sustainment services to the MEAO, takes action on the tender evaluation issues identified by the Deloitte, AGS and AFCD Reviews, as documented at paragraph 11.15 of this report.

Recommendation 6

paragraph 12.10

The committee recommends that in all future procurements of air sustainment services to the MEAO, Defence develops and implements tender evaluation processes for assessing respondents' fitness and propriety to contract with the Commonwealth. Such evaluation processes should:

- a) identify criteria setting out requirements or indicators for being 'fit and proper' to contract with the Commonwealth;
- b) specify searches that may be conducted on tender respondents, their key personnel, proposed subcontractors and any associated companies (for example, parent or subsidiary companies)—including guidance on the scope of the searches;
- c) identify the possible implications of the findings of each of the specified searches; and

- d) enable the identification and assessment of potential risks arising from issues identified in these searches including:
- (i) reputational damage to the Commonwealth, should it proceed to contract with the relevant tenderer; and
 - (ii) proponent grievances about the relevant tenderer's fitness and propriety to contract with the Commonwealth.

Recommendation 7

paragraph 12.16

The committee recommends that Defence includes in all future tender evaluation documentation for the procurement of air sustainment services to the MEAO:

- specific provisions on conducting financial risk assessments of tender responses involving charter broker arrangements; and
- essential requirement that proposals involving any form of broker-based solution—including sub-contracting arrangements—must include the complete financial statements of the proposed air charter operator and any other proposed sub-contractors.

Request to Auditor-General

paragraph 12.22

The committee requests that the Auditor-General:

- Conduct a performance audit of the tender process in respect of RFT AO/014/09, with a focus on probity risk management. In particular, the audit should evaluate the following matters, with a view to identifying any further areas for future improvement:
 - a) Defence's governance arrangements for the identification and management of significant probity risks to the procurement process, including conflicts of interest, confidentiality and proponent grievances;
 - b) Defence's program of procurement governance and process reforms, including those outlined in its evidence to the committee; and
 - c) any other matters considered relevant to probity risk management, or related governance matters, in respect of the procurement of air sustainment services to the MEAO.
- After sufficient time has elapsed, conduct a second review to examine Defence's implementation of its program of procurement governance and process reforms. In particular the review should:
 - a) evaluate the implementation progress and impact of the reforms outlined in Defence's evidence to the committee; and
 - b) recommend, as necessary, any further reforms to probity risk management and other governance arrangements in respect of the procurement of air sustainment services to the MEAO.

Recommendation 8**paragraph 12.23**

The committee recommends that Defence report back to the committee by 1 May 2012 on the progress being made to implement the reforms it has announced including:

- the ongoing performance of the 2010 contract, including the cost per mission, the realisation of projected savings, the continuing need for the increased cargo volumetric requirements and the contractor's compliance with the tender requirements;
- progress on the establishment of the Centre of Excellence that is intended 'to support a more robust and consistent commercial approach to non-equipment procurement';
- the work of the newly created Non-Equipment Chief Procurement Officer; and
- the strategies for the recruitment and retention of suitably skilled procurement professionals.

Recommendation 9**paragraph 12.25**

Although the majority of recommendations apply to the procurement of air sustainment services to the MEAO, the committee recommends that Defence consider incorporating the principles and practices underpinning them as part of Defence wide non-equipment procurement policy.

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

-
- (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.

Chapter 2

Background to the 2010 tender process

2.1 In this chapter, the committee provides the context for its examination of the 2010 tender process. It gives a brief history of the delivery of air sustainment services to the MEAO and also identifies the main entities and individuals involved in or associated with the 2010 tender process.¹ The chapter concludes with the committee's observations on the nature of the commercial air charter industry in Australia and the likely problems it posed for the tender process.

The delivery of air sustainment services to the MEAO

2.2 For many years, Defence has engaged private air charter companies to transport personnel and equipment to and from the MEAO. Defence informed the committee that 'commercial air assets have become an integral component of the support infrastructure to the ADF operations in the MEAO'.²

2.3 Defence identified two broad reasons for this practice. Firstly, since the early 2000s, there has been a progressive increase in the frequency and capacity of strategic air lift requirements, as a result of 'the increased numbers of personnel and equipment committed to Afghanistan operations...and the associated increase in both operational tempo and complexity'.³

2.4 Secondly, the gradual retirement of the Royal Australian Air Force (RAAF) Boeing 707 aircraft—which was completed in 2008—has resulted in greater reliance on commercial airlift support. According to Defence, the retirement of the Boeing 707 aircraft meant that the ADF no longer had the ability to move large numbers of personnel and their equipment over intercontinental distances. It noted that the ADF's current fleet of aircraft—including the C130 Hercules and, more recently, the C17 Globemaster—are 'fully tasked assets' with limited availability to carry out new tasking.⁴ Defence noted further that these aircraft are not suited to the long-range carriage of personnel, because they are designed to transport heavy and bulky cargo. It also stated that these aircraft are more expensive to operate compared to the purchasing of commercial charter services.⁵

1 For convenience, a list of key entities and personnel is provided at Appendix 4 to this report.

2 Department of Defence, *Submission 5*, Attachment A, p. 1.

3 Department of Defence, *Submission 5*, Attachment A, p. 1.

4 Department of Defence, *Submission 5*, Attachment A, p. 1.

5 Department of Defence, *Submission 5*, Attachment A, p. 1. See further Department of Defence Audit and Fraud Control Division, *Final probity review report: probity review of tender process for air sustainment services to the Middle East Area of Operations (MEAO ('AFCD Review'))*, Review Task 11-058, September 2010, pp. 25–26.

The move to a single contract for air sustainment services from 2005

2.5 Initially, the recurring movement of personnel and their equipment to and from the MEAO was provided through a combination of commercial scheduled services⁶ and chartered aircraft.⁷ Freight and cargo were moved by a combination of ADF and commercial aircraft, and commercial and military sea lift.⁸

2.6 In 2005, Defence identified opportunities to achieve greater value for money by moving to a single contract for air sustainment services. The preferred solution was the chartering of a large passenger aircraft to move troops, stores and equipment to and from the MEAO.⁹ Further benefits identified with this solution included:

- enhancing security and force protection of ADF personnel and materiel, as charter arrangements provided the ADF with full control of movement, including the ability to utilise military airfields within the MEAO; and
- avoiding difficulties associated with obtaining large 'block' bookings on commercial scheduled services.¹⁰

2.7 In April 2005, the first single air sustainment services contract was awarded to the charter broker company Strategic Aviation Pty Ltd (Strategic). The contract term was for six months with options for up to four, six-month extensions, one of which was exercised by Defence.¹¹ The published value of the contract was \$22.1 million (2005 value).¹² Strategic performed this contract utilising a chartered Airbus A330-300 aircraft operated by the Portuguese carrier, Hi Fly Transportes Aereos SA of Lisbon (Hi Fly).¹³

2.8 Following a decision by Defence to re-tender the contract, Strategic was awarded subsequent contracts in 2006 and 2008.¹⁴ The 2006 contract term was six

6 Defence advised that these services were provided by Emirates and Etihad Airways: Department of Defence, *Submission 5*, p. 2 (footnote 9).

7 Defence advised that chartered aircraft included Soviet-made Antonov AN12 and AN 124 and Ilyushin IL 76: *Submission 5*, pp. 2 (footnotes 6 and 7), 28. Adagold Aviation was among the contractors who chartered these aircraft: Senator the Hon Robert Hill, Minister for Defence, *Senate Hansard*, 8 September 2003, p. 14506.

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

9 Department of Defence, *Submission 5*, Attachment A, pp. 1–2.

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

11 Australian Government Solicitor, *Legal and legal process review of the procurement process for the Middle East Area of Operation (MEAO) Air Sustainment Support Contract* ('AGS Review'), 15 September 2010, p. 3; AFCD Review, p. 7.

12 Department of Defence, *Contracts Listing for 1/7/2004 to 30/6/2005, Senate Order on Departmental and Agency Contracts*, p. 44.

13 Mr Shaun Aisen, *Proof Committee Hansard*, Canberra, 29 March 2011, p. 4; Department of Defence, *Submission 5*, Attachment A, p. 5.

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

months with options for up to four, six-month extensions.¹⁵ The published value of the contract was \$34.4 million (2006 value) which covered 168 days.¹⁶ The 2008 contract term was 12 months, with two, one-year extension options—one of which was exercised by Defence in 2009.¹⁷ Strategic performed these contracts using a combination of chartered Airbus A330-300 aircraft operated by Hi Fly,¹⁸ and, subsequently, aircraft operated by Strategic, including an Airbus A330-200.¹⁹ The latter aircraft was employed following a contractual amendment agreed on 5 March 2010.²⁰ The amendment enabled a load-splitting solution, whereby Strategic moved 114m³ of freight using the A330-200 aircraft, and forwarded the remaining 33m³ of freight separately.²¹

Re-test the market in 2009

2.9 Defence elected to re-test the market in 2009.²² In November of that year, it established an Air Transport Standing Offer Panel pursuant to a deed of standing offer.²³ Defence intended to use this Panel, which consisted of a mixture of charter operators and brokers, for the procurement of air sustainment services to the MEAO.²⁴ According to Defence the decision to use the air standing offer panel for potential providers was appropriate as it provided a 'valid existing legal procurement

15 Lieutenant-General Ken Gillespie, Vice Chief of Defence Force, *Committee Hansard*, Estimates, 1 November 2006, p. 85.

16 Department of Defence, *Contracts Listing for 1/7/2005 to 30/6/2006*, *Senate Order on Departmental and Agency Contracts*, p. 243. As an indication of the value of the contracts Defence's contracts listing shows contracts with Strategic valued at \$28.6 m, duration 212 days, commencing on 25 October 2005; \$34.4 m, duration 168 days, commencing 25 April 2006; \$42.8 m, duration 186 days commencing 26 October 2006; \$32 m, duration 213 days commencing 1 April 2007; and \$35.5 m, duration 187 days commencing on 24 April 2008.

17 Department of Defence, *Submission 5*, Attachment A, p. 3. The Department of Defence, *Contracts Listing for 1/7/2008 to 30/6/2009*, *Senate Order on Departmental and Agency Contracts* shows contracts with Strategic valued at \$100 m, duration 890days, commencing on 16 May 2008 and \$122 m, duration 395 days, commencing 1 October 2008, pp. 213, 358.

18 Dr Brendan Nelson, MP, answer to question on notice, *House of Representatives Hansard*, 12 September 2007, p. 207; Lieutenant-General Ken Gillespie, Vice Chief of Defence Force, *Committee Hansard*, Estimates, 1 November 2006, p. 85.

19 Department of Defence, *Submission 5*, Attachment A, p 5; Department of Defence, *Response to Questions on Notice, Supplementary Budget Estimates 2010-2011*, response to question (b).

20 Contract Change Proposal No 7, dated 5 March 2010, cited in Department of Defence, *Submission 3*, Attachment A, p. 19.

21 Department of Defence, *Submission 3*, Attachment A, p. 19.

22 The reasons for doing so are summarised in: Department of Defence, *Submission 5*, Attachment A, pp. 2–3 and discussed in chapter 3.

23 Department of Defence, *Submission 5*, Attachment A, pp. 2–3.

24 See for example, Deloitte, 'Examination of the procurement process for Tender RFT AO/014/09-10 September 2010, p. 7.

framework with standardised terms and conditions with which to engage air charter services'.²⁵

2.10 A request for tender (RFT AO/014/09-10) was released to the 13 suppliers registered on the panel on 29 March 2010, with a closing date of 1 June 2010.²⁶ From the 11 solutions submitted by seven panel members, charter broker Adagold Aviation Pty Ltd (Adagold) was identified as the preferred tenderer on 9 July 2010. Its tender response involved a single aircraft solution using an Airbus A340-300. The aircraft is provided by Hi Fly, with whom Adagold has an exclusive access agreement.²⁷

2.11 The contract was signed on 22 October 2010, with services commencing on 23 November 2010.²⁸ The contract term is two years, with options for two, one-year extensions.²⁹ The estimated annual contract price is approximately \$30.9 million (2010 value), excluding fuel costs, or over \$122 million over the four years.³⁰

2.12 Due to delays associated with the awarding of the 2010 contract, consequent upon reviews of the 2010 tender process, Strategic was awarded an interim contract to provide air sustainment services to the MEAO. This contract operated from 23 October 2010 to 22 November 2010.³¹ The 2010 tender process is examined in detail in chapters 3-7 of this report.

The nature of the Australian air charter industry

2.13 The committee heard evidence that the Australian air charter industry comprises a limited number of suppliers—predominately small-to-medium enterprises—with intense competition between them.³² The committee was further informed that 'it is common government practice to contract with an air charter

25 Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 46.

26 Department of Defence, *Submission 5*, Attachment A, pp. 3–4.

27 Department of Defence, *Submission 5*, Attachment A, p. 4.

28 In October 2010, Strategic was awarded an interim contract for flights from 23 October to 22 November 2010, pending finalisation of the 2010 tender process: Department of Defence, *Submission 5*, Attachment A, p. 11, Annexure A.

29 Department of Defence, *Submission 5*, Attachment A, p. 4.

30 AFCD Review, p. 7. See also Department of Defence, *Submission 5*, Attachment A, p. 10 and Department of Defence, *Response to Questions on Notice, Supplementary Budget Estimates 2010-2011*, response to question (bb) (Defence identified the contract price as \$62 million over the two-year term).

31 Department of Defence, *Submission 5*, Attachment A, p. 11; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 49.

32 Department of Defence, *Submission 5*, Attachment A, p. 4; Mr Danny Foster, Pel Air Aviation, *Proof Committee Hansard*, Sydney, 28 March 2011, p. 20. See further, AFCD Review, p. 12: 'the [Air Transport Standing Offer Panel] is composed of highly competitive companies within an industry operating on tight margins and offering almost identical services'.

management company rather than directly with aircraft operators'.³³ Indeed, membership of the Air Transport Standing Offer Panel includes a combination of charter managers or 'brokers' and operators.³⁴ The committee also heard evidence of personnel movement between suppliers, and between the ADF and suppliers.³⁵

2.14 In its submission to the inquiry, Defence provided the following assessment of the Australian air charter industry:

The Australian air charter industry is very small, competitive, operates on tight margins, and is not well placed to meet the services required by the ADF. The major Australian airlines (Qantas and Virgin Blue) are generally not competitive in tenders for services required by the ADF. They have limited capacity to provide aircraft for charter, usually have higher overheads and do not as a matter of course have spare aircraft regularly available for service when required by the ADF. In addition, there are few Australian based airframes with seating for more than 100 passengers, available from the smaller operators...

Consequently, when Defence issues a Request for Tender to move large numbers of passengers (in excess of 100) and baggage in support of an Operation or Exercise, the operators and air charter brokers are all competing for the same limited aircraft resources. This makes for competitive behaviour, including in areas other than price, reinforced by the fact that a number of companies have significant experience with ADF charters, and closely monitor competitors' activities.³⁶

2.15 A number of tenderers supported this view, describing the industry as 'cut-throat' and noting that 'people have a high knowledge of what their competitors are doing' and 'some people seize on the appearance of any improper behaviour'.³⁷

Controversies associated with previous air sustainment contracts

2.16 Consistent with the nature of the air charter industry, arrangements for the delivery of air sustainment services to the MEAO have attracted controversy. For example, in 2002-2003 concerns were raised about the airworthiness of the Soviet-

33 Department of Defence, *Response to Questions on Notice, Supplementary Budget Estimates 2010-2011*, response to question (bb); Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 48.

34 See *Air Transport Deed of Standing Offer*, 2 November 2009 (AusTender SON179438).

35 For instance, the committee heard evidence of multiple movements between suppliers by persons associated with the 2010 tender process. See for example: Major David Charlton, Statutory Declaration 7 September 2010, [5], [6], [9]; Strategic Aviation, *Submission 6*, p. 2; AFCD Review pp. 23-25; Deloitte Review, pp. 42, 51-52; Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, pp. 4-5; 8-9; Mr Shaun Aisen, letter to Inspector-General, Department of Defence, 14 July 2011, p. 2.

36 Department of Defence, *Submission 5*, Attachment A, p. 4.

37 Mr Danny Foster, *Proof Committee Hansard*, 28 March 2011, p. 20; confidential correspondence to the committee, March 2011.

built aircraft chartered by contractors including Adagold.³⁸ Probity related concerns were raised with Defence following the awarding of the 2005 contract.³⁹ In 2006, complaints surfaced about the non-use of Australian pilots.⁴⁰ In 2007, allegations were made regarding non-compliance with aviation safety regulations.⁴¹ In the latter incident, the contractor, Strategic, maintained that it was a victim of 'a commercially motivated campaign to discredit' the company.⁴²

2.17 Recent allegations, which have received media attention, have surfaced which again cast doubts over the integrity of the tender process for the 2005 contract.⁴³ This matter is currently the subject of an investigation by the Australian Federal Police (AFP).⁴⁴

2.18 Against this troubled background, serious questions have now been raised about the probity of the 2010 tender process involving allegations of the unauthorised disclosure of confidential tender information to the successful tenderer. Indeed, even before Defence released the request for the 2010 contract, the incumbent contractor, Strategic, had expressed concerns about a previous employee, Major David Charlton, who was then working as a Reservist in 1st Joint Movement Group (1JMOVGP).⁴⁵

Companies involved in the 2010 tender process

2.19 The major companies associated with the allegations made in respect of the 2010 tender process are:

- the former contract holder and unsuccessful tenderer, Strategic;
- the current contract holder, Adagold; and

38 Senator the Hon Alan Ferguson, *Committee Hansard*, Estimates, 4 June 2003, pp. 408–409; Senator the Hon Robert Hill, Minister for Defence, *Senate Hansard*, 8 September 2003, pp. 14506–14507.

39 Confidential correspondence to the committee, March 2011.

40 Phillip Coorey, 'We're barred from flying troops—pilots', *Sydney Morning Herald*, 2 May 2006, p. 6 (referring to a complaint made by the Australian Federation of Air Pilots to the then Minister of Defence, the Hon Brendan Nelson MP).

41 The '7.30 Report', transcript, 'Troop Transport company failing aviation safety standards, former staff say', 12 July 2007.

42 The '7.30 Report', transcript, 'Troop Transport company failing aviation safety standards, former staff say', 12 July 2007.

43 See for example, Richard Barker, 'The sky's the limit', *Age*, 2 September 2010, p. 13.

44 Defence indicated that it referred the matter to the AFP on 10 September 2010, following media reports alleging collusion between two former ADF members and Strategic: Department of Defence, *Submission 5*, Attachment A, p. 13. See further, Department of Defence 'Referral of matters regarding the 2005 Defence contract for air support services to the Middle East Area of Operations to the Australian Federal Police' Media Release MECC 428/10, 13 September 2010.

45 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 11. Email Shaun Aisen to Lieutenant Colonel Andrew Hall, 30 March 2010.

- Hi Fly, the Portuguese operator that provides the aircraft for Adagold in the 2010 contract under an exclusive access agreement between itself and Adagold.

Strategic Aviation Pty Ltd

2.20 Strategic is an Australian proprietary company limited by shares, registered on 23 March 1993.⁴⁶ Its founder and former Executive Director is Mr Shaun Aisen.⁴⁷ Its Chief Executive Officer is Mr David Blake.⁴⁸ The company's advertised services include facilitating ad-hoc charter services and specialist project cargo flights.⁴⁹ Strategic is a division of the Strategic Aviation Group Pty Ltd,⁵⁰ which includes three companies—Strategic Aviation (as the aircraft charter brokerage, logistics and cargo solutions arm), Strategic Airlines (as the commercial airline arm providing regular public transport and charter services)⁵¹ and Strategic Europe (as the charter and wet lease⁵² arm within Europe).⁵³

Previous MEAO experience

2.21 Strategic was the successful tenderer for the 2005, 2006 and 2008 contracts to provide air sustainment services to the MEAO. Over this period, it used a combination of an A330-300 aircraft operated by Hi Fly, and its own fleet of aircraft to carry both troops and stores to and from the Middle East.⁵⁴ Strategic has also provided services

46 Australian Securities and Investments Commission, extract from National Names Index, accessed 7 April 2011.

47 According to media reports, Mr Aisen resigned in February 2011: Matt O'Sullivan, 'Strategic feeling the pressure', *Age*, 14 March 2011, p. 3.

48 Mr Shaun Aisen and Mr David Blake, *Proof Committee Hansard*, 29 March 2011, p 1.

49 Strategic Aviation Pty Ltd, website, http://www.flystrategic.com.au/About_Us.aspx (accessed 6 December 2010).

50 The Strategic Aviation Group is an Australian proprietary company limited by shares, registered on 15 September 2008: Australian Securities and Investments Commission, extract from National Names Index, accessed 7 April 2011.

51 Strategic Airlines is an Australian proprietary company limited by shares, registered on 16 May 2008: Australian Securities and Investments Commission, extract from National Names Index, accessed 7 April 2011.

52 In broad terms, a 'wet lease' refers to the leasing of an aircraft with crew, often also including maintenance and insurance. See further: CASA 'Assessing aircraft leases prior to adding aircraft to an AOC', Regulatory Policy CEO-PN007-2010 (July 2010), p. 6.

53 Strategic Aviation Group, 'Strategic Airlines Strengthens Management Team', media release 19 October 2010, p. 2.

54 Department of Defence, *Submission 5*, Attachment A, p. 5; Department of Defence, *Response to Questions on Notice, Supplementary Budget Estimates 2010-2011*, response to question (b).

to other Australian Government agencies participating in the Air Transport Standing Offer Panel arrangement, including the Department of Immigration and Citizenship.⁵⁵

2.22 In February 2009, the Chief of the Defence Force stated that Defence had been 'very satisfied' with Strategic's contractual performance.⁵⁶ The committee was, however, made aware of three issues arising in the course of these contracts.

2.23 Firstly, the AFCD review of the 2010 tender process mentioned the need for independent mediation between Strategic and Defence in early 2010, as a result of a fuelling cost issue. The review suggested that this disagreement 'could indicate that there may have been some existing tension between the Commonwealth and Strategic, or at least the existence of a commercial difference of opinion'.⁵⁷ The review noted that the seventh contract change proposal agreed to by the parties was a consequence of the mediation.⁵⁸ It also appears to the committee that there was growing dissatisfaction with the load-splitting solution.⁵⁹

2.24 Secondly, the committee is also aware that an unsuccessful tenderer in the 2005 tender process raised concerns about matters of probity during that process. Defence engaged legal firm Phillips Fox (now DLA Piper) to undertake a probity review of the process. The review found that no issues arose in the 2005 tender process that would justify a re-tender. As noted earlier, complaints relating to the provision of insider information in the 2005 tender process were referred to the AFP for investigation on 10 September 2010, following the publication of allegations in media reports on 2 September 2010.⁶⁰

2.25 Thirdly, the committee was made aware that Defence, in the course of performing the 2008 contract, sought Strategic's advice about possible alternative technical solutions to the 2008 arrangements. Mr Aisen gave evidence to the committee that Defence indicated to Strategic that it regularly received approaches from other panel members about different aircraft solutions. It sought Strategic's advice, as the incumbent contractor, about some of these solutions. This included a

55 See for example, Department of Immigration and Citizenship, *Report on Senate Order on Departmental and Agency Contracts*, 1 January-31 December 2010, pp. 63-64.

56 Foreign Affairs, Defence and Trade Legislation Committee, Estimates, *Committee Hansard*, 25 February 2009, p. 97.

57 AFCD Review, p. 12.

58 AFCD Review, p. 12 (footnote 1).

59 See for example, Group Captain Robert Barnes, Statutory Declaration signed 20 April 2011, [2]-[5]; Jo-Anne Pope, Statutory Declaration signed 14 April 2011; Joshua Prucha, Statutory Declaration signed 14 April 2011.

60 Department of Defence, *Submission 5*, Attachment A, p. 13. See further, Department of Defence 'Referral of matters regarding the 2005 Defence contract for air support services to the Middle East Area of Operations to the Australian Federal Police' Media Release MECC 428/10, 13 September 2010; Richard Barker, 'The sky's the limit', *Age*, 2 September 2010, p. 13.

request for advice about an Airbus A340-300 aircraft option, with a payload of 42,000 kg—the specification which was ultimately included in the 2010 request.⁶¹

Adagold Aviation Pty Ltd

2.26 Adagold is an Australian proprietary company limited by shares, registered on 12 September 2002.⁶² Its Executive Director and Chief Executive Officer is Mr Mark Clark.⁶³ Adagold is an aviation brokerage and management service company and, as such, does not hold ownership interests in aircraft. It obtains the aircraft identified in its tender responses through other suppliers.⁶⁴ As noted above, Adagold is providing services under the 2010 contract using the Portuguese operator, Hi Fly, with whom it has an exclusive access agreement in relation to an Airbus A340-300 aircraft. The arrangements in respect of the 2010 contract are examined in detail in chapters 3–7 of this report.

2.27 Adagold's advertised range of domestic and international services include aviation consultancy; services to the mining and resources sectors; VVIP⁶⁵ and diplomatic services; contract aircraft and management services; and supporting specialised government and military operations.⁶⁶

Previous MEAO experience

2.28 Adagold has previously delivered air sustainment services to the ADF on numerous occasions. Between 2000 and 2005, Defence used Adagold for the regular movement of sustainment stores between Australia and various points in the MEAO.⁶⁷ Although it carried small numbers of troops, the primary contracted services were the carriage of vehicles and heavy cargo that could not be transported by other means into

61 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 12.

62 Australian Securities and Investments Commission, extract from National Names Index, accessed 7 April 2011; Mr Mark Clark, Statutory Declaration, 7 September 2010; Deloitte Report, p. 23.

63 Mr Mark Clark, Statutory Declaration, dated 7 September 2010; Deloitte Report, p. 23; Adagold, 'About us', <http://www.adagold.com.au/about.asp> (accessed 25 November 2010).

64 Mr Geoffrey Brown, Chief Audit Executive, Department of Defence, *Committee Hansard*, Estimates, 19 October 2010, p. 61. See further, Adagold, 'Capability statement', <http://www.adagold.com.au/capability.asp> (accessed 7 April 2011).

65 'Very, Very Important Person'—a term used in the aviation industry to describe persons afforded a status beyond that of 'VIP', for example heads of state, and government or defence force principals.

66 Adagold, 'About us', <http://www.adagold.com.au/about.asp> (accessed 25 November 2010). See further, Judy Hinz, '2010 Defence SME Top 20', *Australian Defence Magazine*, December 2010–January 2011, p. 61.

67 Department of Defence, *Submission 5*, Attachment A, pp. 4–5.

theatre. Adagold used the Latvian operator, Inversija, which used the Soviet-built aircraft, Antonov AN12 and Ilyushin IL76, to provide the service.⁶⁸

2.29 Defence noted further instances of Adagold's 'relevant and recent experience' of operating in the Middle East region, as well as its close monitoring of the market.⁶⁹ They included:

- an ongoing contract with the Danish government, 'providing similar services to those requested in [the 2010 tender]';⁷⁰
- undertaking a site visit to the Al Minhad airbase;⁷¹
- conducting its own MEAO support assessment in conjunction with Hi Fly in 2009;⁷² and
- monitoring the operations of the incumbent contractor, Strategic. This included, for example, observing the separate forwarding of MEAO freight at Brisbane Airport via Etihad Airlines.⁷³

2.30 An example of Adagold's active lobbying occurred in February 2010 when the company submitted an unsolicited proposal for the Middle East Area of Operations (MEAO) air sustainment services.⁷⁴ This action followed an earlier visit by representatives of Adagold to the Head Quarters Joint Operations Command Facility at Bungendore where they engaged in a 'broad discussion about aircraft logistics requirements' with personnel from the Joint Movements Group.⁷⁵

2.31 Defence informed the committee that representatives of Adagold had told it that since 2005 the company had 'been focused on winning the contract in future'.⁷⁶ Indeed, according to Mr Clark, Adagold had been studying the market since October 2009 and had submitted its unsolicited proposal as 'part of its business development'. In his view, this placed Adagold 'in a position to move quickly when the tender was released'.⁷⁷

68 *Committee Hansard*, Estimates, 4 June 2003, pp. 406–410; *Senate Hansard*, 8 September 2003, pp. 14505–14506; Department of Defence, *Submission 5*, Attachment A, pp. 4–5, 28.

69 Department of Defence, *Submission 5*, Attachment A, p. 27.

70 Department of Defence, *Submission 5*, Attachment A, p. 27.

71 Defence advised that Adagold was the only tenderer to have done so: Department of Defence, *Submission 5*, Attachment A, p. 27.

72 Department of Defence, *Submission 5*, Attachment A, p. 5.

73 This was stated to have provided visibility of the increased volumetric freight requirements and the fact that Strategic's A330-200 aircraft could not meet those requirements: AFCD Review, p. 23.

74 Department of Defence, *Submission 5*, Attachment A, p. 5.

75 Mr Warren Clark, Statutory Declaration, signed 7 September 2010.

76 Department of Defence, *Submission 5*, Attachment A, p. 5 (footnote 17).

77 Mr Warren Clark to the Committee, 4 May 2011.

2.32 As a member of the Air Transport Standing Offer Panel, Adagold has also provided charter services to other Australian Government agencies participating in the panel arrangement.⁷⁸ This included multiple contracts administered by the Department of Immigration and Citizenship.⁷⁹

Relationship between Adagold and Hi Fly

2.33 It is evident that Adagold and Hi Fly enjoyed a close commercial relationship in the lead-up to the 2010 tender. This is evidenced in their strategic partnership discussions, including their joint MEAO support assessment in 2009.⁸⁰ According to the Defence Audit and Fraud Control Division (AFCD) probity review of the procurement, prior to the release of the RFT in 2010, Adagold had a 'general arrangement' with Hi Fly, in the event that the contract was re-tendered, but 'no commitment to a specific aircraft'.⁸¹ As discussed subsequently in this report, allegations regarding the precise nature of the relationship between Adagold and Hi Fly were made to Defence and were considered in reviews of the tender process.

Performance of the 2010 contract

2.34 Defence indicated that, to date, it is satisfied with the services performed under the 2010 contract, which came into operation on 23 November 2010.⁸²

Hi Fly Transportes Aereos, SA

2.35 Adagold's operating partner, Hi Fly, is a Portuguese private (family owned) company that operates worldwide and specialises in the wet leasing of long haul, wide-body aircraft.⁸³ Its Managing Director is Mr Paulo Miripuri.⁸⁴

2.36 Hi Fly obtains access to aircraft under operating lease arrangements and then subleases the aircraft to end users.⁸⁵ Hi Fly subleases a fleet of Airbus wide-body aircraft, mainly on long haul operations across Europe, the Middle East, the Far East, Australia and Africa. The company states that it is certified and authorised to fly into

78 The Deed of Standing Offer identifies the Attorney-General's Department and the Department of Immigration and Citizenship as 'participant agencies' eligible to utilise the panel arrangement: *Air Transport Deed of Standing Offer*, 2 November 2009 (AusTender SON179438).

79 See for example, Department of Immigration and Citizenship, *Report on Senate Order on Departmental and Agency Contracts*, 1 January–31 December 2010, pp. 1–2.

80 AFCD Review, p. 24; Department of Defence, *Submission 5*, Attachment A, p. 5.

81 AFCD Review, p. 24.

82 Department of Defence, *Submission 5*, Attachment A, p. 28; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 46.

83 Department of Defence, *Submission 5*, Attachment A, p. 26; Deloitte Review, p. 26.

84 As advised by Defence in correspondence to the committee secretariat, 1 December 2010.

85 Department of Defence, *Submission 5*, Attachment A, p. 26; Deloitte Review, p. 26.

the USA.⁸⁶ Hi Fly identified other areas of its operational experience and expertise as including Africa, Central America, the Caribbean and South America.⁸⁷ At the time of writing, its fleet included six Airbus wide-body, long range, last generation aircraft of the following models: Airbus A310 (two aircraft); Airbus A330 (two aircraft); and Airbus A340 (two aircraft).⁸⁸

Regulatory compliance

2.37 Hi Fly holds an Air Operator's Certificate (AOC) issued by the civil aviation authority of Portugal, INAC. It has held the relevant Australian certification—a Foreign Aircraft Air Operator's Certificate (FAAOC)—issued by the Civil Aviation Safety Authority (CASA) since 2004.⁸⁹ Its current FAAOC was issued on 26 October 2010 and is current between 1 November 2010 and 31 October 2011, subject to Hi Fly's ongoing INAC certification during this period.⁹⁰

2.38 CASA explained that an AOC—granted under s 27 of the *Civil Aviation Act 1988*—authorises carriers to provide civil air service operations in accordance with the conditions prescribed by the AOC.⁹¹ Certification conditions include compliance with designated Aviation Safety Rules,⁹² and with all other applicable provisions of the Civil Aviation Act, the *Civil Aviation Safety Regulations 1998* and the *Civil Aviation Orders*.⁹³

2.39 CASA explained further that FAAOCs are a type of AOC 'covering the operation of foreign registered on-flights that are not undertaken wholly within Australia, and are undertaken as part of a flight into or out of Australian Territory'.⁹⁴ CASA advised the committee that on 23 April 2010, Hi Fly applied to add an A340 aircraft to its AOC which CASA varied on 4 May. On 21 July 2010, Hi Fly applied to add a Danish registered A340 to its AOC.⁹⁵

86 Hi Fly website, <http://www.hifly.aero/company.aspx> (accessed 6 December 2010).

87 Hi Fly website, <http://www.hifly.aero/company.aspx> (accessed 6 December 2010).

88 Hi Fly website, <http://www.hifly.aero/company.aspx> (accessed 6 December 2010). These six aircraft are listed on Schedule 1 to Hi Fly's FAAOC issued by CASA: Air Operator's Certificate AOC # 1-BOV6-09, issued 26 October 2010.

89 Mr Adam Anastasi, Civil Aviation Safety Authority, *Proof Committee Hansard*, 29 March 2011 p. 39.

90 Air Operator's Certificate AOC # 1-BOV6-09, issued 26 October 2010.

91 Civil Aviation Safety Authority, *Submission 7*, pp. 1–2.

92 Defined in s 3 of the Civil Aviation Act as provisions of that Act and the Civil Aviation Orders that relate to safety.

93 Civil Aviation Safety Authority, *Submission 7*, p. 2, citing s 28 of the Civil Aviation Act.

94 Civil Aviation Safety Authority, *Submission 7*, p. 2, citing s 27AE of the Civil Aviation Act.

95 Civil Aviation Safety Authority, answer to question taken on notice.

Previous MEAO experience

2.40 Hi Fly has a history of providing services to the ADF to and from the MEAO, through servicing contracts awarded to members of the Air Transport Standing Offer Panel. It supplied an Airbus A330 used by Strategic between 2005 and 2009, and an Airbus A340 in May 2010 during scheduled maintenance of one of Strategic's A330 aircraft.⁹⁶

Involvement in the 2010 contract

2.41 Hi Fly has an exclusive access agreement with Adagold to provide the Airbus A340 aircraft for the performance of the 2010 contract. Defence advised the committee that Adagold also made a commitment in its tender response to providing contingency arrangements that ensured the availability of a replacement aircraft should the regular aircraft become unavailable.⁹⁷

2.42 Further to the findings of the AFCD and Deloitte Reviews (discussed in chapters 5 and 6), Adagold was required to and obtained a performance guarantee of \$2 million, underwritten by the Commonwealth Bank of Australia. This provides Defence with financial compensation of up to \$2 million should Adagold fail to perform—for example, in the event of aircraft unavailability.⁹⁸ Defence further informed the committee that it has executed a novation agreement between itself, Adagold and Hi Fly. This agreement enables Defence to 'take over the contract and have the aircraft supplied directly to Defence and bypass Adagold' should it fail to perform—for example, in the event of insolvency.⁹⁹ Both the performance guarantee and novation agreement were obtained subsequent to preferred tenderer status.¹⁰⁰

96 Department of Defence, *Submission 5*, Attachment A, p. 5.

97 Department of Defence, *Submission 5*, Attachment A, p. 27.

98 Department of Defence, *Submission 5*, Attachment A, p. 26. Defence advised the Legislation Committee that the value of the performance guarantee was 'assessed on the basis that [it] would cover the cost of another short-term contract in the event of [the] contract falling over': Mr Geoffrey Brown, Chief Audit Executive, *Committee Hansard*, Estimates, 19 October 2010, p. 67.

99 Mr Geoffrey Brown, Chief Audit Executive, *Committee Hansard*, Estimates, 19 October 2010, p. 68; Department of Defence, *Submission 5*, Attachment A, p. 26.

100 In its submission, Defence stated, '...subsequent analysis through the Deloitte Examination of financial statements highlighted additional risks given the subcontractor/contractor structure of the tender response. Following this, Defence recognised the potential risks relating to financial viability and so sought to mitigate the risks by seeking to execute a novation agreement between Adagold, Hi Fly and Defence.' *Submission 5*, p. 26.

Individuals involved in the 2010 tender process

Mr Shaun Aisen, Strategic

2.43 Mr Shaun Aisen founded Strategic Aviation in 1991 and resigned as its Executive Director in February 2011. He was the company's point of contact with the ADF for the MEAO tender processes.¹⁰¹ Mr Aisen raised several probity related concerns about the 2010 tender process, which set in train a number of reviews and examinations. These representations and reviews are discussed in chapters 4-6 of this report.

Major David Charlton

2.44 Mr David Charlton (referred to as Major Charlton throughout this report) also has a long connection with the tendering processes for air sustainment services to the MEAO.

ADF engagement—1995–2005

2.45 Major Charlton is a member of the Australian Army Reserve. He joined the Reserve in 1995 and was initially posted to 11 Movement Control Group, predecessor of 1st Joint Movement Group (1JMOVGP). Between November 2001 and April 2003 he was posted to Joint Movement Control Office (JMCO), Sydney, a sub-unit of 1JMOVGP. On or about April 2003, he was posted to the Headquarters. After a period of Reserve service, he commenced a period of continuous full-time service as Senior Officer (SO) 3 and SO2 Strategic Lift, responsible for supporting the charter activities for air, land and sea on behalf of the ADF.¹⁰² On 22 June 2005, Major Charlton was deployed to the Middle East on Operation Catalyst as Officer Commanding Joint Movements Co-ordination Centre, MEAO. He returned to Australia on 2 November 2005.¹⁰³

2.46 On 7 September 2010, Major Charlton signed a statutory declaration detailing his involvement in the ADF and the civil aviation industry, as relevant to the matters under consideration in respect of the 2010 tender process. The committee was informed that an initial draft of the statutory declaration was undertaken by the Director of Investigations within the Office of the Chief Audit Executive, Department

101 Strategic Airlines, website http://flystrategic.com.au/About_Us.aspx (accessed 6 December 2010). Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 1.

102 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [1]–[3].

103 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [4].

of Defence. The draft was based on transcripts of interviews of Major Charlton conducted by the Office.¹⁰⁴

Civilian employment—2006–2009

2.47 Although he did not mention the fact in his statutory declaration, Major Charlton was the non-voting chair of the Tender Evaluation Board in the 2005 tender process, which selected Strategic as the preferred tenderer.¹⁰⁵ On or about 5 January 2006, Major Charlton ceased active Reserve service and was appointed General Manager, Strategic Aviation. Before taking up this position, he spoke with Group Captain Peter Brennan about his intentions and employment options and consulted the relevant Defence Instruction for post-separation employment.

2.48 In August 2006, Major Charlton resigned from Strategic Aviation and established his own airline, Sky Air World Pty Ltd. Major Charlton stated that Sky Air World supported Adagold's bid for a Danish Defence Force air sustainment services contract, discussed opportunities relating to an Exxon project in Papua New Guinea, and had involvement in numerous ad hoc tasks unrelated to Defence tenders.¹⁰⁶ In February 2009, Sky Air World entered voluntary administration.¹⁰⁷

ADF re-engagement—2009–2010

2.49 Major Charlton sought to re-engage with the Army Reserve in 2009 following the appointment of administrators to Sky Air World. On 23 March 2009, he was advised of a position within JMCO, Brisbane. Major Charlton was posted to the position of Training Officer on 24 June 2009. This role involved managing the training of members of the unit and supporting corporate governance activities—in particular the re-writing of Standing Orders. Major Charlton stated that he had no role

104 The statutory declaration was tabled at the Legislation Committee's Supplementary Budget Estimates hearing of 19 October 2010. Major David John Charlton, Statutory Declaration, signed 7 September 2010, [1]. Dr Raymond Bromwich, *Proof Committee Hansard*, Canberra, 29 March 2011, pp. 80–81.

105 Deloitte Review, p. 18.

106 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [13].

107 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [7]. See further, Australian Securities and Investments Commission, Extract from National Names Index, accessed 13 April 2011. Media reports indicate that the Commonwealth was among the company's unsecured creditors, in respect of a 2008 contract administered by the Attorney-General's Department for the provision of air transport services to the Indian Ocean Territories. See Richard Barker, 'The sky's the limit', *Age*, 2 September 2010, p. 13. See further Joint Standing Committee on the National Capital and External Territories, *Inquiry into the changing economic environment in the Indian Ocean Territories* (April 2010), p. 140; Attorney-General's Department, Annual Report 2009-10, p. 166.

in, or visibility of, the air sustainment procurement being undertaken by 1JMOVGP.¹⁰⁸

2.50 Strategic gave evidence to the committee that it became aware of Major Charlton's return to 1JMOVGP in June 2009 and had 'continuing conversations' with Defence expressing its concerns.¹⁰⁹ These matters were considered in external reviews of the tender process, the findings of which are outlined subsequently in this report.

Civilian employment—2009–2010

2.51 While serving with JMCO, Major Charlton was also employed in a civilian capacity as a consultant to the aviation industry for the firm Aviation Integration Services Pty Ltd (AIS).¹¹⁰ According to Major Charlton, on his posting to JMCO, he discussed this employment with the then Officer Commanding (OC) JMCO Brisbane, Major Tamara Rouwhorst.¹¹¹

2.52 Major Charlton stated that, following the release of the Request for Tender (RFT) on 29 March 2010, AIS was approached by some members of the Air Transport Standing Offer Panel to request his services in providing technical assistance on their tender responses. He identified these panel members as Adagold, Rex/Pel-Air and Alltrans International.¹¹²

2.53 On or about 31 March 2010, AIS elected to assist Adagold with its tender response. Major Charlton stated that the basis for this decision was that Adagold 'appeared to be most capable of making the most competent and compliant tender submission'. He described his role as assisting Adagold with understanding the tender requirements, and identifying the 'platforms that could meet the specified criteria in the context of operational performance and documentation'.¹¹³

Declaration and management of potential conflict of interest in relation to the 2010 tender process

2.54 On 31 March 2010, following the release of the RFT on 29 March 2010, Major Charlton declared a potential conflict of interest to the OC JMCO Brisbane,

108 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [8], [9], [10], [11].

109 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 11.

110 AIS is an Australian proprietary company limited by shares. It was registered on 30 March 2009: Australian Securities and Investments Commission, Extract from National Names Database, accessed 14 April 2011. The company is wholly owned by an entity called Little Pockets Pty Ltd, which is in turn owned equally by Mr Rowan Keast and Ms Melanie Keast: Deloitte Review, p. 24.

111 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [7], [9].

112 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [10], [14].

113 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [14].

Major Lara Bullpitt-Troy. He was directed to cease parading at JMCO Brisbane, effective from 1 April 2010. On 13 April 2010, Major Charlton commenced parading as a visitor at the Directorate of Army Safety Assurance, followed by Headquarters, 11 Brigade while awaiting further instructions.¹¹⁴

2.55 Major Charlton made the following declarations:

- He had no contact with members of HQ1JMOVGP involved in the 2010 tender process prior to or after the release of the RFT.
- He does not have a professional or social relationship with any member of HQ1JMOVGP involved in the MEAO contract.
- At no stage was he provided with information or advice from any source in relation to Defence's intention to re-tender the MEAO contract.
- At no stage prior to 29 March 2010 was he provided with information or advice from any source in relation to the requirements or specifications for the 2010 RFT.
- At no stage prior to 29 March 2010 did he have access to information relating to the requirements or specifications for the 2010 RFT.
- At no stage did he communicate with any tenderer or prospective tenderer prior to the release of the RFT on 29 March 2010 about the tender requirements, because he had no knowledge of them or the imminent release of the RFT.¹¹⁵

2.56 The committee examines Major Charlton's connection to the 2010 tendering process in detail in chapters 3–7 of this report.

Relationship between Mr Aisen and Major Charlton

2.57 A number of media articles published in September 2010 reported on allegations of serious impropriety relating to the 2005 tender process.¹¹⁶ It was alleged that Major Charlton and another member of 1JMOVGP, Warrant Officer John Davies, provided privileged information to directors of Strategic prior to the release of the 2005 RFT.¹¹⁷

2.58 As noted earlier, Major Charlton worked for Strategic in 2006 before establishing Sky Air World. In his statutory declaration, Major Charlton stated that his relationship with Strategic 'soured' following his departure from the company in 2006,

114 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [10], [12]

115 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [17]–[22].

116 Richard Barker, 'The sky's the limit', *Age*, 2 September 2010, p. 13; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 46.

117 Richard Barker, 'The sky's the limit', *Age*, 2 September 2010, p. 13; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 46.

because a number of Strategic staff resigned to take up employment at Sky Air World.¹¹⁸

2.59 According to Mr Aisen, Mr Charlton was the former Strategic employee who appeared on the 7.30 Report in 2007 under the pseudonym 'Charlie' and 'specifically derided' Strategic in relation to its compliance with aviation safety requirements.¹¹⁹ Mr Aisen made further allegations to Defence and in his evidence to the committee, that Major Charlton, or Adagold, approached Strategic employees to offer them employment with Adagold in preparation for its response to the 2010 RFT.¹²⁰ Major Charlton denied these allegations in his statutory declaration, and stated that he had no recollection of speaking with officers from Strategic since leaving its employ.¹²¹

2.60 It should be noted that Group Captain Robert Barnes, Commander 1st Joint Movement Group, stated that around August-September 2009 he became aware of Major Charlton's work with 1JMOVGP in 2005 and his subsequent involvement in the aviation industry. He noted that Major Charlton 'had worked for Strategic Aviation and had departed there, I am told—it is hearsay—under unfavourable circumstances'.¹²² Group Captain Barnes further understood that Major Charlton 'took a number of Strategic Aviation people with him' when he established Sky Air World.¹²³

2.61 Mr Aisen informed the committee that from June 2009 Strategic became concerned about an ongoing relationship between Mr Charlton and Adagold while he was employed as a reservist in a group which oversaw tender specifications, tender documentation and contract. He indicated that during the later part of 2009, Strategic had 'spoken with Defence by phone on many occasions highlighting its concern that "Mr Charlton was back"'.¹²⁴

Mr Mark Clark, Adagold

2.62 Mr Mark Clark is the Executive Director and Chief Executive Officer of Adagold.¹²⁵ He made a statutory declaration on 7 September 2010 addressing his

118 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [4]–[6].

119 Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, Inspector-General, Department of Defence, 21 July 2010.

120 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 5; Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, Inspector-General, Department of Defence, 14, 16 July 2010; Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, Chief Audit Executive, Department of Defence, 18 August 2010.

121 Major David John Charlton, Statutory Declaration, signed 7 September 2010, [16].

122 Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, p. 64.

123 Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, p. 68.

124 *Committee Hansard*, 29 March 2011, pp. 8, 9 and 11.

125 Mr Mark Clark, Statutory Declaration, 7 September 2010; Deloitte Report, p. 23; Adagold Aviation, 'About us', <http://www.adagold.com.au/about.asp> (accessed 25 November 2010).

work with Adagold, his association with Major Charlton, the company's involvement in the 2010 tender process, and allegations of the company's links to suspected tender irregularities in certain procurements conducted by the South African Government.¹²⁶

Relationship with Major Charlton

2.63 Mr Clark stated that he had known Major Charlton since 2003–2004 from his role in 1JMOVGP when Adagold provided MEAO sustainment services in the period of or about 2002–2005. Mr Clark also spoke to Major Charlton on a number of occasions in his capacity as a Sky Air World employee with a view to exploring opportunities unrelated to any possible Defence work.¹²⁷

2.64 During February–March 2009, Mr Clark spoke to Major Charlton about aviation related matters including an Exxon project in Papua New Guinea but stated that at no time was Major Charlton engaged as a consultant in 2009. In 2010, they again spoke about opportunities for Exxon in Papua New Guinea.¹²⁸

Contact with Defence prior to the release of the 2010 RFT

2.65 Mr Clark stated that on 4 September 2009, he and Adagold General Manager Mr Jeff Eager attended Headquarters, Joint Operations Command, Bungendore. They met with members of 1JMOVGP, including Group Captain Robert Barnes and Lieutenant Colonel Andrew Hall, Staff Officer, 1JMOVGP. According to Mr Clark, the meeting canvassed 'a general introduction and broad discussion about aircraft logistics requirements'. He indicated that the Joint Movements Team 'provided limited responses in relation to current arrangements, other than to confirm that they were always open to receiving general information about options that might provide better value to the Commonwealth'.¹²⁹

2.66 Mr Clark undertook to provide Defence with an unsolicited written proposal, which was submitted on 10 February 2010. He stated that Adagold did not receive any feedback from Defence other than an acknowledgement of receipt and that Major Charlton was not involved in the development of the unsolicited proposal.¹³⁰

126 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010. The statutory declaration was tabled at the Legislation Committee's Supplementary Budget Estimates hearing of 19 October 2010: Mr Geoffrey Brown, *Committee Hansard*, Estimates, Canberra, 19 October 2010, p. 111. The committee was informed that an initial draft of the statutory declaration was undertaken by the Director of Investigations within the Office of the Chief Audit Executive, Department of Defence. The draft was based on transcripts of interviews of Mr Clark conducted by the Office: Dr Raymond Bromwich, *Proof Committee Hansard*, 29 March 2011, pp. 80–81.

127 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [2], [3].

128 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [5], [6].

129 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [12].

130 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [15], [16].

Involvement in the 2010 tender process

2.67 In his statutory declaration, Mr Clark stated that following the release of the RFT for the 2010 tender process on 29 March 2010, Adagold approached AIS and requested the services of Mr Charlton, whom it regarded as 'very good at conducting exact analysis on each aircraft'.¹³¹

2.68 According to Mr Clark, at no stage prior to the release of the RFT:

- was he, or any other representative of Adagold, made aware of the tender specifications;¹³²
- did he, or any other representative of Adagold, know of the Commonwealth's intention to re-tender the MEAO contract or receive any information regarding re-tender requirements;¹³³
- did he, or any other representative of Adagold, communicate with Major Charlton about the tender specifications or the Commonwealth's requirements for the RFT;¹³⁴
- did he, or any other representative of Adagold, communicate with any member of Defence about the tender specifications or the Commonwealth's requirements for the RFT.¹³⁵

2.69 Mr Clark stated that at no stage did Adagold request Hi Fly to approach CASA to upgrade its FAAOC to include the Airbus 340-300 aircraft.¹³⁶

Conclusion

2.70 In this chapter, the committee has highlighted a number of important characteristics of the commercial air charter industry, which were known to Defence prior to the commencement of the 2010 tender process. These characteristics include:

- the small and extremely competitive nature of the industry, evidenced by
 - the active market monitoring and lobbying activities of suppliers, including an unsolicited proposal;
 - a history of personal animosity between some companies;
 - proponent grievances about previous tender processes;

131 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [7].

132 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [8].

133 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [9].

134 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [10].

135 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [11].

136 Mr Mark Warren Clark, Statutory Declaration, signed 7 September 2010, [20].

-
- the movement of Major Charlton between civilian employment in the industry and an area of Defence (Joint Movement Control Office, Brisbane) that was a sub unit of 1JMOVGP responsible for conducting the 2010 tender for air sustainment services;¹³⁷
 - the concerns expressed by the incumbent contractor, Strategic, about Major Charlton's re-engagement in 1JMOVGP;
 - the movement of staff between suppliers; and
 - Major Charlton's acrimonious relationship with Strategic.

2.71 Probity risk management is a key theme in the committee's inquiry. These industry characteristics arguably provided signs of the probity risks inherent in the procurement—in particular, the risks of:

- perceived conflicts of interest and breaches of confidentiality arising from personnel movement; and
- proponent grievances about these matters, based on the highly competitive nature of the industry and complaints made about previous tender processes.

2.72 Clearly, there were warning signs for Defence indicating that it should approach this tender with extra care and diligence. Defence's identification and management of the probity risks associated with this tender process is examined in subsequent chapters. In the following chapters, the committee outlines the factual narrative of events occurring in the lead-up to, during and following the 2010 tender process.

137 Dr Watt, *Committee Hansard*, 29 March 2011.

Part II

Factual narrative of events

Chapters 3–7 provide a factual account of the events and procedures of the tender process from its inception to its conclusion. They examine the lead-up to the tender, the approach to market, the tender evaluation and the awarding of the contract.

This part of the report covers the concerns raised about the integrity of the process and the four subsequent reviews that were conducted during the tender process. It provides the evidentiary basis for the committee's findings and recommendations produced in Part III on specific matters of concern identified in the tender process.

Chapter 3

The conduct of the 2010 tender process

3.1 In this chapter, the committee provides a factual narrative of events relating to the 2010 tender process covering the period from the decision to re-test the market to the announcement of the successful tenderer.¹ It examines:

- the lead-up to the tender;
- the approach to the market; and
- the tender evaluation.

3.2 This chapter also includes a description of the key tender documents—the Standing Deed of Offer, the procurement strategy, the Request for Tender, and the Tender Evaluation Plan. The committee then identifies particular aspects of the three stages of the tender process that caused the process to be suspended pending investigation and review.

The lead-up to the tender

3.3 Strategic was contracted between 2005 and 2010 to provide air sustainment charter services to support ADF operations in the MEAO. In October 2008, Strategic entered into a 12-month contract with Defence, which was extended for a further 12 months in March 2009.² Between 24 October 2008 and 2009, Defence and Strategic agreed to seven amendments to the 2008 contract.³ These amendments were a combination of Defence and contractor-initiated proposals, arising from changing force dispositions and other operational factors.⁴ The 2008 contract expired on 23 October 2010.⁵

Decision to re-test the market

3.4 In October 2009, Defence elected to re-test the market and issue a new procurement process for air sustainment charter services. Defence identified several factors which prompted this decision. First, in 2008, the global financial crisis created excess capacity in the commercial air charter industry. Defence identified a decline in demand for international passenger air travel, shrinking aviation industry profitability,

1 A chronology of events is also provided at Appendix 5 to this report.

2 Department of Defence, *Submission 5*, Attachment A, p. 3.

3 Department of Defence, *Submission 5*, Attachment A, p. 3.

4 Department of Defence, *Submission 5*, Attachment A, p. 3.

5 Department of Defence, *Submission 5*, Attachment A, p. 3.

idle aircraft and falling charter rates. It considered that these circumstances presented an opportunity to achieve significant cost savings.⁶

3.5 Second, Defence considered that re-tendering was appropriate in light of the numerous amendments to the 2008 contract. It noted that some amendments 'had significantly altered the contract', in areas including fuel allocation, routing, block hours flown, pricing structure, the aircraft utilised and consequent load-splitting arrangements in relation to cargo.⁷

3.6 In particular, the seventh contract amendment enabled Strategic to substitute the Airbus A330-300 aircraft with an Airbus A330-200 from 29 September 2009.⁸ While reducing price and increasing the range of the aircraft, this solution created a freight shortfall. Under the contract amendments, Strategic separately moved an additional three pallets per week at its own expense.⁹ Defence submitted that this solution introduced additional complexities and delays.¹⁰ Accordingly, Defence determined in 2009 that re-testing the market was necessary to ensure that it obtained maximum value for money.¹¹

Preparation for re-tender

3.7 Defence commenced preparation for the re-tendering process in late 2009. Two key stages—which are discussed below—were the establishment of the Air Transport Standing Offer Panel in November 2009, and the preparation and approval of the procurement strategy. Headquarters, 1st Joint Movement Group (HQ1JMOVGP), within the Joint Operations Command, was the area within Defence responsible for conducting the procurement. The Commanding Officer of 1JMOVGP was Group Captain Robert Barnes. His superior officer was the Deputy Chief of the Joint Operations Command, Rear Admiral Ray Griggs.

Establishment of the Air Transport Standing Offer Panel

3.8 In November 2009, Defence established—via an open tender process—the Air Transport Standing Offer Panel, consisting of 13 providers.¹² The panel

6 Department of Defence, *Submission 5*, Attachment A, p. 3; Deloitte Review, p. 12.

7 Department of Defence, *Submission 5*, Attachment A, p. 3. See further, AFCD Review, pp. 16–17; AGS Review, p. 3; Deloitte Review, p. 12; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 46.

8 Department of Defence, *Submission 5*, Attachment A, p. 3; AFCD Review, p. 16.

9 Department of Defence, *Submission 5*, Attachment A, p. 3; AFCD Review, p. 16.

10 Department of Defence, *Submission 5*, Attachment A, p. 3; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 49. See further: Group Captain Robert Barnes, Statutory Declaration, signed 20 April 2011; Jo-Anne Pope, Statutory Declaration, signed 14 April 2011; Joshua Prucha, Statutory Declaration, signed 14 April 2011.

11 Department of Defence, *Submission 5*, Attachment A, p. 3.

12 *Air Transport Deed of Standing Offer*, 2 November 2009 (AusTender SON179438).

arrangement covers the domestic and international air transportation, on an individual job basis, of ADF personnel, equipment and cargo. The panel was established to 'provide a contractual framework for ad hoc air charter services'.¹³

3.9 As mentioned in chapter 2, panel membership includes both commercial charter brokers and operators, most of which are small-to-medium enterprises.¹⁴ The panel is operative for a term of three years, from 2 November 2009 to 1 November 2012.¹⁵ Deloitte described the use of a panel as having 'effectively pre-selected the air charter market for Commonwealth requirements' for the period of its operation.¹⁶

The use of standing offer panels in Commonwealth procurement

3.10 By way of explanation, standing offer panels are arrangements whereby a number of suppliers—usually selected through a single procurement process—may each supply property or services to the Commonwealth as specified in the instrument establishing the panel.¹⁷ The establishing instrument is often a deed of standing offer, executed between the Commonwealth (as represented by the relevant agency) and each supplier. The deed sets out the terms and conditions that will apply when the property or services are purchased by the Commonwealth. A contract is formed, pursuant to the deed, each time a participating agency purchases property or services under the panel arrangement.¹⁸ The establishment and use of panels by Australian Government agencies is governed by the Commonwealth Procurement Guidelines (CPGs),¹⁹ supported by relevant Commonwealth and agency-level policies.²⁰

3.11 The Australian Government Good Procurement Practice Guide, *Establishing and Using Panels*, states that panel arrangements are intended to provide 'a convenient, flexible, streamlined and efficient process for acquiring the property or services covered by the panel arrangement', while 'providing competitive pressures to

13 AFCD Review, p. 4.

14 *Air Transport Deed of Standing Offer*, 2 November 2009 (AusTender SON179438).

15 *Air Transport Deed of Standing Offer*, 2 November 2009 (AusTender SON179438).

16 Deloitte Review, p. 8. See further, AGS Review p. 6.

17 *Commonwealth Procurement Guidelines* (CPGs), December 2008, [8.35].

18 CPGs, [8.35]; Department of Finance and Deregulation, *Establishing and Using Panels*, Good Procurement Practice Guide 4, December 2007, [3.2]; Defence Procurement Policy Manual (DPPM), April 2011, Chapter 4.8.

19 See especially Division 2 (Mandatory Procurement Procedures), [8.35]–[8.37], which govern the establishment of panels. Note that the Mandatory Procurement Procedures apply to 'covered procurements' (defined as those which exceed the prescribed monetary thresholds in the CPGs and are not otherwise exempt).

20 See, for example, Department of Finance and Deregulation, *Guidance on the Mandatory Procurement Procedures*, Financial Management Guidance 13, Appendix B—Panels; Department of Finance and Deregulation, *Establishing and Using Panels*, Good Procurement Practice Guide 4; DPPM chapter 4.8.

assist in achieving value for money'.²¹ The Guide states that panels are of most benefit where they are used for the procurement of property or services that are purchased regularly.²² The CPGs require panel arrangements to include certain minimum requirements, normally including a clear specification of the types of property or services covered by the panel arrangement, an indicative or set price rate, the term of the panel arrangement and details as to how the agency will purchase from the panel.²³

3.12 Once a panel is established, the purchasing of property or services from panel providers is not subject to the Mandatory Procurement Procedures in the CPGs. However, as procurement-related tasks, these purchases are governed by the other elements of the procurement policy framework—in particular, the requirement to achieve value for money.²⁴

The Air Transport Deed of Standing Offer

Design of the deed

3.13 In its legal process review of the 2010 tender, the Australian Government Solicitor (AGS) explained the design of the deed of standing offer for the Air Transport Standing Offer Panel:

The Panel operates on the basis that the members are pre-qualified on the basis that they either operate aircraft ['operators'] or they have an ability to source aircraft ['brokers']. Where the Commonwealth identifies a particular requirement for air transport, the Commonwealth may then issue a 'Request' under the Panel, and the contractors may submit a response, which would include a contract price.²⁵

Key clauses in the deed

3.14 Key clauses in the deed include the following:

- Clause 5.1 provides an indication of the matters that may be included in requests issued to contractors (for example, equipment, personnel, uplift and delivery dates and locations, and other special conditions);²⁶

21 Department of Finance and Deregulation, *Establishing and Using Panels*, Good Procurement Practice Guide 4, December 2007, [3.3], [3.5].

22 Department of Finance and Deregulation, *Establishing and Using Panels*, Good Procurement Practice Guide 4, December 2007, [3.4].

23 CPGs [8.35].

24 Department of Finance and Deregulation, *Guidance on the Mandatory Procurement Procedures*, Financial Management Guidance 13, Appendix B—Panels.

25 AGS Review, p. 6.

26 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clause 5.1(c).

- Clause 5.2 sets out the requirements that contractors must address in their responses to requests (for example, contract price, loading date, aircraft specifications, and subcontracting arrangements);²⁷
- Clauses 5.3–5.6 govern the assessment, acceptance and rejection of completed requests by the Commonwealth, and the amendment of agreed requests;
- Various clauses setting out contractors' compliance obligations in performing services under the deed, for example clauses requiring compliance with:
 - various legal, regulatory and policy requirements of the Commonwealth and State and Territory governments and local authorities, and the laws of foreign jurisdictions;²⁸ and
 - identified Defence and Commonwealth policies,²⁹ including post-Defence separation employment policies where a contractor proposes to engage former Defence employees.³⁰

3.15 The clause on post-Defence separation employment is particularly relevant to the committee's inquiry. It provides that contractors must ensure that any of their employees who are former Defence employees comply with the requirements of the relevant Defence Instructions and Workplace Relations Manual on post-separation employment.³¹

3.16 This clause further provides that contractors must not, without the written approval of the Commonwealth, permit a person to perform or contribute to the performance of services provided under the deed, where that person was:

- in three separate periods of the previous 24 months, 12 months and 6 months—an employee of or service provider to Defence, who was engaged in the preparation or management of the deed, the selection of the contractor, or the provision of services under the deed; or
- a Defence employee in the previous 12 months.³²

27 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clause 5.2(b).

28 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clauses 6.6, 13.3.

29 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clause 13.4.

30 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clause 22.

31 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clause 22 (a).

32 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clauses 22 (b), (d).

3.17 The clause further prescribes matters to which the Commonwealth must have regard in considering a contractor's written application for approval to engage a former Defence employee. These include:

- the character and duration of the employee's engagement with both Defence and the contractor;
- the potential for real or perceived conflicts of interest; any effects that the withholding of approval will have on the person's employment opportunities or the performance of the deed; and
- the policy contained in the relevant Defence Instruction and Workplace Relations Manual.³³

Development of the procurement strategy

3.18 The 2010 tender process for the provision of air services to the MEAO followed a number of distinct stages, commencing with the development of a procurement strategy in October 2009. In broad terms, a procurement strategy identifies and provides a systematic approach to the management of each stage of the procurement process.³⁴

3.19 The procurement strategy for the 2010 tender process, entitled *Procurement Strategy for the Contracting of Air Sustainment Services in Support of OP Slipper AM183951*, was approved by Group Captain Barnes on 24 March 2010. Two prior approvals were granted on 18 and 23 March covering, respectively, the decision to re-tender and the request for tender (RFT) document.³⁵

3.20 The procurement strategy identified the following project deliverables:

- obtain a statement of funds availability;
- obtain proposal approval;
- obtain delegate approval for the tender evaluation plan;
- conduct financial analysis planning;
- release RFT documentation;
- evaluate tender responses;
- obtain contract approval; and

33 Department of Defence, *Submission 5*, Attachment D ('Air Transport Deed of Standing Offer'), Clause 22(c).

34 See the Defence Procurement Policy Manual (DPPM), Chapter 5.1, 'Planning complex and strategic procurements'.

35 Department of Defence, *Submission 5*, Attachment A, Annexure A; Deloitte Review, Appendix C.

- obtain contract signatory approval from delegate.³⁶

3.21 The procurement strategy stated that Defence would use the Air Transport Standing Offer Panel. It noted that the composition of the panel—being a mixture of charter operators and suppliers—meant that Defence had 'access to all air transport sourcing arrangements', because panel members could source charter aircraft globally.³⁷ It was contemplated that a request would be issued under the deed of standing offer, and responses sought from all panel members.³⁸ The terms of the request are examined separately below.

3.22 The procurement strategy included, as an annexure, a risk management plan, which covered nine key procurement risks. The plan identified, at a high level, the consequences if each risk were realised and detailed risk management strategies. The identified risks pertained to: the terms and conditions of the tender; the number of responses and nature of respondents; the breadth and precision of tender specifications; the selection of appropriate products and services from tender responses; the timing of tender evaluations; and exceeding budgetary limits.³⁹

3.23 The tender evaluation plan (TEP) referred to in the procurement strategy was approved by Lieutenant Colonel Andrew Hall on 25 March 2010.⁴⁰ The TEP documented the governance arrangements for the tender evaluation process. It set out:

- the tender evaluation criteria;
- the delegates nominated to approve actions;
- the proposed timeframes for the critical steps in the procurement;
- the personnel structure for the evaluation of tender responses, comprising a tender evaluation board (TEB), overseen by a Chair and supported by two tender evaluation working groups (TEWGs);
- the roles and responsibilities of the Chair of the TEB;
- how the comparative assessment of tender responses would be undertaken;
- the administrative requirements for the handling of tender documents;

36 Review, p. 14, citing 'Procurement Strategy for the Contracting of Air Sustainment Services in Support of Operation Slipper', [14]. See further, Department of Defence, *Submission 5*, Attachment A, p. 21.

37 Deloitte Review, p. 7, citing 'Procurement Strategy for the Contracting of Air Sustainment Services in Support of Operation Slipper'.

38 Deloitte Review, p. 7.

39 Department of Defence, *Submission 5*, Attachment A, Annexure C (Procurement Risk Management Plan, 23 March 2010).

40 Department of Defence, *Submission 5*, Attachment A, Annexure A; Deloitte Review, Appendix C.

- the requirements in respect of ethics, probity, fair dealing, conflicts of interest and security requirements and arrangements;
- the requirements applying to the detailed evaluation of tenders, the associated methodology and the production of the SER; and
- the steps for notification and debriefing of tenders.⁴¹

Consideration of probity issues in the tender planning stage

3.24 While a dedicated probity plan was not documented in the procurement strategy, the evidence before the committee indicates that probity issues were given consideration during the tender planning stage in the following ways:

- the TEP identified matters of probity relevant to the tender evaluation process, including conflicts of interest of TEB members, fair dealing and security;
- HQ1JMOVGP considered, during its pre-tender deliberations, the potential for conflicts of interest among tender team members. Defence stated that it did not identify any actual conflicts of interest with any of these personnel. It determined that there was 'potential for a perceived conflict of interest to exist through the posting of [Major] Charlton (in his reserve capacity)', but considered that he had been adequately separated from 'any access to, or involvement in, the tender process';⁴² and
- Defence sought advice from the legal firm Clayton Utz on the development of the tender requirements and conduct of the tender process.⁴³ Clayton Utz was selected from the Defence Legal Services Panel and, according to the AFCD review, the firm was familiar with the structure of the deed of standing offer and the MEAO air sustainment services requirements because it supported the initial establishment of the standing offer panel.⁴⁴

3.25 Mr Steven Power, partner, Clayton Utz, informed the committee that Squadron Leader Cole had contacted him as early as 13 January 2010 to draft the request document and have it ready to issue to the panel.⁴⁵ He explained that he reviewed the draft request and through an iterative process over a couple of months developed that document into a form suitable for release. He explained:

Over that two-month period, amendments were made to the capacity requirements of the aircraft. Some of those amendments from memory, would have related to legal drafting to put it in a form that was legally

41 Deloitte Review pp. 15–16; Department of Defence, *Submission 5*, Attachment A, p. 22.

42 Department of Defence, *Submission 5*, Attachment A, p. 23.

43 AFCD Review, p. 11; Mr Geoffrey Brown, Dr David Lloyd and Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, pp. 53–56.

44 AFCD Review, p. 11.

45 *Proof Committee Hansard*, 28 June 2011, p. 10.

enforceable. There may have been amendments to the actual numbers over time.⁴⁶

3.26 Mr Power had also been involved in establishing the standing panel.⁴⁷

Contemporaneous events during the lead-up to the tender

3.27 As noted in chapter 2, a number of external developments occurred contemporaneously with the tender planning stage. In summary these developments were:

- the re-engagement of Major Charlton in 1JMOVGP on 24 June 2009, as a Training Officer in JMCO Brisbane;
- Major Charlton's civilian employment as an aviation industry consultant during this time, following the appointment of administrators to his own company, Sky Air World, in February 2009;
- Strategic's 'continuing conversations' with Defence from June 2009, expressing its concerns about Major Charlton's engagement in 1JMOVGP, after the company learned of his return to the ADF;⁴⁸
- Adagold and Hi Fly's continuing commercial relationship, including undertaking a joint MEAO support assessment exercise;
- Adagold's meeting with 1JMOVGP personnel on 4 September 2009, which prompted Adagold to submit an unsolicited proposal to provide MEAO air sustainment services in February 2010;
- contact between MEAO contract administrators in 1JMOVGP and Strategic (as the incumbent contractor), in which Defence:
 - indicated that it regularly received approaches from other panel members about alternative solutions; and
 - sought Strategic's technical advice about some of these proposed solutions, including an Airbus A340-300 aircraft option, with a payload of 42,000 kg—the specification was ultimately included in the 2010 request;
- some members of the standing offer panel monitoring Strategic's separate MEAO freight forwarding arrangements at Brisbane airport; and
- Strategic's allegations that Adagold or Major Charlton made approaches to Strategic staff, with a view to recruiting them during the lead-up to the tender process—an allegation which was denied by both Adagold and Major Charlton.

46 *Proof Committee Hansard*, 28 June 2011, p. 11.

47 *Proof Committee Hansard*, in camera, 28 June 2011, p. 3.

48 *Proof Committee Hansard*, 29 March 2011, p. 11.

The approach to market

The RFT—AO/014/09–10

3.28 The request for tender was released on 29 March 2010 to all members of the standing offer panel.⁴⁹ Its closing date was 1 June 2010 and the service commencement date was specified as 24 October 2010.⁵⁰ Defence noted that, while tight, the eight-week request period was necessary to meet operational requirements including the rotation of troops.⁵¹ The issue of operational need is discussed below in the context of subsequent reviews of the tender process.

3.29 Broadly, the RFT sought an 'all-inclusive price for the MEAO air sustainment services, based on a guaranteed 65 flights per annum over the initial two-year contract period', in accordance with the aircraft, logistical and other specifications detailed in the request and the terms of the deed.⁵² Item 7.13 of the RFT requested the following aircraft specifications:

(a) the aircraft must:

- (i) have an optimal seating capacity for at least 200 Relevant personnel; and
- (ii) have an available cargo carrying capacity of at least 25,000 kg (comprising a minimum of 150m³ of volumetric capacity), comprising
 - A. capacity to hold accompanying baggage of at least 12,000 kg; and
 - B. a minimum useable cargo capacity of 13,000 kg.

(b) The aircraft must:

- (i) be configured for aero medical evacuation; and
- (iii) carry a minimum of four onboard stretchers that are available for use at all times.⁵³

3.30 The volumetric capacity of 150m³ represented a 3m³ increase on the total capacity of the 2008 contract, as amended in March 2010.⁵⁴ Defence stated that the increased volumetric capacity specified in the request was due to changing operational requirements—including troop dispositions, routes and cargo increases—and value for money considerations.⁵⁵ It stated that the requirement of 150m³ was based on

49 Department of Defence, *Submission 5*, Attachment A, pp. 3–4; RFT AO/014/09-10, p. 1.

50 RFT AO/014/09–10, pp. 2 (definitions section), 20 (item 8).

51 Department of Defence, *Submission 5*, Attachment A, p. 20.

52 Department of Defence, *Submission 5*, Attachment A, p. 18. See further RFT AO/014/09–10, item 10(a). Note however, that the costs of fuel were met by the Commonwealth: item 7.9.

53 RFT AO/014/09-10, pp. 13-14 (Clause 7.13).

54 Department of Defence, *Submission 3*, Attachment A, p. 19.

55 Department of Defence, *Submission 3*, Attachment A, p. 19.

'historical data of ADF changes and projected force structure changes'.⁵⁶ The latter included the introduction of the unmanned aerial surveillance aircraft, Heron, and the C-RAM counter rocket artillery and mortar early warning system.⁵⁷

3.31 Defence stated that while a single aircraft solution was preferred, the RFT did not exclude alternative solutions, such as a combination of passenger-cargo aircraft with a freight-forwarding solution.⁵⁸ For example, item 9.20 in the request provided that 'the Commonwealth may, in its absolute discretion, consider a Completed Request that is non-compliant with one or more of the requirements in this Request'.⁵⁹

3.32 The release of the request documentation on 29 March set in train the tender process as follows:⁶⁰

Conduct industry briefing	→	Receive tender responses	→	Conduct tender evaluation	→	Identify preferred tenderer	→	Communicate tender results	→	Finalise contract
---------------------------------	---	--------------------------------	---	---------------------------------	---	-----------------------------------	---	-------------------------------	---	----------------------

Preliminary probity concerns

3.33 On 30 March 2010, shortly after the release of the request, Strategic put in writing its concerns about the tender process with HQ1JMOVGP. Mr Aisen emailed Lieutenant Colonel Hall and Group Captain Barnes seeking to discuss matters and to 'nip a couple of issues in the bud'.⁶¹ He expressed concerns about potential conflicts of interest arising from the posting of Major Charlton in 1JMOVGP. Mr Aisen wrote:

[I]t became very apparent that it appears that one Brisbane based broker [Adagold] has possibly had a 'heads up' regarding the possibility of re-tender, and has been actively in the market seeking Airbus A340-300 types. I am hoping it is not paranoia, but it does seem coincidental that this broker dealt with a current member in the ADF in Brisbane and a former member of JMOVGP/SLCC [Major Charlton], who endeavoured to operate a 'now defunct' airline, and actually tendered with this broker to introduce the aircraft type in competition with us at the last tendering process.

56 Department of Defence, *Submission 3*, Attachment A, p. 19.

57 Department of Defence, *Submission 5*, Attachment A, p. 19.

58 Department of Defence, *Submission 5*, Attachment A, 15. See further Deloitte Review, p. 11.

59 RFT AO/014/09–10, p. 23 (item 9.20). See also item 9.25(a)(xiii) which enabled the Commonwealth to waive any requirement or obligation under the Request or the Deed of Standing Offer.

60 Deloitte Review, pp. 14–15. See further, Department of Defence, *Submission 5*, Attachment A, p. 20.

61 Mr Shaun Aisen, email correspondence to Lieutenant Colonel Andrew Hall and Group Captain Robert Barnes, 30 March 2010.

More of concern is the likelihood that this gentleman will continue to liaise and possibly work with other tender parties, whilst working under the auspices of the Commonwealth.⁶²

3.34 Mr Aisen also expressed concerns about the preference for a single aircraft solution. He considered that this solution would significantly:

- limit the capability of any Australian operator to provide services from existing fleets; and
- increase cost and reduce delivery flexibility, compared to the load-splitting arrangements developed by Strategic in performing the 2008 contract, and would thereby 'undo' the progress it had made in this regard.⁶³

3.35 In response on 8 April 2010, Lieutenant Colonel Hall informed Mr Aisen that the individual ADF member in question (Major Charlton) had 'no direct line of communication' with HQ1JMOVGP and was not involved in the tender process. He stated that JMCO Brisbane was aware of the requirement to 'keep him distanced from the A330 and any contractual issues arising from it'. Lieutenant Colonel Hall confirmed that the requirement was implemented 'to the point that this contract is not discussed when he is present'. He stated:

[In order to] ensure that there can be no further perception that this individual may bias the process, he will cease parading with JMCO Brisbane from next week until the tender process has been concluded. Although this is unnecessary, as the JMCO is not involved in the tender process, at all, it will be done to ensure that a level playing field is being maintained.⁶⁴

3.36 He commented further on brokers and operators and their significant market awareness, noting that, in most cases, companies making unsolicited proposals to Defence 'had already done their research as to what is required'. He confirmed that no decision had been made in relation to the release of the RFT until it was formally approved on 24 March 2010.⁶⁵

3.37 In response to Strategic's concerns about the tender specifications, Lieutenant Colonel Hall advised that the paramount objective was value for money rather than Australian industry involvement. He noted further that Strategic's load-splitting arrangements would continue to be used in the remaining term of the 2008 contract,

62 Mr Shaun Aisen, email correspondence to Lieutenant Colonel Andrew Hall and Group Captain Robert Barnes, 30 March 2010.

63 Mr Shaun Aisen, email correspondence to Lieutenant Colonel Andrew Hall and Group Captain Robert Barnes, 30 March 2010.

64 Lieutenant Colonel Andrew Hall, email correspondence to Mr Shaun Aisen, 8 April 2010. See further Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, p. 69.

65 Lieutenant Colonel Andrew Hall, email correspondence to Mr Shaun Aisen, 8 April 2010.

and a decision on the continuation of intra-theatre movements would be made before the contract expired on 23 October 2010.⁶⁶

3.38 Mr Aisen replied on 9 April 2011, seeking a meeting with members of HQ1JMOVGP to discuss his concerns. According to Group Captain Barnes, Mr Aisen also telephoned him on 16 April with the same request. Group Captain Barnes further advised that, while he could not recall details of the conversation with Mr Aisen, he 'would have refused to discuss the Request with [Mr Aisen] one-on-one, as it could have provided [Strategic] with an unfair advantage'.⁶⁷

Industry briefing

3.39 In accordance with the procurement strategy, Defence conducted an industry briefing on 23 April 2010. At the briefing, Defence indicated its preference for a single aircraft solution, but advised that it would consider alternative cargo solutions.⁶⁸ Clayton Utz also attended the briefing and assisted with responding to questions from panel members.⁶⁹ No specific probity protocols were developed for the industry briefing.⁷⁰

Contemporaneous events during the tender response period

3.40 As noted in chapter 2, several events occurred contemporaneously with the tender response period relating to:

- the engagement of Major Charlton (via AIS) by Adagold to provide technical assistance on its tender response, on or about 31 March 2010;⁷¹
- Major Charlton's declaration, on 31 March 2010, of a potential conflict of interest to the Officer Commanding JMCO Brisbane;⁷²
- the direction that Major Charlton cease parading at JMCO Brisbane, effective from 1 April 2010;⁷³ and
- on 30 March and 8 April, Mr Aisen wrote to Defence about the possibility of a broker in Brisbane receiving advance notice of the tender.

66 Lieutenant Colonel Andrew Hall, email correspondence to Mr Shaun Aisen, 8 April 2010.

67 See AFCD Review, p. 27.

68 Department of Defence, *Submission 5*, Attachment A, p. 19.

69 AFCD Review, p. 12.

70 AGS Review, p. 9.

71 Major David Charlton, Statutory Declaration, signed 7 September 2010, [10], [14].

72 Major David Charlton, Statutory Declaration, signed 7 September 2010, [10].

73 Department of Defence, *Submission 5*, Attachment A, Annexure A; Deloitte Review, pp. 19–20; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 47.

3.41 Also, in addition to his previous attempts to alert 1JMOVGP to his concerns, Mr Aisen sought further to discuss matters about Major Charlton at a regular management meeting for the then contract on 27 May 2010. The Defence member attending the meeting, Squadron Leader Ben Cole, 'refused to engage in discussing this topic, or any aspect of the request' for reasons of probity.⁷⁴

Tenders close and evaluation

3.42 Tenders closed on 1 June 2010, with seven of the 13 panel members submitting a total of 11 solutions.⁷⁵ This included one response from Adagold utilising an Airbus A340-300, and two responses from Strategic—one utilising an Airbus A340-300 and the other an Airbus A330-200.⁷⁶

3.43 Defence commenced the tender evaluation process on 2 June 2010. The process operated between that date and 9 July 2010 and was conducted primarily at the HQJOC premises near Bungendore, NSW. Evaluation of certain financial aspects of tender responses was undertaken at the Financial Investigation Services (FIS) office in Sydney.⁷⁷

3.44 Overall responsibility for conducting the evaluation rested with the Tender Evaluation Board (TEB), consisting of three officers—two from 1JMOVGP and the third being the Air Transport Standing Offer Administrator. The TEB was supported by two tender evaluation working groups (TEWGs), which provided assistance in evaluating, respectively, technical and operational⁷⁸ and financial⁷⁹ aspects of tender responses.⁸⁰

Evaluation criteria and process

3.45 The TEP and the RFT identified the following nine tender evaluation criteria, which were equally weighted and not listed in order of importance:

- (a) past performance of contractual obligations of the contractor, the operator or any subcontractor;
- (b) the contractor's overall degree of compliance with the requirements of the request;
- (c) the contractor's understanding of the requirements of the request;

74 AFCD Review, p. 27.

75 Department of Defence, *Submission 5*, Attachment A, p. 3.

76 Department of Defence, *Submission 5*, Attachment A, p. 3.

77 Department of Defence, *Submission 5*, Attachment A, p. 18; AFCD Review, p. 8.

78 Referred to as the Technical/Operational TEWG.

79 Referred to as the Financial TEWG.

80 Department of Defence, *Submission 5*, Attachment A, p. 18.

-
- (d) the extent to which the contractor demonstrates how compliance with the requirements of the request and the deed will be achieved;
 - (e) the extent to which the contractor meets the technical, functional, operational and performance requirements stated in the request and the deed;
 - (f) the extent to which the contractor is compliant with the request and the assessed level of risk relating to the negotiation of the request;
 - (g) the proposed corporate structure and the financial and corporate viability of the contractor and any proposed operator to fulfil their obligations under the deed;
 - (h) the contractor's demonstrated technical and managerial capability to meet the requirements in the request and the deed; and
 - (i) the fuel efficiency of the aircraft.⁸¹

3.46 The RFT provided that the criteria were non-exhaustive and did not limit the general provision in clause 5.5 of the deed that value for money was the overriding consideration.⁸² The deed provided further that the Commonwealth may, in its absolute discretion, take into account other matters including past performance.⁸³

3.47 All tender responses were initially assessed for their completeness and compliance and none were set aside during this process.⁸⁴ Commercial and financial information was then extracted from tender responses to undertake detailed compliance assessments. The Operational/Technical TEWG assessed criteria (e) and (h) above, while the Financial TEWG assessed criteria (g) and (i). The TEB conducted the compliance and risk assessments of tenders against the remaining criteria.⁸⁵

3.48 On completion of the compliance and risk assessments, the TEB was provided with the financial and commercial information to consolidate and determine overall compliance and value for money and assign rankings to responses.⁸⁶ Advisors from Clayton Utz attended one TEB meeting to assist with insurance and liability questions and provided a summary document.⁸⁷

81 RFT AO/014/09-10, item 9.22; Department of Defence, *Submission 5*, Attachment A, pp. 17–18; AFCD Report, p. 9.

82 RFT AO/014/09-10, item 9.22.

83 RFT AO/014/09-10, item 9.22.

84 AFCD Review, p. 9.

85 Department of Defence, *Submission 5*, Attachment A, p. 18; AFCD Review p. 10.

86 AFCD Review, p. 10.

87 AFCD Review, p. 12.

3.49 Defence stated that during the evaluation process it became evident that six responses did not meet all of the criteria and were rated as 'non-preferred'.⁸⁸ Defence emphasised that 'this rating did not exclude them from the assessment process. It was merely a means of differentiating between those submissions that met all of the evaluation criteria and those that did not'.⁸⁹

Conflict of interest management

3.50 The TEP contained three key clauses in relation to conflicts of interest, which required that:

- the Chair of the TEB brief members of the tender evaluation team (that is, the TEB and the two TEWGs) on the requirements of the TEP, including conflicts of interest;
- the Chair of the TEB brief members of the tender evaluation team on the risk associated with real or perceived conflicts of interest prior to the evaluation. Any non-Defence personnel participating in the tender would be required to submit a statement to the effect that they had no conflicts of interest; and
- participants in the tender evaluation process were to be advised that, should a real or perceived conflict of interest arise at any time during the evaluation, they would be required to declare this and may be required to exclude themselves from further participation in the process.⁹⁰

3.51 All members of the tender evaluation team signed conflict of interest declarations to the effect that they:

- acknowledged their obligations, as relevant, under the *Australian Public Service Act 1999* (Cth) or the *Defence Force Discipline Act 1982* (Cth) in relation to their membership of tender evaluation team;
- were aware that they were subject to the relevant legislation while carrying out their duties;
- did not have any conflicts of interest—real or apparent—with their duties; and
- would immediately advise the TEB Chair if they had or became aware of any conflicts of interest—real or apparent—with their duties.⁹¹

3.52 Defence stated that members of the Financial TEWG signed their declarations during the evaluation process but before they had finalised their deliberations and made recommendations.⁹² As discussed in Chapter 6, in the course of its external

88 Department of Defence, *Submission 5*, Attachment A, p. 18.

89 Department of Defence, *Submission 5*, Attachment A, pp. 18–19.

90 Clauses 18, 21 and 22 of the TEP, cited in Department of Defence, *Submission 5*, Attachment A, p. 23.

91 Deloitte Review, p. 18.

92 Department of Defence, *Submission 5*, Attachment A, p. 22.

review in September 2010, Deloitte identified certain deficiencies in these declarations. Subsequent to the evaluation process, tender evaluation team members signed revised declarations to address these issues.⁹³

3.53 Defence stated that the tender evaluation team was not provided with a specific briefing on conflicts of interest and other probity matters. It submitted that:

The conduct of a separate probity briefing is considered best practice only and is not a mandatory requirement of the Commonwealth Procurement Guidelines or the Defence Procurement Policy Manual. Specific requirements of the Defence Procurement Policy Manual on conflicts of interest, the Tender Evaluation Plan and the Conflict of Interest declaration forms, combined with coverage of this issue in complex procurement training, provided adequate information on the obligations of the Tender Team in respect of probity matters.⁹⁴

3.54 At this stage, the committee notes that in responding to possible criticism of the tender process, Defence relied on the bare minimum of satisfying mandatory requirements and not necessarily best practice.

Confidentiality

3.55 The TEP contained clauses on confidentiality. These included requirements for the application of access restrictions to files and information, and for the handling of tender material with appropriate security and confidentiality.

Implementation of the TEP

3.56 Defence stated that the following measures were undertaken in compliance with these clauses:

- the tender evaluation was undertaken primarily at the geographically remote and secure facility near Bungendore, NSW;
- the financial evaluation aspects were undertaken in a secure area of Defence offices in Sydney;
- key procurement documents were stored in an electronic folder accessible only to personnel employed in HQ1JMOVGP—it should be noted that, from July 2010, access controls were further tightened to restrict access to personnel directly involved in the tender process only; and
- the TEB advised that, at no stage was commercially sensitive information on any tender response communicated to other tenderers or personnel outside the TEB during the evaluation process.⁹⁵

93 Deloitte Review, p. 18.

94 Department of Defence, *Submission 5*, Attachment A, p. 24. See further, Deloitte Review, pp. 18–19.

95 Department of Defence, *Submission 5*, Attachment A, pp. 15–16.

Additional measures in respect of Major Charlton

3.57 In response to confidentiality concerns arising from Major Charlton's posting to 1JMOVGP, Group Captain Barnes, Lieutenant Colonel Hall and Squadron Leader Cole declared that they did not have a personal or social relationship with Major Charlton and, to their knowledge, nor did any of the staff under their supervision.⁹⁶ Group Captain Barnes stated further that, as part of the tender review process, he directed his Chief of Staff to survey members of 1JMOVGP about their prior contact with Major Charlton.⁹⁷ Members were asked to respond to the following question:

What involvement have you had with Major Charlton in your time in 1JMOVGP?⁹⁸

3.58 Group Captain Barnes stated that two members disclosed prior involvement with Major Charlton, but neither was involved in the tender evaluation. These members were his Chief of Staff and previous contracting officer, who had worked with Major Charlton in HQ1JMOVGP in 2003.⁹⁹ The Defence Chief Audit Executive, Mr Geoffrey Brown, stated that he assessed this remote contact as 'not pertinent to the overall process'.¹⁰⁰ As discussed subsequently, the AFCD examinations of Mr Charlton's Defence email and telephone access records supported these declarations.¹⁰¹

Probity risk management during the tender evaluation stage

3.59 Defence considered the appointment of a probity auditor after the evaluation had commenced. On 7 June 2010, Squadron Leader Ben Cole sent an email to Clayton Utz lawyer Mr Steven Power seeking advice about a probity audit. He wrote:

I have been thinking about the possibility of ministerials etc relating to this tender. To ensure any disputes do not overly delay the scheduled commencement of the new contract, I think it would be best to have some form of probity audit at the conclusion of the tender evaluation. What are your thoughts?¹⁰²

3.60 Mr Power provided advice over the telephone to Squadron Leader Cole on 9 June 2010 about the appointment of a probity auditor to conduct an audit at the end of

96 Deloitte Review, p. 8.

97 Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, pp. 69–71.

98 Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, p. 70.

99 Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, pp. 70–71.

100 Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, p. 72.

101 AFCD Review, pp. 22–23.

102 Department of Defence, *Summary of advice provided by Clayton Utz to Defence in relation to the appointment of a probity auditor* (14 April 2011), response to Question on Notice 3(j).

the evaluation.¹⁰³ During this conversation, the limited role of a probity auditor, that is to identify probity issues after the event, was discussed. Mr Power suggested that it was open to Defence to appoint a probity auditor. He noted that whether a probity auditor should be appointed would depend on whether Defence had any probity concerns in relation to the process that would justify such an appointment. He advised that, if there were no current issues, then it was questionable that the appointment of a probity auditor would be warranted. Even though he had entertained the 'possibility of ministerials', Squadron Leader Cole stated that as far as he was aware there were no probity issues or concerns in relation to the process.¹⁰⁴

3.61 At the same time, Mr Power and Squadron Leader Cole had a general discussion about the role of a probity adviser, as distinct from a probity auditor, and whether a probity adviser should have been appointed at the commencement of the procurement process. In a written summary of his advice, Mr Power gave an account of the points that he had made, which were:

- it was not common for agencies to appoint probity advisers when conducting procurements from established standing offer panels; and
- it was necessary to consider whether the value of the proposed contract warranted the appointment of a probity adviser.¹⁰⁵

3.62 Defence's evidence to the committee indicates that it understood Mr Power to mean that the appointment of a probity adviser would be unusual because:

- the procurement was conducted using a panel arrangement, which provided a level of 'assurance' in regards to probity;¹⁰⁶ and
- the tender process had reached an advanced stage, such that the benefit of appointing a probity adviser had been lost.¹⁰⁷

3.63 In his oral evidence to the committee, Group Captain Barnes stated that on the basis of Mr Power's advice, conveyed to him by Squadron Leader Cole, he made the decision not to appoint a probity adviser.¹⁰⁸

103 Defence made available to the committee a summary prepared by Mr Power of his telephone conversation with Squadron Leader Cole on 9 June 2010: Department of Defence, *Summary of advice provided by Clayton Utz to Defence in relation to the appointment of a probity auditor* (14 April 2011), response to Question on Notice 3(j).

104 Department of Defence, *Summary of advice provided by Clayton Utz to Defence in relation to the appointment of a probity auditor* (14 April 2011), response to Question on Notice 3(j).

105 Department of Defence, *Summary of advice provided by Clayton Utz to Defence in relation to the appointment of a probity auditor* (14 April 2011), response to Question on Notice 3(j).

106 See further: Mr Geoffrey Brown, Dr David Lloyd and Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, pp. 53–56. See also, AFCD Review, pp. 11–12; AGS Review, p. 9; Deloitte Review, p. 15.

107 Dr David Lloyd, *Proof Committee Hansard*, 29 March 2011, p. 55.

Identification of preferred tenderer and the source evaluation report (SER)

3.64 On completion of the overall compliance assessment undertaken by the TEB, Adagold was rated as the highest ranked tenderer.¹⁰⁹ The TEB prepared the Source Evaluation Report (SER), documenting the evaluation and outcome of the tender. Defence stated that the function of the SER was to provide:

...an explanation of how the evaluation has been conducted, summarising the responses received; the outcomes of screening and short-listing processes; the strengths and weaknesses of the tenders; key risks and other problems identified; and issues in the value for money comparison (including those that will need to be negotiated).¹¹⁰

3.65 Early in July, during the final stage of the evaluation process, Squadron Leader Cole approached Clayton Utz to provide two forms of written legal advice—one in relation to a review of the SER and the second to insurances. In respect of the SER, he explained:

We were instructed to carry out a high level review of the SER, and we did that. We were not...second guessing the evaluation. For example, we were not going back to source documents to check whether they had got the evaluation right. We were just doing a review. As a legal adviser, when you are reviewing a document like that, you are making sure that there is sufficient detail in there. You are making sure that you can follow the reasoning leading up to the ultimate conclusion.¹¹¹

3.66 Mr Power identified a number of areas where the SER could be improved or where inconsistencies appeared in the document. Most of the concerns related to a lack or absence of detail, especially on the extent to which each tender had met the evaluation criteria, and the importance of ensuring that statements or assertions could be substantiated. For example, he suggested that Defence consider recording in the SER some of the key matters that led the TEB to conclude that the preferred tender represented value for money. Mr Power also commented on the use of imprecise language such as the term 'compliant' when 'having no deficiencies' would be more accurate. He gave the example of a contractor's 'past performance which 'cannot be assessed as 'compliant' or 'non compliant'—instead a qualitative comment should be made.¹¹²

108 Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, p. 59. See further, Department of Defence, *Submission 5*, Attachment A, p. 16.

109 Department of Defence, *Submission 5*, Attachment A, p. 4.

110 Department of Defence, *Submission 5*, Attachment A, pp. 3–4 (footnote 13). See further DPPM, 5.6—Evaluation of tenders, p. 5.6–14.

111 *Proof Committee Hansard*, 28 June 2011, p. 16.

112 Clayton Utz, Advice to Tender Evaluation Board re Source Evaluation Report, 9 July in camera evidence.

3.67 The committee took in camera evidence on a comment by Mr Power that the SER did 'not appear to have treated tenderers equally on the leasing arrangements with the respective aircraft owners'.¹¹³ Basically, most of the tenderers had not yet entered into formal leasing arrangements with a respective aircraft owner. One tenderer had, however, obtained a signed letter indicating that a named aircraft provider had agreed to deal exclusively with the tenderer in providing suitable aircraft for chartering should that tenderer succeed. In the view of Clayton Utz, this arrangement did 'not constitute a formal lease agreement' and should have been understood in this light.¹¹⁴

3.68 While in private session, the committee also sought to clarify observations made about the scoring method employed by the tender evaluation teams. Mr Power explained:

It was not evident from the document I had been given that there was sufficient information in relation to the overall value for money assessment. I raised the issue of whether that had been documented separately, and if it had been it should have been attached to the report or, alternatively, there should have been a summary detailing the overall outcomes and the reasons for that decision being reached.¹¹⁵

3.69 A subsequent review also took note of the unequal treatment and the scoring methodology, which are discussed later.

3.70 In respect of the insurance matter, Mr Power indicated that his work was 'more a review to identify which of the bidders had provided the relevant insurances, where there were gaps and what would have to be done in the future to follow up those gaps'. He said that Clayton Utz assisted the evaluation team to identify 'the extent to which tenderers had actually provided the required insurances and we identified gaps'.¹¹⁶ He said:

We were not providing specific insurance advice as such; it was more about identifying gaps where they may need to be addressed in the future.

3.71 He noted that more detailed analysis was required and understood that some clarification was then 'sought from tenderers seeking further details about proposed insurances'. Group Captain Barnes explained that it was 'normal business practice' to obtain those types of insurances when the contract was in place. According to him, the contract itself needs to specify that the company needs to provide evidence of these insurances within a certain period of time of signing the contract'.¹¹⁷

113 *Proof Committee Hansard*, 28 June 2011, p. 16 and in camera Hansard, 28 June 2011.

114 *Clayton Utz, Request ALSO/014/09-10 for the Provision of Air Sustainment Services to the MEAO (Request) – Advice to Tender Evaluation Board re Source Evaluation Report, Committee Hansard*, in camera, 28 June 2011.

115 *Committee Hansard*, in camera, 28 June 2011, p. 5.

116 *Committee Hansard*, in camera, 28 June 2011, p. 5.

117 *Committee Hansard*, in camera, 28 June 2011, p. 7.

3.72 On receipt and consideration of Mr Power's advice, Defence finalised the SER on 9 July 2010.¹¹⁸ That same day, it notified Adagold of its preferred tenderer status, and Strategic—as the current contract holder—of its unsuccessful bid.¹¹⁹ Defence formally communicated the tender results to all participants on 12 July 2010.¹²⁰

3.73 On 9, 10, 12 and 13 July 2010, Mr Aisen rang 1JMOVGP voicing concerns about the integrity of the tender process. On 14 July, he wrote to the Inspector General, Department of Defence, detailing his concerns. The letter was copied to a number of other people including the Secretary of Defence and the Chair of the Senate Foreign Affairs, Defence and Trade Legislation Committee.

3.74 Defence conducted initial contract negotiations with Adagold on 27 July 2010, but the procurement was suspended to enable an examination of the complaints made about the tender process.¹²¹ These complaints and their subsequent investigations are considered in chapters 4–7.

Conclusion

3.75 The tender process had a number of key features:

- it used a standing offer panel which, according to the Australian Government Good Procurement Practice Guide on Establishing and Using Panels, is 'of most benefit' where used for 'the procurement of property or services that are purchased regularly';
- the deed used by Defence for this tender had a post-Defence separation employment clause;
- the aircraft specifications in the RFT were materially different from those in the 2008 contract;
- the RFT was released on 29 March 2010 with a closing date of 1 June 2010 meaning potential tenderers had just over two months to prepare and lodge their tender responses;
- within days of the release of the RFT, on 30 March 2010, Mr Aisen representing a member of the Standing Offer Panel, Strategic Aviation, raised concerns about the tender process;
- Major Charlton, who was identified by Mr Aisen as having a conflict of interest, declared a potential conflict of interest on 31 March 2010 and ceased parading at JMCO Brisbane effective from 1 April 2010;

118 Department of Defence, *Submission 5*, Attachment A, Annexure A.

119 Department of Defence, *Submission 5*, Attachment A, Annexure A. See further, DPPM 5.6—Evaluation of tenders, p. 5.6–15.

120 Department of Defence, *Submission 5*, Attachment A, Annexure A.

121 Department of Defence, *Submission 5*, Attachment A, Annexure A.

-
- no probity plan was documented in the procurement strategy, and nor did the risk management plan refer to probity risks;
 - no probity protocols were developed for the industry briefing on 23 April 2010;
 - the TEP contained conflicts of interest clauses and members of the tender evaluation team signed conflict of interest declarations;
 - in June 2010, Defence considered but rejected the idea of appointing a probity adviser;
 - on completion of the tender evaluation, Clayton Utz reviewed the SER and made a number of observations especially about inadequate documentation including insufficient detail on the extent to which each tenderer had met evaluation criteria and on the overall value for money assessment;
 - Defence considered the above comments before finalising the SER on 9 July 2010;¹²² and
 - on 9 July 2010, Defence advised Adagold of its preferred tenderer status and Strategic of its unsuccessful tenderer status.

3.76 In the following chapters, the committee considers the course of events subsequent to the tender evaluation stage. These developments included further allegations of impropriety in the 2010 tender process, which prompted Defence to commission four reviews of the procurement.

122 Report provided to the committee as a confidential document.

Chapter 4

Complaints about the 2010 tender process

4.1 In this chapter, the committee continues the factual narrative of events that took place during the 2010 tender process. It starts with events occurring after Strategic was notified on 9 July that it was not the preferred tenderer. The committee's main focus is on the complaints concerning probity and due diligence matters that triggered a series of internal and external reviews.

Complaints about the tender process

4.2 On 14 July 2010 Mr Aisen, in his capacity as Executive Director of Strategic, wrote formally to the Defence Inspector-General, Dr Raymond Bromwich, raising concerns about the probity of the tender process.¹ Mr Aisen elaborated on these concerns in nine additional items of correspondence to the Inspector-General and the Chief Audit Executive between 16 July and 18 August 2010.² The complaints concerned three broad issues:

- conflicts of interest and confidentiality;
- the tender specifications; and
- Adagold's fitness and propriety to contract with the Commonwealth.³

Conflicts of interest and confidentiality

4.3 At the core of Mr Aisen's complaints was an allegation that Adagold received privileged information about the tender specifications prior to the release of the RFT, which, he submitted, should have disqualified its tender response. Specifically, he alleged that:

- (a) through his employment in 1JMOVGP, Major Charlton 'directly or indirectly provided, or assisted in the provision of, information which justified the stringent increased criteria in the particular tender process in question';⁴

1 Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, 14 July 2010.

2 Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, Inspector-General, Department of Defence, 16, 19, 21 July 2010. See also Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, Chief Audit Executive, Department of Defence, 22, 28, 31 July 2010; 4, 18, 28 August 2010.

3 See further, Department of Defence, *Submission 5*, Attachment A, pp. 5–6; AFCD Review, 4.2.

4 Strategic Aviation, *Submission 6*, p. 2. See also, Mr Shaun Aisen, letter to Dr Raymond Bromwich, 14 July 2010; Mr Shaun Aisen, email to Mr Geoffrey Brown, 4 August 2010 (forwarding email correspondence with HQ1JMOVGP from 30 March to 9 April 2010).

- (b) on his re-employment in 1JMOVGP in mid-2009, it seemed 'likely' that Major Charlton 'may have or could have had access to relevant, discussions, conversations [and] email traffic about a potential upcoming tender or tender in process';⁵
- (c) Major Charlton had an ongoing relationship with Adagold prior to and during his employment in 1JMOVGP from March 2009 to April 2010;⁶
- (d) in the course of that relationship, Major Charlton provided Adagold with inside information on the tender specifications prior to its release;⁷ and
- (e) this information included forewarning of the increased cargo capacity requirements, requiring at least 25,000 kg, comprising a minimum of 150m³ of volumetric capacity.⁸

4.4 Strategic referred to the following circumstantial evidence in support of its allegations:

- (a) Adagold's unsolicited presentations to 1JMOVGP in early 2010, including an Airbus A340 solution. Strategic submitted that this circumstance—together with contact around this time from HQ1JMOVGP seeking Strategic's advice on an Airbus A340 solution—suggested that Adagold 'had been working on the tender for several months prior to its release'.⁹
- (b) 'The fact that Hi Fly managed to flag [its] intention of upgrading [its] FAAOC well before the tender closure date, and succeeded in doing so in May, just prior to the tender closure date, would appear to be highly coincidental'. Strategic stated, 'Why would Hi Fly specifically put the A340-300 onto its FAAOC unless it was aware of the upcoming tender compliance requirements?'¹⁰
- (c) Strategic's receipt of advice from Hi Fly on the evening of 29 March 2011, approximately eight hours after the release of the RFT,

5 Mr Shaun Aisen, email to Mr Geoffrey Brown, 18 August 2010.

6 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 4. See also Strategic Aviation, *Submission 6*, p. 2; Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 4, 18 August 2010.

7 Strategic Aviation, *Submission 6*, p. 2; Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 4 August 2010 (forwarding email correspondence with HQ1JMOVGP between 30 March and 9 April 2010).

8 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 4 August 2010 (forwarding email correspondence with HQ1JMOVGP between 30 March and 9 April 2010).

9 Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, 21 July 2010.

10 Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, 21 July 2010.

that Hi Fly had a commercial arrangement in place with another member of the standing offer panel in respect of its Airbus A340-300 aircraft. According to Strategic, this suggested Adagold may have 'briefed Hi Fly during the periods prior to the tender release'.¹¹

- (d) Alleged approaches by Major Charlton to 'a number of pilots employed by Strategic...seeking their interest in transferring to Adagold's proposed operation'. Strategic submitted that such behaviour was 'contrary to normal contractual negotiation protocols'.¹²
- (e) Major Charlton's employment 'within JMOVGP during the whole development and construction phase of the tender' and his departure 'shortly after the tender was released'.¹³ Strategic stated that this suggested that 'Adagold was aware of this potential tender, its increased specifications and had several months head start to prepare itself for the tender'.¹⁴

The tender specifications

4.5 Strategic asserted that certain tender specifications, in particular, the aircraft volumetric capacity, the preference for a single aircraft solution and the response timeframe:

- (a) did not reflect operational need;¹⁵
- (b) were not commercially justifiable in terms of value for money;¹⁶ and
- (c) were specifically designed to 'exclude the existing operator' and 'all Australian operators', and were 'tailored to suit a foreign entity via a brokered solution'.¹⁷

11 Strategic Aviation, *Submission 6*, p. 4; Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, 21 July 2010.

12 Mr Shaun Aisen, letter to Dr Raymond Bromwich, 14 July 2010. See also, Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, 16 July 2010; Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 18 August 2010.

13 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 18 August 2010.

14 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 18 August 2010.

15 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 28 July 2010. See also, Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, pp. 2–5; Strategic Aviation, *Submission 6*, pp. 3–4.

16 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 28 July 2010; Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 4 August 2010 (forwarding email correspondence with HQ1JMOVGP between 30 March and 9 April 2010). See also, Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 4; Strategic Aviation, *Submission 6*, pp. 3–4.

Adagold's fitness and propriety to contract with the Commonwealth

4.6 Strategic alleged that Adagold was not a fit and proper entity for the purposes of contracting with the Commonwealth due to the company's:

- (a) connection to tender irregularities in relation to contracts with the South African and Danish defence departments;¹⁸
- (b) association with Hi Fly, because the latter company:
 - (i) did not meet minimum essential requirements of the Airworthiness Protectorate for the carriage of Australian military personnel;¹⁹ and
 - (ii) had an unsatisfactory safety record in the provision of services to the ADF under previous MEAO air sustainment contracts;²⁰ and
- (c) association with Major Charlton, via AIS and previously Sky Air World. Strategic submitted that it is 'highly questionable that any company with which [Major Charlton] is involved should have any contractual relationship with the ADF'²¹ because he:
 - (i) was the subject of probity related concerns in the 2005 and 2010 tender processes, through his employment in 1JMOVGP;²² and
 - (ii) has a 'chequered record as an aviation consultant', in particular presiding over the collapse of Sky Air World, of which the Commonwealth is a creditor.²³

Investigation of complaints

4.7 In concluding his letter of 14 July, Mr Aisen recommended that Defence's Inspector-General:

...intervene to independently review the tender and its evaluation so as to avoid having the Commonwealth enter a contract which is clearly contrary to the interests of the Australian taxpayer.²⁴

17 Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, 21 July 2010. See also, Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 2; Strategic Aviation, *Submission 6*, p. 3.

18 Mr Shaun Aisen, email correspondence to Dr Raymond Bromwich, 19 July 2010; Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 18 August 2010; Strategic Aviation, *Submission 6*, p. 4.

19 Mr Shaun Aisen, letter to Dr Raymond Bromwich, 14 July 2010.

20 Mr Shaun Aisen, letter to Dr Raymond Bromwich, 14 July 2010.

21 Mr Shaun Aisen, letter to Dr Raymond Bromwich, 14 July 2010.

22 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 4.

23 Mr Shaun Aisen, letter to Dr Raymond Bromwich, 14 July 2010.

24 Shaun Aisen to Dr Ian Williams, Inspector General, 14 July 2010 (confidential document).

4.8 In response to Strategic's allegations—and those subsequently published in media reports—Defence initiated a series of internal and external reviews of the tender process. As mentioned in chapter 1, these reviews were:

- the AFCD Review—an internal assessment of the MEAO air sustainment requirements, the contract process, the outcome, the probity of the process and value for money;
- the PwC Review—an external peer review of the AFCD review process;
- the Deloitte Review—an external probity review of certain aspects of the tender process; and
- the AGS Review—an external legal and legal process review of the tender, conducted concurrently with the Deloitte Review.

Conclusion

4.9 Strategic made several allegations of serious impropriety in respect of the 2010 tender process that go to critical probity issues including:

- conflicts of interest—especially Major Charlton's engagement in 1JMOVGP and his current and previous involvement in the commercial air charter industry;
- unnecessary or unjustifiable changes to the tender specifications designed to disadvantage the existing and all Australian operators; and
- Adagold's fitness and propriety to contract with the Commonwealth.

4.10 These allegations, among other probity and due diligence issues, then set in train the reviews listed above. The committee considers the conduct and findings of these reviews in the following chapters.

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.

Chapter 6

External reviews of the 2010 tender process

6.1 The AFCD and PwC reviews did not dispel some of the disquiet surrounding the probity of the 2010 tender process. Indeed, Defence felt the need to commission two external reviews, one by Deloitte and the other by the Australian Government Solicitor, concerning matters of probity and legal process compliance. This chapter outlines the reasons for commissioning these reviews, their approach and key findings. It also outlines the limitations in scope and methodology under which the reviews operated. The chapter further identifies the events of September 2010 that prompted the current AFP investigation into the 2005 tender process.

Correspondence with Strategic on completion of the internal review

6.2 Following the completion of the AFCD and PwC reviews, Mr Brown, the Chief Audit Executive, wrote to Mr Aisen on 26 August 2010 to inform him of the outcome of the AFCD review. Mr Aisen responded on 28 August 2010, expressing some 'very serious concerns' about the outcome and process.¹

6.3 Mr Aisen disputed the finding that the tender process was compliant with Commonwealth and Defence procurement policy. He stated that Mr Charlton's employment within 1JMOVGP while providing services to Adagold amounted to at least a perceived conflict of interest that should have disqualified Adagold's tender response.² Mr Aisen also raised concerns about other matters including:

- the financial circumstances of Major Charlton's business, Sky Air World, which he submitted should have been assessed as relevant to Adagold's suitability to contract with the Commonwealth;
- the limited scope of AFCD reviews of telephone records and email correspondence between Major Charlton, Adagold and any member of 1JMOVGP in the lead-up to, and following the release of, the tender; and
- the conduct of interviews with, and information sought from, Major Charlton and Adagold.³

6.4 In the interests of transparency, Mr Aisen requested the public release of the AFCD report and 'all relevant Defence-held records'. On 28 August 2010, he forwarded a copy of his correspondence to the Shadow Minister for Defence and to the Chair of the Senate Foreign Affairs, Defence and Trade Legislation Committee

1 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 28 August 2010.

2 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 28 August 2010.

3 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 28 August 2010.

seeking 'a full, independent inquiry into all matters associated with this tainted tender'.⁴

Consideration of internal review findings

6.5 On 26 August 2010, Defence also provided a submission to the (then) Minister for Defence, Senator the Hon John Faulkner, detailing the outcome of the tender process and noting its intention to proceed to contract with Adagold.⁵

6.6 On the request of the Minister and in accordance with caretaker provisions, a copy of the submission was provided to the Shadow Minister for Defence, Senator the Hon David Johnston, on 27 August 2010.⁶ Senator Johnston raised concerns at a meeting on 31 August 2010 and, on the same day, documented them in a letter to the Secretary of the Department of Defence, Dr Watt.⁷ Senator Johnston indicated that he was 'primarily concerned with Defence's reputation and image, in entering a contract in all of the circumstances of this matter'.⁸ In particular, he stated that:

Quite apart from questions around [Major Charlton's] involvement pre-RFT, post-RFT and currently, the fact that he has a long and substantial relationship with Defence Logistics and particularly the Joint Movement Group whilst providing professional advice to tenderers, successful or otherwise is frankly, not a good look.⁹

6.7 Promptly, Dr Watt convened an internal meeting to discuss and develop terms of reference for external probity reviews before making any decision to proceed to contract with Adagold.¹⁰ Defence stated that the terms of reference for the external reviews were 'specifically drafted to address the concerns raised by Senator Johnston'.¹¹

6.8 The 2010 procurement process was suspended for the duration of these external reviews. To minimise operational disruptions, and notwithstanding the urgency, Defence entered into a short-term contract with Strategic to provide air sustainment services to the MEAO from 23 October to 22 November 2010.¹²

4 Mr Shaun Aisen, email correspondence to Mr Geoffrey Brown, 28 August 2010.

5 Department of Defence, *Submission 5*, Attachment A, pp. 7–8.

6 Department of Defence, *Submission 5*, Attachment A, p. 8.

7 Department of Defence, *Submission 5*, Attachment A, p. 8 and Annexure B.

8 Senator the Hon David Johnston, Shadow Minister for Defence, letter to Dr Ian Watt, 31 August 2010, p. 1.

9 Senator the Hon David Johnston, Shadow Minister for Defence, letter to Dr Ian Watt, 31 August 2010, p. 1.

10 Department of Defence, *Submission 5*, Attachment A, p. 8.

11 Department of Defence, *Submission 5*, Attachment A, p. 8.

12 Department of Defence, *Submission 5*, Attachment A, p. 11; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 49.

Commissioning external reviews

6.9 Defence engaged the external reviewers, Deloitte and the Australian Government Solicitor (AGS), through its professional services panel arrangements.¹³ In respect of its engagement of Deloitte, Defence acknowledged that it had considerable pre-existing contractual arrangements with the firm. Defence considered, however, that these prior arrangements did not affect the independence of Deloitte's review due to the strength of the firm's brand. Dr Watt stated:

One issue about Defence is that no matter where you go...lots of people have contracts with us. In the case of a major accounting firm, their business is their brand not their contracts with us. If they felt there was a conflict of interest because of the contracts they had with us, they would have said so. They did not because their brand is worth much more than whatever current contracts they have. I think there is a point where there are only a limited number of service providers around Canberra or any other town. All users of services rely on the brand.¹⁴

6.10 It should be noted that an article again raising concerns about the probity of the tender process including the 2005 tender appeared in the *Age* on 2 September. The article reported that the newspaper had obtained emails revealing that two Department officers working in the unit responsible for the 2005 contract—David Charlton and John Davies—'were providing information during the tender process to the company later declared the winner'.¹⁵

Deloitte review

Terms of engagement

6.11 Deloitte was engaged on 2 September 2010 to undertake a review of certain aspects of the tender process. These were:

- the governance framework and process of the tender, addressing confidentiality and conflicts of interest in the lead-up to tender and during the tender evaluation process;
- the decision to tender and whether it was based on achieving value for money and was not structured to disadvantage certain potential tenderers;
- the governance of the tender, including adherence to the TEP;
- the financial and commercial capacity of the two top-ranked respondents, and their capacity to meet the quality and standards required by Defence; and

13 Department of Defence, *Submission 5*, Attachment A, p. 8.

14 Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 84. Defence also noted the depth of resources available to large firms and their rapid response capacity—including, for example, through AFCD's outsource co-partner arrangement with PwC: Mr Geoffrey Brown, *Proof Committee Hansard*, 9 March 2011, pp. 83–84.

15 Richard Baker, 'Defence bidders got inside help', the *Age*, 2 September 2010.

- the fitness and propriety of the two top-ranked tender respondents to contract with the Commonwealth, including any reputational concerns and issues arising from media reports.¹⁶

6.12 Deloitte was engaged from the Defence Management consultation panel, following consultation with other panel members Ernst & Young and KPMG who were excluded due to other engagements with Defence.¹⁷ The total cost of the review was \$591,820 (GST inclusive). The timeframe to perform the work was seven business days (extended from an initial five business days). Deloitte engaged 23 staff on the inquiry, comprising seven partners, seven directors and nine other senior staff members. Their total time worked on the assignment was 996 hours.¹⁸

6.13 Defence provided Deloitte with the terms of reference. Deloitte indicated that there were some 'minor modifications' to the terms of reference, which it attempted to incorporate in outlining the scope of its work. One of the partners leading the inquiry, Mr Peter Bars, characterised the process of defining and scoping the terms of reference in the following terms: 'Defence gave us terms of reference and then we said, "given that we have terms of reference what does that actually mean in terms of work that we can execute to meet those terms of reference?" That sort of feedback loop came in some fine-tuning around the scope of what we would do'.¹⁹

Methodology

6.14 Deloitte undertook the following tasks in performing the engagement:

- interviewed certain members of the TEB and relevant Defence stakeholders;
- read aspects of Defence documents and policies;
- read the draft AFCD report and working papers;
- examined the transcripts of AFCD interviews;
- read aspects of the shortlisted tender responses;
- supplemented the financial evaluation for the two top-ranked tenderers with information obtained from additional searches; and
- conducted searches of public records and online media for agreed individuals and companies.²⁰

16 The full terms of reference are set out at pp. 3–4 of the Deloitte Review.

17 Department of Defence, *Submission 5*, Attachment A, p. 8.

18 Department of Defence, *Submission 5*, Attachment A, p. 8.

19 Mr Peter Bars, *Proof Committee Hansard*, 28 March 2011, p. 16.

20 Deloitte Review, p. 2.

Key findings

6.15 Deloitte reported to Defence on 15 September 2010. It found that nothing had come to its attention to indicate that the tender should not proceed.²¹ Its key findings in respect of individual terms of reference are summarised below.

Decision to tender

6.16 Based on its review of the RFT and SER, and its interviews with Group Captain Barnes and Squadron Leader Cole, Deloitte found that:

- the services detailed in the RFT were reasonable from an operational perspective and did not disadvantage any of the tenderers;
- the tender response period of eight weeks provided sufficient time for all parties to provide tender responses that could meet the airworthiness certification requirements in the request; and
- the decision to tender was based on a reasonable expectation of achieving a better value for money outcome for the Commonwealth.²²

6.17 According to Deloitte, there was sufficient evidence to indicate that the volumetric specifications were supported by operational need, based on departure reports from Strategic Aviation indicating full use of cargo capacity and historical and forecast analyses undertaken by Defence. Deloitte noted that the RFT did not preclude separate passenger and cargo flight options.²³

6.18 Deloitte cited AFCD interview records with successful and unsuccessful tenderers indicating acknowledgement of the tight but achievable nature of the tender response timeframe. Further, Deloitte noted that the global financial crisis and the significant number of amendments to the 2008 contract suggested that the decision to proceed to tender was based on an expectation of achieving greater value for money.²⁴

Governance around the development of the RFT and tender evaluation process

6.19 Following its review of the supporting documentation and AFCD interview records, Deloitte concluded that nothing had come to its attention to indicate that:

- there was not an adequate plan in place covering the governance of the tender; and
- the plan was not adhered to in all material respects.²⁵

21 Deloitte Review, p. 2.

22 Deloitte Review, p. 11.

23 Deloitte Review, pp. 11–12.

24 Deloitte Review, p. 12.

25 Deloitte Review, p. 16.

6.20 However, Deloitte identified three shortcomings in the implementation of governance arrangements. Firstly, while the majority of risk management actions in the procurement strategy were implemented, three were not—conducting market research, involving an aviation consultant and providing advance notice to standing offer panel members prior to the release of the request.²⁶

6.21 Secondly, Deloitte found that probity risks were not documented in the risk management plan, and a specific probity plan was not documented.²⁷ Thirdly, it found that there was no documentation indicating that tender evaluation team members had received a briefing on ethics, probity and fair dealing.²⁸

Governance in relation to conflicts of interest

6.22 Deloitte was satisfied that nothing had come to its attention to indicate that:

- the governance process did not address adequately potential or perceived conflicts of interest in the lead up to tender and during the evaluation; or
- any perceived or real conflicts of interest that were identified had not been appropriately dealt with.²⁹

6.23 In addition to the absence of a specific probity briefing to tender evaluation team members addressing conflicts of interest, Deloitte also identified shortcomings in the original conflict of interest declarations signed by evaluation team members. These included an absence of a declaration about possible conflicts arising from employment, prior employment or financial interests in potential suppliers or relationships with persons who have interests in these organisations.³⁰

6.24 In respect of the management of conflicts of interest pertaining to Major Charlton, Deloitte noted the steps taken to identify his background and manage risk identified in AFCD interviews with Major Charlton, his statutory declaration and interviews with other ADF personnel.³¹ It noted that, in reaching its conclusion, it had relied on the transcripts of interviews undertaken by AFCD. Defence had prepared these documents.

Governance in relation to confidentiality

6.25 Deloitte found that nothing had come to its attention to indicate that:

26 Deloitte Review, p. 15.

27 Deloitte Review, p. 15.

28 Deloitte Review, p. 15.

29 Deloitte Review, p. 18.

30 Deloitte Review, pp. 17–18.

31 Deloitte Review, pp. 19–20.

-
- governance processes for the procurement did not adequately address confidentiality in the lead-up to the tender process; and
 - any confidentiality issues were identified.³²

6.26 Deloitte based its findings on:

- the remote geographical location at which tender planning and evaluation was undertaken;
- the access controls applied to electronic files pertaining to the tender and access logs indicating that no unauthorised access had occurred;
- Major Charlton's statement that he did not have access to the files or provide Adagold with any tender-related information prior to the release of the RFT;
- Adagold's statement that it did not have any knowledge of the decision to re-tender or the tender specifications until the release of the RFT; and
- the statements of key personnel involved in the tender planning process that they did not have a personal or social relationship with Charlton and nor did the staff within their areas of supervision.³³

6.27 In relation to the last point, in his oral evidence to the committee, Mr Dennis Krallis, Partner, Deloitte Touche Tohmatsu, stated that to his knowledge Deloitte did not ask these persons whether they or the staff they supervised had any contact with Major Charlton, Warrant Officer Davies or Adagold.³⁴

Respondents' fitness and propriety to contract with the Commonwealth

6.28 Deloitte examined an agreed list of companies and persons with Defence, in respect of the top two ranked respondents.³⁵ On the basis of searches of the public record—using an array of online commercial databases and regulatory agency websites—it concluded that nothing had come to its attention to identify that these persons and entities were not fit and proper to contract with the Commonwealth.³⁶

6.29 Deloitte noted that it had not identified any Commonwealth or Defence criteria setting out requirements for being 'fit and proper' for the purposes of contracting with the Commonwealth. In making its assessment, Deloitte considered

32 Deloitte Review, p. 10.

33 Deloitte Review, p. 8.

34 Mr Dennis Krallis, *Proof Committee Hansard*, 28 March 2011, p. 12.

35 These were Adagold (subsidiaries, related companies and key members or employees); Alltrans (parent company and key members or employees); AIS (parent companies and key members or employees): Deloitte Review, p. 21.

36 Deloitte Review, p. 24.

'whether any information identified in the searches...could cause the Commonwealth reputational damage'.³⁷

Respondents' financial and commercial capacity to deliver the requested services

6.30 Deloitte did not identify any evidence suggesting that the potential risks associated with the financial and commercial capacity of the preferred tenderer had not been recognised.³⁸ It reviewed the RFT and evaluation documentation, interviewed members of the tender evaluation team, undertook supplementary financial evaluation, and made the following observations:

- it appears reasonable that Adagold and Hi Fly were assessed by the TEWG as viable but high-risk, such that a performance guarantee should be obtained from Adagold;³⁹
- the risk classification adopted by the financial TEWG appears to be 'relatively subjective', in particular the requirement for certain proponents considered to be at the higher level of risk to be subject to a financial performance guarantee';⁴⁰ and
- Adagold demonstrated commercial capacity to perform the services through:
 - its demonstrated understanding of the Australian operating and regulatory environments, in both its tender response and previous experience in performing air sustainment services in the MEAO; and
 - its exclusive, informal agreement with Hi Fly.⁴¹

Adagold's capacity to deliver services to the required quality and standard

6.31 Deloitte found that nothing had come to its attention to indicate that Adagold lacked the capacity to meet the quality and standards required by the Commonwealth to provide the contracted services.⁴² It adopted the following measures of quality and standard:

- technical and operational capacity;
- financial capacity;
- operational capability;
- aircraft availability; and

37 Deloitte Review, p. 23.

38 Deloitte Review, p. 27.

39 Deloitte Review, p. 26.

40 Deloitte Review, p. 27.

41 Deloitte Review, p. 27.

42 Deloitte Review, p. 29.

-
- aircraft certification and regulatory requirements.⁴³

6.32 Deloitte examined the RFT documentation, Adagold's response and working papers prepared by AFCD in the evaluation process. It based its conclusions on the following:

- Adagold's evaluation score 56.3 out of 70 on the seven technical and operational criteria, which made it the highest ranked proponent;
- the demonstration of Adagold's operational capability through the information provided in its tender response, its demonstrated experience (including performing ADF and Danish defence force contracts to the MEAO), the previous experience of Hi Fly, and Adagold's operational awareness activities including a site visit to the Al Minhad airbase;
- the existence of an exclusive agreement between Adagold and Hi Fly giving Adagold access to a compliant aircraft, and the provision for a replacement aircraft; and
- Hi Fly's airworthiness certification.⁴⁴

6.33 In reaching its conclusion, Deloitte noted that, 'as would be expected our work does not seek to comment on the likelihood that the respondent will be successfully able to carry out operations as this will be subject to a range of future events and circumstances which are outside the scope of this report'. It also noted that it had not verified the representations made in Adagold's tender response.⁴⁵

Adagold's alleged interests in South Africa

6.34 Deloitte reviewed allegations made in media articles from Australian, South African and Danish media in relation to Adagold contracts in South Africa. It concluded that the allegations did not raise matters of sufficient substance to warrant excluding Adagold from consideration in the 2010 tender process.⁴⁶ In particular, its searches did not locate official records of alleged complaints—including court decisions or records of tender defaults.⁴⁷ It also noted the outcome of the Danish Complaints Board for Public Procurement, in which all complaints were dismissed wholly or partially, and that no action was taken to change the award of the contract.⁴⁸

Other findings

6.35 Deloitte also found that:

43 Deloitte Review, p. 28.

44 Deloitte Review, pp. 28–29.

45 Deloitte Review, p. 29.

46 Deloitte Review, p. 33.

47 Deloitte Review, pp. 31–32.

48 Deloitte Review, p. 33.

- the governance process around the choice of potential suppliers from the standing offer panel was adequate, noting that Defence invited all panel members to participate in the tender for the 2010 contract;⁴⁹ and
- nothing further had come to its attention that could improve the probity of the procurement process.⁵⁰

6.36 In addition to its terms of reference above, Deloitte further considered matters raised in the Shadow Minister's letter to the Secretary dated 31 August 2010. These matters were:

- (a) Major Charlton's 'long and substantial' relationship with 1JMOVGP while providing professional advice to tenderers;
- (b) Major Charlton's recent financial history;
- (c) the financial and corporate integrity of the South African company, Adajet; and
- (d) Hi Fly's performance and quality of service in supporting previous MEAO contracts.

6.37 Deloitte considered that issues (a) and (c) were addressed in its existing terms of reference. Following consultation with the Chief Audit Executive, it determined that issue (b) was not pertinent to the 2010 tender process. In respect of Hi Fly's previous performance in issue (d), Deloitte noted 2007 media reports of allegations of non-compliance with aviation safety standards. It further noted that subsequent inspections undertaken by CASA and ADF did not identify any breaches of regulatory requirements of other or operational concerns.⁵¹

AGS Review

Terms of engagement

6.38 On 2 September 2010—concurrently with the Deloitte review—Defence engaged AGS to undertake an urgent legal and legal process review of the tender.⁵² AGS was instructed to provide advice on the following issues:

- whether the procurement process complied with the Deed of Standing Offer under which the process was let;
- whether the procurement process complied with Commonwealth and Defence procurement policy;

49 Deloitte Review, p. 7.

50 Deloitte Review, p. 34.

51 Deloitte Review, p. 35.

52 AGS Review, p. 1.

- whether the procurement process and the selection of the preferred respondent was fair and defensible; and
- in light of the above answers, what were the legal risks of not proceeding to contract with the preferred respondent, and what options were there for contracting with a different provider.⁵³

6.39 The AGS review was led by the Chief Counsel, Commercial Practice Group and assisted by a Senior Lawyer. The total cost of the review was \$74,203 (GST inclusive).⁵⁴

Methodology

6.40 AGS engaged the following methodology:⁵⁵

- received an initial background briefing by Defence;
- identified, requested and received documentation relating to the conduct of the procurement and the establishment of the standing offer panel;⁵⁶
- conducted interviews with Defence personnel involved in the conduct of the procurement.⁵⁷

Key findings

6.41 AGS reported to Defence on 15 September 2010. In short, it found that the procurement process was conducted in accordance with the standing offer and was compliant with Commonwealth and Defence policy.⁵⁸ It also found that the process and the selection of Adagold as the preferred tenderer was fair and defensible, in that it had not identified any evidence of impropriety.⁵⁹ AGS concluded that—subject to the outcome of the Deloitte probity review—there did not appear to be any reason for Defence not to proceed to contract.⁶⁰ These findings are discussed in detail below.

Compliance with deed

6.42 AGS advised that, in its view, the procurement process complied with the deed of standing offer under which the process was let. However, it identified two

53 AGS Review, p. 1. See also *Proof Committee Hansard*, 28 June 2011, p. 2.

54 Department of Defence, *Submission 5*, Attachment A, p. 8.

55 AGS Review, p. 5.

56 See AGS Review, Annexure A.

57 AGS Review, Annexure B.

58 AGS Review, p. 2.

59 AGS Review, p. 2.

60 AGS Review, p. 2.

issues—the treatment of non-compliant completed requests, and post-separation employment issues.⁶¹

6.43 AGS identified that the deed did not specify how the Commonwealth would treat a completed request that did not comply with requirements expressed in mandatory language (for example, 'must' or 'shall'). It noted that this issue had been raised by potential tenderers and during the evaluation.⁶² AGS concluded, however, that it was open to the Commonwealth to accept a request that did not comply with 'mandatory' requirements, and that this was stated expressly in the terms of the request issued under the deed.⁶³ Interestingly, the other reviews did not mention this issue of the treatment of non-compliance with 'mandatory' requirements.

6.44 In relation to post-separation employment issues, AGS noted the provisions in clause 22 of the deed, requiring contractors to:

- ensure that any former Defence employees engaged by them complied with the relevant Defence Instruction on post-separation employment, DI(G) PERS 25-4; and
- seek written approval to engage certain former Defence employees.

6.45 In AGS's view, it was apparent that Major Charlton 'did not adequately comply with DI(G) PERS 25-4 as he did not submit a specific letter of notification identifying the employing parties (other than a very general email)'.⁶⁴ AGS stated further that it was unclear whether Adagold was aware of Major Charlton's Reservist employment and therefore required to seek Commonwealth approval prior to obtaining his assistance in the preparation of its tender response.⁶⁵ Once again, the other reviews did not refer to this important area of non-compliance with the deed of standing order.

6.46 AGS concluded, however, that this issue did not support a finding of non-compliance with the deed for two reasons. First, although clause 22 was phrased in mandatory terms, it was not specifically identified in the deed or the request as a condition of participation, a minimum form and content requirement or an essential requirement, meaning that non-compliance would lead to automatic exclusion from the tender.⁶⁶

6.47 Secondly, AGS considered that if Adagold had sought approval under the deed to obtain Major Charlton's assistance via AIS, it was unlikely that the

61 AGS Review, p. 7.

62 AGS Review, p. 7.

63 AGS Review, p. 7.

64 AGS Review, p. 7.

65 AGS Review, p. 7.

66 AGS Review, p. 7.

Commonwealth would have withheld approval.⁶⁷ AGS based its assessment on the fact that Major Charlton's work in 1JMOVGP was unrelated to the 2010 tender process and, consequently, 'the potential for real or perceived conflicts of interest or probity objections at that time would in any event probably have been assessed [by Defence] as being low'.⁶⁸

6.48 The committee is of the view that this was a rash and highly speculative assumption in light of the doubts surrounding the probity of the 2005 tender process, chaired by Major Charlton. Defence was aware of these reservations at the time of the 2010 tender, which is now the subject of an AFP investigation. The committee considers the matter of conflicts of interest and post-separation employment in chapter 10.

Compliance with Commonwealth and Defence procurement policy

6.49 AGS advised that, in its view, the procurement process complied with Commonwealth and Defence procurement policies, subject to three matters.⁶⁹ Firstly, it proceeded on the assumption that the standing offer panel was established in accordance with the requirements of the CPGs. It did not review the relevant tender process to establish the panel conducted in 2009.⁷⁰

6.50 Secondly, it noted that as a procurement under a panel arrangement, the 2010 tender process was not subject to the Mandatory Procurement Procedures in the CPGs.⁷¹ It constituted a procurement-related task, meaning that it was still governed by the other elements in the procurement policy framework—in particular the requirement to achieve value for money. AGS stated that provided Defence is able to establish that Adagold represented value for money, then it would be compliant with the CPGs. It returned to the issue of value for money in its advice on whether the process was fair and defensible.⁷²

6.51 Thirdly, AGS noted that Defence did not appoint an independent probity advisor. While acknowledging that this was not a mandatory policy requirement, AGS noted the Department of Finance and Deregulation recommended that consideration be given to the appointment of probity advisors in light of size, complexity, sensitivity and potential risk of individual procurements.⁷³

67 AGS Review, pp. 7–8.

68 AGS Review, p. 7.

69 AGS Review, p. 8.

70 AGS Review, p. 8.

71 AGS Review, p. 8. See further, Department of Finance and Deregulation, *Guidance on the Mandatory Procurement Procedures*, Financial Management Guidance 13, Appendix B—Panels.

72 AGS Review, p. 8.

73 AGS Review, p. 8.

Whether the procurement process and selection of Adagold was fair and defensible

6.52 AGS stated that it had not identified any impropriety in the way in which the procurement process was conducted or in the selection of Adagold as preferred tenderer. However, it identified five areas for improvement in future.

6.53 Firstly, AGS identified that no overarching probity framework for the conduct of the procurement was established. It stated:

The need for the possible engagement of a probity advisor was not identified in the initial risk assessment, and legal advice was not sought on this matter until mid-way through the process. As a result no probity plan for the project was developed. In addition we have identified that there were no specific probity arrangements established to cover the process relating to the development of the Request documentation (although we have been advised that all drafts of the Request were stored on a secure Defence server.⁷⁴

6.54 The review also observed that:

- Defence personnel who assisted in developing the Request documentation were not asked to sign a conflict of interest declaration unless they also participated in the evaluation of tender responses;
- members of the tender evaluation team did not sign conflict of interest declarations until after the evaluation commenced; and
- no specific probity protocols were developed to cover the industry briefing.⁷⁵

6.55 Secondly, AGS identified some instances in which the SER and the supporting TEWG reports could more accurately and transparently reflect the assessment of tender responses. It noted that it held discussions with Defence about these matters, which led to the refinement of the SER and the TEWGs to address these matters.⁷⁶

6.56 Thirdly, AGS noted that the scoring methodology adopted by the TEB and the TEWGs was not referenced in the TEP. It noted that best practice is to set out the evaluation methodology in full in the TEP.⁷⁷

6.57 Fourthly, AGS identified overlap in some of the tender evaluation criteria—particularly in terms of assessing compliance with the request. It further considered that there was a lack of clear guidance in the TEP as to how each of the criteria were to be assessed. It stated that without such guidance, 'there was a possibility that the

74 AGS Review, p. 9.

75 AGS Review, p. 9.

76 AGS Review, pp. 9–10.

77 AGS Review, p. 10.

same issue could be double or even triple counted' in the evaluation.⁷⁸ While acknowledging that all tenderers would have been affected equally in this regard, it recommended the inclusion of more detailed evaluation guidance in future TEPs.⁷⁹

6.58 Finally, AGS noted a disparity between the TEP and the request documentation, in respect of minimum form and content requirements, conditions of participation and essential requirements.⁸⁰ It observed that the TEP referred to initial screening being undertaken to check tenders against these matters. However, the request documentation did not expressly classify provisions in this way. This meant that no screening report was prepared.⁸¹ Similar to its observations on the deed, AGS noted that several requirements in the request were expressed in mandatory language but it was unclear whether non-compliance would result in exclusion from the process.⁸² Mr Scala, AGS, explained:

...although we had things identified as 'must' in the various request documentation, and indeed a standing offer, none of those were actually expressly identified as conditions of participation or essential requirements and the like and none of them specifically had any sanction attached to them—that is 'If you fail to meet this requirement you will automatically be excluded' or 'we reserve the right to exclude'.⁸³

6.59 AGS recommended that future request documentations clearly identify minimum form and content requirements, conditions of participation and essential requirements to avoid potential confusion.⁸⁴

Consistency with advice from Clayton Utz

6.60 In chapter 3, the committee considered Clayton Utz's advice to Defence on the SER and areas identified for improvement. These included providing more complete information and detail, especially on the extent to which each tender had met the evaluation criteria; the need to substantiate some statements and the use of imprecise language such as the term 'compliant' when 'having no deficiencies' would be more accurate.⁸⁵ The AGS review identified similar areas of weakness such as the opaque scoring system and the use in some places of inappropriate language—in this case the use of terminology that was mandatory in nature.

78 AGS Review, p. 10.

79 AGS Review, p. 10.

80 AGS Review, p. 10.

81 AGS Review, p. 10.

82 AGS Review, p. 10.

83 *Proof Committee Hansard*, 28 June 2011, p. 5.

84 AGS Review, pp. 10–11.

85 Clayton Utz, Advice to Tender Evaluation Board re Source Evaluation Report, 9 July in camera evidence.

6.61 Also, the committee took in camera evidence from Clayton Utz on a comment made in its advice to Defence that the SER did 'not appear to have treated tenderers equally on the leasing arrangements with the respective aircraft owners'.⁸⁶ This observation on 'unequal treatment' was of particular interest to the committee and was subjected to further consideration when the committee was taking evidence from AGS. Mr Scala informed the committee that the review team identified this as a matter of concern where:

...there appeared to be a failure to equitably assess the risk associated with tenderers not having entered into formal leasing arrangements with aircraft owners. That was an issue where it appeared to us that one tenderer who did not have a formal lease in place but more a letter of comfort seemed to be assessed as if, effectively, the lease was in place, not as if the alternative was the case, as other tenderers were.⁸⁷

6.62 According to Mr Brown:

...it was not that people were scored down—the issue was taken evenly across all of them—but the grading of the outcomes there was not a specific score of five out of 10 if they were graded through the process. If we take the leasing as an example, no-one was disadvantaged by that. It would be extremely unusual to have a broker come into the process with a signed lease.⁸⁸

6.63 Mr Scala understood that the issue was 'then rectified in the final source evaluation report'.⁸⁹ The committee returns to this matter in chapter 11.

Legal risks of not proceeding to contract with Adagold

6.64 AGS concluded that—subject to the outcome of the Deloitte Review—there would appear to be no reason preventing Defence from proceeding to contract with Adagold. It considered that, unless there were evidence to indicate that Adagold was in some way implicated in causing the procurement process to fail, cancelling the request or not proceeding to contract would result in a claim for damages or costs from Adagold. AGS understood these expenses to be in the vicinity of \$500,000.⁹⁰

6.65 AGS stated further that if the request process were cancelled, it would be necessary to undertake a new procurement process.⁹¹ It stated that if not cancelled but a valid reason existed for excluding Adagold from consideration, it would be possible

86 *Proof Committee Hansard*, 28 June 2011, p. 16 and in camera Hansard, 28 June 2011.

87 *Proof Committee Hansard*, 28 June 2011, p. 4.

88 *Proof Committee Hansard*, 28 June 2011, p. 17.

89 *Proof Committee Hansard*, 28 June 2011, p. 4.

90 AGS Review, p. 11.

91 AGS Review, p. 11.

for Defence to enter into contract negotiations with the second ranked tenderer, however this would have to be assessed against value for money requirements.⁹²

Allegations concerning the 2005 tender and AFP investigation

6.66 As noted earlier, on 2 September 2010, while the external reviews were under way, an article published in the *Age* newspaper reported allegations of impropriety in the 2005 tender process, which resulted in the awarding of the contract to Strategic.⁹³ The allegations concerned the 'leaking' of tender specifications to Strategic prior to the release of the RFT. The article reported that it had uncovered email correspondence between Strategic directors which suggested that two members of 1JMOVGP—identified as Major Charlton and Warrant Officer John Davies—had 'fed' this information to Strategic.⁹⁴ This matter was not taken up by the reviews of the 2010 tender process, on the basis that the Phillips Fox (DLA Piper) review of the 2005 tender process did not identify any probity related compliance issues that would require the process to be set aside.⁹⁵

6.67 On 10 September 2010, Defence referred the allegations concerning the 2005 tender to the AFP. Defence stated that it had not previously been aware of any allegations that Strategic had received inside information in 2005. It noted that, 'if proven, these allegations would give rise to a range of possible criminal offences'.⁹⁶ At the time of writing, the matter remained under investigation by the AFP.⁹⁷

Defence responses to the external review findings

6.68 Following receipt of the external review reports and consideration of their findings, Defence formed the view that it should proceed to contract with Adagold. It also took action to remedy several issues identified in the reviews—in some cases before the reviews had reported, in response to issues raised progressively by the reviewers. These included:

- requiring TEB members to sign revised conflicts of interest and probity declarations, subsequent to the tender evaluation process, addressing the deficiencies identified by Deloitte;⁹⁸

92 AGS Review, p. 11.

93 Richard Barker, 'The sky's the limit', *Age*, 2 September 2010, p. 13.

94 Richard Barker, 'The sky's the limit', *Age*, 2 September 2010, p. 13.

95 AFCD Review, pp. 5, 25.

96 Department of Defence, *Submission 5*, Attachment A, p. 13.

97 Department of Defence, *Submission 5*, Attachment A, p. 13; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 46. See further, Department of Defence 'Referral of matters regarding the 2005 Defence contract for air support services to the Middle East Area of Operations to the Australian Federal Police' Media Release MECC 428/10, 13 September 2010.

98 Deloitte Review, pp. 15, 18.

- revising the SER and the supporting TEWG reports to reflect more accurately and transparently the assessments of tenders which were carried out;⁹⁹
- reconvening the TEB to re-validate the SER. The re-validated SER confirmed Adagold as the preferred tenderer but reversed the order of the second and third preferred tenderers in order to correct a mathematical error in the totalling of evaluation scores;¹⁰⁰ and
- requiring Adagold to provide a performance guarantee to the value of \$2 million, and negotiating a novation agreement between Defence, Adagold and Hi Fly.¹⁰¹

6.69 Defence stated that it was also developing and implementing broader process and policy reforms in respect of non-equipment procurement and the management of conflicts of interest.¹⁰² These initiatives are outlined in chapter 7.

6.70 The committee looks more closely at the re-validation of the SER which resulted in a re-ordering of the second and third ranked preferred tenderers in chapter 11.

Limitations of the external reviews

6.71 In the previous chapter, the committee drew attention to the limits placed on the two earlier reviews. The external reviews conducted by Deloitte and AGS were also subject to significant limitations in time, scope and methodology.¹⁰³ They also seemed to be designed to support the argument for proceeding with the preferred tenderer. In other words, their efforts were really focused on defending the integrity of the process, rather than genuinely testing it.

6.72 Deloitte noted that its work was confined to reading documents, interviews and listening to interviews performed by others. Deloitte also noted the following limitations on its engagement:

- it relied on transcripts from interviews undertaken by others (it should be noted that Major Charlton and Mr Clark's Statutory Declarations were drafted for them by a member of the AFCD team);¹⁰⁴
- it did not interview any of the tenderers or Major Charlton;
- it did not verify the information obtained through interviews or tender responses, or from online media sources;

99 AGS Review, pp. 9–10. See further, AFCD Review, p. 11.

100 Department of Defence, *Submission 5*, Attachment A, pp. 10–11.

101 Department of Defence, *Submission 5*, Attachment A, pp. 26–27.

102 Department of Defence, *Submission 5*, Attachment A, pp. 32–35.

103 Deloitte review, p. 2; AGS review, p. 5.

104 Mr Bromwich, *Proof Committee Hansard*, 29 March 2011, p. 81.

- it did not check the integrity or accuracy of the information contained in the financial viability spreadsheets produced by Defence as part of the tender evaluation;
- while believing that the statements made in its report are accurate, it did not give any warranty of completeness, accuracy or reliability in relation to the statements and representations made by, and the information provided by, Defence personnel. It did not attempt to independently verify these sources; and
- the scope of its engagement did not include examination of the 2005 contract, the extension in 2008 or the establishment of the standing offer panel in 2009.¹⁰⁵

6.73 Deloitte stated that the limitations of its work were due to the following:

- the limited timeframe of seven business days;
- the fact that Defence had conducted interviews and obtained statutory declarations from Adagold representatives and Major Charlton. Deloitte stated that 'given the scope of our engagement, the timeframes involved and the information contained in the interviews and statutory declarations, we did not believe further interviews were required';
- the fact that Deloitte was not engaged to re-perform the tender evaluation; and
- the scope of the work was not an audit, hence Deloitte did not perform audit procedures to verify the accuracy of information.¹⁰⁶

6.74 It should be noted that with regard to its schedule, Defence conveyed to Deloitte 'the importance of completing its review expeditiously'. Defence stated:

Timeframes were set in order to avoid disruption to the critical air sustainment services, to take advantage of greater load requirements, and to minimise the additional costs associated with the interim solution...a short term contract was estimated to cost an additional \$1 million for each week of delay.¹⁰⁷

6.75 Even so, measures were taken to enable the review team to conduct its work effectively and to ensure that its findings were understood in the context of the review's limitations. As required by the Accounting Professional and Ethical

105 Deloitte Review, p. 2.

106 Deloitte Touche Tohmatsu, *Submission 3*, p. 1. See further, Department of Defence, *Submission 5*, Attachment A, p. 9.

107 Department of Defence, *Submission 5*, Attachment A, pp. 8–9. See also Mr Brown, *Proof Committee Hansard*, 29 March 2011, p. 75.

Standards Board, Deloitte was 'obliged to set out the scope of work as well as any limitations on that scope.'¹⁰⁸ In addition:

- the review was undertaken by senior staff who worked intensively within the limited timeframes;¹⁰⁹
- limitations of scope in respect of reliance on secondary evidence were identified largely by the reviewers themselves, on the basis of need.¹¹⁰
- they were 'given complete and unfettered access at all times to all tender and probity review documentation and personnel who participated in the Request for Tender';¹¹¹ and
- reviewers were informed by Defence that their work 'should not be compromised in any respect by artificial constraints, time or otherwise', and were able to undertake any additional work that they identified as necessary in the course of the assignment.¹¹²

6.76 Deloitte stated that no restrictions were placed on it by Defence in the conduct of its engagement.¹¹³ It acknowledged that although Defence was its client, its view was that 'we were carrying out an independent examination'.¹¹⁴ Indeed, the evidence of one of the partners leading the review, Mr Dennis Krallis, was that Deloitte received instructions from the Chief Audit Executive to the effect that 'if there is something to be found, if there are issues, we want you to find them'.¹¹⁵

108 Department of Defence, *Submission 5*, Attachment A, p. 9; Mr Peter Bars, *Proof Committee Hansard*, Sydney, 28 March 2011, p. 2; Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, pp. 84–85.

109 Department of Defence, *Submission 5*, Attachment A, pp. 8–9; Deloitte, *Submission 3*, p. 1.

110 Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, pp. 86–87; Mr Peter Bars, *Proof Committee Hansard*, 28 March 2011, p. 2. See also the evidence of PwC in respect of the development of terms of reference, which were prepared by PwC and approved by Defence: Mr Steven Baker, *Proof Committee Hansard*, 29 March 2011, p. 20.

111 Department of Defence, *Submission 5*, Attachment A, p. 10. See further, Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, p. 87; Deloitte, *Submission 3*, p. 1, but compare the oral evidence of Deloitte, that their request to access the AGS Review was denied by Defence on the basis of privilege: Mr Dennis Krallis, *Proof Committee Hansard*, 28 March 2011, p. 4.

112 Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, pp. 47–48. See further, Deloitte, *Submission 3*, p. 2; Mr Dennis Krallis, *Proof Committee Hansard*, 28 March 2011, p. 13.

113 Deloitte Touche Tohmatsu, *Submission 3*, p. 2; Mr Dennis Krallis, *Proof Committee Hansard*, 28 March 2011, p. 2. See further, Department of Defence, *Submission 5*, Attachment A, pp. 9–10. Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, pp. 84–87.

114 Mr Dennis Krallis, *Proof Committee Hansard*, 28 March 2011, p. 13.

115 Mr Dennis Krallis, *Proof Committee Hansard*, 28 March 2011, p. 13.

Limitations on the AGS Review

6.77 AGS was similarly aware of 'the importance of completing its review expeditiously'. In addition, it identified the following limitations to the scope of its review:

- its instructions from Defence not to address probity related issues under consideration by Deloitte;¹¹⁶
- its full reliance upon 'the accuracy and completeness of information provided...by Defence';¹¹⁷ and
- its assumption that the underlying working papers of the TEB and the TEWGs—which it did not examine—supported the assessments contained in the high-level summary TEB and TEWG reports that it examined.¹¹⁸

6.78 Mr John Scala, Chief Counsel, AGS, also made clear that their legal process review was 'not asked to look into whether or not it was appropriate to use the deed of standing offer as the starting point for the procurement'. Thus, although the terms of reference explicitly asked for advice on 'whether the procurement process complied with the Deed of Standing Offer', it did not go to the suitability of this arrangement for this specific procurement process. Notably in this regard, he observed that 'it would be arguable to say that the deed of standing offer appeared to us to be designed more for ad hoc types of service provision as opposed to this type of service'.¹¹⁹ The AFCD review made a similar observation that the deed 'may not have been suitable for the more complex air sustainment procurement activity'.¹²⁰

6.79 Also, the review team was not required to consider issues of alleged impropriety involving Mr Charlton or allegations concerning any previous tender process in which Adagold may have participated.¹²¹ In the committee's view, the findings of the reviews should be viewed in light of the limits placed on them.

Conclusion

6.80 Numerous allegations have been raised about the integrity of the 2010 tendering process for the delivery of air sustainment services to MEAO. There have been four reviews of the tender process, which focused broadly on the identification of any reasons that should impede Defence from proceeding to contract. The total cost of these reviews was in the vicinity of \$700,000. Additional costs were incurred in the

116 However, AGS consulted with Deloitte in the preparation of its advice and shared thoughts and findings on a progressive basis AGS Review, pp. 1, 5.

117 AGS Review, p. 5.

118 AGS Review, p. 5.

119 *Proof Committee Hansard*, 28 June 2011, p. 7.

120 See paragraph 5.14.

121 *Proof Committee Hansard*, 28 June 2011, p. 2.

awarding of an interim air sustainment services contract, pending finalisation of the 2010 tender process.

6.81 While concluding that the procurement process was not fatally flawed from a technical compliance perspective, the relevant reviews identified several opportunities for improvements to Defence practices and procedures.

6.82 Both the external reviews acknowledged that there were limitations on their work, particularly severe time constraints which meant that they relied heavily on the work done by the AFCD team including transcripts of interviews and on the accuracy and completeness of working documents provided by Defence. Also, the reviews specifically excluded consideration of the 2005 tender whilst allegations concerning serious impropriety in the conduct of that procurement emerged during the course of the inquiries. The allegations were referred to the AFP and were under investigation at the time of writing.

6.83 Given the limitations of, and directions imposed on, the reviews as outlined in this chapter, the committee is aware of lingering concerns about some of their conclusions, and about the overall reputation and image of Defence's procurement processes and practices. In the next chapter, the committee outlines Defence's decision to proceed to contract with Adagold and its performance to date. The committee also outlines several procurement reforms being implemented by Defence, some of which have been prompted by identified weaknesses in the 2010 tender process. Suffice to say, there is an inference that the process was the issue not the outcome.

Chapter 7

The awarding and performance of the 2010 contract

7.1 Between 6 September 2010 and 15 September 2010, the Source Evaluation Report (SER) and subordinate documents raised during the original tender evaluation process were re-validated and the re-validated SER approved. Defence then finalised its arrangements with the preferred tender, Adagold.¹

7.2 In this chapter, the committee looks at the awarding and performance of the contract, and considers Defence's reflections on lessons learned from the procurement in relation to governance and procedure.

Awarding of contract

7.3 Following Ministerial approval on 20–21 October 2010, the contract was signed by Adagold and Defence on 22 October 2010.² The 2008 contract expired the following day, and Strategic performed the interim contract between 26 October and 18 November 2010.³

7.4 On 26 October 2010, shortly after the signing of the 2010 contract, CASA issued a FAAOC to Hi Fly for the period from 1 November 2010 to 31 October 2011. The FAAOC includes two Airbus A340-300 aircraft.⁴

Performance of contract

7.5 The 2010 contract commenced on 23 November 2010 and Adagold performed its first flight on this date. Defence informed the committee of its satisfaction with services rendered to date.⁵

Contractual performance management

7.6 The Air Transport Deed of Standing Offer and the Request make provision for periodic performance assessment and reporting. The deed provides for:

- internal assessments of the contractor's performance without obligation to disclose the results to the contractor;⁶

1 Defence, *Submission 5*, Annex A and Dr Ian Watt, *Proof Committee Hansard*, Estimates, 19 October 2010, p. 11.

2 Department of Defence, *Submission 5*, Attachment A, Annexure A.

3 Department of Defence, *Submission 5*, Attachment A, Annexure A.

4 Air Operator's Certificate AOC # 1-BOV6-09, issued 26 October 2010.

5 Department of Defence, *Submission 5*, Attachment A, p. 15; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 46.

- the issuing of directions to the contractor to remedy performance that is, in the opinion of the Commonwealth, determined to be unsatisfactory;⁷
- the calling of performance review meetings at the Commonwealth's discretion;⁸
- on receipt of notice of a performance review meeting, provision by the contractor of a report detailing its performance;⁹ and
- the rectification by the contractor of areas for improvement identified by the Commonwealth at the performance review meeting, within 30 days of the meeting.¹⁰

7.7 The terms of the request also require the contractor to provide the Commonwealth with monthly reports detailing the number of services provided, the number of personnel moved, the weight of equipment and baggage moved on each service, and the total flight time for each service.¹¹

7.8 Defence further informed the committee that, in the first four months of the contract, all of the ten available pallet spaces had been utilised on all flights performed to date. It stated that an average of 20,033 kg had been moved per flight, 'representing about 80 per cent of the maximum contracted payload and an increase of 37 per cent over that moved in the last five months of the previous contract with Strategic'.¹² Defence stated that the 2010 contract has resulted in 'significant financial savings' on the 2008 contract. It quantified these savings as approximately \$16 million per annum, representing a 32 per cent saving compared to exercising an option to extend the 2008 contract.¹³

Compliance with tender specifications

7.9 In its evidence to the committee, Strategic alleged that Adagold's contractual performance may be non-compliant with the minimum tender specifications on volumetric capacity. Mr Aisen stated that:

The successful Airbus A340-300 series is equipped with 11 pallets and bulk hold for just over 150m³—just meeting the specified criteria of the

6 Clause 16.5(a).

7 Clause 16.5(b).

8 Clauses 16.6(a),(b), (d), (e).

9 Clause 16.6(c).

10 Clause 16.6(f).

11 Item 7.16.

12 Dr Ian Watt, Secretary's opening remarks to the Senate Foreign Affairs Defence and Trade References Committee, tabled 29 March 2011, p.17.

13 Dr Ian Watt, Secretary's opening remarks to the Senate Foreign Affairs Defence and Trade References Committee, tabled 29 March 2011, pp. 1–2.

Commonwealth...Strategic is aware that the current contract is now being provided by a Portuguese A340-300, of which only 10 pallets and loose cargo is being made available due to the carrier's need to fly a maintenance kit on its aircraft—known as a fly-away kit. The ramifications of this are that the current tender response would appear to be non-compliant. The reduction of one pallet position from the Commonwealth reduces available capacity by approximately 10.5 to 11m³, to approximately 142m³.

Having had a relationship with Hi Fly previously, Strategic is aware of the fly-away kit and Hi Fly's need to carry [one]. We knew that this aircraft type, with this fly-away kit, would not be compliant.¹⁴

7.10 Defence responded that the aircraft provided by Adagold is compliant with the minimum volumetric capacity requirements. Rear Admiral Griggs stated that the primary aircraft has a total capacity of 162m³, and that its useable capacity is dependent upon how the aircraft is stacked on individual flights. He noted that the aircraft does not carry a fly-away kit, as Adagold has pre-positioned its maintenance equipment at various ports. Rear Admiral Griggs stated that the alternative aircraft used by Adagold when the primary aircraft is unavailable carries a fly-away kit of 5m³, which reduces the volumetric capacity to 157m³.¹⁵

7.11 Strategic further submitted that Adagold's contract price—which it estimated was \$10 million lower than the Strategic A340-300 proposal—may indicate that Adagold's response did not factor in all necessary contingencies.¹⁶ Mr Aisen stated that:

Ultimately, it begs the question of just how this respondent could be so significantly lower than any respondent elsewhere on the panel. It begs the question of whether there was the depth of knowledge with the decision makers to understand whether all aspects of the tender response were provided and appropriately considered.¹⁷

7.12 Defence did not respond expressly to this submission. However, as noted above, the Deloitte review examined documentary evidence—including Adagold's tender response and the evaluation criteria in the TEP¹⁸—and concluded that it had not identified any evidence suggesting that Adagold lacked capacity to 'meet the quality and standard required by the Commonwealth to provide the contracted services'.¹⁹ The AGS review also concluded that the selection of Adagold as preferred

14 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 2.

15 Rear Admiral Ray Griggs, *Proof Committee Hansard*, 29 March 2011, p. 51.

16 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, pp. 3–4.

17 Mr Shaun Aisen, *Proof Committee Hansard*, 29 March 2011, p. 4.

18 The TEP included criteria assessing: overall compliance with the requirements; the respondent's understanding of the requirements; compliance with specific performance requirements; and demonstrated technical and managerial capacity to meet the requirements: AFCD Review, p. 9.

19 Deloitte Review, pp. 28–29.

tenderer was fair and defensible—including in respect of compliance with the tender evaluation methodology, and the provision in the SER of a defensible and clear justification for the ranking of tenders.²⁰

Lessons learned

7.13 During the inquiry, Defence officials acknowledged that the tender process 'could have been improved'.²¹ As mentioned previously, Defence indicated that it is working on several reforms to its procurement practices and policies on managing conflicts of interest. It identified these initiatives as having arisen from the 2009 Defence White Paper, and its reflections on the MEAO procurement process, including analysis of the findings of the independent reviews.²²

Reforms to Defence procurement practices

7.14 Defence has already started the process of implementing several initiatives to improve the governance of non-equipment procurement (NEP) arising from the White Paper. It stated that the following initiatives have been implemented:

- appointing independent probity advisors for all significant, complex procurements;
- establishing a Centre of Excellence to support a more robust and consistent commercial approach to NEP;
- establishing the position of Non-Equipment Chief Procurement Officer (NECPO) on 1 July 2010. The NECPO provides high-level advice and assistance to all groups and services, and is required to endorse all Defence NEP spending proposals valued over \$1 million as a pre-requisite to proposal approval;
- scoping a whole-of-portfolio sourcing approach for various categories of NEP (for example, travel, garrison support, building maintenance, advertising and health);
- establishing a working group of NEP stakeholders to coordinate and resolve issues arising from the implementation of the new arrangements;
- launching a new NEP website on 17 August 2010, providing a single access point for policy and process guidance; and

20 AGS Review, p. 9. See further, Department of Defence, *Submission 5*, Attachment A, pp. 27–28.

21 Vice Admiral Griggs and Dr Watt, *Proof Committee Hansard*, 28 June 2011, p. 17.

22 Department of Defence, *Submission 5*, Attachment A, pp. 32–35; Dr Ian Watt, Secretary's opening remarks to the Senate Foreign Affairs Defence and Trade References Committee, tabled 29 March 2011, pp. 18–22.

-
- establishing a single simple procurement business centre on 1 February 2011, into which all simple procurements will be transitioned over the next two years.²³
- 7.15 Defence identified the following initiatives to be implemented in 2011:
- the application of a gate review process for major acquisition projects across Defence, focussing on important procurement process and probity issues relevant to a particular 'gate';
 - the engagement of expert procurement teams with lead responsibility for major acquisition projects;
 - the agreement and implementation of a NEP category management model for specific types of NEP;
 - the introduction of implementation status reporting requirements for all major NEPs;
 - improved stakeholder advice and assistance services, including publication of the Defence annual procurement plan on AusTender to provide greater transparency of planned NEPs, and an advisory role for the NECPO in the drafting of tender documentation, publishing on AusTender and evaluating tenders; and
 - implementing strategies for the recruitment and retention of suitably skilled procurement professionals.²⁴

Reforms to conflict of interest management policies

7.16 Defence stated that, in light of the committee's inquiry, it had reviewed its post-separation policy regime and its policy on the engagement of Reservists.²⁵ It identified the following four action areas for implementation in mid to late 2011:

- (a) Creating greater awareness within Defence of existing policy and practice requirements, particularly for Reservists, including:
 - (i) establishing a Defence post-separation employment intranet page; and
 - (ii) ensuring that Reservists are made aware of their obligations in relation to conflict of interest.
- (b) Reviewing ASDEFCON [the suite of tendering and contracting templates used within Defence] provisions to further clarify and strengthen probity arrangements in Defence and Defence Industry, and reinforce the education in

23 Department of Defence, *Submission 5*, Attachment A, pp. 32–33.

24 Department of Defence, *Submission 5*, Attachment A, pp. 33–45.

25 Department of Defence, *Submission 5*, Attachment A, pp. 34–35; Dr Ian Watt, Secretary's opening remarks to the Senate Foreign Affairs, Defence and Trade References Committee, tabled 29 March 2011, pp. 19–22.

Defence and Defence Industry of these provisions. In particular, the ASDEFCON review will focus on:

- (i) reviewing the application of the 'Use of Former Defence Personnel' and 'Post Defence Separation Employment' provisions in the conditions of tender and contract respectively; and
 - (ii) whether provisions need to be strengthened to ensure application to Reservists.
- (c) Strengthening the policy around employing Reservists on continuous full-time service to require that potential conflicts of interest are declared prior to contract commencement.
- (d) Updating the Defence policy framework to include additional requirements on post-separation employment mitigation measures, drawing on those detailed guidelines that are already included in the Defence Materiel Organisation policy [Defence Materiel Instruction (PERS) 1/2007].²⁶

7.17 Defence advised the committee that as at 29 March 2011 it had made the following progress:

- commenced the revision of the relevant Defence Instruction on post separation employment;
- identified two new policy measures in relation to the employment of reservists, which are:
 - requiring Reservists on full-time or part-time service employed in procurement and contract management activity to complete a conflict of interest declaration prior to their engagement for duty; and
 - requiring commanding officers or supervisors to make a risk-based assessment as to which other Reserve personnel must complete a conflict of interest declaration and which personnel do not, and to document this decision; and
- on 24 March 2011, launched a Defence intranet page consolidating conflict of interest policies.

7.18 Defence acknowledged that the process of reviewing the 2010 tender has been an 'expensive exercise'.²⁷ It submitted, however, that this cost has been justified by the 'significant changes to the way we do business to ensure the robustness and the independence of the processes, and the governance around them'.²⁸ The committee provides its views on lessons learned in chapters 8–12.

26 Department of Defence, *Submission 5*, Attachment A, pp. 34–35.

27 Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, pp. 88–89.

28 Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, pp. 88–89.

Conclusion

7.19 This and the previous four chapters have outlined the factual narrative of events occurring in the lead-up to, during and on the completion of the 2010 tender process. Several issues emerge from this evidence, namely:

- The tender was conducted in circumstances which suggested that significant probity risks were present—in particular, those pertaining to perceived conflicts of interest, breaches of confidentiality and proponent grievances about these matters.
- Defence was aware, or ought to have been aware, of these circumstances during the lead-up to the tender, the approach to market and during the tender evaluation stage.
- However, this awareness (actual or constructive) was not reflected significantly in governance arrangements for probity risk management, particularly during the procurement planning stage.
- Probity risks materialised during the course of the procurement.
- Defence made no substantial attempts to re-consider probity risk management strategies as these risks materialised.
- Proponent grievances about the outcome of the tender processes prompted multiple reviews of the procurement. While concluding that there were no compliance grounds requiring the discontinuation of the procurement, two broad issues arose from their findings:
 - the reviews identified a number of shortcomings in the procurement process—including in respect of probity risk management; and
 - due to limitations in their scope and methodology, the reviews did not quell the disquiet that some proponents felt towards the procurement process.
- In the course of the reviews, allegations of impropriety arising from the 2005 tender process were referred to the AFP for investigation.
- In response to the findings of the reviews of the 2010 tender process Defence:
 - determined to proceed to contract with Adagold;
 - made retrospective corrections to aspects of the tender process; and
 - initiated a program of broader policy and procedural reforms.

7.20 In the following five chapters, the committee identifies specific matters of concern arising from the tender process and makes its findings and recommendations on those matters.

Part III

Committee's consideration of the evidence

In this part of the report, the committee analyses the evidence outlined in the preceding chapters to provide its findings and recommendations about the integrity of the 2010 tender process.

Chapters 8–12 look at three particular aspects of the tender—governance arrangements, which go to issues such as the integrity of the tender preparation and evaluation stages, conflicts of interest; tender design and due diligence. Chapter 10 also considers the suggestion in the terms of reference regarding the appointment of a permanent, independent probity adviser to oversee the awarding of all Commonwealth aviation contracts.

Chapter 8

Taking stock

8.1 Under its terms of reference, the committee is required to assess the adequacy and appropriateness of key aspects of the 2010 tender process. The terms of reference focus on the probity of the procurement and cover four broad areas:

- (a) ***governance arrangements***—the adequacy of, and adherence to, processes for the identification and management of conflicts of interest throughout the tender process.¹
- (b) ***tender design***—whether the technical requirements or tender conditions in the request documentation were designed to unfairly advantage a particular respondent.²
- (c) ***matters of due diligence***—whether the tender respondents (and their key personnel and associated companies) were fit and proper persons to contract with the Commonwealth, and possessed the financial and commercial capacity to deliver the contracted services to the requisite quality and standard.³
- (d) ***other relevant matters***—any further issues concerning the probity of the procurement and the tender respondents, including the appointment of a permanent and independent probity advisor to oversee the awarding of all Commonwealth aviation contracts.⁴

8.2 The committee has identified several matters of concern within these broad areas. In this chapter, the committee provides a summary of the findings of, or observations made by, Clayton Utz, AFCD, PwC, Deloitte and AGS. In the subsequent chapters, the committee considers in greater depth the governance arrangements, tender design and due diligence and other relevant probity matters. Before outlining its findings and recommendations, the committee explains its approach to assessing the adequacy and appropriateness of the 2010 tender process.

The committee's approach to assessing adequacy and appropriateness

Achieving the objectives of good probity management

8.3 In approaching its terms of reference, the committee is not confined to strict matters of technical compliance, such as the identification of grounds upon which the procurement should have been discontinued. Rather, the committee is concerned with

1 Terms of Reference, paragraphs (a)(iii),(iv),(vi),(vii).

2 Terms of Reference, paragraphs (a)(ii), (v).

3 Terms of Reference, paragraphs (a)(i),(viii); (b)(i)-(iv).

4 Terms of Reference, paragraph (b)(v).

achieving the objectives of good probity management, as contained in Commonwealth procurement policy.

8.4 These objectives include the maintenance of public sector integrity; the achievement of effective procurement outcomes; maximising efficiency by reducing the likelihood of resource-intensive conflicts or complaints associated with the procurement; and maintaining relationships of mutual trust and respect with suppliers.⁵

8.5 The committee observes that the 2010 tender has been the subject of no less than five separate reviews.⁶ It has also come under considerable parliamentary scrutiny through the Senate estimates process,⁷ and was subject to significant public criticism.⁸ Information that emerged during the reviews of the tender has led to criminal investigations into the awarding of a previous contract in 2005.⁹

8.6 Clearly, the associated costs to Defence—both financial and reputational—have been substantial. It is highly unsatisfactory that a Commonwealth procurement exercise should attract such controversy and exposure to public embarrassment. The following advice in FMG 14 on ethics and probity in Commonwealth procurement is apposite:

Perceptions should not be overlooked when considering probity. It is important not only to do the right thing, but also to be seen to be doing the right thing. The public should be confident that officials conducting procurement will maintain a professional relationship that stands up to public scrutiny.¹⁰

5 Department of Finance and Deregulation, *Ethics and Probity in Procurement*, Financial Management Guidance 14.

6 These are: the AFCD Review, the PwC Review, the Deloitte Review, the AGS Review and the committee's inquiry.

7 See, for example, *Committee Hansard*, Estimates, 23 February 2011, pp. 89–91; *Committee Hansard*, Estimates, 19 October 2010, pp. 8–10, 49–71; Department of Defence, *Response to Questions on Notice, Supplementary Budget Estimates 2010-2011*.

8 See, for example, the series of articles by journalist Richard Baker, including: 'Concerns over Defence contract', *Age*, 12 August 2010, p. 5; 'Defence bidders got inside help', *Age*, 2 September 2010, p. 1; 'The sky's the limit', *Age*, 2 September 2010, p. 13; 'Pledge to probe Defence contract', *Age*, 3 September 2010, p. 6; 'Pledge to probe Defence contract', *Age*, 3 September 2010, p. 6; 'Probes on deal to fly troops', *Age*, 13 September 2010, p. 1; 'Police to probe \$30m Defence deal', *Age*, 14 September 2010, p. 5; 'Defence contract row widens', *Age*, 30 September 2010, p. 13; 'Defence must act on contract cover-up claims', *Age*, 18 November 2010, p. 18.

9 Department of Finance and Deregulation, *Guidance on Ethics and Probity in Government Procurement*, Financial Management Guidance 14 (January 2005) ('FMG 14'), p. 16.

10 FMG 14, p. 16.

The scope of the committee's findings and recommendations

8.7 After careful consideration, the committee has determined not to make findings or recommendations on two matters. First, the committee does not express any views on the substance of allegations of fraudulent conduct in the 2010 tender process or any previous tender processes. In particular, the committee does not make any definitive findings as to whether there were any unauthorised disclosures of confidential tender information. Secondly, in the absence of conclusive evidence on these allegations of fraud, the committee does not make any retrospective findings or recommendations as to whether the 2010 tender process should have been discontinued on probity grounds.

8.8 In the committee's view, such findings would require specialised forensic examination. Regrettably, such examination was not conducted as part of the reviews commissioned by Defence. The committee is also conscious that at the time of writing, the 2005 tender process was under investigation by the AFP. In addition, the committee acknowledges that retrospective findings on whether the tender process should have been discontinued would have limited effect on the procurement outcome, given that the contract has been awarded and has commenced.

8.9 In declining to make findings on these matters, the committee emphasises that it does not discount the possibility that fraudulent or other acts of wrongdoing may have been committed. Accordingly, the committee's findings should not be interpreted as an endorsement of Defence's decision to proceed to contract. Rather, the committee's approach reflects the fact that there is insufficient evidence available to reach a definitive conclusion.

Areas for improvements

8.10 There is no doubt, however, that there were shortcomings in the 2010 tender. Indeed, it courted trouble from its very inception. Dr Watt accepted the fact that the process had problems. He stated:

Did we make a mistake at the start in not putting more arrangements in place, given the history of the industry? I think we would all acknowledge with hindsight that we would have done that.¹¹

8.11 Despite recognised deficiencies in the tender process, Defence relied heavily on the findings of numerous reviews to justify proceeding to contract with the preferred tenderer, Adagold. Although the reviews found flaws in the tender process, they concluded that the failings were not sufficiently material to render the decision to award the contract to Adagold unsound.

8.12 When considered together, however, the reviews identified a raft of deficiencies not only in the planning phase but also in the evaluation stages. They

11 *Proof Committee Hansard*, 28 June 2011, p. 17.

highlighted inadequacies in the probity management throughout the tender process, citing areas where it could have been strengthened, especially in developing a probity framework and formulating probity plans and protocols, documenting probity risks and plans, and appointing a probity adviser. Both Deloitte and AGs referred to lapses in the management of conflicts of interest.

8.13 The reviews, especially by the AGS, revealed inadequacies in the design of tender documents and the implementation of the tender processes. They drew attention to the need for stronger risk management arrangements; improved documentation; clearer definitions in the request documentation; more detail on the scoring and pricing model and a fuller account of the evaluation methodology in the TEP (for example, the scoring methodology adopted by the TEB and TEWGs was not referenced in the TEP and the TEP did not provide clear guidance as to how each criterion was to be assessed). The AGS noted that the TEWG reports and SER could have 'more accurately and transparently reflected the assessment of tender responses' and the SER could have provided a clearer explanation of rankings in the SER. The process could also have benefited from earlier and better consultation between those developing the TEP and also between elements of the tender team in the evaluation process.

8.14 Three matters of particular concern were Clayton Utz's observation on unequal treatment; the discovery of a mathematical error when reviewing the Source Evaluation Report; and AFCD's preparation of the statutory declarations. The committee assesses the significance of the findings of the respective reviews in the following chapters.

The reviews and the reliance on their findings

8.15 The committee was not only concerned about the deficiencies in the tender process identified by the reviews but with aspects of the reviews themselves, particularly the limitations on their time, scope and methodologies. The veracity of their conclusions is critical because of Defence's heavy reliance on their findings to salvage the reputation of the tender process.

8.16 Even though those conducting the reviews acknowledged the limitations and produced qualified reports, their shortcomings cannot be ignored. In this regard, the committee notes:

- the time constraints placed on each review—the AFCD review in particular mentioned, on a number of occasions, the tight timeframe needed to facilitate the signing of the contract;¹²
- the limited terms of reference which meant that potentially important factors were not considered—for example, the reviews did not examine concerns raised

12 See chapter 5, paragraphs 5.18–5.19 and 5.36–5.5.41.

at the end of the 2005 tender about that process, or Major Charlton's relationship with Adagold, through AIS, at the time of the unsolicited proposal in 2010;¹³

- AFCD and AGS considered the tender process and its compliance with the Deed of Standing Offer but not whether the Deed itself was a suitable arrangement for the tender;
- AFCD's failure to interview Mr Aisen, which was not rectified by subsequent reviews;¹⁴
- the reliance by Deloitte and AGS on Defence interviews and documentation without independent verification, which meant that any original weakness or oversight carried over into their reviews;¹⁵ and
- Defence drafted the statutory declarations signed by Major Charlton and Mr Clark on which it then relied to determine facts: subsequent reviews also relied upon these declarations.¹⁶

8.17 At a minimum, the committee considers that the AFCD review should have interviewed Mr Aisen. It would not have been unduly onerous to do so. The decision not to interview him meant that the reviews did not resolve or at least attempt to defuse the probity risk posed by his ongoing and increasingly public complaints. The committee acknowledges that interviewing Mr Aisen may not necessarily have prevented him or any other proponent from making further allegations. However, this step—which was clearly feasible in the time available—could have limited the adverse impact of future grievances. It could have provided a firm basis for Defence's finding that the complaints were based on speculation or conjecture, if that was, in fact, the case.

8.18 The committee agrees with the observation of the PwC review that such a course would have furthered the interest of 'being seen to conduct a fair and transparent process'.¹⁷ The fact that the AFCD review was followed by two external reviews and a parliamentary inquiry is a salutary reminder that significant weight should be placed upon interviewing complainants in future probity reviews.

8.19 The committee is of the view that the reviews have not succeeded in removing all doubts about the procurement process particularly the pre-tender stage and the potential for conflicts through the use of insider knowledge. Moreover, by finding that the tender process merely complied with written policy guidelines and manuals, the reviews ignored the important fact that in some aspects the process was not best

13 See chapters 5 and 6.

14 See chapters 5 and 6.

15 See chapter 6.

16 See chapter 2. See further Dr Raymond Bromwich, *Proof Committee Hansard*, 29 March 2011, pp. 80–81.

17 PwC Review, p. 8. See further chapter 5.

practice. Indeed, when it came to probity matters, the process disregarded strong advice contained in official policy documents.

Conclusion

8.20 In this chapter, the committee brought together in summary form the observations of the respective reviews to provide a more complete and accurate picture of the deficiencies in the governance arrangements for the tender process. In the following chapters, the committee uses the findings of the reviews and other evidence before it to draw conclusions about the tender process. It looks first at the management of risk and associated probity issues, then the design and conduct of the tender and finally due diligence.

Chapter 9

Governance arrangements—probity

Terms of reference

9.1 Under its terms of reference, the committee is required to consider the following matters relating to the governance arrangements for the 2010 tender process:

- whether the decision to award the contract to Adagold was influenced by any vested interests, outside influences or any other perceived or actual conflicts of interest;¹
- the role of departmental personnel in the tender process and their adherence to Commonwealth procurement policy, as well as any conflict of interest issues arising from the tender process and if any perceived or actual conflicts were declared;²
- the integrity of governance around the development of the RFT and the subsequent evaluation process, and whether the governance arrangements achieved their intended purposes, including the processes to manage perceived and actual conflicts of interest;³ and
- whether the governance arrangements were adequate and did in fact 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.⁴

Matters of concern

9.2 Governance issues lie at the heart of the committee's concerns about the procurement. The committee is particularly concerned about probity risk management arising from perceived conflicts of interest, the maintenance of confidentiality and proponent grievances about these matters. These concerns arise principally from two shortcomings identified in Defence procurement policy and practice, namely:

- the inadequate identification and management of probity risks, particularly at the procurement planning stage; and
- the inadequate management of potential or perceived conflicts of interest arising from the outside employment or commercial interests of ADF personnel—particularly the early identification of potential conflicts arising from the civilian

1 Terms of Reference, paragraph (a)(iii).

2 Terms of Reference, paragraph (a)(iv).

3 Terms of Reference, paragraph (a)(vi).

4 Terms of Reference, paragraph (a)(vii).

employment of ADF Reservists who are not engaged in continuous full-time service.

9.3 In this chapter, the committee considers probity risk management and then, in the following chapter, turns to consider conflicts of interest.

Probity risk management

9.4 The committee's key concern is that Defence did not manage probity risks proactively or in a coordinated way, primarily because it did not take sufficient steps to identify foreseeable risks at the beginning of the procurement. In particular, the committee considers that:

- (a) Several probity risks were inherent in the circumstances of the procurement. These probity risks took the form of:
 - (i) perceived conflicts of interest arising from the current and previous civilian employment of Major Charlton while he was engaged in 1JMOVGP;
 - (ii) potential breaches of confidentiality arising from such a conflict of interest; and
 - (iii) the potential for proponent grievances about these matters.
- (b) Defence was aware of, or ought reasonably to have been aware of, these probity risks throughout the procurement process. Consequently, it should have been alert to the need for strengthened probity risk management measures.
- (c) Despite its actual or constructive awareness of these probity risks, Defence did not manage them appropriately. In particular, it failed to:
 - (i) document a probity risk management framework at the procurement planning stage; and
 - (ii) revise its approach to probity risk management as probity risks materialised during the procurement process, particularly in the form of sustained proponent grievances.

9.5 The committee details its findings on these points below. It then provides its views on Defence's submissions which sought to explain the absence of robust probity risk management measures, including the documentation of a probity plan and the appointment of a probity advisor.

Probity risks inherent in the circumstances of the procurement

9.6 The 2010 tender was conducted in circumstances that signalled significant probity risks, particularly in respect of conflicts of interest, breaches of confidentiality and proponent grievances about these matters. These circumstances included:

-
- the high value of the contract and the limited timeframe for the procurement;⁵
 - the small and extremely competitive nature of the commercial air charter market;⁶
 - the transfer of personnel between suppliers and between Defence and suppliers;⁷
 - the history of controversy associated with the MEAO contracts, particularly proponent grievances about the probity of the 2005 tender process;⁸
 - the questionable behaviour of some in the industry such as the public denigration of a competitor in the 7.30 report mentioned in chapter 2;
 - the complaints made by Strategic about probity matters in the 2010 tender process, both prior to and following the release of the request, relating to the re-engagement of Major Charlton in 1JMOVGP and the alleged disclosure of confidential tender information to Adagold prior to the release of the request;⁹
 - the preliminary concerns expressed by Strategic shortly after the release of the request about the changed tender specifications, particularly the increased cargo volumetric capacity and the preference for a single aircraft solution. These complaints suggested that the new tender specifications may be a point of contention with some suppliers;¹⁰ and
 - the complexity of the proposed procurement arrangements, particularly the use of the standing offer panel to purchase longer term, scheduled air sustainment services. The deed of standing offer which established the panel was framed around the provision of ad hoc services.¹¹

Defence's awareness of probity risks

9.7 Defence had at least constructive knowledge of these circumstances and the associated probity risks because:

- It met with and received unsolicited proposals from members of the standing offer panel, and considered the technical solutions in their proposals. These interactions suggest that Defence was aware of the highly competitive nature of the market, and in particular that some suppliers were:
 - closely monitoring the delivery of services to the MEAO under the 2008 contract;

5 See chapters 2 and 3.

6 See chapter 2.

7 See chapters 2 and 3.

8 See chapter 2.

9 See chapters 3 and 4.

10 See chapters 3 and 4.

11 See chapter 3.

- anticipating that the 2008 contract may be re-tendered, and in some cases actively lobbying Defence to re-tender; and
- positioning themselves for a possible re-tender, for example by holding strategic partnership discussions with potential subcontractors.¹²
- It received and responded to preliminary complaints from Strategic prior to the release of the request about the re-engagement of Major Charlton in 1JMOVGP.¹³
- It received and responded to further complaints from Strategic following the release of the request about:
 - perceived conflicts of interest and alleged breaches of confidentiality arising from the re-engagement of Major Charlton in 1JMOVGP; and
 - value for money considerations arising from the changed tender specifications.¹⁴
- It was further aware of Major Charlton's current and previous involvement in the commercial air charter industry from:
 - Major Charlton's disclosures including his discussions with the Officer Commanding JMCO Brisbane upon his re-engagement in 1JMOVGP in 2009, and his declaration of a potential conflict of interest after the release of the request in 2010; and
 - 'hearsay that Major Charlton had worked for Strategic and left there 'under unfavourable circumstances'.¹⁵
- It received complaints about the probity of the 2005 tender at the debriefing session for that tender.¹⁶
- It contemplated the possibility of proponent grievances during the tender evaluation stage in June 2010, and their potential adverse impact on the timely commencement of the contract. Consequently, the Secretary of the TEB sought legal advice about the appointment of a probity auditor and a probity advisor at this time.¹⁷
- It received legal advice about the request documentation, which identified the tension between the framing of the deed (which was designed for ad hoc services) and the terms of the request (which required longer-term, scheduled services). Defence was advised that while the services were to be sourced from

12 See chapters 2 and 3.

13 See chapter 3.

14 See chapters 3 and 4.

15 See chapters 2 and 3.

16 See chapter 2.

17 See chapter 3.

an established panel, the request, needed to be more robust than usual.¹⁸ This suggested that the selection of panel members may have been conducted on the basis of their suitability to provide ad hoc services. Therefore, additional probity measures may be required where longer-term services were to be sourced from the panel.

9.8 In the committee's view, these circumstances ought reasonably to have alerted Defence to:

- the heightened potential for probity risks, especially proponent grievances;
- the adverse impact that such risks may have on procurement outcomes—particularly:
 - delaying the commencement of the contract—for example, the risk that the procurement may be suspended during the investigation of proponent grievances;
 - increasing the financial costs of the procurement—for example, the risk that additional costs may be incurred to investigate proponent grievances and enter into interim contracts pending investigation of those grievances; and
 - reputational damage—for example, allegations of serious impropriety may damage Defence's image and reputation in the market and in the eyes of the public more broadly; and
- the consequent need to develop, document and implement rigorous governance measures to enable the systematic and proactive identification and management of probity risks—in particular:
 - the documentation of a probity plan or, at the least, the integration of probity risks into the procurement risk management plan; and
 - the early consideration of appointing a probity advisor.

9.9 Indeed, the probity risks noted above—and appropriate risk management responses—are identified expressly in Commonwealth procurement policy. For example, the relevant Australian Government Financial Management Guidance document, *Ethics and Probity in Government Procurement* (FMG 14) identifies probity plans as particularly useful in procurements that are:

- of high value;
- in need of careful management;
- likely to encounter ethical problems; or
- likely to be subject to a high degree of public scrutiny.¹⁹

18 See chapter 3.

19 Department of Finance and Deregulation, *Ethics and Probity in Procurement*, Financial Management Guidance 14, January 2005 ('FMG 14'), p. 28.

9.10 FMG 14 further recommends that agencies consider appointing external probity advisors in large or complex transactions—for example, where:

- the transaction is of high value;
- the matter is complex;
- the integrity of the project may be questioned;
- there has been a history of controversy or litigation in relation to the matter;
- the matter is politically sensitive;
- the nature of the market place makes supplier grievances more likely (such as where competition is strong and confidentiality is particularly important); and
- there is a high probability of conflict of interest.²⁰

9.11 In its Better Practice Guide, *Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement*, the ANAO recommends the appointment of a probity advisor where:

- the nature of the market place makes proponent grievances more likely (for example, where trade secrets are commonplace, or where competition is particularly strong);
- an in-house or public sector bid is expected and independent scrutiny is needed to avoid actual or perceived bias;
- there is an incumbent supplier with a history of contracts with the entity, and competitors may require an increased level of confidence in the integrity of the process;
- proponents are likely to have had previous dealings with selection panel members, such that conflicts of interest could become an issue; or
- in the past there has been controversy or litigation relevant to the project, the entity, or one or more of the potential suppliers.²¹

9.12 The Defence Procurement Policy Manual (DPPM) also contains a dedicated chapter on ethics in procurement, which includes guidance on the appointment of probity advisors and auditors and managing conflicts of interest.²² The DPPM mandates consideration of documenting a legal process or probity plan for any complex or strategic procurements.²³ It also requires all officers involved in the tender evaluation of complex and strategic procurements to be briefed on their probity

20 FMG 14, p. 30.

21 Australian National Audit Office, *Better Practice Guide—Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement*, ('ANAO Better Practice Guide') August 2007, p. 33.

22 DPPM, Chapter 3.13.

23 DPPM, p. 3.13-3, [12].

obligations in accordance with the probity plan.²⁴ The DPPM identifies circumstances in which consideration may be given to the appointment of a probity advisor, which include those contained in FMG 14.²⁵ It notes that probity advisors are 'normally engaged at the beginning of the procurement process'.²⁶ The DPPM further refers to the ANAO better practice guide as a key reference.²⁷

Defence's approach to probity risk management

9.13 Defence's awareness of the probity risks outlined above was not reflected in the procurement governance arrangements, at either the planning stage or subsequently during the procurement process.

9.14 The evidence before the committee is that probity issues were given very limited consideration during procurement planning. As noted in the Deloitte and AGS reviews, the procurement strategy did not document a dedicated probity plan, nor did the risk management plan identify probity risks.²⁸ The evidence before the committee suggests that Defence may have relied on the fact that the tender was conducted through a standing offer panel as a substitute for implementing a specific probity risk management framework.²⁹

9.15 Incidental consideration was given to the appointment of a probity advisor very late in the tender process in June 2010. Legal advice was sought by the Secretary of the TEB during the evaluation stage about engaging a probity auditor on completion of the process.³⁰ The advice was provided orally, however the legal advisor's written summary of his advice indicates that the issue of a probity advisor was considered at this time because he happened to raise the distinction between a probity auditor and an advisor.³¹ It appears that Defence did not specifically seek advice on this point. In any event, the legal advice was to the effect that there would have been limited benefit in appointing a probity advisor so late in the process.³²

9.16 The absence of a probity risk management framework was evident as the tender process continued. For example:

24 DPPM, p. 3.13-3, [13].

25 DPPM, p. 3.13-4.

26 DPPM, p. 3.13-3, [16].

27 DPPM, p. 3.13-6.

28 See chapter 6.

29 Department of Defence, *Submission 5*, Attachment A, p. 22.

30 See chapter 3.

31 Department of Defence, *Summary of advice provided by Clayton Utz to Defence in relation to the appointment of a probity auditor* (14 April 2011), response to Question on Notice 3(j). See further chapter 3.

32 See chapter 3.

- Defence personnel who assisted in developing the Request documentation were not asked to sign a conflict of interest declaration unless they also participated in the evaluation;
- there were no probity protocols developed for the industry briefing;³³
- tender evaluation team members did not receive a probity briefing;³⁴
- tender evaluation team members did not sign the conflict of interest declarations until after the evaluation commenced and the declarations were deficient in several respects;³⁵ and
- there were inadequate access controls applied to electronic files containing confidential tender information. These circumstances meant that significant *ex post facto* checks were necessary to ascertain whether Major Charlton had accessed relevant tender files and information systems, or had contact with persons involved in the procurement.³⁶

9.17 Defence did not revise its approach to probity risk management or seek to develop a risk management framework as the tender process continued. This was so even as probity risks began to materialise, primarily in the form of repeated complaints by Strategic.³⁷ The evidence before the committee is that Defence did not appear to recognise or appreciate the magnitude of these risks. For example:

- Defence emphasised the non-mandatory nature of probity measures that could have avoided or minimised the adverse consequences of proponent grievances.³⁸
- Defence submitted that during pre-tender deliberations it recognised the risk that Major Charlton's re-engagement in 1JMOVGP may create a perceived conflict of interest. However, it believed that the risk had been wholly removed because Major Charlton had been separated from any MEAO-related contracting or procurement activities, and was ultimately directed to cease parading with JMCO Brisbane.³⁹
- The Secretary of the TEB, Squadron Leader Cole, stated categorically in June 2010 that there were no probity issues associated with the procurement.⁴⁰

33 See chapter 3. See further the observations of the Deloitte and AGS Reviews in chapter 6.

34 See chapter 3. See further the observations of the Deloitte and AGS Reviews in chapter 6.

35 See chapter 3. See further the observations of the Deloitte Review in chapter 6.

36 See chapters 5 and 6.

37 See chapters 3 and 4.

38 See for example, Department of Defence, *Submission 5*, Attachment A, pp. 16, 22.

39 See chapter 3. See further Department of Defence, *Submission 5*, Attachment A, p. 23.

40 Department of Defence, *Summary of advice provided by Clayton Utz to Defence in relation to the appointment of a probity auditor* (14 April 2011), response to Question on Notice 3(j).

Committee views

9.18 In statements before the committee, Defence made two key points:

- (a) the probity risks and risk management responses were identifiable with the benefit of hindsight, but not necessarily at the time;⁴¹ and
- (b) risk management measures such as probity plans and the appointment of probity advisors are non-mandatory.⁴²

9.19 Turning to the first matter, the committee rejects, in the strongest possible terms, the emphasis that Defence placed upon the benefits of hindsight. In the committee's view, the probity risks outlined above should have been anticipated and given close consideration from the commencement of the procurement process. The committee emphasises its findings above that these risks were foreseeable due to:

- the circumstances of the procurement, of which relevant Defence personnel were aware or ought reasonably to have been aware; and
- their express recognition in Commonwealth procurement policy.

9.20 Similarly, the committee does not accept Defence's submissions on the non-mandatory nature of dedicated probity plans or advisors.⁴³ It is unsatisfactory to make bare assertions that the Department was not subject to any binding legal or policy obligations to adopt these measures. The Commonwealth procurement policies outlined above identify clearly the circumstances in which the documentation of probity plans and the appointment of probity advisors are encouraged. The 2010 tender process fell squarely within these circumstances, yet Defence failed to adduce any evidence explaining how, if at all, it considered these policies in making key procurement decisions, including:

- the decision not to document a probity plan in the procurement strategy;
- the decision not to include probity issues in the risk management plan; and
- the decision not to appoint a probity advisor at the commencement of the procurement, and when the issue arose belatedly in June 2010.

9.21 The committee is concerned that the decisions not to implement these measures may have been motivated by an over-reliance on the use of the standing offer panel. It seems that the panel arrangement may have been used as a substitute for

41 See for example, AFCD Review, p. 12: 'while the advice not to appoint an independent probity advisor may have been reasonable at the time, with the benefit of hindsight, the review concluded that a complete risk assessment ... should have identified the desirability for an independent probity advisor'. See further, Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, p. 88; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 88 (evidence on the benefits of hindsight with respect to the decision not to interview Mr Aisen).

42 See for example, Department of Defence, *Submission 5*, Appendix A, pp. 16, 22.

43 Department of Defence, *Submission 5*, Attachment A, p. 16. See further, p. 22.

considering probity risk management strategies. For example, Defence noted the findings of the Deloitte Review that probity risks were not documented in the risk management plan, and a probity plan was not documented. It submitted that these findings:

[align] with the Proposal Approver's decision that an external probity advisor was not mandatory and therefore not required as the existing Air Services Standing Offer Panel was being accessed. Therefore it was assessed that there was no requirement to include this in the risk management plan.⁴⁴

9.22 In the committee's view, such reliance was unreasonable, having regard to the foreseeable probity risks inherent in the circumstances of the procurement and the clear statements in Commonwealth procurement policy noted above. In addition, Defence received legal advice about the development of the request, which identified significant differences between the services contemplated by the deed, and those required in the request.⁴⁵ This should have alerted Defence to the need to consider whether further probity measures, developed specifically for the request, were necessary.

9.23 Moreover, the committee is concerned that Defence does not appear to have sought legal advice about the appointment of a probity advisor during the planning stage. Ultimately, legal advice was provided—incidentally to a request for advice about a probity auditor—very late in the process in June 2010.⁴⁶ Accordingly, the committee takes no comfort from the evidence of Group Captain Barnes that:

...the Defence Procurement Policy Manual does not actually mandate the requirement for a probity advisor. It is to be considered, and that is indeed what we feel we did.⁴⁷

9.24 The committee is disappointed that uncritical reliance on the panel arrangement—followed by belated and incidental consideration during the tender evaluation stage—was thought to be sufficient in a complex, high-value procurement with a history of controversy. It indicates that Defence adopted a minimal approach to interpreting and applying its procurement policy.

9.25 Having regard to the circumstances of the procurement and the factors identified in FMG 14, the DPPM and the ANAO better practice guide, the committee considers that:

- a probity plan should have been documented in the procurement strategy;

44 Department of Defence, *Submission 5*, Attachment A, p. 22.

45 See Chapter 3. See further AFCD Review, p. 12.

46 Department of Defence, *Summary of advice provided by Clayton Utz to Defence in relation to the appointment of a probity auditor* (14 April 2011), response to Question on Notice 3(j).

47 Group Captain Robert Barnes, *Proof Committee Hansard*, 29 March 2011, p. 64.

-
- the probity plan should have identified risks arising from the circumstances of the procurement—in particular, the following risks should have been identified:
 - the potential for actual, potential or perceived conflicts of interest to arise from the previous and concurrent, secondary employment or other financial interests of 1JMOVGP personnel in the commercial air charter industry;
 - the potential disclosure of confidential tender information as a result of such conflicts of interest; and
 - potential proponent grievances about these matters; and
 - a probity advisor should have been appointed from the commencement of the procurement process to provide advice about the development and implementation of strategies to manage the abovementioned probity risks.

9.26 The committee acknowledges that these measures may not have prevented proponent grievances from arising. However, it takes the firm view that a rigorous and thoroughly documented probity risk management framework could have minimised their impact significantly. In particular, such an approach could have provided sufficient reassurance about the probity of the process to avert the need for five reviews of the procurement, at significant public cost. In the committee's view, Defence must ensure that robust probity risk management measures are implemented in all future procurements of air sustainment services to the MEAO. In this regard, the committee welcomes Defence's advice that probity advisors will be appointed to all future complex and strategic procurements.⁴⁸

9.27 The committee is of the view that the deficiencies in risk identification evident in the 2010 tender process may further illustrate a gap in Defence procurement policy. Currently, the DPPM chapter on risk management⁴⁹ does not cross-reference the chapter on ethics and probity⁵⁰ or otherwise provide significant guidance on identifying and responding to probity risks as part of risk management, particularly at the procurement planning stage. The single reference to probity in the DPPM chapter on risk management is to identify the potential for a 'breach of ethics and probity in the tender evaluation process' as a factor to be considered in risk identification.⁵¹ Accordingly, the committee considers that the DPPM should provide clearer guidance on the relationship between probity and risk management. That is, it should provide expressly that probity risks must be taken into consideration in risk management. One way of achieving this may be for the DPPM chapter on risk management to cross-reference the chapter on ethics and probity.

48 Department of Defence, *Submission 5*, Attachment A, p. 16. See further, chapter 7.

49 DPPM, Chapter 3.2.

50 DPPM, Chapter 3.13.

51 DPPM, p. 3.2-2.

Recommendation 1

9.28 The committee recommends that Defence:

- **requires the documentation of a dedicated probity plan for all future procurements of air sustainment services to the MEAO;**
- **ensures probity plans for all future procurements of air sustainment services to the MEAO identify expressly and address the risks associated with:**
 - (i) proponent grievances and**
 - (ii) the small and highly competitive nature of the commercial air charter market;**
- **implements its proposed policy of appointing probity advisors to all complex and strategic procurements and monitors closely the implementation progress and impact of this policy—in particular, ensures that a probity advisor is appointed to all future procurements of air sustainment services to the MEAO; and**
- **amends chapter 3.2 of the Defence Procurement Policy Manual on risk management in procurement to include references to probity risks. In particular, Defence should consider cross-referencing chapter 3.13 on ethics and probity in procurement.**

The appointment of an independent probity advisor to all Commonwealth aviation contracts

Terms of reference

9.29 In directing the committee to examine 'any other matters relevant to the probity of the procurement processes', the terms of reference specifically require the committee to consider the potential appointment of a permanent and independent probity advisor to oversee the awarding of all Commonwealth aviation contracts.⁵²

9.30 This measure was supported by some members of the Air Transport Standing Offer Panel.⁵³ One submitter, Pel-Air Aviation Pty Ltd, supported this option on the basis of possible irregularities in other Commonwealth aviation procurements using the standing offer panel. It expressed the following concerns about the awarding of air charters by the Department of Immigration and Citizenship (DIAC):

Over the period 7 October to 22 January 2011 last, DIAC issued 48 requests for which Pel-Air submitted quotations for the majority, but did not succeed in winning any of these charters. These tenders are always given very tight timeframes (overnight or within two days) and there is the perception that certain parties may be given advanced notice and unfairly advantaged. We

52 Terms of Reference, paragraph (b)(v).

53 This included Pel-Air Aviation Pty Ltd, *Submission 2*, p. 2.

suggest that there is an investigation as to whether the tight deadlines were indeed unavoidable or were indeed intentional. Additionally, Pel-Air is concerned that there may be some bias associated with the awarding of these contracts.⁵⁴

9.31 In his oral evidence to the committee, the Chief Operating Officer of Pel-Air, Mr Danny Foster, stated further:

We believe that this is an industry where some people seize on the appearance of any improper behaviour. It is quite a small industry, and it is an industry where people have a high knowledge of what their competitors are doing...We believe that business should not only be conducted in a proper fashion, but it is important that it be seen to be conducted in a proper fashion. So if nothing else, the appointment of a probity auditor would create an environment where there is a high degree of confidence in the process.⁵⁵

Committee view

9.32 Although the committee has recommended that a probity advisor be appointed to complex and strategic procurements such as the air sustainment services to the MEAO, it does not necessarily suggest that an advisor is appointed to all Commonwealth aviation tenders. While recognising that there may be potential benefits in the appointment of a permanent and independent probity advisor for Commonwealth aviation contracts, the committee considers that it would be premature to recommend this course for several reasons.

9.33 The committee considers that such an approach—which would involve singling out aviation services for differential treatment to other procurements—must be informed by a strong evidence base. The current Commonwealth policy approach to probity management favours agency level responsibility, and the implementation of measures specific to individual procurements.⁵⁶ The detail in Commonwealth procurement policy and guidance documents on potential conflicts of interest, outside employment and potential proponent grievances suggests that many goods and services are procured from markets with similar characteristics to the commercial air charter industry.⁵⁷ That is, it seems that Commonwealth policy has contemplated that procurements are conducted in small and highly competitive markets, in which there may be significant personnel movement between suppliers, and between purchasers and suppliers.

54 Pel-Air Aviation Pty Ltd, *Submission 2*, p. 2. See further, Mr Danny Foster, *Proof Committee Hansard*, 28 March 2011, pp. 19–26.

55 Mr Danny Foster, *Proof Committee Hansard*, 28 March 2011, p. 20.

56 See especially, FMG 14.

57 See FMG 14. See further, Australian National Audit Office, *Better Practice Guide—Fairness and Transparency in Purchasing Decisions: Probity in Australian Government Procurement*, August 2007.

9.34 Although these matters should not preclude consideration of the appointment of a permanent, independent and Commonwealth-wide probity advisor, they indicate the need for a thorough cost-benefit analysis of this option. This would require a broader analysis than is possible in the investigation of an individual procurement. Before introducing a further layer of regulation, it is also necessary to allow time for agency level reforms to take effect—including those proposed by Defence in the context of this inquiry—and to enable consideration of the committee's recommendations.

9.35 While acknowledging the concerns raised about possible irregularities in DIAC air charters, the committee considers that an investigation of this matter is beyond its mandate. Accordingly, the committee draws these matters to the attention of the Senate, so that it may determine whether to pursue them.

9.36 With regard to managing proponent grievances, the committee considers that it may be timely for Defence to review its procurement complaint resolution procedures to ensure that they align with best practice. It also notes a suggestion from a member of Defence industry to appoint an independent Ombudsman to handle complaints about Defence procurement.⁵⁸

58 Confidential correspondence to the committee, March 2011.

Chapter 10

Governance arrangements—conflicts of interest and confidentiality

10.1 The committee's second major concern about the governance arrangements for the 2010 tender process centred on the early identification and management of potential or perceived conflicts of interest—especially those arising from the outside employment of ADF personnel. The circumstances surrounding Major Charlton's employment in JMCO in Brisbane and his activities as a civilian in the air charter business especially his association with a likely tenderer highlighted three issues of policy, practice and procedure. They are:

- Defence policies on the disclosure and management of conflicts of interest;
- the contractual management of conflicts of interest; and
- adherence to risk management measures documented in the TEP.

Defence policies on the disclosure and management of conflicts of interest

10.2 The 2010 tender process appears to have revealed a gap in Defence policy on the disclosure and management of perceived conflicts of interest in respect of Reservists who:

- are not engaged in continuous full-time service; and
- are not directly involved in the relevant procurement being conducted within their group.

10.3 The evidence before the committee is that Major Charlton re-engaged with the ADF on a part-time basis.¹ As noted in the Deloitte Review, it appears that he was not, at any material time during the 2010 tender process, subject to the mandatory procedures in the relevant Defence Instructions on secondary employment² and the disclosure and management of conflicts of interest.³

1 See for example, Deloitte Review p. 19.

2 Deloitte Review, p. 19. Defence Instruction (General) PERS 25-2—Employment and voluntary activities of Australian Defence Force Members in off-duty hours.

3 Defence Instruction (General) PERS 25-3—Disclosure of interests of members of the Australian Defence Force. It is, however, acknowledged that Major Charlton was subject to legal and ethical requirements of general application—for example, the *Crimes Act 1914* (Cth) s 70(2) (the offence of the unauthorised disclosure of information by a Commonwealth officer); the *Criminal Code Act 1995* (Cth) s 135 (the offence of dishonestly obtaining a gain or financial advantage from the Commonwealth); *Defence Force Discipline Act 1982* (Cth) s 58 (the offence of the unauthorised disclosure of information likely to be prejudicial to national security or defence); and DI(G) PERS 25-6—conflicts of interest and acceptance of offers of gifts and hospitality, p. 3 (general duty to disclose actual or perceived conflicts of interest).

10.4 These Instructions do not apply to ADF Reservists who are not employed on continuous full-time duty. They are expressed as applying to 'members' of the ADF. The term 'member' is defined narrowly to mean a permanent ADF member or a Reservist engaged in continuous full-time service.⁴ The Instructions do not provide reasons for their limited application, nor do they cross-reference any specific policies or procedures applicable to Reservists who are engaged on a part-time basis.

10.5 In contrast, the Defence Instruction on post-separation employment applies to Reservists who are on duty or rendering continuous full-time service.⁵ The Instruction also makes reference to the risk that conflicts of interest may arise from Reservists' civilian employment.⁶ However, it does not appear to regulate conflicts of interest arising upon a member's re-engagement with the ADF following a period of separation.

10.6 The Defence Instruction on conflicts of interest and acceptance of offers of gifts and hospitality contains a general duty to disclose conflicts of interest.⁷ As it is expressed as applying to 'all ADF members' without defining the term 'member', it appears to extend to Reservists employed in part-time service. However, the Instruction refers back to the procedures set out in the Instruction on the disclosure of interests (DI (G) PERS 25-3) for the notification of such conflicts. As noted above, the latter Instruction does not apply to ADF Reservists engaged in part-time service.

10.7 Cumulatively, these Instructions evince Defence's appreciation of the substantial risk in procurement processes that the outside employment or other private interests of Defence members—including Reservists—may create actual or perceived conflicts of interest. However, the limited definition of 'ADF member' in the Instructions on secondary employment and conflicts of interest means that this in-principle awareness is not reflected comprehensively at a procedural level.

10.8 While the committee welcomes the reforms announced by Defence, it notes that the measures identified in the Department's submission were limited expressly to Reservists who are engaged in continuous full-time service.⁸ Accordingly, the

4 DI (G) PERS 25-2, paragraph 3(c); DI (G) PERS 25-3, paragraph 3. See further, Deloitte Review p. 19.

5 Defence Instruction (General) PERS 25-4—Notification of post-separation employment, annex a.

6 DI (G) PERS 25-4, annex b, paragraph 3.

7 High-level statements on the disclosure and management of conflicts of interest also appear in various other Defence policy documents and industry publications. See for example, Department of Defence, *Guidance on Conflict of Interest Issues for Defence Personnel*, Circular Memorandum No 53/98, [1]; Department of Defence, *Defence and Industry—an Ethical Relationship* (1998), pp. 2–4; Department of Defence, *Ethics Matters in Defence Resource Management* (2002), pp. 10–12.

8 Department of Defence, *Submission 5*, p. 35.

committee is concerned that neither the current Instructions nor the proposed reforms appear to apply to Reservists who are engaged on a part-time basis.

Recommendation 2

10.9 The committee recommends that Defence reviews all Defence Instructions and related documents in respect of Reservists, full or part time, to ensure that real and potential conflicts of interest that might arise as a result of past, current or post separation employment are identified, reported and managed appropriately. In particular:

- (a) Defence considers whether Defence Instructions DI(G) PERS 25-2 (Employment and voluntary activities of ADF members in off-duty hours) and DI(G) PERS 25-3 (Disclosure of interests of members of the ADF) should be extended to Reservists who are not engaged in continuous full-time service; or**
- (b) if there is no intention to extend the application of DI(G) PERS 25-2 and DI(G) PERS 25-3 to Reservists who are not engaged in continuous full-time service, Defence develops specific policies covering the civilian employment of, and the disclosure of conflicts of interests by, these personnel.**

The contractual management of conflicts of interest

10.10 The Defence Instruction on post-separation employment referred to above makes reference to the contractual management of conflicts of interest. It notes the inclusion in Defence contracts of standard provisions governing contractors' engagement of former Defence personnel. These provisions generally require contractors to disclose the proposed use of former Defence personnel, and in certain circumstances seek written approval from Defence before engaging such personnel.⁹

10.11 As mentioned in chapter 3, a provision of this nature was included in the Deed of Standing Offer. Under Clause 22, Adagold was required to:

- ensure that any of its employees who were former Defence employees complied with the requirements of the Defence Instruction on post-separation employment; and
- seek the prior written consent of Defence before permitting a person to contribute to the performance of services provided under the deed, where that person was a Defence employee in the previous 12 months.

10.12 The clause required Defence, in assessing a contractor's application, to consider:

- the character and duration of the person's engagement with Defence and the contractor; and

9 DI(G) PERS 25-4, paragraph 28.

- the potential for real or perceived conflicts of interest; and
- the effects of withholding permission on the person's employment opportunities or the performance of the deed.

10.13 As mentioned in Chapter 6, the AGS Review found that Adagold did not comply with this clause before seeking the assistance of Major Charlton, through AIS, in the preparation of its tender response. However, as the clause was not expressed as a mandatory condition of participation, AGS concluded that it was open to Defence to accept Adagold's tender response despite its non-compliance. This finding may well be valid but it then raises the question about what is the point in having such a clause if it can be ignored with impunity.

10.14 Even so, the committee is concerned by the conclusion reached by AGS that it was unlikely Defence would have withheld approval had Adagold complied with clause 22 and sought permission to obtain Major Charlton's assistance in the preparation of its response. The basis for this conclusion was that Major Charlton's engagement in JMCO Brisbane was unrelated to the procurement and, consequently, 'the potential for real or perceived conflicts of interest or probity objections would have been assessed as low'.¹⁰

10.15 While it may be that Defence would have assessed the potential for conflicts of interest as low, it does not follow that such an assessment would have been reasonable in the circumstances of the procurement. Defence should have been sensitive to the heightened potential for probity objections and perceived conflicts of interest and the adverse impact they may have on procurement outcomes. Defence had received Strategic's preliminary concerns about the involvement of Major Charlton in Adagold's tender response. Notwithstanding these complaints, and the receipt of Major Charlton's declaration of a potential conflict of interest, Adagold's compliance (or the failure thereof) with clause 22 does not appear to have been considered at any stage in the procurement process.

10.16 The committee considers that compliance with contractual clauses on conflicts of interest should be given closer attention in future procurements. It is also encouraged by Defence's proposed review of its standard contractual provisions on the use of former Defence personnel and post-separation employment, to clarify and strengthen probity arrangements.¹¹ It requests that Defence keep it informed of progress in this regard.

Adherence to risk management measures documented in the tender evaluation plan

10.17 The committee is concerned that the 2010 tender process has highlighted multiple failures to adhere to documented risk management processes, namely:

10 AGS Review, p. 7.

11 Department of Defence, *Submission 5*, p. 35.

-
- security measures to confidential tender files were not applied in a timely way;
 - conflict of interest declarations by tender evaluation team members were not signed before the evaluation process began and were deficient in their coverage; and
 - specific probity briefings to tender evaluation team members were not provided prior to the commencement of the evaluation process.

10.18 In light of the probity concerns outlined above, the committee considers that compliance with probity measures should be prioritised in future procurements of air sustainment services to the MEAO. In this respect, the committee welcomes Defence's proposed reforms to the use of conflict of interest declarations. The committee understands that all Reservists on full-time or part-time service employed in procurement or contract management activity will be required to sign a conflict of interest declaration prior to their engagement for that duty. In addition, the committee understands that commanding officers or supervisors will be required to make a risk-based assessment as to which other Reserve personnel under their supervision must complete a declaration, and must document their decisions.¹²

10.19 Irrespective of Defence's broader reform timeframes, it is essential that these measures are implemented, as a matter of priority, in any future tenders of the MEAO contract. Further, in assessing the need for Reserve personnel to sign declarations, the committee emphasises the importance of identifying and considering Reservists' civilian employment or other financial interests in the commercial air charter industry—as well as their professional and social relationships with persons holding such interests.

10.20 The committee also supports the findings of the Deloitte Review in respect of the scope of conflict of interest declarations.¹³ It considers that all future conflict of interest declarations should routinely address the matters identified in that review — 'declarations should include possible conflicts arising from employment, prior employment other financial interests in potential suppliers or relationships with persons who have interests in these organisations'. In line with the observations made in the AGS' review, the committee also notes the importance of all personnel, including people involved in the preparation of request documents, signing conflict of interest declarations before embarking on their respective tender work.

Recommendation 3

10.21 The committee recommends that, prior to the re-tendering of any future contracts for the provision of air sustainment services to the MEAO, Defence ensures that:

12 Department of Defence, *Secretary's Opening Remarks* (tabled 29 March 2011), pp. 20–21.

13 See chapter 6.

- (a) all Reserve personnel involved in the procurement complete a conflict of interest declaration; and**
- (b) commanding officers or supervisors in 1JMOVGP:**
 - (i) make a risk-based assessment as to which other Reserve personnel must complete a conflict of interest declaration and which personnel do not;**
 - (ii) in making a risk-based assessment, give consideration to identifying and obtaining conflict of interest declarations from Reservists who have associations with the commercial air charter industry. Such associations may include:**
 - present or previous civilian employment with air transport providers;**
 - financial interests in these companies or related companies; or**
 - professional or social relationships with members or employees of these companies; and**
 - (iii) document their decisions whether or not to require these Reservists to complete a conflict of interest declaration.**

Recommendation 4

10.22 The committee recommends Defence ensures that, in all future procurements of air sustainment services to the MEAO:

- All members of tender evaluation boards and working groups, and all persons involved in the development of requests, sign conflict of interest declarations. Such declarations:**
 - (a) should be signed prior to the commencement of the tender evaluation process or the development of the request (as applicable); and**
 - (b) include declarations about possible conflicts of interest arising from their employment, prior employment, financial interests in potential suppliers or relationships with persons who have interests in potential suppliers.**
- All members of tender evaluation boards and working groups receive specific briefings on conflicts of interest and other probity matters, prior to the commencement of tender evaluations.**

Conclusion

10.23 In considering its terms of reference with respect to governance arrangements, the committee finds that:

- there was insufficient evidence to determine whether the decision to award the contract to Adagold was influenced by any vested interests, outside influences or any other perceived or actual conflicts of interest;
- while departmental personnel in the tender process may not have breached Commonwealth procurement policy or procedure they certainly failed to heed strong advice and guidance provided in these documents on managing probity risk; and
- the governance arrangements were inadequate and did not protect the process from perceived conflicts of interest. There was, however, no convincing evidence that those with a potential conflict acted improperly.

10.24 The committee has made a number of recommendations designed to improve the way in which risk management and probity concerns are managed in future tenders. The most important is the appointment of a probity adviser for such complex tender processes and the implementation of a more robust system governing conflicts of interest protocols especially as they relate to reservists. When it comes to probity matters, the committee believes that Defence needs to strive for best practice rather than mere compliance with the wording of Commonwealth procurement policy documents.

Chapter 11

Findings on tender design

11.1 This chapter outlines the committee's findings and recommendations on the design of the tender. That is, the technical requirements and tender conditions set out in the request documentation. In particular, the committee is required under its terms of reference to consider the following matters relevant to the design of the tender:

- the requirements of tenders and how effectively these will be met;¹ and
- the methodology and adequacy of the decision process 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.²

11.2 During the course of the inquiry a number of matters were raised not only with respect to the design of tender documents but with the process of preparing and releasing tender documents and in the evaluation of tender responses. The committee considers the adequacy of communication and consultation, the quality of the documentation, including the TEP and the SER and the checking and verification of calculations in the SER. It looks at key issues raised before the committee pertained to:

- the decision to re-tender;
- the technical specifications, in particular the cargo volumetric capacity and preference for a single aircraft solution;
- the tender response period; and
- the tender evaluation criteria and their application.

Decision to re-tender, specifications and timeframe

11.3 It was alleged by Strategic that the first three matters did not reflect operational need, were not commercially justifiable in terms of value for money, and were designed to disadvantage the existing operator in favour of a foreign, broker-based solution.

The evidence

11.4 Having regard to the factors cited by Defence, the committee is satisfied that there was a sound business case for re-tendering the 2008 contract. Defence identified an opportunity to achieve significant cost savings as a result of the global financial crisis which created excess capacity in the commercial air charter industry; a decline

1 Terms of Reference, paragraph (a)(ii).

2 Terms of Reference, paragraph (a)(v).

in demand for international passenger air travel, shrinking aviation industry profitability, idle aircraft and falling charter rates.³ It also noted that re-tendering was appropriate in light of the numerous amendments to the 2008 contract which 'had significantly altered' the agreement.⁴ These changes were in areas including fuel allocation, routing, block hours flown, pricing structure, the aircraft used and consequent load-splitting arrangements in relation to cargo.⁵ The committee notes the findings of the Deloitte review that the decision to tender was 'based on a reasonable expectation of achieving a better value for money outcome for the Commonwealth'.⁶ The AFCD review stated that the decision to re-tender was based on 'valid commercial and operational considerations'.⁷

11.5 The committee is also satisfied that the design of the RFT was supported by operational need, and was not intentionally designed to advantage or disadvantage individual respondents. It accepts Defence's line of reasoning that there was sufficient evidence of operational need to justify the increased cargo volumetric requirements in item 7.13 of the request, and the preference for a single aircraft solution.

11.6 Indeed, the balancing of these considerations was legitimately a matter of discretion for Defence as purchaser. In the absence of evidence suggesting that the decision to include these requirements was unreasonable, or was based on incorrect (or no) factual information, there would be little utility in the committee making a different assessment of how operational needs should be reflected in the tender requirements. In this respect, the committee notes the findings of the AFCD and Deloitte reviews that the tender requirements were functionally specified in the request, and that consideration was given to cargo-splitting solutions put forward by respondents. The committee also notes the evidence of Defence that the 2010 contract has achieved significant financial savings on the previous contract, and that the additional aircraft capacity has been utilised in the services performed to date.

11.7 The committee makes clear, however, its ongoing interest in this matter. It is concerned to ensure that the technical requirements identified in requests for the provision of air sustainment services—whether under the current contract or under future contracts—continue to be based on documented evidence of operational need. Accordingly, the committee requests that Defence provide it with periodic reports on the ongoing performance of the 2010 contract, including in the realisation of projected savings, the continuing need for the increased cargo volumetric requirements and the contractor's compliance with the tender requirements (see recommendation 8).

3 Department of Defence, *Submission 5*, Attachment A, p. 3; Deloitte Review, p. 12.

4 See paragraphs 3.3–3.5.

5 Department of Defence, *Submission 5*, Attachment A, p. 3. See further, AFCD Review, pp. 16–17; AGS Review, p. 3; Deloitte Review, p. 12; Dr Ian Watt *Proof Committee Hansard*, 29 March 2011, p. 46.

6 See paragraph 6.16.

7 See paragraph 5.7.

11.8 The committee accepts the evidence suggesting that the eight-week tender response period was reasonable. While the limited timeframe inevitably meant that some respondents would not be in a position to meet the aircraft certification requirements, the committee acknowledges that this factor must be weighed against competing considerations. These include, for example, operational needs and the costs associated with granting a longer response period to allow potential tenderers to obtain certification or source aircraft as necessary. Accordingly, the committee considers that the decision to require an eight-week response timeframe was reasonably open to Defence.

Areas for improvement—documentation, consultation and certification

11.9 Both Strategic and the external reviewers raised issues concerning the tender evaluation criteria and their application. The external reviews identified a range of process issues, including a lack of clarity as to the meaning of individual criteria; the potential for duplication of criteria; and the standard of documentation recording the evaluation processes and outcomes. The committee considers that there is scope to improve future practices in the procurement of services from the Air Transport Standing Offer Panel, including:

- procurement planning, particularly the identification of tender requirements;
- communication with potential tenderers;
- the evaluation of tender responses; and
- developing the source evaluation report.

Procurement Planning

11.10 The committee considers that procurement planning could be improved in two respects. First, key planning decisions should be documented at a level of detail that is commensurate to the level of probity risk. In particular, the business case for re-testing the market should be documented thoroughly. The committee notes the findings of the AFCD review in this regard.⁸ In light of proponent grievances about the tender requirements discussed above, the committee also observes the importance of documenting in detail the evidentiary basis for these requirements. Rigorous documentation is particularly important where the revised requirements are greater or more stringent than those of the current contract.

11.11 Secondly, it is important that future procurement plans make sufficient contingency for decisions to re-test the market. Such decisions must be made as early as possible before the expiration of the current contract to allow sufficient lead time for a re-tender if required. The committee is concerned that the time pressures bearing upon the 2010 tender process contributed significantly to the problems encountered. It questions whether the transition between the 2008 and 2010 contracts could have been

8 AFCD Review, p. 5.

better planned. The committee acknowledges that the tight timeframes in the 2010 tender process were driven by a contract commencement date that was aligned to operational requirements in the MEAO. However, it questions whether the decision to re-test the market and the identification of the tender requirements could have been made earlier. This would have minimised the time pressures on the 2010 tender process.

Communication with potential tenderers

11.12 To manage the risk of proponent grievances, the committee considers that communication with potential tenderers could be strengthened in several respects. First, future procurement strategies should continue to include a requirement that standing offer panel members are provided with advance notice of any decisions to re-tender, prior to the release of the request. As noted by the Deloitte Review, this was not adhered to in the 2010 tender process. In the committee's view, early notification may assist potential tenderers in meeting narrow timeframes and help prevent perceptions that such timeframes may be motivated by uncommercial interests.

11.13 Secondly, the committee notes the importance of providing a clear and consistent explanation to potential tenderers of how Australian industry participation is assessed in the tender evaluation process. That is, its consideration within the overall assessment of value for money. The correspondence between Strategic and 1JMOVGP in April 2010 indicates that there may be some industry confusion about this matter.⁹

11.14 Thirdly, the committee considers that aspects of the tender process could be better communicated to potential tenderers, to ensure clarity of understanding and minimise the risk of potential proponent grievances. These include:

- (a) providing potential tenderers with an explanation of the reasons for re-tendering and the changed tender requirements;
- (b) providing potential tenderers with an explanation of how the evaluation criteria referred to in the request document will be assessed; and
- (c) including in the request documentation an express statement of Defence's preference for a single aircraft solution (or any other preferred solution that is identified in future requests), and the fact that alternative solutions will be considered.

Tender evaluation

11.15 The committee notes the shortcomings identified by the external reviews in the development of the tender evaluation plan, the tender evaluation criteria, the documentation of evaluation results and other matters of process in relation to the

9 See, for example, Mr Shaun Aisen, email correspondence to Lieutenant Colonel Andrew Hall, 8 April 2010.

tender evaluation. Such failings increased the likelihood of mistakes such as the possibility of double counting the same issue because of the lack of clear guidance in the TEP.¹⁰ The committee endorses the observations made by the external reviews and, in particular, considers that Defence should take action on the following matters:

- (a) In the development of the TEP, there should be early and ongoing consultation with relevant line areas within Defence on the evaluation processes—in particular, advice should be obtained from FIS on the agreed pricing model and the financial evaluation processes.¹¹
- (b) The request documentation and the deed of standing offer should identify expressly:
 - (i) provisions which are minimum conditions of participation, minimum form and content requirements or other essential requirements; and
 - (ii) how Defence will treat completed requests that do not comply with requirements expressed in mandatory language.¹²
- (c) Future TEPs should document the following, to ensure a transparent, consistent and complete assessment of all tender responses:
 - (i) a full outline of the tender evaluation methodology, in particular the scoring methodology and pricing models adopted by the TEB and the TEWGs;¹³ and
 - (ii) detailed guidance as to how the tender evaluation criteria are to be applied, to ensure that there is no overlap between criteria, such that issues are assessed multiple times.¹⁴
- (d) The tender evaluation process should be improved through the following measures:
 - (i) ensuring effective consultation between elements of the tender team during the evaluation process—particularly between the technical and financial TEWGs;¹⁵
 - (ii) requiring the TEB to produce a separate report on its initial compliance assessment against the evaluation criteria for which it is responsible;¹⁶ and

10 See paragraph 6.56, AGS Review, p. 79.

11 AFCD Review, pp. 11, 12.

12 AGS Review, pp. 7, 10–11.

13 AFCD Review, p. 11.

14 AGS Review, p. 10.

15 AFCD Review, pp. 11, 12.

16 AFCD Review, p. 10.

- (iii) ensuring that the SER transparently and accurately communicates the evaluation processes, and explains the outcomes in detail. In particular, future SERs should include the matters identified by the AFCD and AGS Reviews, and subsequently incorporated into the revised SER.¹⁷

11.16 As noted earlier the committee had two particular concerns relating to the evaluation process—the observation about unequal treatment on the leasing arrangements with the respective aircraft owners and a mathematical error. The committee notes that the concerns about the unequal treatment were rectified in the final SER.

11.17 In its submission, Defence noted that the TEB was reconvened to re-validate the SER. In the process a mathematical error was discovered and reversed the order the second and third ranked tenderers.¹⁸ When asked about the consequences stemming from this mistake, Mr Brown agreed that it was a good point. He stated:

If it had been close, which it was not—and thankfully we found it before the contract was awarded, as a result of this investigation the gap was such that it did not matter, but it did swap two to three on a fuel calculation. It was a computation within the spreadsheet where the error was found. Again it goes to the point of the probity auditor, 'Have you had an audit done of the Excel spreadsheet?'

11.18 Along similar lines, Dr Watt told the committee that 'the real difference is that the tenders were chalk and cheese'—'that is the thing that is hard to get away from in all of this'. The committee notes, however, the statement in the AFCD review, noted earlier, that there 'was very little difference between the top three ranked tender options'.¹⁹

11.19 This mathematical miscalculation and the confusion over the unequal treatment of the leasing arrangements highlights the critical importance of having in place robust protocols and important safeguards governing the evaluation process. The committee is of the view that Defence should ensure that tender documentation, especially in respect of scoring and pricing models is clear, unambiguous and detailed, that there is transparency and consistency in the TEP and that calculations are independently verified.

Recommendation 5

11.20 The committee recommends that Defence:

17 AFCD Review, p. 11; AGS Review, pp. 9–10.

18 See paragraph 6.65.

19 AFCD Review, p. 14.

-
- **In line with the findings of the AFCD Review, considers strategies for the improved documentation of the business case for any future decisions to re-test the market for the provision of air sustainment services to the MEAO.**
 - **Reviews its procurement plan for the current MEAO contract, to ensure that sufficient lead time is provided for the making of any future decisions to re-test the market, and the planning and execution of a procurement process.**
 - **In all future procurements of air sustainment services to the MEAO:**
 - (a) **continues to include in procurement strategies a requirement that members of the Air Transport Standing Offer Panel are given advance notice of any decisions to re-tender the contract, prior to the release of the RFT; and**
 - (b) **ensures that such requirements are implemented.**
 - **Implements strategies to ensure that potential tenderers have a clear and accurate understanding of how Australian industry participation is taken into account in the evaluation of tender responses, as part of the overall value for money assessment.**
 - **On the release of future requests for air sustainment services to the MEAO, implements the following actions to minimise the risk of potential proponent grievances:**
 - (a) **provides potential tenderers with an explanation of the reasons for re-tendering the contract and any changes to tender requirements from the previous request;**
 - (b) **provides potential tenderers with an explanation of how the evaluation criteria in the request documentation will be assessed; and**
 - (c) **includes in the request documentation, where applicable, an express statement of Defence's:**
 - (i) **preferred solution for meeting tender requirements, including technical specifications; and**
 - (ii) **intention to consider alternative solutions.**
 - **As a matter of priority in future tender processes for the provision of air sustainment services to the MEAO, takes action on the tender evaluation issues identified by the Deloitte, AGS and AFCD Reviews, as documented at paragraph 11.15 of this report.**

Conclusion

11.21 The committee found that the decision to re-tender was sound and supported by operational needs and that Defence could justify the change in specifications from the previous contract. It is also of the view that although the time frame for tenderers

to prepare and lodge their tender was tight, it was not intended to deliberately disadvantage any tenderer.

11.22 In respect of the quality of documentation, consultation and certification, the committee found much room for improvement. Because of failings in this area, the committee noted the potential for confusion, inconsistency and errors in calculations during the evaluation, and in some cases the realisation of this potential. Although the SER was re-validated and confirmed the successful tender as the top ranked tenderer, the problems identified in the process cannot help but to undermine the committee's confidence in the robustness of the decision.

Chapter 12

Findings on due diligence and other relevant matters

12.1 In this chapter, the committee provides its findings and recommendations in relation to the balance of its four key areas of concern. The areas remaining for consideration are:

- *matters of due diligence*—whether the tender respondents (and their key personnel and associated companies) were fit and proper persons to contract with the Commonwealth, and possessed the financial and commercial capacity to deliver the contracted services to the requisite quality and standard.¹
- *other relevant matters*—any further issues concerning the probity of the procurement and the tender respondents.²

Due diligence on tender respondents

12.2 The committee is required by its terms of reference to consider the following matters in respect of tender respondents, their key personnel and associated companies:

- 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;³
- 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;⁴
- the adequacy and appropriateness of the processes in determining:
 - 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;⁵

1 Terms of Reference, paragraphs (a)(i),(viii); (b)(i)-(iv).

2 Terms of Reference, paragraph (b)(v).

3 Terms of Reference, paragraph (a)(i).

4 Terms of Reference, paragraph (a)(viii).

5 Terms of Reference, paragraph (b)(i).

- whether the 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 the foreign carrier when they last provided such services;⁶
- 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;⁷ and
- whether issues relating to the respondents, or their related companies, about their contracts in South Africa are such as to warrant their exclusion from consideration on ethical or probity grounds.⁸

Matters of concern

12.3 The committee has limited its examination to Adagold—as the current contract holder—and the company's key personnel and associated entities. The committee comments below on the following matters of concern:

- the assessment by Defence of Adagold's fitness and propriety to contract with the Commonwealth—namely, the consideration of the company's connection to South African tender controversies; its association with Major Charlton; and the safety record of Hi Fly;
- Adagold's financial and commercial capacity; and
- Adagold's capacity to deliver the contracted services to the required quality and standard.

Fit and proper persons

12.4 The committee notes the findings of the Deloitte Review on allegations about Adagold's connection with South African tender irregularities; its association with Major Charlton; and the safety record of Hi Fly.⁹ For the reasons identified in chapter 8, the committee makes no findings on the substance of these allegations, but records its concern that these matters did not appear to have been the subject of due diligence during the initial tender evaluation process.

12.5 In particular, it is unclear how, if at all, the TEP and tender evaluation process considered reputational issues or other matters concerning tender respondents' general

6 Terms of Reference, paragraph (b)(ii).

7 Terms of Reference, paragraph (b)(iii).

8 Terms of Reference, paragraph (b)(iv).

9 Deloitte Review, pp. 21–24 (terms of reference, paragraph 4.6).

fitness and propriety to contract with the Commonwealth. Given the small and competitive nature of the air charter market, the committee is of the view that such matters—and the assessment of their associated risks—should be addressed expressly in the TEP.

12.6 The committee notes the findings of the Deloitte Review that there did not appear to be any criteria within Commonwealth or Defence procurement policy that specify requirements for being 'fit and proper' for the purposes of contracting with the Commonwealth. Nor did Deloitte identify any authoritative guidance on the relevant searches to be undertaken in assessing a respondent's fitness and propriety to contract with the Commonwealth. The committee observes that Deloitte assessed fitness and propriety in terms of whether proceeding to contract with the relevant tenderer could cause the Commonwealth reputational damage.¹⁰

12.7 In the committee's view, the overall fitness and propriety of potential Commonwealth contractors falls squarely within an assessment of value for money. Value for money requires a comparative analysis of all relevant costs and benefits of a proposal—that is, both financial and non-financial—over the entire procurement life-cycle. Two key considerations identified in the CPGs are 'fitness for purpose' and 'the performance history of each prospective supplier'.¹¹

12.8 Accordingly, the committee considers that the overall fitness and propriety of tender respondents, their key personnel, proposed sub-contractors and associated entities should be assessed routinely in all future procurements of air sustainment services to the MEAO. Future TEPs should include criteria setting out requirements or indicators for assessing a tenderer's fitness and propriety to contract with the Commonwealth. TEPs should also identify key searches that should be performed in undertaking assessments, and provide guidance on the possible implications of the outcomes of those searches. These criteria, indicators, searches and relevant persons and entities should be based on those outlined in the Deloitte Review.¹²

12.9 In developing guidance on the consequences of relevant search results, the sole focus should not be on identifying factors that would automatically disqualify a respondent from further consideration. In this respect, the performance of 'fit and proper' inquiries in the first instance should be broader than the task of the AFCD and Deloitte reviews. Those reviews were concerned with identifying reasons that the tender process should not continue. While these factors are clearly important, consideration should also be given to the risk of reputational damage associated with entering into a contract with a respondent who is subject to allegations of impropriety. The potential risk for proponent grievances on the basis of such allegations should also be considered.

10 Deloitte Review, p. 23.

11 CPGs, Division 1, Part 4—Value for Money.

12 Deloitte Review, pp. 21–23.

Recommendation 6

12.10 The committee recommends that in all future procurements of air sustainment services to the MEAO, Defence develops and implements tender evaluation processes for assessing respondents' fitness and propriety to contract with the Commonwealth. Such evaluation processes should:

- (a) identify criteria setting out requirements or indicators for being 'fit and proper' to contract with the Commonwealth;**
- (b) specify searches that may be conducted on tender respondents, their key personnel, proposed subcontractors and any associated companies (for example, parent or subsidiary companies)—including guidance on the scope of the searches;**
- (c) identify the possible implications of the findings of each of the specified searches; and**
- (d) enable the identification and assessment of potential risks arising from issues identified in these searches including:**
 - (i) reputational damage to the Commonwealth, should it proceed to contract with the relevant tenderer; and**
 - (ii) proponent grievances about the relevant tenderer's fitness and propriety to contract with the Commonwealth.**

Financial and commercial capacity

12.11 The committee supports the decision to obtain a performance guarantee from Adagold, and to execute a novation agreement between the Commonwealth, Adagold and Hi Fly. These are appropriate risk management measures having regard to Adagold's business structure and financial position.

12.12 The committee notes, however, two key findings of the Deloitte Review that identified shortcomings in the financial evaluation of tender responses. Firstly, the Deloitte review found that the particular risks arising from the sub-contracting arrangements in Adagold's tender response were not initially identified in the assessment undertaken by the FIS team. Deloitte observed that Adagold was assessed as 'medium risk', suggesting that a performance guarantee may not have been required.

12.13 Given that the membership of the Air Transport Standing Offer Panel includes several charter brokers, the committee considers that future tender evaluation documentation—at least for high value contracts such as the MEAO contract—should contain specific provisions on conducting financial risk assessments of tender responses involving charter broker arrangements.

12.14 Secondly, the Deloitte Review identified a further instance in which the circumstances of charter brokers did not appear to have been adequately considered. Under the terms of the request, tender respondents were required only to submit the

financial statements of 'the contractor' and not their sub-contractors.¹³ The Deloitte Review indicated that some proponents of broker-based solutions submitted limited financial information on their subcontractors.¹⁴

12.15 Accordingly, the committee considers that all future requests should require tender respondents submitting broker-based solutions to provide the complete financial statements of their proposed sub-contractors.

Recommendation 7

12.16 The committee recommends that Defence includes, in all future tender evaluation documentation for the procurement of air sustainment services to the MEAO:

- **specific provisions on conducting financial risk assessments of tender responses involving charter broker arrangements; and**
- **essential requirement that proposals involving any form of broker-based solution—including sub-contracting arrangements—must include the complete financial statements of the proposed air charter operator and any other proposed sub-contractors.**

Capacity to deliver the contracted services to the requisite quality and standard

12.17 In addition to its earlier comments on the limitations of the external reviews of the tender process, the committee comments on two further issues. First, in its submission to the committee CASA identified a possible limitation in Defence's understanding of the application of the civil aviation safety regulatory regime in respect of charter broker arrangements. CASA stated that:

Charter brokers have no regulatory obligations to CASA, and CASA has no authority to regulate these charter brokers. It is only operators—AOC and FAAOC and permission holders—who must comply with the applicable safety requirements and over whose conduct CASA has any regulatory authority.

Depending on the nature of the arrangements involved in any given case, it is possible that the Department of Defence may not have a clear or complete understanding about the *operator* that will actually be performing the air services contemplated by the contract, as opposed to the charter broker with whom the Department will have dealt.¹⁵

12.18 In light of this comment, the committee encourages Defence to ensure that all personnel involved in the procurement of air charter services understand the operation of the civil aviation regulatory framework in respect of charter broker arrangements.

13 Deloitte Review, pp. 25–26.

14 Deloitte Review, p. 25.

15 Civil Aviation Safety Authority, *Submission 7*, p. 3.

12.19 Second, while acknowledging that Defence has indicated its general satisfaction with Adagold's contractual performance to date, the committee notes the performance reporting, review and management provisions in the deed and the request. The outcomes of future performance assessment under these provisions are of interest to the committee.

Independent, expert scrutiny and continuing monitoring

12.20 Finally, while welcoming the reform program announced by Defence, the committee is concerned to ensure that:

- there is an independent, expert assessment of the lessons learned from the tender—particularly in respect of probity risk management; and
- the implementation of these reforms is monitored closely—especially to ensure that policy reforms are reflected in procurement practice.

12.21 In the committee's view, the Auditor-General would be well placed to conduct two further reviews of the procurement—first, to assess the immediate lessons learned from the 2010 tender process, and subsequently to assess Defence's progress towards implementing reforms.

Request to Auditor-General

12.22 The committee requests that the Auditor-General:

- **Conduct a performance audit of the tender process in respect of RFT AO/014/09, with a focus on probity risk management. In particular, the audit should evaluate the following matters, with a view to identifying any further areas for future improvement:**
 - (a) **Defence's governance arrangements for the identification and management of significant probity risks to the procurement process, including conflicts of interest, confidentiality and proponent grievances;**
 - (b) **Defence's program of procurement governance and process reforms, including those outlined in its evidence to the committee; and**
 - (c) **any other matters considered relevant to probity risk management, or related governance matters, in respect of the procurement of air sustainment services to the MEAO.**
- **After sufficient time has elapsed, conduct a second review to examine Defence's implementation of its program of procurement governance and process reforms. In particular the review should:**
 - (a) **evaluate the implementation progress and impact of the reforms outlined in Defence's evidence to the committee; and**

-
- (b) **recommend, as necessary, any further reforms to probity risk management and other governance arrangements in respect of the procurement of air sustainment services to the MEAO.**

Recommendation 8

12.23 The committee recommends that Defence report back to the committee by 1 May 2012 on the progress being made to implement the reforms it has announced including:

- **the ongoing performance of the 2010 contract, including the cost per mission, the realisation of projected savings, the continuing need for the increased cargo volumetric requirements and the contractor's compliance with the tender requirements;**
- **progress on the establishment of the Centre of Excellence that is intended 'to support a more robust and consistent commercial approach to non-equipment procurement';**
- **the work of the newly created Non-Equipment Chief Procurement Officer; and**
- **the strategies for the recruitment and retention of suitably skilled procurement professionals.**

Broader application of the committee's recommendations

12.24 Consistent with its terms of reference, the majority of the committee's recommendations are specific to the procurement of air sustainment services to the MEAO. However, the committee recognises that the principles and practices underpinning them are of broader application to other procurements, particularly non-equipment procurements. Accordingly, Defence should also consider giving these recommendations broader application as part of its program of non-equipment procurement policy reforms.

Recommendation 9

12.25 Although the majority of recommendations apply to the procurement of air sustainment services to the MEAO, the committee recommends that Defence consider incorporating the principles and practices underpinning them as part of Defence wide non-equipment procurement policy.

Conclusion

12.26 The reviews of the 2010 tender identified deficiencies in the process but, overall, concluded that the flaws were not sufficiently material to render the process unsound. The committee is strongly of the view that Defence should not take comfort from these findings. Aspects of the tender process were sloppy and, in light of the nature of the industry and the behaviour of people in the industry, Defence was particularly inattentive when it came to identifying and managing probity risks. The committee is critical of Defence's heavy reliance on the reviews to salvage the

reputation of the tender process. The reviews were concerned with identifying whether Defence had satisfied the barest minimum requirement that would avoid invalidation of the tender process. Bare compliance is not a desirable procurement outcome.

12.27 The committee remains concerned that the image and reputation of Defence has been diminished by the circumstances which prompted the significant parliamentary and public scrutiny of the 2010 tender process. The incident has demonstrated a lack of understanding, on the part of Defence, of the critical need to identify, assess and manage probity risks effectively.

12.28 The committee is especially concerned that the risks associated with perceived conflicts of interest and the potential for proponent grievances were not afforded appropriate weight in the circumstances of the procurement. Defence possessed significant knowledge of the competitive nature of the market and the long history of controversy associated with the MEAO contract. Despite this knowledge, it failed to implement measures to enable the systematic identification and management of potential probity risks arising from these circumstances—for example, documenting a probity plan, integrating probity issues into the risk assessment framework and appointing a probity advisor.

12.29 Accordingly, the committee cannot accept that these probity risks were identifiable only in hindsight. In the committee's view, they were foreseeable from the commencement of the procurement and should have been given due consideration in risk assessment. Defence's emphasis on the benefits of hindsight¹⁶ and the non-mandatory nature of probity plans and advisors¹⁷ has done little to allay the committee's concerns about the Department's level of insight into probity risk management.

12.30 While the lessons emerging from this incident need not have been learned at such significant cost, the committee welcomes the reforms announced by Defence during the inquiry. These measures may go some way towards addressing the governance and procedural shortcomings evident in the 2010 tender process. The committee has made recommendations for further reforms to enhance those already in train. It has also requested the Auditor-General to conduct a review of the tender process and the reforms announced by Defence, to identify any additional lessons to be learned.

12.31 The committee has highlighted the need for ongoing monitoring of the implementation and effects of these reforms. It is concerned to avoid an 'implementation gap' between documented policy reforms and procurement practice. Accordingly, it has requested the Auditor-General to conduct a second review

16 AFCD Review, p. 12; Mr Geoffrey Brown, *Proof Committee Hansard*, 29 March 2011, p. 88; Dr Ian Watt, *Proof Committee Hansard*, 29 March 2011, p. 88.

17 Department of Defence, *Submission 5*, Attachment A, p. 22;

examining Defence's implementation of these reforms after a suitable time has elapsed.

12.32 The committee also notes the importance of ongoing parliamentary scrutiny of Defence's progress towards implementing reforms, and the performance of the 2010 contract and any subsequent contracts and has recommended that Defence provides periodic updates on these matters.

SENATOR ALAN EGGLESTON
CHAIR

Appendix 1

Public submissions

- 1 Confidential
- 2 Pel-Air Aviation Pty Limited
- 3 Deloitte Touche Tohmatsu
- 4 Confidential
- 5 Department of Defence
- 6 Strategic Aviation Group Pty Ltd
- 7 Civil Aviation Safety Authority

Appendix 2

Public hearings and witnesses

Monday, 28 March 2011—Sydney

Deloitte Touche Tohmatsu

BARS, Mr Peter John, Partner

KRALLIS, Mr Dennis, Partner

Pel-Air Aviation Pty Ltd

FOSTER, Mr Danny, Chief Operating Officer

Tuesday, 29 March 2011—Canberra

Strategic Aviation Group

AISEN, Mr Shaun Michael, Former Executive Director

BLAKE, Mr David William, Chief Executive Officer

PricewaterhouseCoopers

BAKER, Mr Steve, Partner

Civil Aviation Safety Authority

ANASTASI, Mr Adam, Acting Chief Legal Officer, Legal Services Division

Department of Defence

BARNES, Group Captain Robert, Commander, 1st Joint Movement Group

BRENNAN, Air Commodore Peter, Director-General, Assurance, Joint Logistics Command

BROMWICH, Mr Ray, Inspector-General

BROWN, Mr Geoffrey, OAM, Chief Audit Executive

CREET, Ms Karen, Assistant Secretary, Ministerial and Executive Support

DUNSTALL, Mr Harry, General Manager, Commercial, Defence Materiel Organisation

GRIGGS, Rear Admiral Ray, AM, CSC, RAN, Deputy Chief of Joint Operations

LEWIS, Mr Simon, Deputy Secretary, Defence Support

LLOYD, Dr David, Defence General Counsel

MINNS, Mr Phillip, Deputy Secretary, People Strategies and Policy

WATT, Dr Ian, AO, Secretary

Tuesday, 28 June 2011—Canberra

Department of Defence

BROWN, Mr Geoffrey Spencer OAM, Chief Audit Executive,

GRIGGS, Vice Admiral Ray, Chief of Navy

LLOYD, Dr David, Defence General Counsel

WATT, Dr Ian, Secretary
POWER, Mr Steven, Partner, **Clayton Utz**

Australian Government Solicitor
SCALA, Mr John Joseph, Chief Counsel, Commercial

Appendix 3

Tabled documents and answers to questions on notice

Tabled documents

29 March 2011—Civil Aviation Safety Authority—Air operator's certificate, Hifly Transportes Aereos SA of Lisbon, Portugal.

29 March 2011—Department of Defence—Opening statement, Dr Ian Watt AO.

Answers to questions taken on notice

20 May 2011, Deloitte Touche Tohmatsu, answers to questions taken on notice (from public hearing 28 March 2011, Sydney).

27 May 2011, answers to questions on notice Nos 1–5 (from public hearing 29 March 2011).

26 July 2011, Department of Defence, answers to questions taken on notice Nos 6–9 and 11 (from public hearing 28 June 2011, Canberra).

Appendix 4

List of key personnel

Aisen, Shaun	Founder and former Executive Director (until February 2011), Strategic Aviation Pty Ltd
Baker, Steve	Partner, PricewaterhouseCoopers
Barnes, Group Captain Robert	Commander, 1 st Joint Movement Group
Bars, Peter	Partner, Deloitte Touche Tohmatsu
Blake, David	Chief Executive Officer, Strategic Aviation Pty Ltd
Brennan, Air Commodore Peter	Director General, Logistics Assurance, Joint Logistics Command, Defence
Bromwich, Dr Raymond	Inspector General, Department of Defence
Brown, Geoffrey	Chief Audit Executive, Department of Defence
Bullpitt-Troy, Major Lara	Officer Commanding Joint Movements Coordination Centre
Charlton, Major David	Australian Army Reservist
Clark, Mark	Executive Director and Chief Executive Officer, Adagold Aviation Pty Ltd
Cole, Squadron Leader Benjamin	Staff Officer 2 Strategic Lift Coordination Cell, 1JMOVGP
Evans, Lieutenant-General Mark	Commander, Joint Operation Command
Griggs, Rear Admiral Ray	Deputy Chief of Joint Operations
Hall, Lieutenant Colonel Andrew	Staff Officer 1 Operations/Plans, 1JMOVGP
Miripuri, Paulo	Managing Director, Hi Fly Transportes Aereos
Strugnell, Doug	Principal, Financial Investigation Service
Watt AO, Dr Ian	Secretary, Department of Defence

Appendix 5

Chronology of significant events 2005-2011¹

2005

April Following a competitive tender process, Strategic Aviation Pty Ltd ('Strategic') is awarded the first single air sustainment services contract to the MEAO, utilising an Airbus A330-300 aircraft operated by the Portuguese company Hi Fly.

Captain (now Major) David Charlton, an Australian Army Reservist then on continuous full-time service, is the non-voting chairman of the 2005 tender evaluation board which selected Strategic as the preferred tenderer.

In response to allegations of impropriety associated with the 2005 tender, Defence engages legal firm Phillips Fox (now DLA Piper) to conduct an independent external probity review of the procurement. The review concludes that the 2005 tender was conducted in a fair, open and transparent manner, and that no tenderer was disadvantaged in the tender process.

22 June Major Charlton deploys to the Middle East on Operation Catalyst, as Officer Commanding Joint Movements Coordination Centre, MEAO. He returns to Australia on 2 November 2005.

Mid-2005 Defence exercises an option to extend the 2005 MEAO contract with Strategic for a further six months.

2006

5 Jan Major Charlton ceases active Reserve service in the ADF and is appointed General Manager of Strategic.

Defence re-tenders the 2005 MEAO contract. The re-tendered contract is awarded to Strategic for a term of six months, with options for up to four, six-month extensions.

April The Chief Executive Officer and Executive Director of charter broker company Adagold Aviation Pty Ltd ('Adagold'), Mr Mark Clark, returns to Australia from South Africa. Mr Clark had been in South Africa since

1 This chronology was compiled from information taken from many different sources. Please consult the relevant sections in the report for more detail.

February 2004, where he jointly established and held a directorship in the company Adagold Aviation (South Africa).

- May The Australian Federation of Air Pilots writes to the Defence Minister about the alleged non-engagement of Australian pilots under the MEAO contract with Strategic.
- July Allegations are published in the South African media in respect of tender irregularities concerning contracts awarded to Adagold (South Africa) by the South African Government from 2004 to 2006.
- Aug Major Charlton resigns from Strategic and establishes his own airline, Sky Air World Pty Ltd.
- October Defence exercises an option to extend the 2006 MEAO contract for a further six months.

2007

- 28 Feb Mr Mark Clark resigns from his role as Director of Adagold Aviation (South Africa) by letter dated 28 February 2007. According to Mr Clark, the resignation does not appear to have been registered with the South African Registrar of Companies until 5 September 2007.
- July The 7:30 Report airs allegations made by former Strategic employees that the company is breaching aviation safety standards. Strategic responds that it is a victim of 'a commercially motivated campaign' to discredit it.

2008

- Ongoing Major Charlton, through Sky Air World, supports the bid of Adagold Aviation Pty Ltd ('Adagold') for a tender for an air services contract to the Danish Department of Defence. Adagold is awarded this contract in December 2008. The unsuccessful tenderer, Cimber Air, lodges a complaint with the Danish Complaints Board for Public Procurement in relation to the decision to award the contract to Adagold.
- June Defence re-tenders the 2006 MEAO contract. The re-tendered contract is awarded to Strategic for a term of 12 months, with options for two extensions of 12 months each.
- 24 Oct Commencement date for 2008 MEAO contract with Strategic.
- 24 Oct
08 to 09 Defence and Strategic agree to seven contract change proposals that provide amendments to the 2008 contract.
- Dec South African media reports indicate that the South African Defence Department has announced that there were no grounds for concluding

that tenders were improperly awarded to Adagold Aviation (South Africa).

2009

- Ongoing Adagold Aviation Pty Ltd (Adagold) undertakes market assessment and monitoring activities, including performing its own MEAO site assessment in conjunction with Hi Fly, and observing Strategic's freight forwarding arrangements at Brisbane Airport.
- Feb Sky Air World is placed into voluntary administration.
- Major Charlton is engaged as a consultant to the firm Aviation Integration Services Pty Ltd ('AIS'). Through AIS, Major Charlton provides consultancy services to certain members of the air transport standing offer panel in 2009.
- 20 March Major Charlton approaches Army Personnel Agencies seeking to recommence active Reserve service.
- 23 March Defence advises Major Charlton of a Reserve position within the Joint Movement Control Office (JMCO), Brisbane.
- 22 April Defence exercises an option to extend the 2008 contract with Strategic for a further 12 months.
- 24 June Major Charlton is posted to the role of Training Officer in JMCO, Brisbane. Major Charlton continues working for AIS in a civilian capacity and discusses his employment with the Officer Commanding (OC) JMCO, Brisbane, Major Tamara Rouwhorst.
- 6 July Major Charlton commences parading at JMCO, Brisbane.
- According to Defence, the OC ensures that Major Charlton is 'purposely kept away from all operational matters at JMCO Brisbane' including 'anything to do with' the 2008 MEAO contract.
- 4 Sept Adagold representatives meet with Defence personnel to discuss a range of issues. One issue relates to Adagold's plan to present an unsolicited proposal to provide air sustainment services to the MEAO.
- Oct Defence establishes a need to retender the MEAO contract and commences the procurement process (for example, preparation of tender related documents and discussions with Clayton Utz, the law firm engaged to provide legal support on the tender). Defence drafts the procurement strategy. Procurement documentation is stored in a DRMS folder, which is accessible to all personnel employed in HQ1JMOVGP near Bungendore.

The Danish Complaints Board for Public Procurement hands down its decision on complaints made by the unsuccessful tenderer, Cimber Air, in relation to the awarding of the 2008 Danish Defence Department contract to Adagold. Of the 16 heads of complaint, 15 are dismissed entirely and one is partly dismissed. No action is taken to change the award of the contract.

2 Nov The Air Transport Standing Offer Panel is established, comprising thirteen providers which are a combination of air charter brokers and operators.

2010

Early 2010 Defence and Strategic participate in mediation in respect of a refuelling cost dispute under the 2008 MEAO contract.

Jan Upon the changeover of the OC of JMCO Brisbane, the new OC is briefed on Major Charlton's history and the measures in place to keep him distanced from operations and any issues relating to the operation of the MEAO air sustainment contract.

10 Feb Adagold submits a written, unsolicited proposal to Defence entitled 'Middle East Sustainment Aircraft'.

18 March Defence approves the procurement decision to retender the MEAO contract.

23 March Clayton Utz provides oral advice to Defence in respect of the appointment of a probity advisor to the procurement. On consideration of this advice, Defence determines not to appoint a probity advisor.

23 March Defence approves the request for tender (RFT) for the 2010 MEAO contract.

24 March Defence approves procurement strategy for the retender of air sustainment charter services to the MEAO.

25 March Defence approves the tender evaluation plan (TEP).

29 March The RFT is issued to standing offer panel members.

30 March Major Charlton verbally declares a potential conflict of interest in his role as a member of the JMCO Brisbane, having been approached, through AIS, to assist with the tender responses of three standing offer panel members one of whom is Adagold.

30 March Mr Shaun Aisen, the Executive Director of Strategic corresponds with

- to 9 April members of 1JMOVGP, Group Captain Robert Barnes and Lieutenant Colonel Andrew Hall, to express Strategic's concerns about the upcoming tender process.
- 31 March AIS elects, in consultation with Major Charlton, to assist Adagold with its tender response.
- 1 April Major Charlton ceases parading at JMCO Brisbane on the instruction of the OC, Major Lara Bulpitt-Troy.
- 13 April Major Charlton commences parading as a visitor at the Directorate of Army Safety Assurance, followed by Headquarters 11 Brigade while awaiting further posting instructions.
- 23 April Defence conducts an industry briefing of standing offer panel members.
- April-June Defence provides additional tender clarifications at the request of standing offer panel members through Request for Information (RFI) notices.
- 1 June RFT closing date.
- 2 June to 8 July Defence undertakes the tender evaluation process.
- 16-24 June Members of the relevant Tender Evaluation Organisation (comprising the Tender Evaluation Board and working groups assisting the board) within Defence sign conflict of interest declarations to the effect that they:
- acknowledge their obligations as members of the APS or ADF;
 - are aware that they are subject to the relevant legislation governing their employment as members of the APS or ADF while carrying out their duties in the tender evaluation process;
 - do not have conflicts of interest (real or apparent) with their duties; and
 - will immediately advise the Chair of the Tender Evaluation Board or their supervisor if they have or become aware of a conflict of interest.

Members of the Tender Evaluation Organisation were not provided a specific briefing on conflicts of interest and other probity matters.

Subsequent to the tender evaluation process, members of the Tender Evaluation Board sign further conflict of interest and probity declarations covering possible conflicts of interest arising from employment, prior employment or financial interests in the organisations who may be potential suppliers, and relationships with persons who have interests in these organisations.

- July Defence applies access controls to the DRMS file containing tender documentation for the 2010 MEAO procurement. The folder is now accessible only to personnel directly involved in the 2010 tender process.
- 1 July Major Charlton is posted to Army Active Stand-by Staff Group on promotion to Major, undertaking project work for Headquarters 11 Brigade and the Directorate of Army Safety Assurance.
- 9 July Clayton Utz provides a letter to Defence outlining the findings of its review of the draft Source Evaluation Report (SER).
Defence finalises the SER and identifies Adagold as the preferred tenderer.
Defence provides verbal advice to Adagold that it is the preferred tender and to Strategic Aviation that it is not the preferred tenderer.
- 12 July Defence formally communicates the tender results to all participating tenderers.
- 14 July Mr Aisen writes to the Defence Inspector-General, Dr Raymond Bromwich, raising concerns about the tender process. Mr Aisen raises further allegations in nine additional items of correspondence to the Inspector-General and Chief Audit Executive, Mr Geoffrey Brown, between 16 July and 18 August 2010.

Mr Aisen forwards this correspondence to the Chair of the Senate FADT Legislation Committee, raising several concerns about the 2010 tender process and recommends that the committee 'intervene to independently review the tender and its evaluation'.
- 15 July The Secretary, Department of Defence, Dr Ian Watt, instructs the Defence Chief Audit Executive to conduct a probity review of the 2010 tender process. The Defence Audit and Fraud Control Division (AFCD) commences scoping the review.
- 19 July AFCD commences its probity review.
- 20 July Defence issues a media release announcing the AFCD probity audit.
- 27 July Defence conducts initial contract negotiations with Adagold.
- From July 2010 Defence begins implementing initiatives to improve non-equipment procurement (NEP) arising from the Defence White Paper 2009.
- 16 Aug PricewaterhouseCoopers (PwC) is engaged by Defence to conduct an independent peer review of the AFCD probity audit of the tender process

- 18 Aug Defence provides a formal letter of engagement to PwC in relation to the independent peer review of the AFCD probity audit.
- 24 Aug Defence approves the contract for the provision of air sustainment charter services with Adagold. The contract is not signed.
- 26 Aug On completion of the AFCD review, Defence briefs the (then) Minister for Defence, Senator the Hon John Faulkner, on the outcome of the review in a written submission. The Minister notes Defence's intention to proceed to contract with Adagold, subject to the agreement of the Department of Prime Minister and Cabinet.
- 27 Aug On the request of Minister Faulkner, Defence provides a copy of the ministerial submission to the Shadow Minister for Defence, Senator the Hon David Johnston, under caretaker provisions.
- 26 Aug Defence Chief Audit Executive, Mr Geoffrey Brown, writes to Mr Aisen advising him of the outcome of the AFCD review.
- 28 Aug Mr Aisen responds to Mr Brown's letter of 26 August, re-iterating his concerns about suspected conflicts of interest arising from the employment of Major Charlton in 1JMOVGP. Mr Aisen calls for a 'full, independent inquiry' into the procurement.
- 31 Aug Senator Johnston raises additional concerns about the 2010 tender process during a meeting with Defence, and subsequently records these concerns in a letter to Dr Watt dated 31 August.
- Defence convenes an internal meeting to discuss and develop the terms of reference for subsequent independent probity reviews of the 2010 tender process before taking any decision to proceed to contract.
- 2 Sep An article published in the *Age* reports allegations of impropriety in respect of the 2005 tender process. These allegations concern the provision of privileged information on tender specifications to Strategic before the release of the RFT. The article also reports on an alleged connection between Adagold and tender irregularities in procurements conducted by the South African and Danish defence departments.
- Defence engages the Australian Government Solicitor (AGS) from its legal services panel to conduct a legal and legal process review of the procurement process.
- Defence engages Deloitte Touche Tohmatsu (Deloitte) from its management consultancy panel to undertake a probity review of the procurement process.
- 6-15 Sept The tender evaluation board (TEB) undertakes a re-validation of the original SER and subordinate documents raised during the original

	tender evaluation process. The re-validated SER confirms Adagold as the preferred tenderer.
10 Sept	Defence refers matters concerning the 2005 MEAO contract to the Australian Federal Police for investigation.
13 Sept	Defence issues a media release announcing the referral of matters concerning the 2005 contract to the AFP.
15 Sept	<p>Deloitte provides its probity review report to Defence. The review concludes that nothing had come to Deloitte's attention to indicate that Defence should not proceed to contract with Adagold, but identifies several areas for improvement.</p> <p>AGS provides its legal and legal process review to Defence. The review concludes that the procurement process complies with the deed of standing offer under which the process was let, that it complies with Commonwealth and Defence procurement policy, and that there is no evidence of impropriety in the conduct of the process. AGS identifies areas for improvement in respect of SER and Tender Evaluation Working Group reports, to ensure greater accuracy and transparency in the documentation of evaluations.</p> <p>Defence approves the re-validated SER.</p>
Sept-Oct	<p>Defence implements findings and recommendations of the procurement reviews. These include:</p> <ul style="list-style-type: none"> • including in the deed of standing offer a performance guarantee to the value of \$2m (underwritten by the Commonwealth Bank of Australia); and • executing a novation agreement between Adagold, Hi Fly and Defence, enabling Defence to novate the contract to Hi Fly should Adagold become insolvent.
21 Sept	Defence issues an RFT for an interim MEAO contract, for four flights between 26 October and 4 November 2010.
6 Oct	The Defence Minister provides approval to proceed with the interim contract, which is awarded to Strategic.
7 Oct	An interim contract change proposal is signed by Defence and Strategic for four flights between 9 and 18 November 2010.
8 Oct	PwC provides its report on its independent peer review of the AFCD probity audit to Defence.
15 Oct	Defence briefs Senator Johnston on the 2010 contract approval.

- 19 Oct The Senate FADT Legislation Committee questions Defence about the 2010 tender process at supplementary budget estimates hearings.
- 20-21 Oct The Defence Minister approves the 2010 contract for signature.
- 22 Oct The 2010 contract is signed by Adagold and Defence.
- 23 Oct The 2008 contract concludes.
- 26 Oct to 18 Nov Strategic performs the interim MEAO air sustainment contract.
- 26 Oct CASA issues a FAAOC to Hi Fly for the period 1 November 2010 to 31 October 2011. The certification includes two Airbus A340-300 aircraft.
- 23 Nov 2010 MEAO contract commences. Adagold performs its first flight to the MEAO.
- 24 Nov The Senate refers an inquiry into the Department of Defence's request for tender for aviation contracts and associated matters to the FADT References Committee, for report by 1 May 2011.

2011

- Feb The Senate FADT Legislation Committee questions Defence about the 2010 tender process at additional estimates hearings.

Mr Shaun Aisen resigns as Executive Director of Strategic.
- 28-29 Mar The Senate FADT References Committee holds public hearings in Sydney and Canberra.
- Mar Defence implements non-equipment procurement reforms arising from the Defence White Paper 2009.
- 27 April The Senate FADT References Committee provides an interim report to the Senate, stating its intention to provide a final report on 23 June 2011.
- Mid 2011 Defence begins implementing reforms to its post-separation employment policy framework, which are due to be rolled out by late 2011.