

Report 9 of 2021

Probity of the processes
for the heavy rail
service contract



Report of the Auditor-General

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Probity of the processes for
the heavy rail service contract

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*The Auditor-General's Department acknowledges and respects
Aboriginal people as the State's first people and nations, and
recognises Aboriginal people as traditional owners and occupants of
South Australian land and waters.*



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Dear President and Speaker

**Report of the Auditor-General:
Report 9 of 2021 *Probity of the processes for the heavy rail service contract***

Under section 31(2) of the *Public Finance and Audit Act 1987* (PFAA), I have conducted an audit of the probity of the processes leading to the awarding of the heavy rail service contract.

As explained in section 3 of my report, the objective of the examination was to conclude on the effectiveness of the procurement process for heavy rail passenger transport services for metropolitan Adelaide. To do this we assessed:

- the probity of the process leading up to the awarding of the service contract for the provision of heavy rail passenger transport services in metropolitan Adelaide
- whether the service contract met the requirements of the *Passenger Transport Act 1994*.

I present to each of you my independent assurance report on the findings of the audit.

A copy of this report has also been provided to the Treasurer and the Minister for Infrastructure and Transport.

Content of the Report

We examined the procurement process established by the Department for Infrastructure and Transport for contracting out the heavy rail passenger transport services for metropolitan Adelaide

My conclusions are outlined in section 1.2 of the Report.

My responsibilities

Audits conducted under section 31(2) of the PFAA are assurance engagements that assess whether a public authority is achieving economy, efficiency and effectiveness in its activities. These engagements conclude on the performance of the activities evaluated against identified criteria.

The Auditor-General's roles and responsibilities in undertaking examinations are set out in the PFAA. Section 31(2) of the PFAA empowers me to conduct this examination while section 37 deals with the reporting arrangements.

The examination was conducted in line with the Standard on Assurance Engagements ASAE 3500 *Performance Engagements*. We complied with the independence and other relevant ethical requirements for assurance engagements.

Acknowledgements

The audit team for this Report was Salv Bianco, Philip Rossi, Jodie Fitzgerald, Stephen Gladigau, and Simon Altus.

We appreciate the cooperation and assistance given by staff of the Department for Infrastructure and Transport during the review.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richardson', with a long horizontal flourish extending to the right.

Andrew Richardson
Auditor-General

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1 Executive summary

1.1 Introduction

Under the *Passenger Transport Act 1994* (PTA) the Minister for Infrastructure and Transport (the Minister) is responsible for providing passenger transport services in South Australia.

The PTA allows the Minister to award service contracts for the operation of regular public transport services by tender or other such means as the Minister thinks fit. In 2019, the SA Government decided to invite tenders for heavy rail passenger transport services from private contractors for the first time.

The Department for Infrastructure and Transport (DIT) plans, regulates and funds public transport services across South Australia in line with the PTA.

On 18 September 2020, following a procurement process run by DIT, the Rail Commissioner¹ executed a contract, the Outsourced Rail Operations Agreement (OROA), with Keolis Downer for heavy rail passenger transport services.

The contract is for eight years (through to 4 February 2029) with a value estimated by DIT of \$1.374 billion inclusive of GST. There is an option for the Minister to extend for a further four years at a further value estimated by DIT of \$764 million inclusive of GST. Over the 12-year term the contract value is therefore estimated to be \$2.138 billion inclusive of GST.

Keolis Downer started providing the services from 31 January 2021. Under terms and conditions set out in the OROA, the SA Government has retained ownership of the rail system infrastructure and assets, and responsibility for setting and receiving fares and setting the requirements for service delivery. Keolis Downer is required to perform all work necessary to maintain the rail assets to the SA Government's specified standards, and to operate trains and deliver services to the schedule and performance standards determined by the SA Government.

Consistent with section 39(3f) of the PTA, we examined the contract and:

- reviewed the probity of the procurement process leading up to the awarding of the contract
- assessed whether the contract complies with the requirements of the PTA.

To assess probity in this review we identified key probity principles that are necessary to demonstrate that the procurement process was fair, transparent and defensible. They are outlined in section 3.4.

¹ The Rail Commissioner is appointed under the *Rail Commissioner Act 2009*. Its powers and functions are outlined in that Act and include entering into service contracts relating to the operation of passenger transport services under the PTA. The Minister and the Rail Commissioner entered into an agreement that sets out the conditions that the Rail Commissioner can subcontract the operation of the Adelaide metropolitan passenger rail network.

This Report communicates the outcome of our review. The PTA requires the Auditor-General's Report to be delivered to Parliament within four months of receiving a service contract and report from the Minister. I received a report from the Minister on 15 October 2020. Accordingly, the due date for my Report was 15 February 2021.

As explained in my Report to Parliament in February 2021,² I had not completed all the audit procedures to my satisfaction to form a conclusion for this audit by 15 February 2021. My Report of February 2021 also explains the factors impacting my capacity to complete the audit within the four-month statutory time frame.

I took legal advice and formed the view based on this advice that the time limit specified in section 39(3f) of the PTA does not allow for the Auditor-General to conduct an audit under the PTA, or deliver a report after the expiry of the four-month period. I was also advised that an audit could be conducted and a report prepared for Parliament under the *Public Finance and Audit Act 1987* (PFAA).

I have now completed the necessary procedures to my satisfaction.

Consequently, I have prepared this Report under sections 31(2) and 37 of the PFAA to conclude on the matters required by the PTA.

1.2 Conclusion

Based on my audit of the effectiveness of the procurement process for heavy rail passenger transport services for metropolitan Adelaide, I formed the following conclusions.

1.2.1 Probity of the process

I concluded that DIT designed and applied processes throughout the procurement that were consistent with sound probity principles for a transaction of this size and nature. I did not identify evidence of any specific probity matters that would suggest the procurement process was compromised.

Key findings that support my conclusion include that DIT:

- established clear and sound governance arrangements
- set up probity principles for the procurement
- designed and used detailed plans for the acquisition, evaluation and negotiation stages
- communicated clear procurement objectives, process rules and timelines to proponents
- engaged an independent probity advisor throughout the process
- established and implemented sound processes to negotiate with Keolis Downer.

Two particularly notable events occurred during the procurement, which I believe will be of interest to the Parliament.

² Auditor-General's Report 4 of 2021 *Passenger transport service contracts: Heavy rail*, February 2021.

Firstly, in March 2020, the outbreak of the COVID-19 worldwide pandemic was declared a South Australian public health emergency. This pandemic presented unique circumstances and challenges that impacted the heavy rail procurement. In April 2020, DIT made several amendments to the procurement process with the aim of ensuring delivery of the invitation to supply outcome and maintaining a competitive process. All proponents had the opportunity to consider how these amendments affected their involvement in the procurement.

In my opinion, the amendments were a reasonable response, ensuring there was an opportunity for the procurement process to continue in the circumstances COVID-19 created. My audit did not identify any matters that suggested these changes compromised the procurement process.

Secondly, in August 2020, late in the procurement, unauthorised disclosure of confidential information from the process was made to local media and was subject to debate in Parliament. Disclosure of confidential information during the process was a breach of the procurement probity principles. My examination of the available evidence on this matter did not identify any issue that indicated that any proponent was advantaged or disadvantaged by the unauthorised disclosure. I note that DIT referred this matter to the former Independent Commissioner Against Corruption who then referred the matter back to DIT to investigate. At the time of finalising this Report, this separate investigation had not been completed.

In my opinion, while not compromising the overall probity of the process, the following were specific areas where DIT did not, in all instances, carry out its processes consistent with reasonable probity standards for the procurement:

- recording meetings with proponents
- approval of purchase recommendation prior to finalisation of the final probity report
- documenting the assessment of the probity impacts from the invitation to supply process amendments
- managing some probity advisor arrangements.

My audit also noted there were some areas where specific practices and procedures could be improved. These matters, in my opinion, did not compromise the probity of the process and were not systemic or pervasive, but warrant consideration to improve processes for future procurements.

1.2.2 Compliance with the PTA

I concluded that the service contract met the requirements of the PTA and contained a broad range of contractual provisions that should help to protect the State's interests.

It is essential DIT establish a robust contract management framework and processes to effectively manage the contracts and any related operational and legal risks.

1.3 What we found

1.3.1 Sound processes established

DIT established sound processes to manage the procurement and award the contract, including the following:

- Governance arrangements were established and documented, including the appointment of the DIT Chief Executive as the person responsible for the procurement in line with the PTA.
- A probity plan was developed that included communication protocols. In addition, DIT designed and implemented a number of processes to manage the probity risks of communications/interactions with proponents.
- A probity advisor was engaged early in the procurement process to provide independent probity advice for the procurement. The advisor prepared regular probity reports, including a final written report on the probity of the procurement process.
- An acquisition plan was developed that addressed State Procurement Board (SPB) requirements. It was approved by the SPB's Procurement Approvals Committee before DIT approached the market.
- Amendments to the invitation to supply occurred only after reasonable consideration of the State's interests and proponents' feedback and were made available to all proponents.
- An evaluation plan for the invitation to supply was prepared and approved before tenders were opened and the evaluation of responses followed the process that was established in the plan.
- Sound processes were established and implemented to negotiate with Keolis Downer.
- The contract documents were approved in line with Treasurer's Instruction 8 *Financial Authorisations*.
- Except for one minor matter, the Minister complied with the requirements of the PTA leading up to and following the award of the heavy rail passenger transport service contract.

1.3.2 Disclosure of confidential information

There is evidence that there was unauthorised disclosure of confidential information relating to the procurement process.

Disclosure of confidential information during the process was a breach of the procurement probity principles. This unauthorised release of information was reviewed by the probity advisor and separately by DIT. The review by the probity advisor, reported on 8 September 2020, found that:

- aside from the outcome of a review being conducted by DIT, the procurement process was conducted in line with the probity plan and communication protocols, evaluation and negotiation plans, and probity principles
- the information disclosed was not of a nature that provided any advantage or disadvantage to any proponents or affected the outcome of the process.

I note that DIT referred this matter to the former Independent Commissioner Against Corruption who then referred the matter back to DIT to investigate. At the time of finalising this Report, this separate investigation is ongoing.

My examination of the available evidence on this matter did not identify any issue that indicated that any proponent was advantaged or disadvantaged by the unauthorised disclosure (refer to sections 11.3 and 11.4).

1.3.3 Areas where processes did not meet probity standards

DIT carried out its processes consistent with reasonable probity standards for most areas of the procurement other than for the specific areas of the procurement outlined below.

- Records of matters discussed for some specific meetings with proponents were not maintained (sections 6.3.2, 7.3.4 and 11.5.1).
- The purchase recommendation was finalised and approved by the DIT Procurement Committee before the probity advisor had issued a final probity report on the procurement process. The probity advisor did present a summary of the probity process and findings from probity reports on the evaluation of the invitation to supply and negotiation process at the committee approval meeting. However not having access to the final probity report limited the ability of the DIT Procurement Committee to properly discharge its responsibility for effective governance of procurement (section 10.3.1).
- While, in my opinion, the rationale for introducing the package of amendments, including the offer cost contribution and tender extension during the invitation to supply was a reasonable response to the unprecedented and uncertain circumstances, the assessment of the probity impacts from introducing the amendments was not documented. DIT advised that probity impacts were assessed in its consideration of the amendments but its assessment was not documented (section 7.3.3).
- Managing some probity advisor arrangements including:
 - probity assurance arrangements were not clearly defined, documented and agreed before the engagement started (section 11.5.4)
 - DIT did not ensure probity reports include details required in the acquisition plan and all events with potential probity risks (sections 11.5.6 and 11.5.7)
 - the level of information in the probity register was insufficient and/or incomplete (section 11.5.10).

These matters did not compromise the overall probity of the procurement.

1.3.4 Areas requiring improvement

While most processes and practices implemented by DIT were sound, we did identify some areas that should be improved for future procurements including:

- the Adelaide Rail Transformation Program (ARTP) Steering Committee did not meet for four months from March 2020 to June 2020 and there was no evidence to demonstrate how it maintained its oversight role during the period (section 4.3.2)

- the specialist assessment team’s rationale for not calculating certain risk adjustments as part of the financial assessment of offers was not documented in evaluation reports (section 8.3.2)
- the evaluation panel for the invitation to supply did not document how a shortcoming relating to emission targets in Keolis Downer’s offer was assessed by the panel as a minor risk that could be addressed during negotiations. This matter had been assessed by DIT subject matter experts as being a significant risk. While the evaluation panel considered and formed its own view of the risk raised by the subject matter experts, which was consistent with its role, it should have documented the basis for its different assessment (section 8.3.3)
- six advisors involved in the negotiations did not complete a code of conduct and confidentiality form established specifically for negotiations as required by the negotiation plan. We note these officers did sign a code of conduct and confidentiality form at the start of their role in the procurement (section 9.3.3)
- the procurement communication register did not include some interactions/communications with proponents (section 11.5.2)
- at two interactions with a proponent there was only one State representative. We were advised that these interactions were not related to the heavy rail procurement. Further, for one of these interactions a file note detailing matters discussed was prepared and provided to the probity advisor. However to manage probity risks we consider that at least two State representatives should have been present for the interaction (section 11.5.3)
- records of confidential documents printed and confirmation that they were securely destroyed were not obtained (section 11.5.11)
- the probity plan did not consider some probity risks and did not outline the nature and scope of probity services (section 11.5.5)
- conflict of interest declarations were not obtained from consulting firms engaged to assist in the procurement. We were advised that DIT obtained verbal legal advice that consulting firms did not need to complete a conflict of interest declaration as they have a contractual obligation to disclose any actual and/or potential conflicts of interest if it arises. It is our view that it is sound practice to obtain a positive confirmation on conflicts of interest from consulting firms (section 11.5.8)
- the probity plan requirement to advise the Chair of the ARTP Steering Committee about conflict of interest disclosures and action taken was not followed (section 11.5.9).

1.3.5 Compliance with the PTA

The Minister’s report to the Economic and Finance Committee was not provided within the time frame required by the PTA. We consider this matter is minor in nature and did not impact the procurement process (refer to section 12.2.1).

1.4 What we recommend

To address our findings for processes that did not meet probity standards, we recommend that DIT:

- ensure records are maintained of matters discussed in meetings with proponents (sections 6.3.2, 7.3.4 and 11.5.1)
- ensure the final probity report is provided to those responsible for approving the purchase recommendation before its approval (section 10.3.1)
- document its assessment of potential probity impacts where it considers amending tender conditions during the procurement process (section 7.3.3)
- ensure probity assurance arrangements, including the nature and extent of probity reporting required, are clearly defined, documented and agreed before the probity engagement starts, and that the probity register includes specific details on the nature of the probity matter and the actions taken to resolve the matter (sections 11.5.4, 11.5.6, 11.5.7 and 11.5.10).

To address our findings for processes and practices that should be improved for future procurements, we recommend that DIT:

- ensure that changes made to established oversight/governance arrangements during a procurement process are documented with the reasons for the change and consideration of any associated risks and risk mitigations (section 4.3.2)
- ensure evaluation teams clearly document their rationale where they do not conduct steps or activities outlined in evaluation plans. This should include a risk analysis of not following the planned activities and consider any probity impacts (section 8.3.2)
- ensure that where an evaluation panel does not agree with how risks are assessed by subject matter experts, the panel document that it has assessed the risks and outlines the reasons and evidence supporting its assessment (section 8.3.3)
- review processes to understand why a signed code of conduct and confidentiality form was not obtained from all negotiation advisors as required by the negotiation plan and ensure any gaps in processes are addressed for future procurements (section 9.3.3)
- record all meetings/interactions in the communication register (section 11.5.2)
- ensure at least two State representatives attend meetings/interactions with proponents (section 11.5.3)
- implement systems and processes to ensure confidential documents are securely maintained and destroyed where required (section 11.5.11)
- clearly identify in the probity plan relevant probity risks and the management strategy to mitigate them, and assign specific responsibility for ensuring the management strategy is implemented (section 11.5.5)
- obtain a conflict of interest declaration from consulting firms engaged to assist in the procurement (section 11.5.8)

- assess and report all conflict of interest disclosures in line with the procurement probity plan (section 11.5.9).

To address our finding on compliance with the PTA we recommended DIT ensure the Minister's report on the tender and assessment process is forwarded to the Economic and Finance Committee within 14 days of the invitation being published (section 12.2.1).

1.5 Response to our recommendations

The DIT Chief Executive provided an overall response to our draft report to Parliament which is provided below.

DIT thanks the Auditor-General for the thoroughness with which the processes and practices adopted for the ARTP has been objectively examined. The Auditor-General has concluded that DIT designed and applied processes that were consistent with sound probity principles for a transaction of this size and nature.

Given its complexity, it is understandable that the Auditor-General has found some administrative oversights and inconsistencies, which the Auditor-General has concluded did not compromise the probity of the process or the outcome but which warrant improvement for future procurements. In summary, in response to the Auditor-General's recommendations, DIT will modify elements of its Probity Policy and/or related procedures to:

- *improve record keeping of specific aspects of procurement processes identified in the report*
- *provide for improved practice in interactions with proponents as set out in the report, including the keeping of records of those interactions*
- *optimise the documenting of the assessment of probity risks where changes are made*
- *ensure Steering Committees and Evaluations Teams record in writing their rationale for certain actions, as identified in this report*
- *better define the requirements of Probity Advisors in relation to the performance of certain tasks, including the keeping of records and reporting, as identified in the report*
- *seek advice from the Crown Solicitor on the requirement for companies appointed to provide services to enter into deeds that relate to conduct and confidentiality, in addition to the provisions in their contract, and in addition to the individuals who perform the work under that contract.*

DIT has responded in more detail to each of these recommendations in the relevant sections; and will take action in accordance with those responses.

In addition, the DIT Chief Executive provided a final response to our Report, which is included in Appendix 4.

2 Background

2.1 The *Passenger Transport Act 1994*

Under the PTA the Minister is responsible for providing passenger transport services in South Australia.

The PTA allows the Minister to award service contracts for the operation of regular public transport services by tender or other such means as the Minister thinks fit.

Before the contract was awarded to Keolis Downer through this procurement process, the Rail Commissioner³ operated the Adelaide metropolitan passenger rail network under a service contract with the Minister.

Under the new contractual arrangements the Minister has entered into a new service contract with the Rail Commissioner. The agreement sets out the conditions on which the Rail Commissioner can subcontract the operation of the rail network. In line with the agreement, the Rail Commissioner entered into a subcontract with Keolis Downer.

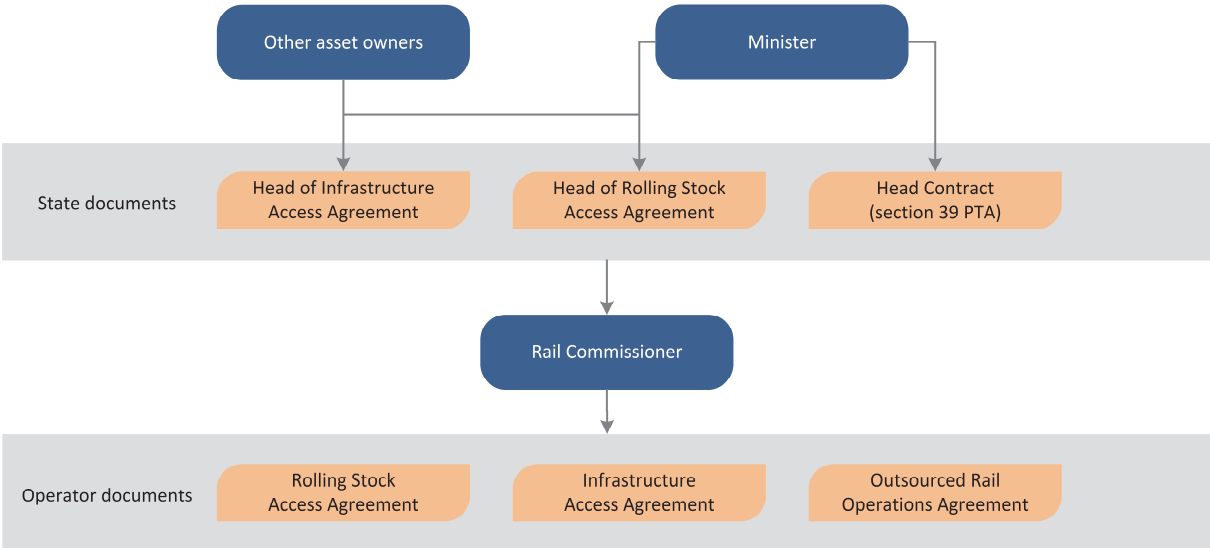
Section 2.2 provides details of the new contractual arrangements and the relationship between the parties.

2.2 Contract awarded under this procurement process

2.2.1 Contractual framework

Figure 2.1 sets out the new contractual framework and the relationship between the Minister, the Rail Commissioner and Keolis Downer.

Figure 2.1: Contractual framework and relationship between the parties



Source: Developed from the Minister’s report to Parliament on the Adelaide Rail Transformation Project issued under section 39 of the PTA.

³ The Rail Commissioner is a body corporate established under the *Rail Commissioner Act 2009*. The Commissioner’s powers and functions are outlined in that Act and include entering into service contracts relating to the operation of passenger transport services under the PTA.

The Minister has entered into three head agreements with the Rail Commissioner for rail infrastructure access, rolling stock access and operation of the train passenger service network. They provide the mechanism to grant the Rail Commissioner, which has custodianship of the assets and its rights, to enter into the agreements with Keolis Downer.

The operator documents contain the terms of the agreement between the Rail Commissioner and Keolis Downer. Section 2.2.2 provides an overview of these documents.

2.2.2 Overview of contract awarded to Keolis Downer

The contractual arrangement between the Rail Commissioner and Keolis Downer has the following key elements:

- The OROA is the main agreement between the parties that sets out the terms and conditions on which Keolis Downer operate and provide the heavy rail services.
- A rolling stock access agreement and an infrastructure access agreement grant Keolis Downer access to the relevant land, rolling stock and infrastructure assets through lease and licensing arrangements.

The main objective of the OROA, aside from the actual operation and provision of train services, is for Keolis Downer to:

- identify and implement network and service improvements to reduce costs
- deliver better, more efficient services
- increase train patronage.

In effect, the SA Government has outsourced the operation of its rail system infrastructure and most assets, including trains, tracks and stations, but has retained ownership of those assets. Under the OROA the SA Government also retains control over setting and receiving fares and determining service schedules and service levels.

The start date for the OROA was 18 September 2020. Keolis Downer started providing the passenger transport services from 31 January 2021. The initial term of the contract is eight years (through to 4 February 2029), with an option for the Minister to extend for a further four years to 6 February 2033.

The value of the service contract is estimated by DIT to be \$2.138 billion (including GST) over the 12-year term.

2.2.3 Summary of key commercial terms and arrangements

The key commercial elements of the arrangements entered into between the Rail Commissioner and Keolis Downer are as follows:

- The service contract is a 'gross cost' contract⁴ with an incentive payment for achievements in customer satisfaction and patronage growth.

⁴ In a 'gross cost' contract the service receiver (ie SA Government) retains the fare revenue, whereas in a 'net cost' contract the operator retains the fare revenue.

- All the core passenger transport assets critical to delivering services (trains, tracks and stations) are owned by the SA Government.
- The SA Government sets the:
 - price of fares charged and retains the fare revenue collected
 - service levels and locations.
- Keolis Downer’s performance is guaranteed by:
 - a performance bond issued before the commencement of the OROA
 - guarantees and indemnities provided by Keolis Downer and its parent entity guarantors.

The OROA also includes an asset condition adjustment mechanism that provides a one-off payment adjustment post contract commencement. This provision addresses issues resulting from COVID-19 that limited proponent’s due diligence and ability to inspect the condition of the rail network assets.

2.2.4 Service levels

From 31 January 2021, when Keolis Downer began service delivery, it was required to provide the same services, with the same timetable, frequency and stopping patterns on all lines that are currently operated on the Adelaide metropolitan passenger rail network.

When the Gawler Electrification Project is completed and the new electric trains for the Gawler Line are fully delivered, new minimum service levels in the contract will be implemented on all lines.

2.2.5 Asset maintenance

Although the State retains ownership of rolling stock and infrastructure assets, Keolis Downer are responsible for the maintenance and renewal of those assets except for certain major renewal works as detailed under the OROA. Infrastructure assets include track systems and structures, rail yards, maintenance facilities and stations.

Maintenance services for rolling stock were provided by Bombardier Transportation Australia (Bombardier) and were governed by the Diesel Rail Car Maintenance Agreement and the Electric Rail Car Maintenance Agreement. The Rail Commissioner, Bombardier and the Minister entered into the head agreement dated 30 December 2019, which provided a mechanism to transition those arrangements to a new party in place of the Rail Commissioner.

Under the OROA, the responsibility for the rail car maintenance agreements was transferred to Keolis Downer on the transition date. Accordingly, rolling stock maintenance remains outsourced to Bombardier until the end of 2022 under the same terms and conditions as had been agreed with the SA Government.

Section 13.1.1 summarises specific provisions in the OROA on the maintenance and renewal of assets.

2.2.6 Performance management arrangements

The OROA includes a performance management regime that requires regular and comprehensive reporting by Keolis Downer on its performance of the train services.

The performance management regime also includes assessing Keolis Downer's performance against a range of KPIs.

Keolis Downer's performance against the KPIs feeds into the calculation of the contract payments payable to Keolis Downer.

Where Keolis Downer's performance for certain critical KPIs is consistently below the required performance benchmark, the Rail Commissioner has a range of remedies available to it, including requiring Keolis Downer to prepare and implement plans for remedial action to rectify the performance issues. If not adequately addressed, the termination provision in the OROA may also be activated.

Section 13.1.2 provides further information on the operation of the performance management regime, including the KPI regime.

2.2.7 Contract payments

Contract payments are payable to Keolis Downer monthly. The contract payment is calculated based on a main payment sum amount and a number of further components, that can result in either positive or negative adjustments to the main payment sum.

The payment components that can adjust the payment sum amount include:

- service adjustments⁵
- force majeure events (negative amount only)
- profit sharing (negative amount only)
- energy costs and fuel reconciliation adjustments
- special event adjustments
- employee entitlements and human resources matters
- rolling stock overhauls
- any impacts from the electrification of the Gawler Line
- infrastructure usage
- performance abatements and incentive payments.

Further, the OROA provides for the contract payment to be adjusted as a result of events that are set out in various provisions of the OROA. Examples of these adjustment events include changes in law, contract variations and changes to the KPI regime.

The Rail Commissioner also has set-off rights against the contract payments for any amounts owing to it by Keolis Downer under the OROA or any related contract.

⁵ Service adjustments include the use of different trains, adjustments to the number of kilometres scheduled to be run by a particular rolling stock type, and amendments to the service specification and/or master timetable changes.

Performance incentive payments

The performance management regime includes incentives to encourage Keolis Downer to improve patronage growth and customer satisfaction.

Keolis Downer are eligible to receive a performance incentive payment where they exceed performance targets for these two key performance areas.

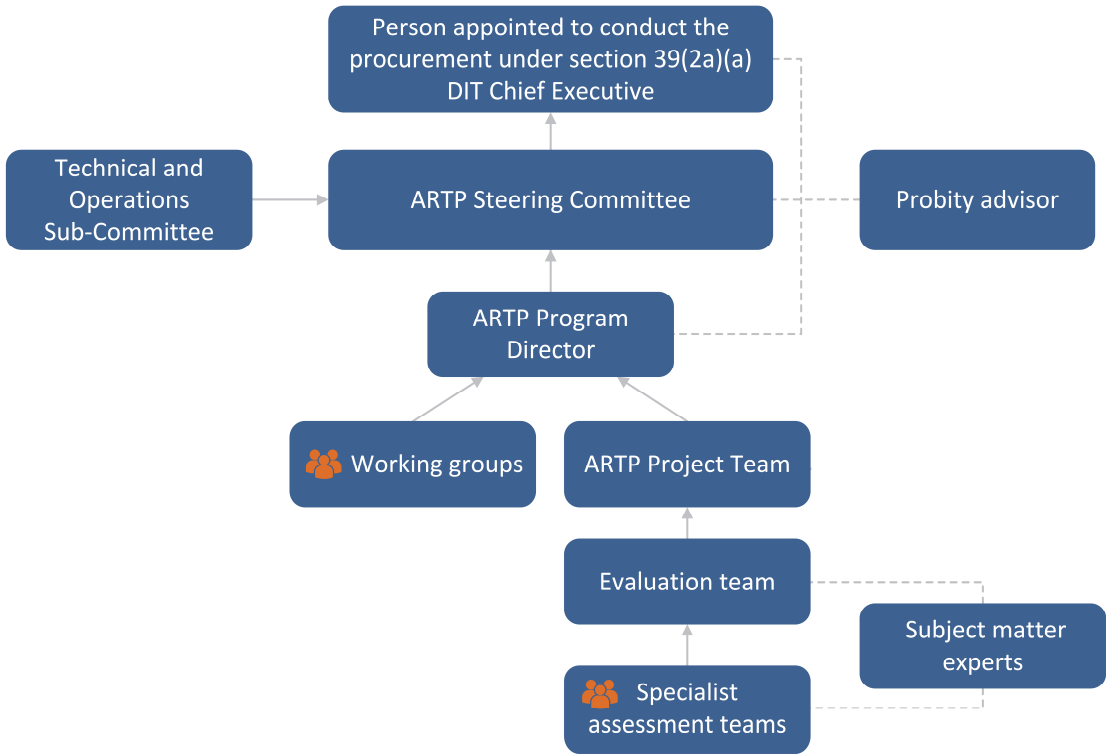
2.3 Project governance

2.3.1 Program governance overview

Governance arrangements for the Adelaide Rail Transformation Program (ARTP) were established and documented through the acquisition plan and terms of reference approved for the established committees and working groups.

Figure 2.2 provides an overview of the governance structure established for the ARTP.

Figure 2.2: Governance structure for the ARTP



Source: Developed from the ARTP Steering Committee terms of reference and the acquisition plan for the provision of heavy rail passenger services.

In addition to the project governance structure shown in Figure 2.2, the DIT Procurement Committee oversaw the procurement. This included endorsement of the acquisition plan and approval of the purchase recommendation.

The roles and responsibilities of the groups and individual that make up the governance structure are discussed in section 4.2.

2.4 Procurement process

2.4.1 An overview of the stages of a procurement

A public sector procurement involves a range of activities conducted to buy goods or services aimed at delivering the best value in the expenditure of public money.

The SPB defines procurement as a three-stage process that includes:⁶

- acquisition planning
- supplier selection
- contract management.

The activities conducted for each stage of the procurement and the risks that need to be managed depend on the value and nature of the overall procurement. The procurement of heavy rail passenger transport services for metropolitan Adelaide is a significant procurement because the services are relied on by the public and will be provided for a minimum of eight years, and the resulting contract is high value.

Acquisition planning is the process conducted when starting the procurement and includes identifying needs, planning the procurement strategy and preparing an acquisition plan. Good planning supports efficient, effective, economical and ethical procurement and needs to start early enough to identify opportunities and mitigate risks.⁷

Supplier selection is the process conducted to ensure appropriate suppliers are selected to provide required goods or services, while ensuring value is achieved.⁸ Under the SPB's *Procurement Policy Framework* there are six broad stages for supplier selection which include developing bid documents and the evaluation plan, managing distribution and receipt of bids, selecting the preferred supplier(s) and developing contracts.

The contract management stage focuses on preparing and implementing a contract management strategy, implementing the contract, and monitoring and maintaining performance of the contract.

To review the probity of the procurement process leading up to the awarding of the contract in line with the requirements of the PTA, we focused on the acquisition planning and supplier selection stages of the procurement. We also assessed contract negotiation, approval and execution processes.

2.4.2 Rail reform program

In May 2019, the SA Government approved the development of an implementation program

⁶ State Procurement Board, *Procurement Policy Framework*, version 4.1, issued September 2018, page 7. The SPB was established under the *State Procurement Act 2004* to oversee procurement operations for public authorities. It established policies, principles and guidelines directed to providing ethical and fair treatment of participants and ensure probity, accountability and transparency in procurement operations. In October 2020 the *State Procurement Repeal Act 2020* was assented and once it is proclaimed it will repeal the *State Procurement Act 2004*, dissolving the SPB along with its policies and procedures.

⁷ State Procurement Board, *Acquisition Planning Policy*, version 10.3, issued March 2018, page 5.

⁸ State Procurement Board, *Supplier Selection Policy*, version 3.6, issued April 2020, page 4.

to transition from a government-operated metropolitan heavy rail passenger services to a franchise (contracted services) model procured through a competitive tender process.

DIT set up the ARTP to improve services, grow patronage and reduce the cost of services.

A program director was engaged and an ARTP Project Team established to:

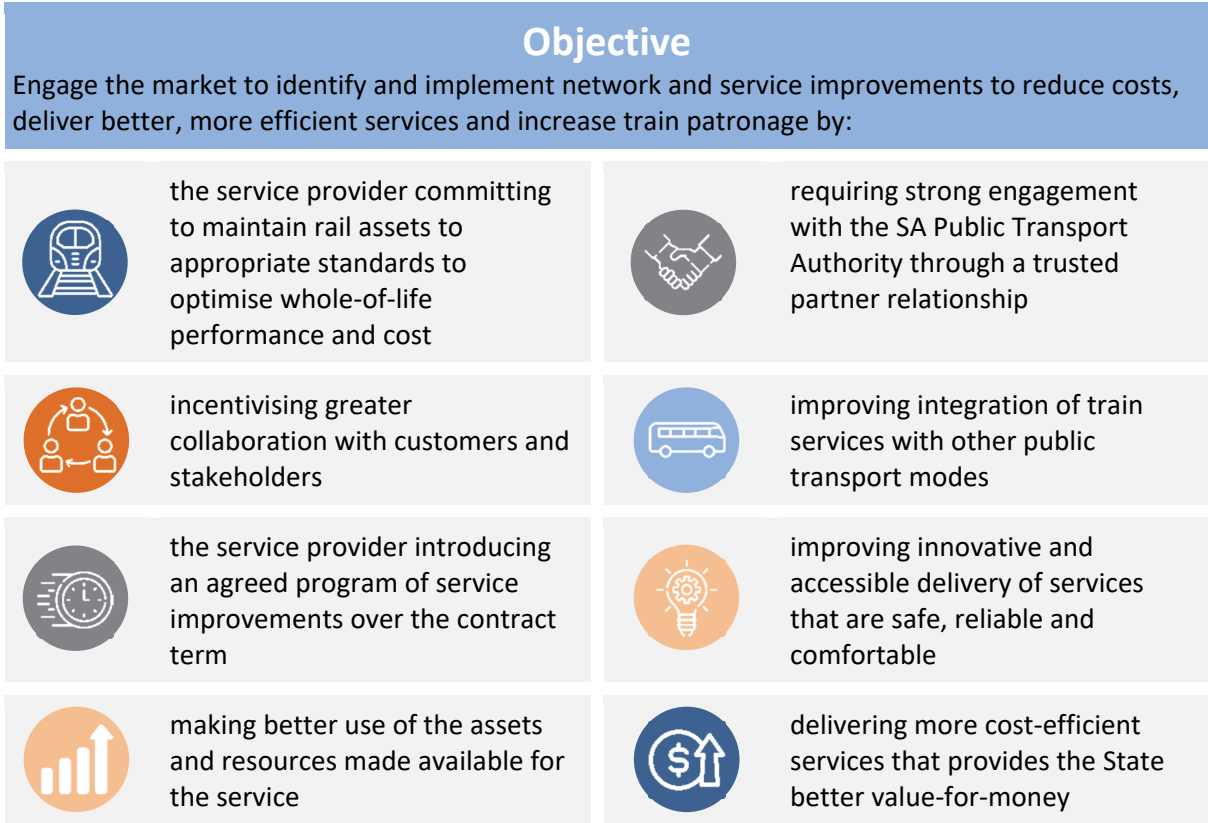
- develop the contract model and performance regime
- conduct initial market sounding
- conduct the procurement process
- manage commercial, regulatory and legal matters
- manage industrial relations
- manage the transition from government to private sector.

In October 2019, the SA Government approved DIT proceed with a market-based competitive procurement for the operation, maintenance and service delivery for Adelaide metropolitan heavy rail passenger services.

2.4.3 Procurement objectives

Figure 2.3 shows the objective of the procurement and the specific elements that contribute to achieving it. These were included in the expression of interest and invitation to supply and are included in the contractual arrangements.

Figure 2.3: Objective of the procurement to provide heavy rail passenger transport services



Source: Developed from DIT’s acquisition plan for the provision of heavy rail passenger services for the Adelaide metropolitan public transport network.

2.4.4 Market approach

Figure 2.4 provides an overview of the four-stage market engagement process for the procurement of heavy rail passenger transport services.

Figure 2.4: Overview of the four-stage market engagement process for heavy rail passenger transport services



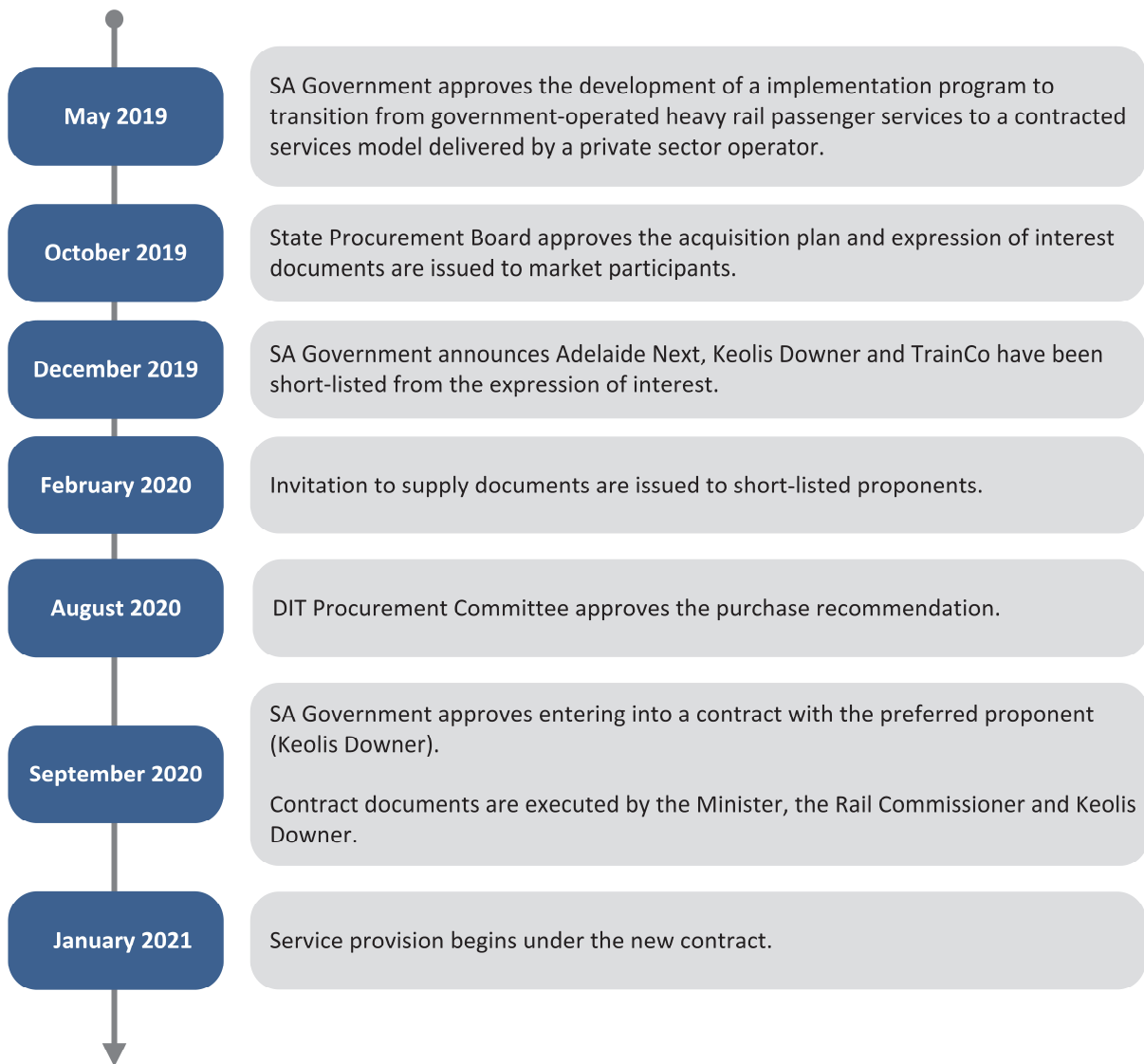
Source: Created from heavy rail procurement market documents.

Sections 6 to 8 provide more information about the market approach and evaluation process for the expression of interest and invitation to supply stages of the procurement process.

2.4.5 Procurement timeline

Figure 2.5 provides a timeline of the key events, starting with the SA Government deciding to outsource the heavy rail passenger transport services and ending with services starting under the new contractual arrangements.

Figure 2.5: Timeline of key events for the procurement process



Source: Audit analysis.

A detailed timeline of events is provided in Appendix 1.

3 Audit mandate, objective and scope

3.1 Our mandate

This review was conducted and the report prepared under sections 31(2) and 37 of the *Public Finance and Audit Act 1987* (PFAA).

On 18 September 2020 the Rail Commissioner executed a contract with Keolis Downer for the provision of heavy rail passenger services for metropolitan Adelaide.

Section 39 of the PTA requires the Minister, on awarding a service contract to operate regular passenger services with a value of \$4 million or above, to provide the Auditor-General with:

- a copy of the service contract
- a report on the processes leading to the award of the contract.

The PTA requires the Auditor-General to examine the contract and prepare a report to Parliament on the probity of the processes that led to it being awarded, within four months of receiving the service contract and report from the Minister.

I received a report from the Minister on 15 October 2020. Accordingly, the due date for my Report was 15 February 2021.

As explained in my Report to Parliament in February 2021,⁹ I had not completed all the audit procedures to my satisfaction to form a conclusion for this audit by 15 February 2021. My Report of February 2021 also explains the factors impacting my capacity to complete the audit within the four-month statutory time frame.

I took legal advice and formed the view based on this advice that the time limit specified in section 39(3f) of the PTA does not allow for the Auditor-General to conduct an audit under the PTA, or deliver a report after the expiry of the four-month period. I was also advised that an audit could be conducted and a report prepared for Parliament under the PFAA.

Consequently, I have conducted this review and prepared this Report under sections 31(2) and 37 of the PFAA to conclude on the matters required by section 39(3f) of the PTA.

3.2 Our objective

The objective of our review was to conclude on the effectiveness of the procurement process for heavy rail passenger transport services for metropolitan Adelaide. To do this we assessed:

- the probity of the process leading up to the awarding of the service contract for the provision of heavy rail passenger transport services in metropolitan Adelaide

⁹ Auditor-General's Report 4 of 2021 *Passenger transport service contracts: Heavy rail*, February 2021.

- whether the service contract met the requirements of the PTA.

3.3 What we reviewed and how

3.3.1 The probity of the process leading up to the awarding of the service contract

We reviewed the probity of the procurement process leading to the award of a contract in September 2020 for the provision of heavy rail passenger transport services for the Adelaide metropolitan area.

To assess the probity of the procurement process we considered whether DIT effectively implemented a procurement process that addressed:

- concepts and requirements in the SPB policy framework
- the probity principles outlined in section 3.4.

We also considered whether:

- procurement procedures, processes and probity controls outlined in the procurement acquisition plan, evaluation plans and probity plan were effectively implemented
- expression of interest and invitation to supply requirements were followed.

3.3.2 Assessment of whether the service contract complies with the requirements of the PTA

In examining the service contract, we assessed whether the Minister addressed specific requirements in the PTA in conducting processes leading up to and following the awarding of the service contract. This included whether the Minister and DIT had effective processes to properly consider the following four principles outlined in the PTA:

- avoiding a monopoly
- developing sustainable competition
- integrating passenger transport services
- achieving efficiency and promoting innovation.

We also assessed whether matters required to be included in the contract by the PTA were included and considered whether the contract protects the State's interests.

We engaged a legal firm to help us examine the contract and review legal compliance with the PTA.

3.4 Key probity principles

For the probity of the process leading up to the awarding of the service contract, we identified key probity principles to use in conducting the review. We considered SPB policies

and guidelines. The SPB's *Probity and Ethical Procurement Guideline* states:

Probity is the evidence of ethical behaviour commonly associated with the practice of adopting and following well considered procedures and processes to ensure that procurement decisions are fair, transparent and defensible ...

... In a general sense, probity means a process that is able to withstand internal and external scrutiny. Procurement processes and procedures must be clear, open, well understood, communicated and applied equally to all parties to ensure purchasers and suppliers are able to deal with each other on the basis of mutual trust and respect.¹⁰

We also considered DIT's probity plan and our previous reviews of the procurement of bus and light rail passenger transport services.

We identified the following key probity principles for our review of the procurement:

- compliance with the law
- transparent and consistent decision making
- security and confidentiality of information
- fairness, impartiality, integrity and equality provided to all parties
- management of conflicts of interest
- conducting an appropriately competitive process
- maintenance of records, including maintaining an audit trail that enables independent review of processes.

3.5 What we did not review

Our review was limited to the probity of the procurement process. We did not review:

- the basis for the SA Government's decision to outsource heavy rail services
- the arrangements implemented by DIT to transition to the new service contract
- the contract management framework (including plans) developed to help manage the new service contract
- development and analysis of the public sector comparator
- whether identified cost savings are being achieved.

¹⁰ State Procurement Board, *Probity and Ethical Procurement Guideline*, version 1.4, issued August 2019, page 3.

4 Procurement governance arrangements

What we found

Governance arrangements for the procurement of heavy rail passenger transport services were established and documented. The governance arrangements included:

- appointing the DIT Chief Executive to conduct the process. This appointment was in line with the PTA
- appointing a steering committee with defined roles and responsibilities that were documented in approved terms of reference
- establishing working groups and specialist assessment teams with documented roles and responsibilities. Subject matter experts were available to assist the working groups and assessment teams
- endorsement of the acquisition plan and approval of the purchase recommendation by the DIT Procurement Committee.

We found that the ARTP Steering Committee did not meet for four months from March 2020 to June 2020 and there was no documented evidence to demonstrate how it maintained its oversight role during this period.

What we recommend

For future procurements, where changes are made to established oversight/governance arrangements during a procurement process, the reasons for this and consideration of any associated risks and risk mitigations should be documented.

4.1 Audit approach

We assessed the governance arrangement by reviewing:

- the appointment of a person to conduct the process, made by the Minister in line with section 39(2a)(a) of the PTA
- roles and responsibilities established for committees and groups as documented in the acquisition plan and evaluation plans
- approved terms of reference established for the committees and working groups for the project
- meeting minutes and records maintained for committees and working groups
- meeting records and key procurement documents to assess the level of oversight provided by the DIT Procurement Committee.

Our procedures also included interviewing some members of the ARTP Steering Committee.

4.2 Overview of governance arrangements

4.2.1 Person appointed under the PTA to conduct the process

Section 39(2a)(a) of the PTA requires that if the Minister determines that a passenger transport service contract should be awarded by tender, the Minister must appoint a person to conduct the process, including the assessment of responses to the tender.

On 29 October 2019, the former Minister for Transport, Infrastructure and Local Government (the former Minister) appointed the DIT Chief Executive to conduct the passenger transport tender process for heavy rail services in metropolitan Adelaide.

4.2.2 ARTP Steering Committee and Technical and Operations Sub-Committee

ARTP Steering Committee

The ARTP Steering Committee was established to provide guidance and leadership to the ARTP Project Team. Its objective was to enable and support the project team and evaluation team in fulfilling the program objectives and achieving the following success measures:

- average annual operating gross cost saving in the order of \$10 million over the life of the contract
- seamless transition to private sector operations
- private operator commitment to service improvements over the life of the contract that will have significant impact on rail service patronage and customer satisfaction
- private operator commencement by early 2021
- successful transition of government staff to private operator.

Its role and functions included:

- providing project strategy
- defining and realising the benefits for the program
- monitoring project risks, quality, cost and timeliness
- ensuring that appropriate probity principles are applied
- providing the ARTP Program Director with support and high-level decision making.

The committee membership included senior executives from DIT and the Department of Treasury and Finance. It was chaired by the DIT Chief Executive.

The function, objectives, membership and responsibilities of the ARTP Steering Committee were documented in the ARTP Steering Committee terms of reference, which the DIT Chief Executive approved in September 2019.

The ARTP Steering Committee started meeting in August 2019 and met monthly. No meetings were held during the invitation to supply stage of the procurement, between March 2020 and June 2020 (refer to section 4.3.2).

Technical and Operations Sub-Committee

The ARTP Steering Committee established the Technical and Operations Sub-Committee to assist with decision making on certain technical, operational and safety related matters. The sub-committee had input into determining the scope of responsibilities for the private operator.

The sub-committee also had documented terms of reference and was chaired by the DIT Chief Executive.

In line with the terms of reference, matters covered by the sub-committee included:

- asset condition and asset management
- safety accreditation
- technical related employee matters
- technical standards.

4.2.3 ARTP Project Team and working groups

The ARTP Project Team, led by the ARTP Program Director, coordinated all aspects of the procurement process. Its roles and responsibilities were set out in the acquisition plan and included:

- establishing the strategic objectives, commercial principles and governance requirements
- developing and managing a program plan for the acquisition and delivery of the required services
- identifying, monitoring and reporting on key project risks and monitoring implementation of mitigation strategies
- planning, conducting and managing an evaluation plan to ensure the strategic objectives are met.

Working groups were established by the ARTP Project Team to perform specific roles and functions to assist with the procurement. Roles and functions for the various working groups included:

- assisting with the approach to the financial evaluation of offers
- preparing the offer template¹¹ to be provided to proponents
- assisting with the development of the contract documentation
- determining performance requirements for the private operator
- preparing data to provide to proponents
- facilitating a smooth transition from government operation to private operation.

¹¹ Offer templates are documents provided to proponents to assist them with submitting required information as part of their bid.

Each working group operated under approved terms of reference that documented the purpose, role and function of the group. The working groups that were established during the procurement process were for the following areas:

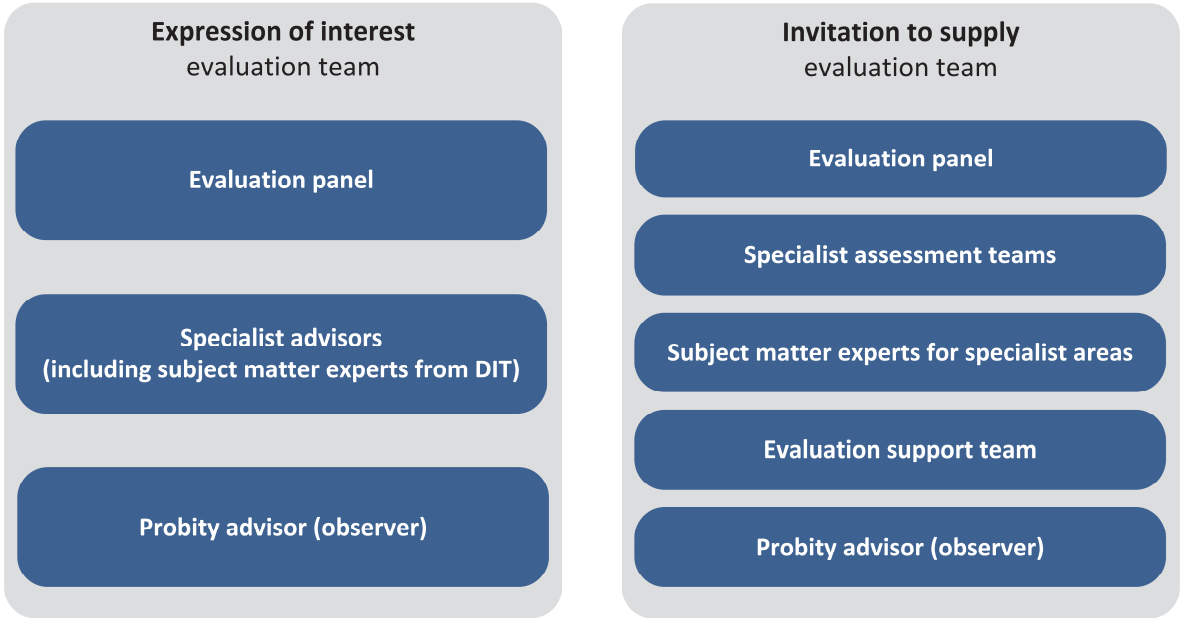
- financial
- commercial
- technical
- communications and industrial relations
- rail network planning
- rail safety
- transition.

Membership of the working groups comprised ARTP Project Team members, consultants engaged to provide specialist expertise to the procurement, DIT officers (from relevant areas within DIT’s operations) and other external advisors.

4.2.4 Evaluation teams

Evaluation teams were established for the expression of interest and invitation to supply stages of the procurement. Figure 4.1 outlines the composition of the evaluation teams for each phase of the procurement.

Figure 4.1: Overview of evaluation teams established for the expression of interest phase and invitation to supply phase of the procurement



Source: Developed from the expression of interest and the invitation to supply evaluation plans.

The evaluation teams were established to evaluate expression of interest submissions and invitation to supply offers and to prepare an evaluation report for each phase. The evaluation panels were chaired by the ARTP Program Director. The roles and responsibilities for the evaluation teams were set out in the evaluation plans for each phase of the procurement.

Specialist assessment teams were established for the invitation to supply evaluation. Their role included:

- providing specialist advice and support to the evaluation panel on specific evaluation criteria in relation to strengths, weaknesses and risks for each offer
- identifying clarification questions for proponents and reviewing clarifications received.

The following specialist assessment teams were established:

- operational (five members)¹²
- asset management delivery (three members)
- customer experience (five members)
- transition and employee/industrial relations (five members)
- safety, environment and risk (four members)
- finance and commercial (four members).

A total of 32 subject matter experts¹³ were sourced from within DIT operational areas or externally. They provided assistance to the specialist assessment teams and the evaluation panel.

Further details on the activities of the evaluation teams are provided in sections 6 and 8.

4.2.5 DIT Procurement Committee

In line with SPB policy, DIT have established a procurement governance committee.¹⁴ The role of the DIT Procurement Committee, as outlined in its terms of reference, includes approving and overseeing the management of significant, complex and high-risk procurements.

The committee membership comprises executive and senior management level staff from DIT.

The procurement of heavy rail passenger services was a significant procurement due to the length of the proposed contract period, the contract value, the impact on the community and the provision of heavy rail operation by the private sector for the first time.

The DIT Procurement Committee performed the following actions for this procurement:

- endorsed the acquisition plan for SPB approval
- endorsed the evaluation report for the expression of interest
- approved the purchase recommendation.

4.2.6 Role of the SPB

The SPB was established under the *State Procurement Act 2004* to oversee procurement operations for public authorities. It has established policies, principles and guidelines

¹² The number of members has been sourced from the invitation to supply evaluation plan.

¹³ Based on the subject matter experts listed in the invitation to supply evaluation plan.

¹⁴ State Procurement Board, *Procurement Authority and Governance Policy*, version 2.0, issued July 2018, page 3.

directed to providing ethical and fair treatment of participants and ensuring probity, accountability and transparency in procurement operations.

On 14 October 2019, the SPB's Procurement Approvals Committee¹⁵ approved the acquisition plan for the procurement of Adelaide metropolitan heavy rail passenger services in line with its *Acquisition Planning Policy*.¹⁶ It also endorsed the invitation to supply evaluation plan in May 2020.¹⁷

In approving the acquisition plan, the SPB's Procurement Approvals Committee also delegated its authority to approve the purchase recommendation to the DIT Procurement Committee.¹⁸

The *State Procurement Repeal Act 2020* was assented to in October 2020 and will come into effect on a date to be fixed by proclamation. When it comes into effect, the *State Procurement Act 2004* will be repealed and the SPB will be dissolved, along with its policies and guidelines.

4.2.7 Probity advisor

DIT appointed an independent external probity advisor to provide probity advice and oversight throughout all stages of the procurement process.

Further details on the appointment of the probity advisor are included in section 11.2.3.

4.3 Findings

4.3.1 DIT established sound governance structures for the procurement

We found that governance arrangements were established and documented for the procurement of heavy rail passenger transport services. Governance arrangements met the requirements of the PTA and SPB policies and guidelines.

The Minister's appointment of the DIT Chief Executive as the person responsible for the procurement was made in line with the PTA.

Roles and responsibilities for the committees, work groups and teams were documented and approved. The roles and responsibilities were established sufficiently early in the process to allow each group to operate with a clear understanding of their function.

¹⁵ A committee established by the SPB under section 13 of the *State Procurement Act 2004* to carry out functions for it, including considering and approving acquisition plans and purchase recommendations above the procurement authority of public authorities.

¹⁶ State Procurement Board, *Acquisition Planning Policy*, version 10.6, September 2019, page 16.

¹⁷ A condition of approval for the acquisition plan was that DIT would provide a copy of the invitation to supply evaluation plan to the SPB's Procurement Approvals Committee for endorsement prior to the opening of tenders.

¹⁸ The SPB's *Acquisition Planning Policy* states that authority for the approval of the purchase recommendation may be delegated at the time of approving the acquisition plan to simplify approval processes and eliminate unnecessary delays.

Records were maintained by committees and working groups. These included meeting minutes and action items, which provided a summary of the nature of matters being discussed and managed.

Oversight of the procurement was provided by the DIT Procurement Committee and the acquisition plan was approved by the SPB.

4.3.2 The ARTP Steering Committee did not meet for four months during the invitation to supply phase of the procurement

Recommendation

Where a decision is made for a steering committee or other governance group to change established arrangements during a procurement process, the reasons for this and consideration of any associated risks and risk mitigations should be documented.

Finding

The ARTP Steering Committee did not meet for four months from March 2020 to June 2020. There was no documentation to explain why meetings were not held and there was no evidence to demonstrate how the ARTP Steering Committee maintained its oversight role for the procurement during this period.

The ARTP Steering Committee was established to provide high-level project governance, guidance and leadership of the project. Its role included providing the ARTP Program Director with support and high-level decision making.

The terms of reference for the ARTP Steering Committee provides that the Committee will meet as required to ensure project decisions are made in a timely manner. To fulfil the functions outlined in its terms of reference (refer to section 4.2.2), including monitoring risks and supporting high-level decision making, the ARTP Steering Committee had met monthly up to February 2020 and from July 2020 until September 2020.

The invitation to supply phase of the procurement was in progress during the period when the ARTP Steering Committee did not meet. A number of key approvals and decisions were made during this time, including an amendment to the:

- invitation to supply, to extend the time frame for offers to be submitted and to include an offer cost contribution for unsuccessful proponents (refer to section 7.2.12)
- draft OROA, to include provisions designed to address the proponents' limited ability to inspect the condition of the rail network assets during the procurement (refer to section 7.2.14).

We acknowledge that:

- the DIT Chief Executive did consult with the Department of Treasury and Finance Chief Executive, who was also a member of the ARTP Steering Committee, on the offer cost contribution amendment to the invitation to supply

- the COVID-19 pandemic had a significant impact on the working environment and the provision of essential government services during this time. This may have impacted the ability of senior executive members to continue meeting for this procurement during this time.

We also note that during the period the ARTP Steering Committee did not meet, the DIT Chief Executive (ie the authorised person under the PTA) and the ARTP Program Director:

- supervised and conducted specific procurement activities
- made decisions in line with their roles and their respective delegated authorities.

However as the ARTP Steering Committee did not meet for four months of the procurement, it was not able to demonstrate how it maintained its oversight function over these activities for this period.

While we consider the ARTP Steering Committee not meeting for four months did not compromise the probity of the process, we believe it is sound practice for DIT to document the reasons for not meeting and its consideration of any associated risks.

DIT response

Recommendation accepted.

DIT Probity Policy and/or related procedure(s) will be amended to establish a default setting of a monthly Steering Committee meeting, with provisions for the exercise of managerial judgement to vary this; and where a material change to meeting schedules is decided, for the reason and consideration of any associated risk to be recorded.

5 Procurement planning

What we found

DIT prepared a comprehensive acquisition plan that addressed SPB requirements.

The SPB's Procurement Approvals Committee approved the acquisition plan before DIT approached the market. It also endorsed the invitation to supply evaluation plan before the tender responses were opened.

There were several deviations to the approved acquisition plan that were assessed, approved and reported in line with SPB requirements.

Two rounds of early market engagement were conducted with invited participants to maximise market awareness of the procurement. Feedback from the market engagement sessions was reported to the ARTP Steering Committee and was used to inform preparation of the commercial terms and the general procurement approach.

5.1 Audit approach

Our review of procurement planning assessed whether:

- appropriate procurement planning activities were conducted, including preparation of a detailed acquisition plan that addressed SPB requirements
- the acquisition plan was approved before DIT approached the market and any deviations to the acquisition plan were approved in line with SPB requirements
- risk management was adequately considered during acquisition planning and risk treatments were identified to mitigate identified probity risks.

5.2 Overview of procurement planning

5.2.1 DIT prepared a comprehensive acquisition plan

DIT prepared an acquisition plan for the procurement process. It was a comprehensive document that included:

- the procurement objectives
- a description of the requirement
- governance arrangements
- external market analysis and details of the market approach
- a risk management plan and risk register
- an overview of the probity management arrangements and a probity plan
- details of the evaluation methodology for the expression of interest
- a high-level overview of the evaluation process for the invitation to supply.

The acquisition plan addressed requirements set out in the SPB's *Acquisition Planning Policy*.

5.2.2 An SPB committee approved the acquisition plan and endorsed the invitation to supply evaluation plan

The SPB's Procurement Approvals Committee (the Committee) considered and approved the acquisition plan on 14 October 2019.

The Committee Chair informed the DIT Chief Executive that the Committee was satisfied the acquisition plan contained an appropriate methodology in line with the processes required under the SPB's policies and guidelines.

The Committee requested that DIT notify its support staff¹⁹ of any material changes to the expression of interest evaluation methodology before the opening of bids. Our review of the evaluation plan for the expression of interest did not identify any changes from the acquisition plan requiring DIT to notify the Committee's support staff.

The approval of the acquisition plan was subject to DIT providing the Committee with an acceptable evaluation plan for the invitation to supply for endorsement before tenders were opened. Consistent with this condition, on 11 May 2020, DIT provided an evaluation plan to the Committee, which endorsed it on 25 May 2020 before the invitation to supply tender responses were opened.

5.2.3 Deviations to the approved acquisition plan were assessed and approved in line with SPB requirements

The SPB's *Supplier Selection Policy* explains that deviations occur where there is a material departure from the strategy approved in the acquisition plan before contracts are executed. The policy requires agencies to assess deviations to determine the type of approval required, by considering the potential impact on the procurement strategy, probity and/or procurement outcome, and stage in the procurement process.

During the procurement there were several deviations to the approved acquisition plan including changes to the evaluation team membership, and the planned evaluation and approval processes. The potential impact of these deviations on the procurement was assessed by the ARTP Program Director as being insignificant or minor.

A record of the deviations was maintained. The DIT Chief Executive approved them, and they were reported to the DIT Procurement Committee in the purchase recommendation, consistent with SPB policy requirements.

5.2.4 Two rounds of market engagement were conducted with invited participants

DIT conducted two rounds of early market engagement following approval of the acquisition plan. The purpose of the market engagements, as outlined in the acquisition plan included:

¹⁹ Staff in the Procurement Policy, Governance and Capability unit of the Department of Treasury and Finance.

- maximising market interest and competitive tension
- eliciting initial feedback on critical issues to be addressed in developing the invitation to supply
- developing a compelling value proposition for the contracted-out service model.

A market engagement strategy was prepared by the ARTP Project Team and reviewed by the probity advisor. A list of questions was prepared by the ARTP Project Team for each round of market engagement.

The first round of market engagement was conducted through one-on-one meetings with 17 companies. A total of 15 invited companies participated in the second market engagement. The probity advisor attended market engagement sessions.

Feedback from the market engagement sessions was reported to the ARTP Steering Committee and we were advised that it was used to inform preparation of the commercial terms and the general procurement approach.

6 Expression of interest

What we found

For the expression of interest phase of the procurement, we found that:

- market documents were consistent with SPB requirements and the approved acquisition plan
- sound practices were implemented for opening and registering expressions of interest
- expression of interest submissions were evaluated in line with the documented evaluation plan
- an evaluation panel report and recommendation was prepared for the expression of interest which was consistent with the evaluation outcomes, including the recommendation that three proponents proceed to the next phase of the process
- the probity advisor reviewed draft documentation, attended the mandatory briefing session and opening of submissions and reported that they had not observed any material matters of a probity nature
- the expression of interest evaluation panel report and recommendation was endorsed by the ARTP Steering Committee and approved by the DIT Chief Executive, in line with the evaluation plan.

We also found that meeting records were not prepared for clarification meetings held with proponents during the evaluation of expressions of interest as required in the expression of interest evaluation plan.

What we recommend

For future procurements, DIT should prepare and maintain reasonable records of matters discussed for all clarification sessions.

6.1 Audit approach

Our review of the expression of interest included assessment of:

- whether expression of interest documents released to the market clearly outlined the evaluation criteria and were consistent with SPB guidelines and the approved acquisition plan
- compliance with the required registration process by all participants
- the mandatory briefing session attendance and whether appropriate records were maintained. We also considered the involvement of the probity advisor in the mandatory briefing session
- the arrangements implemented to manage the receipt and opening of expression of interest responses

- the preparation and approval of an evaluation plan before the opening of expression of interest responses
- whether the evaluation of expression of interest submissions were completed in line with the evaluation plan.

6.2 Overview of the expression of interest

6.2.1 Issue of expression of interest

An invitation for expressions of interest was issued to the market on 30 October 2019, with a closing date of 26 November 2019. The purpose of the expression of interest was to short-list up to four proponents who could deliver on the established procurement objectives.

The expression of interest process guidelines outlined the objectives of the procurement. The broad objectives were to implement network and service improvements to reduce costs and to deliver better, more efficient services and increase train patronage.

Submissions were received from four consortia.

6.2.2 Registrations to participate in the expression of interest

To obtain access to the expression of interest market documents, proponents were required to register their interest by downloading an information pack and returning three schedules to DIT via email. A total of 13 companies registered to obtain expression of interest market documents. The registration included confirmation that the company is a heavy rail operator or heavy rail infrastructure operator, a signed non-disclosure deed and acceptance of the electronic data room rules.²⁰

Following review of the registration information provided, the ARTP Program Director approved 12 companies to gain access to the expression of interest market documents.

One company was not approved to participate in the expression of interest because it was not a rail operator or rail infrastructure manager.

Further, not all companies who registered to obtain expression of interest documents made a submission.

6.2.3 Mandatory industry briefing

The four proponents who participated in the expression of interest attended the mandatory briefing session held on 7 November 2019.

The briefing included presentations by the DIT Chief Executive, members of the ARTP Project Team and the probity advisor.

²⁰ For this procurement DIT used a virtual data room to make information available to proponents and to manage communications with proponents. This enables electronic transfer of information and communication between authorised officers within DIT and the proponents.

Any questions and answers from the briefing session were to be posted in the data room for all participants to review. DIT advised that no questions were asked by proponents.

6.2.4 Evaluation plan

An evaluation plan for the expression of interest was approved by the DIT Chief Executive on 6 November 2019. The evaluation plan included:

- objectives for the expression of interest
- evaluation team membership and roles and responsibilities
- evaluation criteria and scoring methodology
- detailed description of the evaluation process.

The evaluation plan contained some deviations from the acquisition plan. The deviations were assessed by the ARTP Program Director as minor or insignificant and were approved by the DIT Chief Executive on 25 November 2019.

The deviations included:

- changes to the weighting and description of some evaluation criteria listed in the acquisition plan to bring further robustness to the short-listing of proponents. The most significant change was the removal of an evaluation criterion for risk management, which was absorbed into another weighted criterion with a redistribution of the weighting
- a clarification on the stages of the evaluation to be explicit about the concurrent evaluation for the gated criteria and weighted criteria
- changes to the evaluation team membership in response to DIT staff taking leave and having pre-existing commitments that might make them unavailable for the evaluation.

The evaluation plan was signed by all members of the evaluation panel to acknowledge their agreement to follow the plan.

6.2.5 Opening of expressions of interest

Two officers independent of the evaluation process opened and recorded all responses to the expression of interest. A schedule of the submissions received was prepared and signed off by the opening officers. The probity advisor attended the opening and recording of responses.

A response which was submitted in the electronic data room prior to the closing date and time was unable to be viewed by the opening officers because it had not received the required electronic approval for release within the data room by the proponent's nominated approver.²¹ Confirmation that the submission was lodged prior to the closing date and time was obtained from the data room provider.

²¹ The data room rules state that a proponent's expression of interest response must be submitted by the Bidder's Question Approver logging a question and attaching the expression of interest submission.

The probity advisor provided advice on this response and determined that the proponent had submitted its expression of interest by the closing time and date and had not received any competitive advantage, so it could be accepted for evaluation.

6.2.6 Evaluation of the expressions of interest

The evaluation process comprised six steps as detailed in Figure 6.1. Some of the steps were conducted concurrently, as shown in the diagram.

Figure 6.1: Steps in the expression of interest evaluation



Source: DIT evaluation plan for the expression of interest.

Completeness review

A DIT procurement officer performed a completeness review on the four submissions to ensure the proponent had provided adequate information to enable the evaluation teams to complete their evaluation.

The completeness review also ensured that each proponent provided a completed Industry Participation Plan Statement of Intent to address the mandatory criteria specified by DIT for the expressions of interest.

Gated criteria assessment

Financial capacity and safety were identified in the evaluation plan as criteria that must be assessed as acceptable and compliant for the submission to be considered further in the evaluation.

The gated criteria were assessed by members of the evaluation panel with assistance from specialist advisors.

Detailed financial assessments were conducted by an external company, engaged by DIT, to verify the financial capacity of each proponent to conduct the contract and assess their solvency and overall financial viability.

The safety assessment was to ensure that proponents had a strong approach to maintaining accredited rail safety operations and could demonstrate a culture of continuous safety improvement.

All proponents were considered further in the evaluation.

Weighted evaluation criteria assessment and clarifications

Assessment of the weighted evaluation criteria was conducted concurrently with assessment of the gated criteria. The weighted criteria are provided in Figure 6.2.

Figure 6.2: Weighted evaluation criteria for the expression of interest



Source: Developed from the expression of interest evaluation plan.

The weighted criteria were evaluated by each of the evaluation panel members individually. Specialist advisors for nominated areas were available to advise evaluation panel members.

Areas for clarification with proponents identified by the evaluation panel members were assessed by the evaluation panel chair and the probity advisor before sending clarification questions in the data room.

Following individual scoring, the evaluation panel met on 6 December 2019 and agreed on consensus scores. As part of the consensus scoring, the evaluation panel considered the proponent’s responses to clarification questions.

The evaluation plan provided for referee checks to be performed as part of the consensus scoring. Referee checks were sought from 12 referees. Only four completed responses were received.

The evaluation panel agreed at their consensus scoring meeting that, due to the low response rate, the referee checks would not be considered as part of the expression of interest evaluation.

At the completion of scoring against the weighted evaluation criteria, a weighted points total was calculated for each proponent. The scoring determined the initial ranking of the submissions received.

Overall assessment and risk determination

In line with the evaluation plan, the evaluation panel met again on 6 December 2019 to review the initial ranking and confirm that it accurately reflected the relative merits of the submissions and the proponent’s ability to deliver on the procurement objectives.

Strengths and weaknesses were identified for each submission and the evaluation panel confirmed the initial ranking of the proponents.

Short-listing recommendation

The ranking was used to determine the short-listing of proponents. The evaluation panel determined that the fourth ranked proponent did not meet the expression of interest requirements and procurement objectives to the same extent as the first three ranked proponents.

The evaluation panel, by consensus, recommended the top three ranked proponents from the expression of interest should be short-listed for the invitation to supply phase of the procurement.

Proponent debriefing

A debriefing session was held with the unsuccessful proponent from the expression of interest stage. The meeting was attended by the ARTP Program Director and three members of the evaluation panel. Strengths and areas for improvement and development were provided to the unsuccessful proponent against each of the evaluation criteria.

The probity advisor attended the debrief and records were maintained for the approach to the session, the feedback provided to the unsuccessful proponent and the questions and answers discussed.

6.2.7 Role of probity advisor

The probity advisor undertook numerous activities during the expression of interest phase of the procurement. These included:

- reviewing and providing advice on the draft market documents
- attending and presenting on probity principles and protocols at the industry briefing
- attending the receipt and opening of expressions of interest
- attending evaluation team meetings and clarification interviews with the proponents
- reviewing the draft expression of interest evaluation panel report and recommendation.

A report on the probity advisor's work up to and including the expression of interest stage of the procurement (dated 8 December 2019) was presented to the ARTP Steering Committee at its meeting on 11 December 2019. The report documented that the expression of interest had been conducted in line with the approved probity plan and communications protocol and the evaluation plan and that no material issues of a probity nature were observed.

6.2.8 Approval of evaluation panel report and recommendation

An evaluation panel report and recommendation for the expression of interest detailed the evaluation process and recommended three proponents be short-listed for the invitation to supply phase.

The evaluation panel report was signed by all panel members and was endorsed by the ARTP Steering Committee on 11 December 2019. The DIT Procurement Committee endorsed the evaluation panel report and recommendation on 16 December 2019, and it was approved on the same day by the DIT Chief Executive as the responsible person appointed under the PTA.

6.3 Findings

6.3.1 DIT established sound practices for the expression of interest phase of the procurement

The invitation for expression of interest was prepared in line with the SPB's *Market Approaches and Contracts Guideline*. The expression of interest documents included process guidelines, specifications and response schedules.

The expression of interest process guidelines included objectives that were consistent with those outlined in the acquisition plan.

The expression of interest response schedules included the evaluation criteria and an outline of the evaluation approach that was consistent with the acquisition plan and evaluation plan for the expression of interest.

A detailed evaluation plan for the expression of interest stage was prepared in line with the SPB's *Supplier Selection Policy*. The evaluation plan was reviewed by the probity advisor, endorsed by the evaluation panel and approved by the DIT Chief Executive before the expression of interest responses were opened.

Sound practices were implemented for opening and registering expressions of interest, including two independent officers opening submissions and maintaining appropriate scheduling records, and the attendance of the probity advisor.

Expression of interest responses were evaluated by the expression of interest evaluation panel against the criteria set out in the evaluation plan. Clarifications were sought from all proponents and considered in the overall consensus scoring and risk determination.

An evaluation panel report and recommendation was prepared detailing the evaluation process followed. The recommendation was consistent with the outcome of the evaluation process and listed the three proponents to proceed to the next phase of the procurement.

6.3.2 Meeting records were not prepared for expression of interest clarification interviews

Recommendation

For future procurements DIT should prepare and maintain reasonable records of matters discussed with proponents at expression of interest clarification sessions.

Finding

We found that the evaluation team did not maintain minutes for clarification meetings held with proponents during the evaluation of expressions of interest.

Clarification questions and initial responses from proponents were recorded in the data room before the clarification interviews were conducted.

The evaluation team advised that the purpose of the clarification interviews was to provide proponents with the opportunity to discuss their responses to the clarification questions and that no new information was sought at these meetings.

After the interviews, DIT used the electronic data room to obtain additional information from two proponents and seek confirmation from two proponents of answers provided for specific questions. For this purpose, DIT provided the proponent with a record of the response they had given during the interview. These written records did not cover all clarification questions discussed in the interview and did not state if any other matters were discussed during the interview.

Without a record of matters discussed at clarification meetings, it is more difficult for DIT to demonstrate that probity principles of transparency and fair and equitable treatment of all proponents have been upheld.

The expression of interest evaluation plan required all discussions with proponents to be documented, including minutes recording the main points raised in face-to-face meetings and telephone or electronic communications. The SPB's *Probity and Ethical Procurement Guideline* supports the importance of keeping records of communication with prospective suppliers.²²

DIT response

Recommendation accepted.

DIT's Probity Policy and/or related procedures will be modified to reflect a requirement to keep a record of key matters discussed at clarification meetings with expression of interest participants.

²² The SPB's *Probity and Ethical Procurement Guideline* states that officers should pay particular attention to documenting all relevant communication with prospective suppliers and significant verbal discussions should be followed up in writing to confirm the conversation.

7 Invitation to supply release, amendments and opening of responses

What we found

DIT amended the invitation to supply to address the impact and pressures that COVID-19 was having on the proponents' ability to prepare their bids and fully respond to the requirements by the tender close date. The amendments included:

- a two-week extension to the tender close date
- a provision to reimburse unsuccessful proponents for additional offer costs incurred because of COVID-19 (offer cost contribution)
- allowing proponents to identify assets to be subject to further due diligence after contract commencement and providing a mechanism for costs to be adjusted if the condition of those assets is found to be substantially different to asset information provided by DIT during the procurement.

The DIT Chief Executive's rationale for introducing the offer cost contribution and tender extension was a reasonable response to the unprecedented and uncertain circumstances that existed.

The asset condition amendment was also reasonable to help limit the State's exposure and respond to impacts from COVID-19 that limited the proponents' ability to inspect asset conditions and delayed DIT's provision of access to asset information to proponents.

We also found that DIT did not:

- document its assessment of the probity impacts from introducing the amendments during the invitation to supply. DIT advised that probity impacts were assessed in its consideration of the amendments but its assessment was not documented
- maintain records of key matters discussed with proponents at interactive sessions or who attended the sessions.

What we recommend

For future procurements, DIT should:

- document its assessment of potential probity impacts when amending tender conditions during the procurement process, and how they are addressed
- maintain records of key matters discussed with proponents at interactive sessions and who attended the sessions.

7.1 Audit approach

We reviewed documents and interviewed a sample of key people involved in the invitation to supply to:

- determine if the invitation to supply documents released to shortlisted proponents were consistent with SPB requirements and clearly outlined the evaluation criteria
- assess whether the evaluation approach outlined in the documents issued to short-listed proponents was consistent with the approved evaluation plan
- assess whether amendments made to the invitation to supply process were properly documented and approved
- assess whether appropriate records were maintained for the invitation to supply process, including the briefing sessions, one-on-one interactive sessions and other meetings with proponents
- determine the probity advisor’s involvement in the briefing sessions, infrastructure and rolling stock inspections, and one-on-one interactive sessions
- assess the arrangements established to manage the receipt and opening of tender responses.

For our assessment, we made inquiries with those responsible for making key decisions about the process, including the DIT Chief Executive and ARTP Program Director. We also made inquiries with some ARTP Steering Committee members, the probity advisor and the unsuccessful proponents.

7.2 Description of the invitation to supply process

This section describes the elements of the invitation to supply. The invitation to supply is a crucial aspect of the procurement in meeting the SPB procurement principles receiving, competitive bids and achieving the specific procurement objectives for this procurement. This section includes some instances where matters arose and how they were addressed.

7.2.1 Invitation to supply release

Invitation to supply timing and documents

An invitation to supply was released on 24 February 2020 to Adelaide Next, Keolis Downer and TrainCo. The invitation to supply documents contained:

- procurement process guidelines specifying the rules for the conduct of the invitation to supply phase, evaluation criteria and rules for the electronic data room
- an overview of the invitation to supply requirements
- commercial documents including the draft OROA and other supporting contracts
- a response document and offer templates that set out the format and information proponents were required to provide in their offers.

The procurement process guidelines stated that the tender closing date was 18 May 2020.

Aim of the invitation to supply

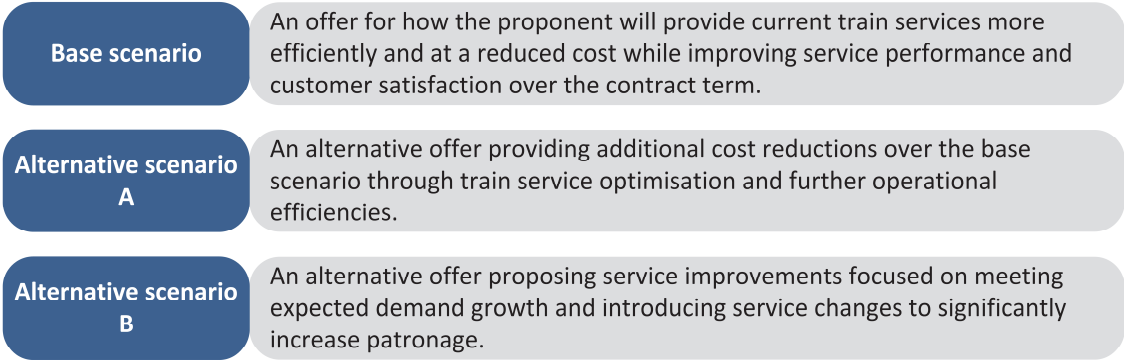
The documents explained that the State expected the invitation to supply would result in the new operator providing current train services more cost effectively, with no reduction in service level and improved levels of service performance and customer satisfaction.

The requirements document stated that the invitation to supply was designed to enable proponents to clearly set out their approach to achieving cost-efficiencies and improved outcomes for customers.

Proponents were required to submit three different offers

Each proponent was initially required to provide three offers for their bid to comply with the tender requirements. Figure 7.1 describes the three offers.

Figure 7.1: Offer requirements when the invitation to supply was released



Source: Audit analysis developed from the invitation to supply requirements released to proponents on 24 February 2020.

After the invitation to supply was released, DIT changed the offer requirements. Sections 7.2.8 and 7.2.12 discuss these changes.

Condition precedent for proponents to submit a tender response

The procurement process guidelines explained that briefing sessions, interactive sessions and a site visit would be held before the tender closing date to help proponents prepare their tender responses. The guidelines stated that it was mandatory for proponents to attend these sessions and that this was a condition precedent to them submitting an offer.

7.2.2 Proponent briefing sessions

Three separate mandatory briefing sessions, one for each proponent, were held on 3 March 2020. At each briefing session, DIT provided a summary of the invitation to supply documents and process and the proponent was able to ask questions. The questions that each proponent asked and DIT’s responses were subsequently provided to all proponents via the electronic data room on 16 March 2020.

Another three briefing sessions, one for each proponent, were held on 4 March 2020. At these sessions, DIT provided a summary of the payment mechanisms, KPI system and offer template.²³

The probity advisor attended all the briefing sessions and outlined key probity principles and processes to the proponents at the start of the sessions.

²³ Template that proponents were required to populate with financial information for their bid.

7.2.3 Transdev letter to the probity advisor seeking comfort about fair treatment for all proponents

On 9 March 2020, Transdev, a TrainCo consortium member, sent a letter to the probity advisor raising concerns about the invitation to supply.

In their letter, Transdev discussed its view that the ARTP was one part of a larger procurement program for Adelaide metropolitan transport that included the recent tender for bus and light rail passenger transport services.²⁴ It also indicated that the timing of the separate procurement processes meant there was an inevitable overlap and a potential imbalance of information that existed between proponents.

Transdev discussed the synergies that can come from operating another mode of transport in the same area and its understanding that integration with other modes of transport would be a key evaluation criterion. It explained it was important for all proponents to have the same access to the information that may be relevant to such integration.

Transdev also stated it was likely that all proponents for the heavy rail procurement were also involved in the earlier bus and light rail procurement. Because of this it expected that integration information, including bus and tram timetables and asset information, was likely to be known to the proponents. It explained that it considered having access to integration information was a material probity concern and outlined the advantages that this could provide to the other proponents. This included that those other proponents could offer synergies to DIT based on information known only to them as a bus or tram operator and be able to use the integration information to prepare timetables for the heavy rail project.

Transdev considered that integration information should be reviewed to determine if such information was available to the bus and light rail operators who were also proponents for the heavy rail procurement. It indicated that this integration information should then be made available to all proponents.

Transdev sought comfort that all proponents were being treated fairly and that Transdev was not advantaged or disadvantaged by being unsuccessful in the earlier procurement of bus and light rail passenger transport services.

Probity advisor's response

On 17 March 2020, the probity advisor responded to Transdev's concerns. The probity advisor explained to Transdev that one of DIT's objectives for the procurement was to increase train patronage, however, integration with other public transport modes was not in itself a key evaluation criterion. Rather, the proponent's approach to delivering integrated operations, both within its own operations and with other public transport modes, was a sub-criterion within the weighted evaluation criteria for operational delivery.

The probity advisor stated that it understood DIT did not require proponents to provide detailed integrated timetables and interface arrangements, but instead sought an outline of how each proponent would approach integration activities.

²⁴ The tender result for the bus and light rail procurement was announced on 10 March 2020.

The probity advisor explained that DIT was committed to continually monitoring the availability and relevance of information that can and should be provided to proponents to enable them to be fairly evaluated against the criteria. The probity advisor also stated that it had and would continue to require DIT to promptly provide all proponents with all information about heavy rail that was necessary and relevant for them to prepare their bids.

Transdev did not raise its concerns with the complaints officer

The procurement process guidelines included a process for instances where a proponent considered it was being unfairly treated. This process required the proponent to first notify the State of the issue in the electronic data room. If the issues were not resolved, the proponent could then write to the complaints officer listed in the guidelines, who would deal with the issue in line with the SPB's complaint processes.

After receiving the probity advisor's response to its letter, Transdev did not write to the complaints officer to deal with its concerns.

We found the probity advisor's reports and the probity register did not include specific details on the probity concern raised by Transdev and the probity advisor's response to these concerns (refer to sections 11.5.7 and 11.5.10).

7.2.4 Site visit to inspect rail infrastructure and depots

Representatives from the State, the three proponents and the probity advisor attended a mandatory site visit on 14 March 2020. The site visit gave the proponents an opportunity to visually examine the rail infrastructure and depots used to provide the services.

The procurement process guidelines included protocols that proponents were required to follow for the site visits. The protocols included that proponents should strictly limit questions to the purpose and scope of the site visit and submit questions to clarify any information from the site visit in the electronic data room.

7.2.5 SA Health declares COVID-19 a public health emergency

During the invitation to supply, the COVID-19 pandemic emerged as a global concern and was significantly impacting global business operations and people. Governments around the world were urgently introducing measures to prevent COVID-19 from spreading, including travel restrictions and requiring people to work remotely and practise social distancing.

On 15 March 2020, the Chief Executive of the Department for Health and Wellbeing declared COVID-19 a public health emergency in South Australia.²⁵

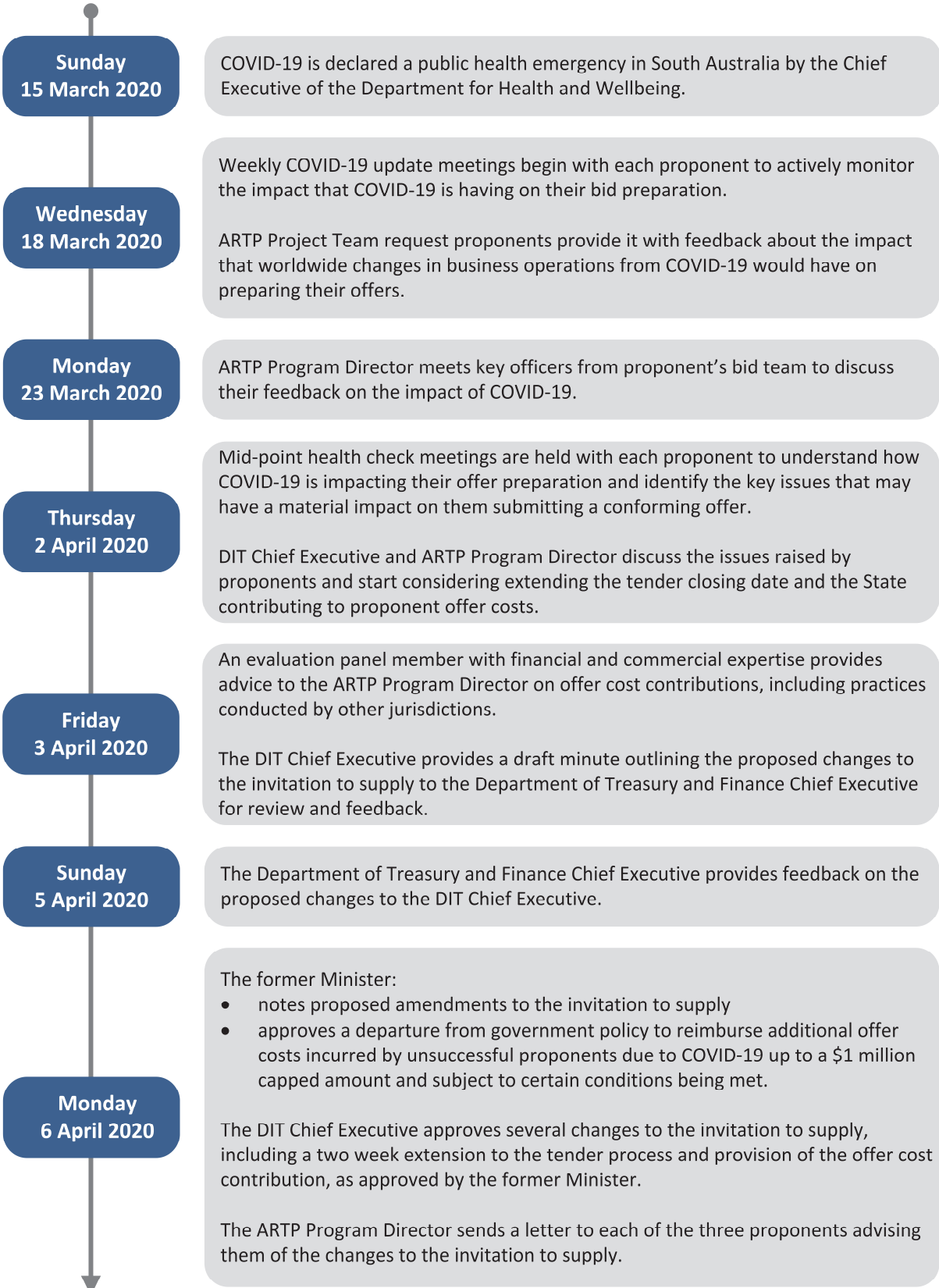
The Premier announced on 22 March 2020 that South Australian borders would close from 24 March 2020, with anyone entering South Australia required to self-isolate for 14 days.²⁶

²⁵ The South Australian Government Gazette, 16 March, no. 18, *State Government Instruments, South Australian Public Health Act 2011, Declaration of a Public Health Emergency, 2020*.

²⁶ Marshall, S (Premier), Wade, S (Minister for Health and Wellbeing) 2020, *South Australia's borders to close*, media release, South Australian Government, Adelaide, 22 March.

Several changes to the invitation to supply were made in response to COVID-19. Figure 7.2 shows a timeline of events leading up to the changes being introduced. For details of these events refer to sections 7.2.5 to 7.2.12.

Figure 7.2: Timeline of events for amendments made to the invitation to supply on 6 April 2020



Source: Audit analysis.

7.2.6 Meetings held with proponents to discuss the impacts of COVID-19 on preparing their offers

Meetings held with proponents on 18 March 2020

In response to the rapidly developing COVID-19 pandemic, three teleconference briefings, one for each proponent, were held on 18 March 2020. These briefings were between the ARTP Program Director and key officers from the proponent's bid team. The probity advisor also attended each briefing. The purpose of the briefings was for each proponent to discuss COVID-19's impact on preparing their bid.

The meeting record for the teleconference with Keolis Downer, maintained by the probity advisor, indicated that Keolis Downer advised DIT that it may need to seek some bid cost relief.

Later that day, the State issued a notice to all proponents in the electronic data room. It explained that the State:

- had set clear time frames for completing the invitation to supply, including the tender closing on 18 May 2020, awarding of the contract in late August 2020 and contract commencement in late January 2021
- was seeking the proponent's feedback about the impact that worldwide changes in business operations from COVID-19 would have on preparing their bid and the offers they would provide to the State on 18 May 2020.

The proponents were asked to provide in their feedback:

- relevant information about potential areas of weakness within the offer they would submit on 18 May 2020
- any changes to the offer requirements which would help enable them to prepare and submit a coherent offer by the tender closing date
- any ways the ARTP Project Team could assist them.

The proponents were also advised that the ARTP Project Team proposed to hold another teleconference with them on 23 March 2020 to discuss their feedback.

TrainCo response

On 20 March 2020, Transdev advised that around half of its core tender team had moved from preparing TrainCo's bid to dealing with planning for and minimising the impact of COVID-19 on its operations and clients.

Transdev suggested five options for changing the procurement approach for DIT's consideration. These options included:

- suspending the tender until travel restrictions were lifted and teams could work collaboratively

- backfilling proponents internal resources with consultants and other external service providers to address the impact of internal resources moving away from preparing the bid to minimise the impact of COVID-19 on other business operations. Transdev stated that to conduct this approach it would be looking for financial support from DIT and this option was likely to require a tender extension.

Transdev advised that it did not recommend extending the tender period, as COVID-19 impacts, such as travel restrictions and isolated team working were likely to continue for many months.

Keolis Downer response

On 22 March 2020, Keolis Downer advised that ensuring business continuity remained its priority, views around the allocation of resources were changing daily, and it had enforced working from home and travel restrictions for all staff working on its bid. Further, it advised some staff had returned to Europe and while they would continue to work on the bid remotely, there would be limited time periods for live interaction with Australian staff. They also advised that it was difficult to forecast the full impact of COVID-19 on resource availability and they anticipated further disruption.

Keolis Downer explained that they were encountering general delays in developing their bid due to restrictions in face-to-face meetings. They also proposed changes to the offer requirements for DIT's consideration. They included:

- reducing the requirements for alternative scenario B or extending the deadline for this scenario so a more detailed and fully written offer could be prepared
- providing an extension for submitting certain financial information, including details of the assumptions used by proponents in preparing bids.

Keolis Downer also proposed a mechanism for pricing asset condition risk that would allow them to reduce the amount of due diligence required to be completed in a short period of time and mitigate the impact of being unable to conduct assessments of assets due to the pandemic.

Adelaide Next response

On 23 March 2020, Adelaide Next advised that COVID-19 was continuing to evolve and was having an almost daily (and hourly) impact on business continuity planning, including preparing their bid.

It stated that John Holland, an Adelaide Next consortium member, had started moving all its office-based teams to remote working. It also highlighted that running a large-scale bid completely remotely was unprecedented and would be challenging.

Adelaide Next explained that it was committed to meeting the SA Government's time frames and could submit an offer for the base scenario by 18 May 2020, but proposed a one-month extension to submit the two alternative offers. Adelaide Next felt it could not deliver the two alternative offers by the tender closing date because its team was working remotely and was unable to engage on the ground with the team in South Australia. It advised that separating the base scenario offer from the alternative offers was believed to be a workable solution that would enable the SA Government to form a view within its time frames as to the viability of the submissions for all proponents.

Meetings held with proponents on 23 March 2020 and DIT's response

On 23 March 2020 the ARTP Program Director met separately with key officers from each proponent's bid team to discuss the feedback they provided. This process allowed the proponents to provide input into the measures that DIT was considering to reduce the impact of the pandemic on the invitation to supply, while still achieving the overall objectives of the procurement.

On 24 March 2020, DIT subsequently made several changes to the invitation to supply to address the feedback that proponents had provided. Section 7.2.8 provides details of the main changes that were made.

7.2.7 Weekly COVID-19 update meetings with proponents

On 24 March 2020 the ARTP Project Team advised each proponent it would hold a weekly COVID-19 update meeting with them via video conferencing. The meetings allowed the ARTP Project Team to understand the impact the pandemic was having on each proponent's bid preparation. The COVID-19 update meetings were held with proponents each week until 19 May 2020.

DIT did not keep a record of matters discussed at the meetings, although the ARTP Project Team advised us that a record of any actions from these meetings was maintained. The probity advisor attended the meetings and kept notes of the meetings for its own records. This matter is discussed further in section 11.5.1.

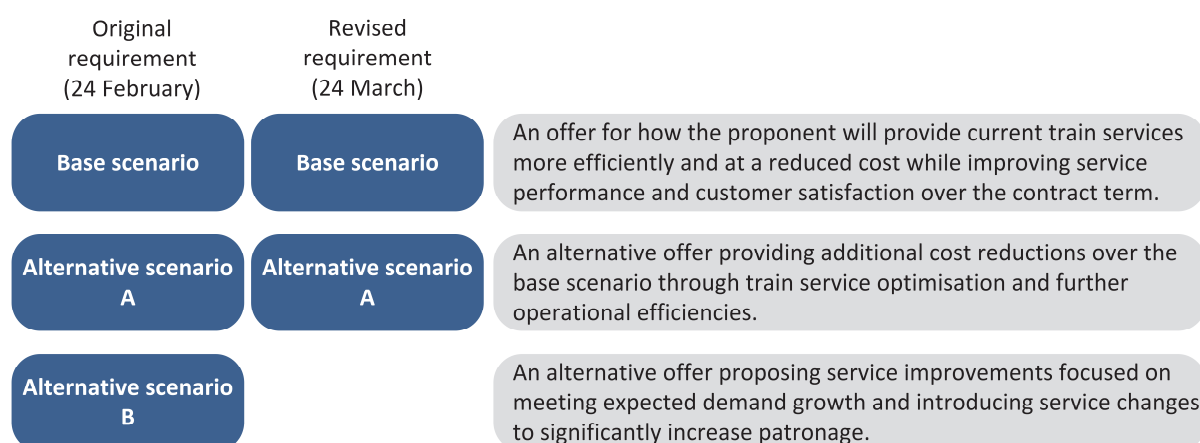
7.2.8 Amendments made to the invitation to supply

On 24 March 2020, DIT made several changes to the invitation to supply. These changes were made to respond to the impact that COVID-19 was having on the proponents' ability to prepare offers by the tender closing date. Refer to section 7.2.6 for details of the impacts of COVID-19 on bidders' ability to prepare bids.

DIT removed the requirement for the alternative scenario B offer

The changes to the invitation to supply included removing the alternative scenario B offer that proponents were required to submit in their tender response. Figure 7.3 shows the original and revised offer requirements.

Figure 7.3: Offers required on 24 February 2020 and on 24 March 2020



Source: Audit analysis developed from the invitation to supply requirements released to proponents on 24 February 2020 and 24 March 2020.

DIT advised the proponents the alternative scenario B offer was not needed, as the procurement outcomes of increased efficiencies and improved customer service outcomes could be achieved under the other two offers (base scenario and alternative scenario A).

Instead of providing the third offer (alternative scenario B), proponents were given the option to provide a high-level summary of possible service improvements with costed options. Providing this information was not required for bids to comply with the requirements.

The level of information required in tender responses was reduced

The ARTP Project Team reviewed the information required to be provided in tender responses. This review was to determine which elements could be relaxed to reduce the pressure on proponents' workloads while ensuring they could submit reasonable bids that could be effectively evaluated.

This resulted in several changes to the requirements, including allowing proponents to submit outline plans instead of fully completed plans for certain areas, such as environment and sustainability management and security management. The full plans were instead required to be provided before contract award or contract commencement.

Proponents were given another week to provide assumption details

The time for proponents to submit details of assumptions used in preparing their offers was also extended by one week from 18 May 2020 to 25 May 2020.

7.2.9 Transdev letters to DIT on the impact of COVID-19

Transdev provided two letters to the ARTP Program Director via the electronic data room, outlining the impact of COVID-19 on preparing TrainCo's bid.

Letter from Transdev on 24 March 2020

On 24 March 2020, Transdev wrote to the ARTP Program Director to reiterate the COVID-19 impacts it had previously raised (refer to section 7.2.6). In this letter, Transdev explained that:

- its main priority continued to be the safety and wellbeing of its staff and customers and delivering services to their clients
- COVID-19 had resulted in its tendering team being reduced to around 40% capacity, which impacted its progress in preparing TrainCo's bid
- it needed to supplement its reduced resources with unplanned consultancy costs, causing significant concern
- most of its team was based interstate or overseas and could no longer travel to Adelaide, as South Australia had closed its borders and it was not prepared to conduct a desktop exercise for the tender
- it had yet to be provided access to DIT's asset information system. The restrictions on viewing the assets to validate information provided by the ARTP Project Team and resourcing constraints raised significant concerns that it was unable to accept the risks relating to asset condition. This included pricing of renewal activities and accepting latent defects in infrastructure and rolling stock
- it had serious concerns in meeting the tender closing date, given the significant impact COVID-19 had already had on tender preparation
- the ARTP Project Team should consider suspending the invitation to supply for a number of months to enable the market to focus on businesses currently impacted by COVID-19 and apply resources to the invitation to supply only when it recommences.

ARTP Project Team's response to Transdev

The ARTP Project Team responded to Transdev via the electronic data room on 24 March 2020, advising that it had noted the letter.

Letter from Transdev on 27 March 2020

On 27 March 2020 Transdev provided another letter to the ARTP Program Director to advise it had completed a detailed review of impacts to date from COVID-19 on TrainCo's tender submission.

Transdev advised that if the tender closing date of 18 May 2020 was maintained, TrainCo would be unable to submit a tender response. Further, it advised that a decision had been made to stand down its tender team from 27 March 2020 to ensure its total focus was on addressing and mitigating impacts of COVID-19 for its staff, customers and existing clients. It also highlighted that being unable to access DIT's asset information system had contributed to the decision to stand down its tender team.

Transdev acknowledged that while it appreciated DIT's amendments to the invitation to supply made on 24 March 2020 (refer to section 7.2.8), it did not consider it was able to dedicate sufficient resources or have sufficient time to conduct work required to ensure accurate and sustainable pricing. It stated that it would like to further participate in the tender, but noted this could now only be achieved if the tender was suspended.

ARTP Project Team's response to Transdev

The ARTP Program Director responded to Transdev via the electronic data room on 27 March 2020. He advised Transdev that the ARTP Project Team had noted the points made in the letter and would consider them for discussion at the mid-point health check meeting with TrainCo on 2 April 2020.

7.2.10 Mid-point health check meetings with proponents

On 2 April 2020, at about the mid-point of the invitation to supply, separate health check meetings were held via teleconference with each proponent. The DIT Chief Executive, ARTP Program Director and the proponent's chief executive and other key staff involved in preparing its offer attended these meetings. The probity advisor also attended all three meetings.

The purpose of the mid-point health checks was for DIT to understand the proponent's progress in preparing their offers, given COVID-19 impacts, and to identify any key issues that may have a material impact on them submitting a competitive and conforming offer.

The ARTP Project Team's meeting records show that all proponents noted that:

- the changes made to the offer requirements on 24 March 2020 (refer to section 7.2.8) had assisted with preparing their offers
- COVID-19 had delayed DIT providing access to its asset information system, which had impacted bid preparation
- the financial security requirements seemed high compared to other public transport arrangements and had changed from the expression of interest.

The meeting records also show each proponent's view of its progress at this stage of the process and the key issues they communicated to DIT. These are discussed below.

Adelaide Next's position

Adelaide Next advised that it remained fully committed to the process and was on track to submit its tender response by 18 May 2020. Adelaide Next noted that it had experienced some challenges because of COVID-19 and that its large bid team was unable to work in usual ways, impacting productivity. It also noted that COVID-19 had delayed DIT providing access to its asset information system, which had impacted its bid preparation.

Keolis Downer's position

Keolis Downer advised it was committed to the process and working towards the tender closing date of 18 May 2020, but had experienced some productivity challenges due to COVID-19. It explained the pandemic had resulted in changes in team location and composition and additional resources were needed to complete the development of its bid, at an additional cost to Keolis Downer. It also advised that as a result of remote working and increased governance, the bid team was behind schedule and it would greatly appreciate any consideration of an extension to the tender closing date.

TrainCo's position

TrainCo raised concerns about the impact of COVID-19 on its ability to form a bid team.

TrainCo sought advice on options for postponing the invitation to supply or the provision of offer costs, so that it could engage more resources to assist with developing its tender response. The DIT Chief Executive and ARTP Program Director advised TrainCo that the State would form a view on the feedback provided by all proponents at the meetings and look to actively monitor and respond sensibly.

TrainCo confirmed that if the State suspended the tender, it would continue to participate post-suspension.

DIT response to matters raised by the proponents

After meeting all proponents, the DIT Chief Executive and ARTP Program Director met to discuss and consider the issues raised by proponents and decide how DIT would respond. For details about how DIT responded to the issues, refer to section 7.2.12.

7.2.11 Telephone meetings between the DIT Chief Executive and the Keolis Downer Chief Executive

The meeting records for the mid-point health checks indicated that the Keolis Downer Chief Executive had raised some concerns with the DIT Chief Executive about the outcome of the recently completed tender for bus and light rail passenger transport services.

A telephone meeting between the Keolis Downer Chief Executive and the DIT Chief Executive was held on 3 April 2020 to discuss the concerns raised on the previous day.

The DIT Chief Executive prepared a file note that recorded what was discussed. The file note stated the meeting was arranged to discuss matters not directly related to the heavy rail tender and that the matters discussed were about the bus and light rail tender.

While the probity advisor was not present for the discussion, the DIT Chief Executive sent the file note that he prepared to the probity advisor so that the probity advisor was made aware of the interaction and what was discussed.

A further telephone meeting between the two chief executives occurred on 9 April 2020. This was to discuss a matter that the DIT Chief Executive agreed to follow up from the meeting on 3 April 2020. The probity advisor was also not involved in the discussion and no file note was prepared to record what was discussed.

The DIT Chief Executive was the only State representative who was involved in these interactions. In our view, it is sound practice that at least two State representatives attend meetings with proponents. This is to help to effectively manage probity risks (refer to section 11.5.3).

7.2.12 Further amendments made to the invitation to supply

From the mid-point meetings held on 2 April 2020 through to 6 April 2020, the ARTP Program Director and DIT Chief Executive considered responses that could reasonably address the impact of COVID-19 on the proponents' preparation of offers.

On 2 April 2020, shortly after meeting the proponents, the ARTP Program Director sought advice from an evaluation panel member with financial and commercial expertise about Australian practice on contributing to bid costs incurred by proponents. This included advice on the typical levels of contributions made to offer costs, the conditions that proponents would need to meet and whether all proponents or only unsuccessful proponents would be eligible to receive offer cost contributions.

On 3 April 2020, the ARTP Program Director received the requested advice and developed some proposed conditions for any offer cost contribution, based on that advice. The ARTP Program Director provided the advice and proposed conditions to the DIT Chief Executive.

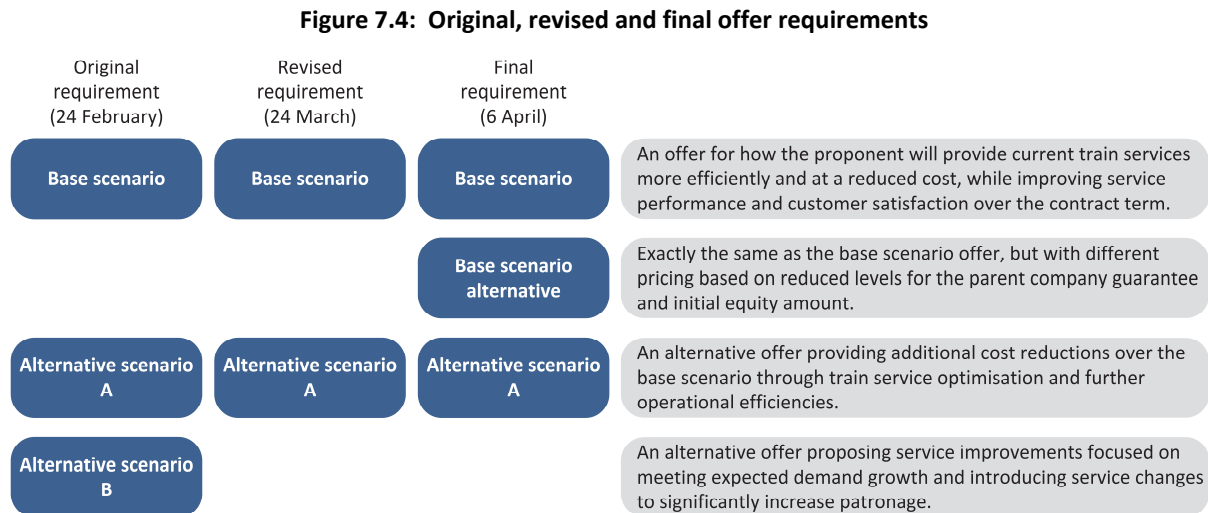
The DIT Chief Executive also sought feedback from the Department of Treasury and Finance Chief Executive later that day on a minute that set out the proposed changes to the invitation to supply. This included extending the tender closing date and introducing provisions for the SA Government to reimburse offer costs of up to \$1 million per unsuccessful proponent, subject to certain conditions. On 5 April 2020, feedback on the proposed changes was provided by the Department of Treasury and Finance Chief Executive, who was satisfied with the proposals.

DIT amended the invitation to supply on 6 April 2020. The amendments included:

- a two-week extension to the tender closing date, resulting in a revised date of 1 June 2020
- that the State would consider reimbursing additional offer costs incurred by unsuccessful proponents as a direct result of COVID-19, up to a cap of \$1 million per unsuccessful proponent, subject to certain conditions being met
- introducing a requirement for proponents to submit a third offer, referred to as the base scenario alternative. This offer was the same as the base scenario offer, but with different pricing based on a reduced parent company guarantee and reduced initial equity amount
- requiring the proponents attend a mandatory additional interactive session to clarify requirements and provide feedback on their approach to employment matters.

DIT made the amendments to address its assessment of the risk to the process continuing, based on the proponents' feedback on the impacts of COVID-19, which at that time were significant and uncertain.

Figure 7.4 shows the original offer requirements and the changes that were made to them on 24 March 2020 and 6 April 2020 (the final offer requirements).



Source: Audit analysis developed from the invitation to supply requirements released to proponents on 24 February 2020, 24 March 2020 and 6 April 2020.

Context and rationale for the offer cost contribution and tender extension amendment

We focused on understanding the context and DIT's rationale for introducing the offer cost contribution and the tender extension amendments. This is because these were significant amendments that had potential to impact the probity of the process.

As well as reviewing records of the events in Figure 7.2, we interviewed the ARTP Program Director and the DIT Chief Executive to clarify what occurred leading up to the amendments being issued.

The DIT Chief Executive advised us of the following circumstances:

- The amendments were considered during a period of enormous uncertainty around what was happening with COVID-19 and what might happen next.
- The idea for the offer cost contribution came from the mid-point health checks on 2 April 2020, where proponents had indicated they were incurring additional costs in preparing their bids because of COVID-19. It was the DIT Chief Executive's understanding from the health check meetings that proponents were likely to need to use external consultants more than they had anticipated because of COVID-19 impacts and to complete their due diligence on the commercial terms in a shorter period. A key factor was access to the rail assets and reliability of asset information.
- Proponents had indicated they were incurring additional costs in preparing their bids because of COVID-19 and would appreciate some assistance. However they did not directly seek offer cost contributions as a condition of continued participation.

- The DIT Chief Executive considered it was in the State’s best interest to receive at least two competitive bids. With the significant uncertainty at the time brought by COVID-19, he was concerned about the quality of the bids and proponents being able to fully respond to the State’s requirements. He said he wanted to make sure that the proponents did not feel constrained in any way by having to incur additional costs to meet the tender requirements.
- Given the uncertain environment, he exercised judgement to put in place a framework, that on the information he had at the time, would provide the best chance of the State receiving at least two materially conforming tenders at the end of the invitation to supply. He also explained that DIT had one chance to set the framework for the next six weeks and get it right as there was a lot of thinking about how the pandemic could get worse, the consequences and how they might be dealt with.
- For the tender extension, considering the uncertainty and unknown impacts from COVID-19, allowing more time for proponents to prepare their bids was also in the State’s interest. There had been delays in DIT releasing asset information to proponents and this was an area where he considered proponents needed to conduct a large amount of due diligence, given the nature of the operations and contract. If the proponents were not given enough time to conduct their due diligence, they would likely add contingencies in their bids and depart from the contract terms, which would not be in the State’s interest.
- DIT concluded that no proponent was advantaged by introducing the offer cost contribution. The DIT Chief Executive explained that this was because the changes provided each proponent with an equal opportunity to use more resources to fully respond to the invitation to supply requirements.

Approval of offer cost contribution and tender extension amendments

The DIT Chief Executive prepared a minute to the former Minister that outlined the proposed amendments to the invitation to supply and the conditions of the offer cost contribution. On 6 April 2020 the former Minister received the minute, noted the amendments and provided approval to offer unsuccessful bidders reimbursement for additional bid costs incurred due to COVID-19 impacts up to a capped amount of \$1 million.

On the same day, the DIT Chief Executive (as the appointed person under the PTA) then approved the proposed amendments to the invitation to supply in line with the acquisition plan. Also, the ARTP Program Director sent a letter to the proponents to advise them of the amendments (refer to section 7.2.13).

Conditions for the payment of any offer cost contribution

The invitation to supply documents released on 24 February 2020 stated that proponents were responsible for the cost of preparing and submitting their offers and all other costs arising from their participation in the procurement process.

The amended tender conditions outlined that payment of any contribution is at the State's discretion and that offer cost contributions (as a direct result of COVID-19) would only be paid to an unsuccessful proponent where the following conditions were met:

- A materially conforming offer was submitted.
- The proponent agrees to make available to the State any project-specific intellectual property rights reasonably requested by DIT.
- The proponent provides auditable evidence and records of the additional costs incurred because of COVID-19 and agrees to the State conducting a third party audit to verify offer costs.

Section 7.4 discusses an offer cost claim that Adelaide Next submitted and DIT's assessment of the claim.

7.2.13 Letter from ARTP Program Director to proponents

On 6 April 2020, the ARTP Program Director wrote to all proponents to advise them that further changes had been made to the invitation to supply documents. Section 7.2.12 provides details of these changes.

DIT required the proponents to respond to the letter by 8 April 2020 to confirm their intention to continue to participate in the procurement process and their commitment to provide a conforming offer by the extended tender closing date.

The ARTP Program Director acknowledged that COVID-19 had restricted the ability for proponents to physically inspect rail network assets or observe the network and assets in operation. The ARTP Program Director also acknowledged that the pandemic had impacted the timing of providing the proponents access to DIT's asset information system.

To address this matter, DIT offered to provide proponents with additional asset information as an alternative to them physically inspecting and reviewing the assets. Proponents were asked to provide feedback on which additional sources of asset information would help most and when this would need to be available to be useful for preparing their bid.

Proponents were also asked to provide any proposals to defer submitting specific parts of tender responses until 8 June 2020, where this could be demonstrated to be of benefit in finalising their offer.

Adelaide Next response

Adelaide Next confirmed on 8 April 2020 that it intended to continue to participate in the tender process and was committed to providing a conforming offer by 1 June 2020. It did not provide any proposal to defer submitting specific parts of the tender response to 8 June 2020.

Keolis Downer response

Keolis Downer confirmed on 8 April 2020 that it intended to continue to participate in the tender process and was committed to providing a conforming offer by 1 June 2020.

It emphasised that COVID-19 had to date had a major impact on preparing a competitive and conforming offer. It also provided proposals to defer submitting specific parts of the tender response to 8 June 2020 and its rationale to support this.

On DIT's proposed approach to asset information in lieu of site inspection, Keolis Downer raised concerns that the approach was for proponents to conduct a desktop review of information provided by DIT and its consultants. It advised that its preferred position was for proponents to provide a range of prices per asset class during the tender process, with certain elements of asset condition pricing being finalised as a condition precedent to commencement. Keolis Downer stated that this was the fairest approach available to both the State and proponents and would require the contract to be amended to create a mechanism that allows the operator to re-price asset condition risks if the assumed asset condition does not align with the inspected condition.

TrainCo response

On 7 April 2020 TrainCo confirmed that unless the tender was suspended it would not be able to participate in the invitation to supply. TrainCo also advised that:

- it appreciated the amendments made but remained concerned that DIT's response had not sufficiently accounted for the impact of COVID-19 on its tender preparations and had not addressed the commercial issues it had previously raised
- the two-week extension to the tender closing date was not sufficient to overcome the continuing business impacts of COVID-19
- due to the unpredictable nature and unknown duration of the pandemic's impact, it was firmly of the view that the invitation to supply should be suspended until proponents could complete full and detailed tender preparations, including physical on-site assessments.

The ARTP Program Director replied to TrainCo on 9 April 2020. He advised that:

- after considering all proponent responses, DIT was continuing with the invitation to supply process with the 1 June 2020 tender closing date
- if TrainCo did not submit a conforming offer by 1 June 2020, it would be excluded from further participating in the invitation to supply process
- if DIT determined before 1 June 2020 to suspend the process it would give TrainCo the opportunity to participate in a further, revised invitation to supply process.

7.2.14 Invitation to supply amendment for asset information

From mid-March 2020, the COVID-19 pandemic restricted proponents' ability to physically inspect rail network assets and observe the network and assets in operation, as would typically occur during this type of procurement. The emergence of COVID-19 also put pressure on DIT's IT environment, delaying proponents' access to DIT's asset information system.

DIT offered to provide proponents with additional asset information as an alternative to physical inspection and review of the assets (refer to section 7.2.13). On 15 April 2020,

proponents were provided with details of the extra asset information DIT were to provide. This information included a driver's cab view video of the network assets, additional detailed inspection reports and condition assessment reports. DIT also arranged an extra site visit, that was held on 19 April 2020.

The invitation to supply was amended on 20 April 2020 to include provisions in the draft OROA designed to address the proponents' limited ability to complete their due diligence and inspect the condition of the rail network assets. The new provisions included:

- providing a framework for the operator to identify the assets that are to be subject to further due diligence by the operator after contract commencement
- proponents including in their offer the estimated timing and cost of additional rectification, remediation and maintenance works for those assets, up to a cap of \$30 million over the 12-year term (nominated asset cap)
- a mechanism to adjust the payment sum if the operator and the State agree that the actual condition of those assets is substantially different to the asset information provided to proponents during the procurement process.

7.2.15 Interactive sessions with proponents

Several interactive sessions were held individually with each proponent to provide them with an opportunity to discuss the development of their offers and to seek clarification and feedback before submission. The interactive sessions were also intended to minimise the risk of proponents misunderstanding the State's requirements.

Adelaide Next, Keolis Downer and TrainCo attended two mandatory interactive sessions, held on 13 March 2020 and 26 March 2020. Adelaide Next and Keolis Downer attended a third mandatory interactive session held on 15 April 2020.

Adelaide Next and Keolis Downer also attended additional interactive sessions that they either requested or that DIT offered. Adelaide Next attended a further six interactive sessions between 19 March 2020 and 7 May 2020. Keolis Downer attended another five interactive sessions between 16 April 2020 and 8 May 2020.

The probity advisor attended all the interactive sessions. He provided a probity briefing at the start of the sessions on the need for attendees to maintain the confidentiality of information discussed at the sessions.

7.2.16 Invitation to supply evaluation plan

The DIT Chief Executive approved the evaluation plan on 11 May 2020, consistent with approval processes set out in the acquisition plan.

The SPB's Procurement Approvals Committee considered and endorsed the evaluation plan on 25 May 2020 before tenders were opened.

Sections 8.2.1 and 8.2.2 provide further information about the evaluation plan and the evaluation team.

7.2.17 Request for further extension by Keolis Downer rejected by the State

On 28 May 2020, the DIT Chief Executive received text messages from the Keolis Downer Chief Executive asking if he was able to speak to him later that evening about delaying the submission of Keolis Downer's tender response. The DIT Chief Executive prepared a file note as a record of this interaction. The file note states that his response to the messages suggested they talk the following morning and that the ARTP Program Director be involved.

The DIT Chief Executive discussed this matter with the ARTP Program Director and they agreed that the ARTP Program Director would consult with the probity advisor to determine an appropriate course of action. The probity advisor stated that the DIT Chief Executive should be excluded from the process to consider the extension. He also advised that approving an extension at this late stage would require DIT to consider the risks to the integrity and fairness of the process.

The DIT Chief Executive then told the Keolis Downer Chief Executive to submit the request to extend the tender close date through the required process (the electronic data room). This instruction was consistent with the probity advice received.

Later that evening, Keolis Downer submitted a request via the electronic data room to extend the tender closing date from 1 June 2020 to 5 June 2020.

On 29 May 2020, the ARTP Program Director and probity advisor met two Keolis Downer representatives to discuss the request. This meeting was held to help DIT understand the basis for the request so that it could be fully considered. The probity advisor's record of the meeting states that, at the meeting, the Keolis Downer representatives advised that COVID-19 continued to provide difficult challenges, in particular for Keolis Downer's governance and approval processes. The representatives also advised that while their tender response was substantially complete, further approvals were needed that may require rework of documents that may not be complete by the closing date.

Later that day, the ARTP Program Director responded to Keolis Downer's request. He advised via the electronic data room that the State was unable to agree to the request and that the tender close date and time would remain.

7.2.18 Tender close and opening of responses

The amended procurement process guidelines required proponents to submit their offers via the electronic data room by 2 pm on 1 June 2020.

This excluded the following supporting financial information, which proponents were required to submit by 2 pm on 9 June 2020:

- details of the assumptions used in preparing offer pricing
- approach to cost and productivity management
- approach to risk and financial sustainability
- approach to financial management of escrow arrangements.

Tender submissions received and opened on 1 June 2020

An automated email from the electronic data room was sent at 2.01 pm on 1 June 2020 to the officers responsible for opening the tender responses. This automated email contained three spreadsheets, one for each of the three proponents short-listed from the expression of interest. The spreadsheets include a list of the documents that the proponents had uploaded to the electronic data room, that formed their tender response.

The spreadsheets show that Adelaide Next and Keolis Downer submitted a tender response by the tender closing date and time. Both tender responses included the three offers that the State required (separate offers for the base scenario, base scenario alternative and alternative scenario A). Both proponents also submitted a high-level summary of possible service improvements, with costed options.

The spreadsheet for TrainCo, the other short-listed proponent from the expression of interest, shows that it did not submit a tender response for the invitation to supply.

The evaluation plan addressed the receipt and opening of tender responses. It required that they be opened and recorded in line with DIT policies and for the probity advisor to attend to observe this process.

A schedule of tenders recording the receipt of the invitation to supply responses was completed. It shows that two tender responses were received via the electronic data room and opened by three authorised officers in line with DIT policies. The schedule was countersigned by the probity advisor to evidence that it observed this process.

Supporting financial information received and opened on 9 June 2020

The electronic data room shows that both Adelaide Next and Keolis Downer submitted the required supporting financial information on 9 June 2020 before the 2 pm closing time.

A schedule of tenders recording the responses received was completed. It shows that responses from Adelaide Next and Keolis Downer were received via the electronic data room and opened by the same three authorised officers who had opened the tender responses on 1 June 2020. Extracts from the electronic data room were attached to the schedule, which shows the files that Adelaide Next and Keolis Downer submitted and that these files were submitted before the tender closing time. The schedule was countersigned by the probity advisor to evidence that it had observed this process.

7.3 Findings

7.3.1 The basis for amending the invitation to supply for the offer cost contribution and tender extension was reasonable

As described in section 7.2.12, in April 2020 DIT amended the invitation to supply to provide for reimbursing unsuccessful bidders for additional bid costs incurred due to COVID-19 impacts up to a capped amount of \$1 million and to extend the closing date of the invitation to supply.

We reviewed documentation and made specific inquiries with the DIT Chief Executive and the ARTP Program Director to understand the circumstances and basis for amending the invitation to supply.

The DIT Chief Executive advised us that the amendments were considered during a period of enormous uncertainty about what was happening with COVID-19. He explained that proponents had indicated that they were incurring additional costs in preparing their bids because of COVID-19 and were finding challenges in completing required due diligence processes within the required time frames. The DIT Chief Executive advised us that, considering the uncertainty and unknown impacts from COVID-19, allowing more time for proponents to prepare their bids was in the State's interest.

We found the rationale for introducing the offer cost contribution and tender extension was a reasonable response to the unprecedented and uncertain circumstances that existed.

7.3.2 The amendment to the invitation to supply to respond to limitations in asset information was reasonable

The invitation to supply was amended on 20 April 2020 to address issues from COVID-19 that limited the proponents' due diligence and ability to inspect the condition of the rail network assets.

As well as reviewing records of these events, we interviewed the DIT Chief Executive and ARTP Program Director to clarify what had occurred up to the amendment being issued.

The DIT Chief Executive advised us that the proponents were likely to build a contingency into their offer pricing for uncertainties from being unable to complete their due diligence on asset conditions. He also advised us that it was not in the State's interest for proponents to include such contingency in their offers without the State having visibility over it. The DIT Chief Executive explained that it was better to have a framework where the proponents could be clear about where the uncertainty was for them and how to put a value on that. It would also provide a mechanism with which the State could then deal with it.

We found that the asset condition amendment was reasonable to help limit the State's exposure and respond to impacts from COVID-19.

7.3.3 Impact on probity from introducing the offer cost contribution and extending the tender was not documented

Recommendation

Where amendments are made to the tender arrangements, DIT should document how it assessed potential impacts on the probity of the procurement process. This information should be provided to those responsible for approving the amendment.

Finding

We found DIT did not document the potential impacts on the probity of the procurement process from introducing the offer costs contribution and extending the tender closing date.

To respond to the impacts of COVID-19 on proponents' preparation of their offers, DIT amended the invitation to supply on 6 April 2020. The amendments included:

- a two-week extension to the tender closing date
- the reimbursement of additional offer costs incurred by unsuccessful proponents as a direct result of COVID-19 up to a cap of \$1 million per unsuccessful proponent, subject to certain conditions.

These amendments were made in a period of significant uncertainty due to COVID-19.

These amendments had potential probity impacts as they could potentially advantage or disadvantage specific proponents, depending on the stage they were at in developing their response to the invitation to supply.

We noted that the following minutes were prepared:

- a minute to the DIT Chief Executive, seeking approval of amendments to the invitation to supply, including the offer cost contribution and tender extension
- a minute to the former Minister, seeking approval of the offer cost contribution.

However we found neither of these minutes outlined the probity impacts/risk from the proposed amendments.

We also found DIT did not receive specific advice from the probity advisor on any probity impacts/risks from the proposed amendments.

The probity advisor advised us that, as the offer costs contribution and tender extension was a DIT policy decision and he had no involvement in its formulation, he did not review it or provide any probity advice on the amendments.

DIT response

Noted.

During the first few weeks of the COVID-19 pandemic, there were a number of decisions that needed to be made quickly, across a broad span of services and activities for which DIT is responsible. This included putting in place new systems and measures that protected the safety of the public who we serve daily, as well as over 3,000 employees; taking measures to ensure that essential important services could continue to be delivered; and ensuring the continuity of business activities that support our economy. During this period, some matters were not fully documented as they may otherwise have been.

In his examination of the ARTP, and these particular decisions, the Auditor-General has described comprehensively what in normal times we accept to be best practice. Notwithstanding the gaps identified, the Auditor-General has found a clear trail of evidence that supports the making of the decision and has found that the decisions made were reasonable in the circumstances. These decisions made a significant contribution to a successful outcome of the tender process in conformity with the government's policy.

7.3.4 No records maintained of matters discussed or attendees at interactive sessions with proponents

Recommendation

For interactive sessions with proponents, DIT should maintain a record of key points discussed and the names of attendees to demonstrate the interaction process is fair, transparent and auditable.

Finding

The evaluation team did not minute the interactive sessions to record the main matters discussed by DIT and the names of proponents who attended the sessions.

It is sound practice to take minutes and/or keep records of key matters discussed at interactive sessions. The SPB guidelines support this sound practice, that helps to maintain the integrity of the procurement process and ensure that interactions are transparent and can withstand objective and independent scrutiny.²⁷

The probity advisor attended and observed the conduct of the interactive sessions. We consider that this was a sound practice to help to mitigate probity risks for these interactions.

Our interviews with DIT staff and the proponents highlighted that there are different recollections of what was discussed at these meetings. This indicates the need and benefit of maintaining records of meetings.

DIT response

Recommendation accepted.

DIT's Probity Policy and/or related procedure(s) will be modified to reflect a requirement to keep a record of key points discussed at interactive sessions (this will identify the subject matters raised by proponents and a summary of what was discussed).

7.4 Offer cost claim submitted by Adelaide Next

Adelaide Next was advised by DIT on 18 September 2020 that its bid was not successful.

John Holland, an Adelaide Next consortium member, submitted an offer costs claim for more than \$1 million to the ARTP Program Director on 1 October 2020.

²⁷ The SPB's *Probity and Ethical Procurement Guideline* explains that officers should pay particular attention to documenting all relevant communication with prospective suppliers. It also explains that appropriate records (such as meeting minutes) should be maintained of relevant verbal discussions during the procurement process.

In the claim, John Holland highlighted that COVID-19 presented significant challenges to all proponents in responding to the invitation to supply. John Holland also explained that Adelaide Next incurred substantial additional costs from needing to engage external resources to help prepare its bid due to COVID-19 impacts, such as travel restrictions.

DIT engaged an external professional services firm to review Adelaide Next's claim. The external firm found that Adelaide Next had incurred offer costs above \$1 million that met the criteria established by the ARTP Project Team. It recommended to DIT that Adelaide Next be reimbursed \$1 million for offer costs (the capped amount).

The external firm also identified the intellectual property from the invoices submitted by Adelaide Next.

The ARTP Project Team sought legal assistance to develop a mechanism for transferring ownership of the intellectual property rights to the State. A deed was prepared that sets out the terms on which the intellectual property is assigned to the State.

On 15 January 2021, the DIT Chief Executive approved Adelaide Next's offer costs claim. He approved that Adelaide Next be reimbursed for \$1 million of its offer costs on the condition that it execute a deed to transfer the intellectual property to the Rail Commissioner.

8 Evaluation of invitation to supply responses

What we found

DIT established and implemented sound processes to manage the evaluation of the invitation to supply responses. This included:

- an evaluation plan was prepared and approved before tenders were opened and the evaluation of the invitation to supply responses followed the process that was established in the plan
- records were maintained by the evaluation panel and specialist assessment teams, showing the evaluation and assessment that was conducted
- the probity advisor reviewed key procurement documents, observed the evaluation process and provided a written report on the probity of the evaluation process that was presented to the ARTP Steering Committee
- deviations to the evaluation plan were appropriately assessed and approved in line with SPB requirements
- an evaluation report was prepared that outlined the evaluation process conducted. It was endorsed by all evaluation panel members and noted by the ARTP Steering Committee and DIT Chief Executive before negotiations started.

We identified the following processes and practices that should be improved for future procurements:

- The financial assessment did not include the calculation of risk adjustments for commercial departures and other areas as outlined in the evaluation plan, and the specialist assessment team's rationale for not conducting the activity was not documented.
- The evaluation panel did not document how a shortcoming in Keolis Downer's offer relating to emissions targets, that was assessed by DIT subject matter experts as being a significant risk, was assessed by the panel as a minor risk that could be addressed during negotiations.

What we recommend

For future tender evaluation processes, DIT should:

- ensure evaluation teams clearly document their rationale for instances where they do not conduct steps/activities set out in evaluation plans. This should include a risk analysis of not following the planned activities and how probity was considered
- ensure that where an evaluation panel does not agree with how risks are assessed by subject matter experts, it documents how it assessed this risk and records the reasons and evidence supporting the assessment.

8.1 Audit approach

Our review of the evaluation of invitation to supply responses assessed whether:

- responses were evaluated in line with the approved evaluation plan
- any requests for further information and/or clarification of tender responses were carried out in line with the evaluation plan and probity plan
- the probity advisor ensured that the evaluation process was consistent with the evaluation plan
- any deviations to the evaluation plan were approved in line with SPB requirements
- an evaluation report was prepared and approved, outlining the result of the evaluation process.

Our assessment of the evaluation of invitation to supply responses included reviewing key evaluation records and interviewing a selection of officers who were involved in the evaluation process. These officers included members of the evaluation panel, specialist assessment teams and subject matter experts. In determining who we interviewed, we ensured we covered a cross-section of work groups and considered the evidence required to address specific probity issues and risks.

8.2 Overview of the invitation to supply evaluation

8.2.1 Evaluation plan

DIT prepared an evaluation plan for the invitation to supply that outlined the processes, evaluation criteria and weightings to be used to evaluate the tender responses. The plan addressed matters set out in the SPB's *Supplier Selection Policy* and documented principles and procedures designed to ensure the evaluation process was fair, defensible and consistent with government policies and objectives.

The probity advisor reviewed the draft evaluation plan and invitation to supply documents before the invitation to supply was released. On 14 February 2020, he advised the ARTP Steering Committee Chair (DIT Chief Executive) that these draft documents were prepared consistently with probity principles and in line with the ARTP probity plan.

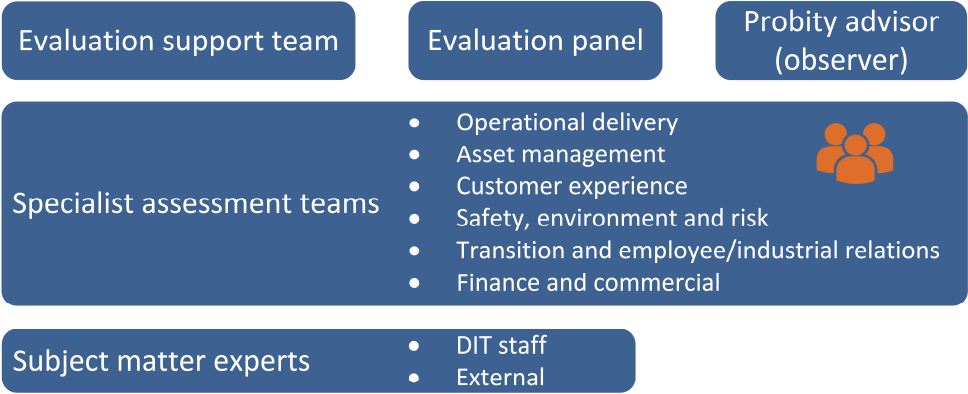
The DIT Chief Executive approved the evaluation plan on 11 May 2020, consistent with approval processes set out in the acquisition plan.

The SPB's Procurement Approvals Committee considered and endorsed the evaluation plan on 25 May 2020, before tenders were opened on 1 June 2020.

8.2.2 Evaluation team

An evaluation team was established to evaluate the invitation to supply offers and make recommendations for the ARTP Steering Committee and DIT Chief Executive to consider. Figure 8.1 shows the evaluation team for the invitation to supply.

Figure 8.1: Evaluation team for the invitation to supply



Source: Developed from the DIT evaluation plan for the invitation to supply.

The evaluation plan listed the evaluation team members and described their roles and responsibilities, which are discussed below.

Details of the composition of the evaluation team for the invitation to supply is provided in Appendix 3.

Evaluation panel

The evaluation panel had 10 members, that included DIT staff and external contractors and consultants who had knowledge and expertise for the evaluation criteria areas that were assessed. Their main responsibilities, as recorded in the evaluation plan, included:

- evaluating the offers received against the evaluation criteria
- reviewing advice received from the specialist assessment teams
- identifying any clarifications required and reviewing clarifications received
- identifying the need for references and visits
- preparing an evaluation report
- maintaining probity and reporting to the ARTP Steering Committee any probity matters or issues.

Evaluation panel chair

The ARTP Program Director was the evaluation panel chair and was responsible for:

- maintaining overall oversight of the evaluation process for the qualitative, financial, commercial and overall assessments
- managing the conduct of the evaluation, resolving any differences and addressing any issues during the evaluation

- reviewing clarification questions identified by evaluation team members and approving them before they were issued to proponents
- reporting matters associated with the evaluation and presenting the evaluation report to the ARTP Steering Committee.

Specialist assessment teams and subject matter experts

Six specialist assessment teams were established, with each team having up to five members (refer to Figure 8.1 and Appendix 3.). The team members for five of the six teams included a mix of evaluation panel members and other DIT staff. The asset management team had three team members in total, who were also evaluation panel members.

Each specialist assessment team was responsible for providing specialist advice to the evaluation panel about the strengths, weaknesses and risks of each offer. The teams were not required to score the offers, rather they were to provide advice to the evaluation panel, who could then consider that advice in determining their consensus scores. The teams were also responsible for identifying clarification questions for proponents and reviewing responses to clarifications received.

Each team had access to subject matter experts from within DIT, other government agencies and/or external firms to help them with their assessment of the offers against the evaluation criteria.

Evaluation support team

An evaluation support team was established within DIT. They were responsible for certain administrative tasks, such as providing the relevant evaluation team members with tender responses and clarifications received from proponents. They were not involved in evaluating or assessing the tender responses.

Probity advisor

DIT engaged a probity advisor from an external firm for the procurement. The probity advisor was an independent observer and was required by the evaluation plan to:

- provide advice to the evaluation panel chair and the ARTP Steering Committee on any probity matters or issues
- attend evaluation panel meetings to ensure that the evaluation process complies with the evaluation plan
- review requests for clarification and provide advice on whether the specific request should be limited to a specific proponent or also be sent to other proponents
- provide a report to the ARTP Steering Committee at the end of the evaluation process.

8.2.3 Evaluation process

Figure 8.2 shows a high-level summary of the evaluation process that was conducted.

Figure 8.2: Evaluation process for the invitation to supply



Source: Audit analysis.

On 1 June 2020 and 9 June 2020, three evaluation support team members conducted a completeness review of tender documents submitted by Adelaide Next and Keolis Downer. They found the information provided in the proponents' submissions was complete and adequate to enable the evaluation panel to conduct its assessment.

The evaluation process was structured and organised to enable elements of the evaluation to be conducted by different groups at the same time.

Each specialist assessment team initially separately reviewed the offers against a particular weighted evaluation criterion at the same time as each evaluation panel member individually reviewed the offers. Each specialist assessment team then met with the evaluation panel to present the findings from its assessment.

The evaluation support team separated the offer pricing details from the tender responses so that specialist assessment teams and evaluation panel members were not aware of the pricing details when conducting the qualitative evaluation. The pricing details were provided to the finance and commercial specialist assessment team, who considered this separately while the qualitative evaluation criteria were being assessed.

The evaluation panel was only made aware of pricing details after it had determined the final consensus scores for the qualitative evaluation criteria. It then used this information to conduct a value-for-money assessment and an overall evaluation. Although the two leads of the finance and commercial specialist assessment team were also evaluation panel members and attended evaluation panel meetings, their roles were set up so that they did not participate in the panel's consensus scoring of the qualitative criteria.

8.2.4 Evaluation criteria

The evaluation team evaluated the tender responses submitted by Adelaide Next and Keolis Downer for the invitation to supply against three mandatory criteria, six weighted qualitative criteria and non-weighted criteria that included pricing and commercial details.

Mandatory evaluation criteria

The three mandatory evaluation criteria included confirming that:

- the proponent's proposed structure and the financial position of each proponent member had not materially changed from the expression of interest and continued to meet the State's requirements. Proponents had to demonstrate that they and the entities in their consortia, had the financial capacity to conduct the services and their proposed structure facilitates the efficient and effective performance of their obligations under the contract
- the proponent had the capability to achieve appropriate accreditation under the Australian Rail Safety National Law by the commencement date
- the tender response included a Tailored Industry Participation Plan.

The finance and commercial and the safety, environment and risk specialist assessment teams conducted an initial assessment of the mandatory criteria. The evaluation panel then made the final determination on whether the proponents had met the mandatory criteria. The outcome of the review is discussed below.

A financial capacity assessment of the members and parent company guarantors within the proponents' consortia was conducted by the two leads of the finance and commercial specialist assessment team. They prepared a report that discussed the findings from the assessment, that stated that all entities assessed were considered capable of meeting the required financial undertakings and security obligations.²⁸ The evaluation panel considered the team's findings and formed a consensus view that Adelaide Next and Keolis Downer had both proposed a consortium structure and financial position that continued to meet the State's requirements and met the mandatory criteria.

²⁸ The security obligations include a minimum equity requirement and parent company guarantee.

For rail safety accreditation, the evaluation panel concluded that both proponents provided a road map and risk register that adequately addressed their obligations and requirements to meet rail safety accreditation. Further, the proponents also demonstrated that they, or their consortia entities, were accredited by the Office of the National Rail Safety Regulator in other jurisdictions. The evaluation panel formed a consensus view that both proponents had the capability to achieve appropriate rail safety accreditation under the Australian Rail Safety National Law and that they met the mandatory criteria. We note that Keolis Downer received accreditation from the National Rail Safety Regulator on 25 January 2021 before it started operating the Adelaide metropolitan train services.²⁹

Both Adelaide Next and Keolis Downer submitted a Tailored Industry Participation Plan, and the evaluation panel formed a consensus view that they met the mandatory criteria.

Weighted qualitative evaluation criteria

Both the evaluation plan and the procurement process guidelines issued to proponents provided descriptions for each of the evaluation criteria. These detailed the specific elements that proponents needed to demonstrate and that they would be assessed during the evaluation process. The evaluation plan explained that the weighting assigned for each criterion reflected its contribution to the achievement of the procurement objectives. The invitation to supply documents did not include the weightings and explained to proponents that the evaluation criteria was not listed in any special order of priority and may not be given equal weight.

Figure 8.3 shows the six weighted qualitative evaluation criteria. The evaluation plan described them as the fundamental elements that are considered necessary to achieve the procurement objectives.

Figure 8.3: Weighted qualitative evaluation criteria for the invitation to supply



Source: The evaluation plan for the invitation to supply.

Specialist assessment teams were assigned specific evaluation criteria to assess. The purpose of their assessment was to identify the extent to which each offer meets the specific evaluation criterion being assessed (but not score the offers) and to highlight the strengths, weaknesses, benefits and risks of the offers relevant to each criterion.

Non-weighted criteria

The evaluation criteria also included non-weighted criteria, for which the State considered

²⁹ Office of the National Rail Safety Regulator, Publications, National Rail Safety Registers, *National Rail Safety Register Accreditations*, <<https://www.onrsr.com.au>>, viewed 14 April 2021.

pricing details and life cycle costings, and conducted an assessment of any commercial departures from the draft OROA. The procurement process guidelines issued to the proponents stated that the evaluation of non-weighted criteria included:

- considering offers against the broader procurement objectives over the 12-year term
- an assessment of the relative strengths, weaknesses and risks of the offers
- a value-for-money assessment to measure the overall package offered to the State.

8.2.5 Clarifications issued to proponents

The evaluation plan provided for clarifications to be issued to proponents during the evaluation of their offers.

While assessing the offers, the specialist assessment teams identified clarification questions for the evaluation panel chair to consider sending to the proponents to help the teams with their assessments. The evaluation panel chair and the probity advisor met regularly to review the proposed clarification questions. The aim was to determine if they were needed and would have a material impact on the assessment, if they should be issued as proposed and if they should be limited to a specific proponent or issued to both proponents.

A total of 42 clarification questions were issued to proponents via the electronic data room between 5 June and 19 June 2020 with 22 clarifications issued to Adelaide Next and 20 clarifications issued to Keolis Downer.

The evaluation plan allowed the evaluation panel to determine if presentations by proponents were required. On 18 June 2020, the evaluation panel determined that it did not require proponents to attend formal clarification interviews and conduct presentations as the panel had sufficient information to make their assessment.

Each specialist assessment team only received the clarification responses for the criterion it was assessing. The teams considered the clarifications and met to conclude their assessments before presenting their findings to the evaluation panel.

In our discussions with evaluation panel members and specialist assessment team members, they advised us they were satisfied that proponents' responses to all required clarifications were received during the evaluation.

8.2.6 Presentation of specialist assessment team reports to the evaluation panel

Weighted evaluation criteria

Consistent with the evaluation plan, each specialist assessment team prepared a report that detailed its findings and presented it to the evaluation panel on 18 June 2020 and 19 June 2020. On both days, the evaluation panel met shortly after the presentations had been made to discuss and determine the initial consensus scores for each of the weighted evaluation criteria.

The evaluation panel then met on 23 June 2020 to determine the final consensus scores for the weighted evaluation criteria.

Financial and commercial assessments (non-weighted evaluation criteria)

The finance and commercial specialist assessment team presented two reports to the evaluation panel on 23 June 2020 after the panel had determined its final consensus scores. One of the reports discussed the findings of the team's financial assessment and the other report included findings from the team's commercial assessment.

The financial assessment included comparing the costs of the proponents' offers against a public sector comparator model that was developed by an external firm. The purpose of this model was to estimate the cost if the SA Government continued to operate the rail network, to enable an assessment of whether a private operator would deliver value-for-money under an outsourced model. The model was reviewed by another external firm that checked and validated that the assumptions developed by DIT subject matter experts were correctly reflected in the model.

The financial and commercial specialist assessment team found that the offers from Adelaide Next and Keolis Downer had a lower cost compared to the cost estimated by the public sector comparator model. The team also found that the offers were financially robust, with generally well described assumptions.

8.2.7 Value-for-money assessment

On 24 June 2020, the evaluation panel met to conduct a value-for-money assessment of all six offers. The weighted score of each offer from the qualitative evaluation was assessed against the offer price. The pricing and qualitative impacts of commercial departures and the associated risk-adjusted pricing of the offers was also considered.

The value-for-money assessment resulted in the evaluation panel determining a value-for-money ranking of the six offers. The evaluation panel determined that Keolis Downer's base scenario offer provided the best value-for-money.

While the weighted scores for both proponents' base scenario offers was close, the evaluation panel determined that the Adelaide Next offer had a substantially higher price than the Keolis Downer offer.

8.2.8 Overall evaluation of the offers and evaluation outcome

After completing the value-for-money assessment, the evaluation panel then met again on 24 June 2020 to conduct an overall evaluation of the six offers. In conducting the overall evaluation, the panel considered:

- the assessments by the specialist assessment teams, including their analysis of the relative strengths, weaknesses and risks of the offers
- the qualitative evaluation assessment and the weighted scores for each offer by ranking on price and ranking on qualitative assessment
- the sustainability impact assessment
- the value-for-money ranking of offers (discussed in section 8.2.7)
- the procurement objectives and the ARTP program objectives.

After considering these matters, the evaluation panel determined an overall ranking of the offers.

Keolis Downer's base scenario offer, that was ranked first in the value-for-money assessment, was also ranked first in the evaluation panel's overall evaluation. The panel determined in its overall evaluation that both Adelaide Next and Keolis Downer could meet the State's requirements, but Keolis Downer's offer provided the best value-for-money and that it best met the procurement objectives and ARTP program objectives.

8.2.9 Probity advisor report for the invitation to supply evaluation

The probity advisor provided a written probity report to the ARTP Program Director on 3 July 2020 on the evaluation of the invitation to supply.

The probity report covered activities from when the tenders were submitted through to preparation of the evaluation report.

The probity advisor's report stated that it found that the invitation to supply process had been conducted in line with the approved probity plan and communication protocol and the evaluation plan, and that no material issues of a probity nature were observed. It also noted that the probity advice provided during the evaluation period had been appropriately acted on.

8.2.10 Evaluation panel report and recommendations made to the ARTP Steering Committee

The evaluation panel prepared an evaluation report. The report provided a summary of the evaluation process for the invitation to supply, including amendments made due to COVID-19, and set out the conclusion reached in evaluating the offers received. The report included several attachments, including reports from the probity advisor, a financial capacity assessment report, a register of amendments made to the invitation to supply documents and a reference check report.

Consistent with the evaluation plan, the evaluation report included a ranking of all offers based on results of the overall evaluation conducted by the evaluation panel.

The evaluation panel recommended in the evaluation report that the ARTP Steering Committee:

- receive and note the report and the summary of the evaluation process
- note the results of the overall evaluation conducted by the evaluation panel
- note two proposed changes from the planned evaluation process (refer to section 8.2.11 for details of these changes)
- note that a separate paper about the negotiation strategy would be provided to the ARTP Steering Committee.

All evaluation panel members endorsed the report on 3 July 2020.

At the ARTP Steering Committee meeting held on 8 July 2020, the evaluation panel chair (ie the ARTP Program Director) presented the report to the committee members. The minutes from this meeting explain that this presentation included providing an overview of the offers received and the relative strengths, weaknesses and risks of the offers.

The Committee noted the evaluation report at this meeting. In considering the report, it noted that the alternative scenario A offers from both proponents involved significant reductions in train services, that would have adverse customer impacts. The Committee determined that these offers would not be considered further.

8.2.11 Amendment to the invitation to supply evaluation process

The evaluation plan required the evaluation panel to document in the evaluation report the potential areas for negotiation with proponents and the likely benefits from engaging in negotiations. It also required the ARTP Steering Committee to endorse the evaluation report and the DIT Chief Executive to approve it.

In developing the evaluation report, the evaluation panel proposed two changes to the planned process and determined that:

- the evaluation report would not address the negotiation strategy and that instead this would be presented to the ARTP Steering Committee through a separate negotiation plan
- the ARTP Steering Committee and DIT Chief Executive would note the evaluation report, with the negotiation plan to then be endorsed by the ARTP Steering Committee and approved by the DIT Chief Executive.

The DIT Chief Executive approved the changes to the planned process and noted the evaluation report on 13 July 2020 before negotiations started with Keolis Downer.

8.3 Findings

8.3.1 DIT established sound processes for the evaluation of responses to the invitation to supply

We found that DIT established and implemented sound processes to manage the evaluation of the tender responses for the invitation to supply.

An evaluation plan was prepared that contained a structured evaluation process. The plan was approved by the DIT Chief Executive and endorsed by the SPB's Procurement Approvals Committee before tenders were received and opened.

The invitation to supply responses were evaluated in line with the process that was established in the evaluation plan. The evaluation panel and specialist assessment teams maintained records that showed the evaluation and assessment that they conducted. Deviations to the evaluation plan were appropriately assessed and approved in line with SPB requirements.

The probity advisor reviewed key procurement documents including the evaluation plan, proposed clarification questions and the evaluation report. They observed the evaluation process conducted and attended meetings of the evaluation panel and specialist assessment teams to ensure the evaluation process was consistent with the evaluation plan. They also provided a written report to the ARTP Program Director on the probity of the process at the end of the invitation to supply evaluation that was also presented to the ARTP Steering Committee.

An evaluation report was prepared that outlined the evaluation process conducted. It was endorsed by all evaluation panel members and noted by the ARTP Steering Committee and DIT Chief Executive before negotiations started.

8.3.2 Reasons for not calculating certain risk adjustments were not documented in evaluation reports

Recommendation

For future procurements, the evaluation team should clearly document its rationale for instances where it does not conduct steps/activities outlined in the evaluation plan.

This should include a risk analysis of the consequences, including probity considerations, of not conducting those steps/activities.

Finding

To ensure a fair comparison of the financial aspects of the offer received the evaluation plan required the financial and commercial specialist assessment team to calculate risk adjustments. The evaluation plan stated that the financial assessment will involve:

... risk adjustment to reflect commercial departures and other areas where additional cost or cost saving to the State is anticipated as a result of the offer, and normalisation to ensure common assumptions for factors where risk is borne by the State ...

We found that a risk adjustment was calculated to normalise the long service leave payment between the bids to the public sector comparator.³⁰ However, the financial assessment did not include the calculation of risk adjustments to reflect commercial departures and other areas where additional cost or cost savings to the State were anticipated from the offer.

The finance and commercial specialist assessment team's report on the financial assessment performed identified some additional costs/cost savings associated with proponent's offers. Further, both proponents' offers identified proposed commercial departures, though not all of these were priced.

³⁰ Proponent offers included the amount of long service leave they expected to pay during the contract term. However, the State bears the risk with long service leave payments. To enable fair comparison of the bids a risk adjustment was calculated so that the long service leave payment in all bids was consistent with the public sector comparator.

A member of the finance and commercial specialist assessment team advised us that the team determined that they would only calculate a risk adjustment for commercial departures and areas where additional costs or cost savings were anticipated if it would impact the ranking of the bids.

We found that the finance and commercial specialist assessment team's report and the evaluation panel's report did not outline the reasons why these risk adjustments were not calculated and considered in the financial assessment. As noted in section 8.2.7, the Adelaide Next's base scenario offer had a substantially higher price than the Keolis Downer offer.

In our view, to support transparency and accountability, the finance and commercial specialist assessment team's report and the evaluation panel report should have detailed the rationale for not calculating risk adjustments to reflect commercial departures and areas where additional cost or cost savings are anticipated.

DIT response

Recommendation accepted in principle.

There was a clear, evident and uncontroversial reason for confining the risk adjustments to the minimum essential to reflect financial outcomes that were certain. To address the issue raised by the Auditor-General in relation to risk adjusting for commercial departures, the Probity Policy and/or related procedures will be amended to provide guidance to future procurement teams on matters that should be considered in contemplating risk adjustments for commercial departures, and when it should proceed. It would be therefore only when a team exercises its judgment to adopt a different course in certain circumstances that the recording or a rationale and potentially a risk assessment would be required.

8.3.3 Evaluation panel did not document its rationale for assessing that a risk raised by subject matter experts was not significant

Recommendation

For future procurements, where the evaluation panel does not agree with how risks have been assessed by subject matter experts, the panel should document how it has assessed the risk and outline the reasons and evidence that support the assessment.

Finding

We found the evaluation panel did not document its rationale for assessing a shortcoming in Keolis Downer's offer as a minor risk that could be addressed during negotiations. (Note that the DIT subject matter experts had determined this risk to be significant.)

DIT subject matter experts conducted a sustainability impact assessment during the tender evaluation for the invitation to supply. They provided a report to the evaluation panel that explained:

- the rail network represents a significant portion of DIT's electricity consumption. To meet the SA Government's commitment to net zero emissions by 2050, it is crucial that the operator develops and implements an emissions reduction plan that is aligned with this target
- Keolis Downer's emissions reduction plan did not meet the emissions reduction requirements of the contract and the invitation to supply. Further, it did not align with the SA Government's 2050 emissions target. The report highlighted that a lack of an appropriate target or plan for emissions reduction represented a significant sustainability and reputational risk for the SA Government.

The evaluation panel considered the sustainability impact assessment and risk as part of the overall evaluation (refer to section 8.2.8). The evaluation panel formed its own views on the assessment and risk that was consistent with its role as outlined in the evaluation plan. An evaluation panel member advised us that the evaluation panel did not agree with the subject matter experts' view that the risk was significant and that they considered it to be a minor risk because it could be addressed during negotiations.

It is sound practice for an evaluation panel to document its rationale for forming a different view on matters and risks that subject matter experts consider are significant. This enables the evaluation panel to demonstrate how it has formed its view and considered and addressed the matters and risks in the evaluation process.

We note that the emissions reduction requirements outlined in the invitation to supply are a requirement of the OROA that the Rail Commissioner and Keolis Downer have executed.

DIT response

Recommendation accepted in principle.

As has been explained to the Auditor-General, it is our view in this instance both assessments were reasonably founded. The subject matter expert for sustainability identified a risk to one aspect of sustainability, which from a sustainability perspective was material to a broad and long-term state government policy goal. However from the perspective of the procurement objectives and the role of the evaluation panel, it was minor. Whilst the evaluation panel may not have documented a rationale for why its assessment varied from that of the subject matter expert, it clearly did consider the risk, formed its own view on it, and determined that it could be addressed during negotiations (and subsequently it was addressed).

Any level of risk was completely mitigated in negotiations and this matter is therefore considered to be very minor.

Nevertheless, to address the Auditor-General's comments, the Probity Policy and/or related procedures will be modified to provide guidance that where there is a material issue on which there was not a consensus in relation to its assessment, the rationale for final conclusion and how this view was formed will be documented.

9 Negotiations

What we found

We concluded the rationale for DIT's decision to negotiate only with Keolis Downer was consistent with the probity principles of fairness, impartiality and equality to all proponents.

DIT established and implemented sound processes to negotiate with Keolis Downer.

We identified one instance of non-compliance with the negotiation plan. Six advisors involved in the negotiations did not complete a code of conduct and confidentiality form established specifically for negotiations. We note these officers did sign a code of conduct and confidentiality form at the start of their role in the procurement and we concluded this matter did not impact the probity of the procurement process.

What we recommend

DIT should review processes to understand why a signed code of conduct and confidentiality form was not obtained from all negotiation advisors as required by the negotiation plan and ensure any gaps in processes are addressed for future procurements.

9.1 Audit approach

We assessed whether DIT:

- developed and implemented an appropriate plan to negotiate with the preferred proponent
- maintained records of negotiation activities to ensure transparency and accountability for the negotiation process.

We also assessed whether there was evidence that the negotiations conducted were consistent with the probity principles of fairness, impartiality and equality provided to all proponents.

To gather evidence and make these assessments, we considered the requirements in the SPB's *Supplier Selection Policy*, reviewed DIT's negotiation records and made specific enquiries with the DIT Chief Executive, the ARTP Program Director and the ARTP Project Team.

9.2 Overview of negotiation process

Negotiations were conducted with Keolis Downer to finalise and agree to a contract for the provision of heavy rail passenger transport services in metropolitan Adelaide.

9.2.1 Keolis Downer base scenario offer was ranked first

As outlined in section 8.2.8, Keolis Downer's base scenario offer was ranked first for value-for-money and first overall and was assessed as providing a sound basis for a contract. Before a contract could be entered into with Keolis Downer, some offer weaknesses, transition issues and commercial terms needed to be addressed. To address these issues the State entered into negotiations with Keolis Downer on its base scenario offer.

9.2.2 Negotiation plan

A negotiation plan was developed and endorsed by the ARTP Steering Committee at its meeting on 8 July 2020 and approved by the DIT Chief Executive on 13 July 2020.

The negotiation plan addressed the following:

- negotiation objectives and strategy
- negotiation issues and priorities
- the State's acceptable negotiation outcome, preferable negotiation outcome and optimal negotiation outcome
- make-up of the negotiation team and negotiation schedule
- negotiation conduct including probity considerations.

Negotiation strategy

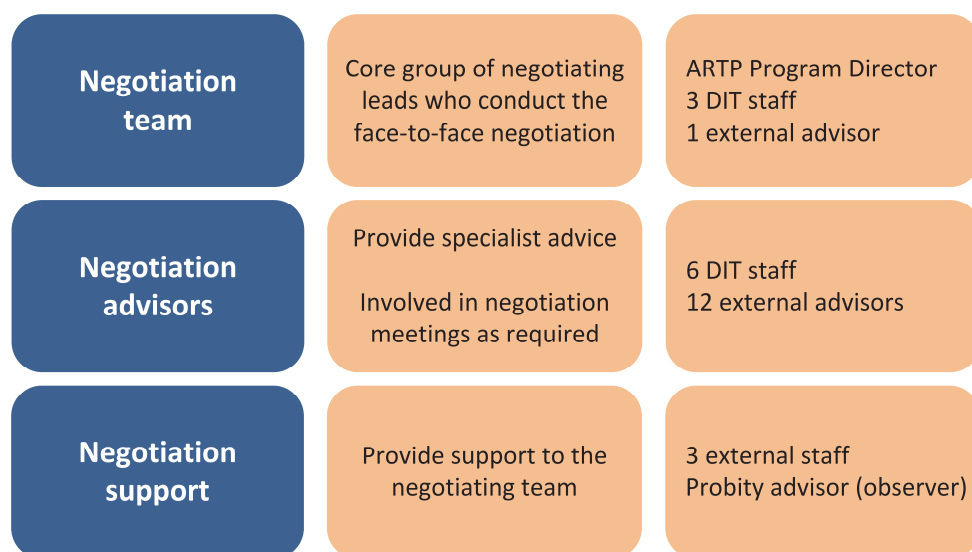
The negotiation plan stated that the overall negotiation strategy was to:

- negotiate with Keolis Downer on its base scenario offer to address offer weaknesses, improve offer value, review change management and the industrial relations approach, agree commercial terms and achieve best possible price
- use the negotiation process to confirm that Keolis Downer would be a constructive and collaborative partner with the SA Government for the contract
- not engage further with Adelaide Next, with this to be re-assessed depending on the outcome of the negotiations with Keolis Downer.

9.2.3 Negotiation team

A negotiation team was appointed to conduct the negotiations with Keolis Downer. Figure 9.1 outlines the composition of the negotiation team, which was led by the ARTP Program Director.

Figure 9.1: Negotiation team composition



Source: Developed from the DIT negotiation plan for the procurement.

9.2.4 Keolis Downer invited to negotiate

On 8 July 2020 the ARTP Program Director wrote to Keolis Downer inviting them to participate in negotiations.

Negotiations with Keolis Downer were conducted through a series of meetings held in Sydney between 15 July 2020 and 7 August 2020.

Consistent with the SPB's *Supplier Selection Policy* DIT documented the negotiation proceedings providing an audit trail.

9.2.5 Assertions made by proponent about an apparent breach of confidentiality

On 30 July 2020, during the negotiating period, the ARTP Program Director called a member of the Adelaide Next consortium to reply to a text message the ARTP Program Director received the previous day.

As a result of their discussion, DIT was concerned there was an apparent breach of confidentiality during the procurement process.

DIT considered this a serious matter and initiated a confidential investigation to be performed by the probity advisor.

We have reported on this matter in sections 11.3 and 11.4.

9.2.6 Negotiation report

A negotiation report detailing the outcomes of the State's negotiations with Keolis Downer was prepared and endorsed by the negotiating team on 13 August 2020.

The report detailed that the negotiations with Keolis Downer met the negotiation objectives and recommended acceptance of the Keolis Downer base scenario offer as modified during the negotiations.

The negotiation report was endorsed by the ARTP Steering Committee on 19 August 2020.

9.2.7 Probity advisor report on negotiations

Consistent with the negotiation plan, the probity advisor attended all negotiation meetings.

The probity advisor also provided DIT with a report on the probity of the negotiations. It stated that the probity advisor had observed that the negotiations with Keolis Downer were conducted in line with the approved negotiation plan and that the negotiation report provides a true and accurate reflection of the negotiation process and outcomes.

The probity advisor's report on the negotiations was provided to the ARTP Steering Committee on 19 August 2020 to support its consideration of the negotiation report.

9.2.8 Negotiation outcome

The negotiation report detailed that the negotiations with Keolis Downer met the negotiation objectives, addressed all the negotiation issues and achieved:

- the State's acceptable negotiated outcome – that the Keolis Downer base scenario offer as amended through negotiations was an acceptable basis for the contract
- all the preferable negotiated outcome parameters and nearly all the optimal negotiated outcomes.

The negotiation process resulted in changes to Keolis Downer's base scenario offer. The net impact of the negotiations was a relatively small decrease in Keolis Downer's base scenario offer. The changes included:

- inclusion of maintenance costs for rolling stock (overhauls) for the first two years, that was omitted from Keolis Downer's base scenario offer
- inclusion of efficiencies proposed in Keolis Downer's alternative scenario A offer, resulting in a reduction in Keolis Downer's base scenario offer price
- reduced security (parent company guarantee and equity amount) resulting in a reduction in Keolis Downer's base scenario offer price
- reduction in certain costs and the nominated asset cap (refer to section 7.2.14), resulting in a reduction in Keolis Downer's base scenario offer price.

Keolis Downer's invitation to supply submission included some priced options and future improvement initiatives. The negotiated offer included acceptance of two of these initiatives, namely Keolis Downer's proposal to maintain public information displays across the whole public transport network and Flinders Link additional services.

Keolis Downer's base scenario offer included several changes to occur from day one. One of the changes included removing passenger service assistants from evening train services.

After the SA Government approved that the OROA be awarded to Keolis Downer, the State negotiated with Keolis Downer to retain passenger service assistants on evening trains on the Gawler, Outer Harbor and Seaford lines for the first three years of the OROA. This increased the contract price.

9.2.9 Rationale for not negotiating with Adelaide Next

The negotiation plan detailed that the State would not negotiate with Adelaide Next, as its highest ranked offer was substantially more expensive than Keolis Downer's base scenario offer and was assessed as not providing any additional value. The negotiation plan detailed that:

- there was little benefit in negotiating with Adelaide Next given the significant price gap
- the likelihood of reducing the price of Adelaide Next's highest ranked offer was low.

The negotiation plan detailed that Adelaide Next's highest ranked offer would be a backup should unforeseen difficulties arise with Keolis Downer in negotiations and/or if the negotiation process raised doubts about Keolis Downer as a contract partner.

To ensure Keolis Downer believed that they were in competition with another viable bidder Adelaide Next was not advised that the State had entered negotiations with Keolis Downer. The negotiation plan outlined this was an important enabling strategy to reduce the risk of Adelaide Next becoming aware that they were not included in negotiations and Keolis Downer realising that.

The ARTP Program Director advised the ARTP Steering Committee during its consideration of the negotiation report that the negotiating process had confirmed that Keolis Downer would likely be a constructive and collaborative contract partner. Consequently the State did not enter negotiations with Adelaide Next.

9.3 Findings

9.3.1 Sound processes established and implemented to maintain probity during negotiations

We found DIT established and implemented sound processes to maintain probity during the negotiations with Keolis Downer. This included:

- the probity advisor attending all negotiation meetings
- completion of code of conduct and confidentiality forms by members of the negotiation team
- a briefing on probity and confidentiality requirements for the negotiation process by the probity advisor at the first negotiation meeting.

A comprehensive negotiation plan was developed and implemented with one exception. Some negotiation advisors did not sign a code of conduct and confidentiality form (refer to section 9.3.3). These instances were not systemic and did not impact on the probity of the procurement process.

Adequate records were maintained to evidence transparency and accountability for the negotiations conducted.

9.3.2 DIT's decision to negotiate only with Keolis Downer was reasonable

The negotiation team negotiated only with Keolis Downer. In this process the team negotiated with Keolis Downer to address certain weaknesses in its offer and improve its value.

As negotiations were not held with Adelaide Next, they were not provided with the same opportunity that Keolis Downer had to address weakness in its offer and/or improve its offer value.

The ARTP Program Director outlined to us the rationale for negotiating only with Keolis Downer:

- the evaluation was clear that Keolis Downer's base scenario offer was the best value-for-money as:
 - the Keolis Downer and Adelaide Next offers were assessed to be of similar quality
 - there was a significant price difference between the Keolis Downer offer and the best Adelaide Next offer
- to make the Adelaide Next offer competitive in terms of price would have involved substantial redevelopment of its offer.

We note:

- Keolis Downer's base scenario offer was ranked first for value-for-money and first overall
- the next highest ranked offer, the Adelaide Next base scenario alternative offer A was substantially more expensive.

The DIT Chief Executive also advised that the likelihood of reducing the Adelaide Next offer price was low.

Further, the DIT Chief Executive advised us that given the decision to negotiate with Keolis Downer, which in his view was in the commercial best interest of the State, it would not be in good faith to have also negotiated with Adelaide Next, causing it unnecessary additional effort and costs.

The DIT Chief Executive also advised us that Adelaide Next was not advised at the time the State was negotiating with Keolis Downer, of the State's intention not to consider its offers any further. He advised this was done so that if the negotiations with Keolis Downer failed then the State retained the option of further assessing its position and entering into structured negotiations with Adelaide Next.

We concluded DIT's decision to negotiate only with Keolis Downer was reasonable and consistent with the probity principle of fairness, impartiality and equality provided to all proponents. This is because:

- DIT assessed Adelaide Next's offers in a way that was consistent with the evaluation plan and found it was uncompetitive on price compared with Keolis Downer's base scenario offer
- to have allowed Adelaide Next to redevelop its offer to make it competitive with Keolis Downer's base scenario offer through a negotiation process would not be fair to Keolis Downer.

9.3.3 Code of conduct and confidentiality form not completed by some negotiation advisors

Recommendation

DIT should review processes to understand why a signed code of conduct and confidentiality form was not obtained from all negotiation advisors as required by the negotiation plan and ensure any gaps in processes are addressed for future procurements. Where a decision is made not to implement a control process outlined in the negotiation plan, the reasons should be documented and the approach endorsed by those responsible for the procurement.

Finding

We found six negotiation advisors did not complete a code of conduct and confidentiality form specific for negotiations.

While these officers signed a conflict of interest declaration and confidentiality agreement at the start of their role in the procurement, the negotiation plan required them to also complete and sign a code of conduct and confidentiality form specific for negotiations.

As personal circumstances can change over time obtaining a code of conduct and confidentiality form specific for negotiations mitigates the risk of undeclared actual and/or potential conflicts of interest that may impact the probity of the procurement process.

DIT response

Recommendation accepted in principle.

This was an administrative oversight arising out of a lack of awareness that the six individuals identified were required to sign a further confidentiality agreement when they had already done this at the commencement of the process. The Probity Policy and/or related procedures will be modified to provide greater clarity on the triggers of a requirement for individuals to sign a second or further code of conduct and confidentiality undertaking.

10 Purchase recommendation and contract approval

What we found

A purchase recommendation for the provision of heavy rail passenger transport services was prepared and authorised in line with SPB requirements. The recommendation included details of the evaluation, the outcome of the negotiation process and the contractual arrangements.

The contract documents were approved in line with Treasurer's Instruction 8 *Financial Authorisations*.

The purchase recommendation was finalised and approved before the probity advisor had issued a final probity report on the procurement process. Not having access to the final probity report may have limited the ability of the DIT Procurement Committee to properly discharge its responsibility for effective governance of procurement.

What we recommend

For future procurements, DIT should ensure the final probity report is provided to those responsible for approving the purchase recommendation before its approval.

10.1 Audit approach

We reviewed the documentation supporting the approval of the purchase recommendation to determine if it:

- was approved before the contract was awarded
- contained details of evaluation and negotiation process and outcomes
- was approved by the designated authority in the acquisition plan
- adequately addressed requirements in the SPB's *Supplier Selection Policy*.

We also considered whether the DIT Procurement Committee had received all probity reports before approving the purchase recommendation.

We reviewed the approval of the contract documents to ensure they were approved in line with Treasurer's Instruction 8 *Financial Authorisations* (TI 8).

10.2 Purchase recommendation

A purchase recommendation was prepared and approved that included an outline of the offer evaluation, the results of negotiations and contractual arrangements. It included a recommendation that the contract documentation for the provision of heavy rail passenger

transport services for the Adelaide metropolitan rail network be awarded to Keolis Downer for an initial term of eight years, with the option to extend for four years.

10.2.1 Endorsement of purchase recommendation by the ARTP Steering Committee

The ARTP Steering Committee endorsed the purchase recommendation for the provision of heavy rail passenger transport services on 19 August 2020.

The ARTP Steering Committee meeting minutes record that the ARTP Program Director provided a high level overview of the purchase recommendation, noting that the evaluation and negotiation phase of the invitation to supply was complete.

The ARTP Steering Committee papers also included a probity report on the invitation to supply negotiation from the probity advisor, dated 14 August 2020 (refer to section 10.2.3 for details on this report).

An in-camera discussion on probity matters was held by the ARTP Steering Committee with the ARTP Program Director and the probity advisor in attendance. The minutes of the meeting state that the in-camera discussion was particularly about an Adelaide media outlet publishing an article on 14 August 2020 about the ARTP.³¹ The meeting records also state that:

... it was agreed by the members that the probity matter resulted in no impact on the procurement process. There was nothing to give the members a cause of doubt up to and including the negotiation process that has just been conducted. As a result, the procurement process can continue as scheduled.

We asked the ARTP Program Director what the basis was for the conclusion that there was no impact on the procurement process, and he indicated that:

- the advice consistently from the probity advisor was that the matter did not have an impact on the procurement process as DIT had followed their processes with the requirements as they were set out
- DIT followed good probity and process each step of the way
- the evaluation and negotiation was virtually complete by the time of the media article of 14 August 2020, so the leak did not impact on this.

10.2.2 Approval of purchase recommendation by the DIT Procurement Committee

The DIT Procurement Committee met on 21 August 2020 to consider the purchase

³¹ Smith M, 2020, 'Claims companies were offered \$1m taxpayer-funded 'loser fee' for \$1b contract to privatise Adelaide's rail network', *The Advertiser*, 14 August 2020, <<https://www.adelaidenow.com.au/news/south-australia/claims-companies-were-offered-1m-taxpayerfunded-loser-fee-for-1b-contract-to-privatise-adelaides-rail-network/news-story/9e4212a0d1054f4f82dfb2fb8df272c9>>.

recommendation. At this meeting the ARTP Program Director, an ARTP Project Team member and the probity advisor presented the purchase recommendation.

The DIT Procurement Committee meeting minutes state:

- the committee noted a query raised prior to the meeting on the negotiation process and whether all steps in the approved evaluation process had been followed
- the committee noted the probity report (dated 14 August 2020) was provided
- it was confirmed that the SPB delegated responsibility for approving the purchase recommendation to the DIT Procurement Committee
- contract authorisation was to be obtained from the SA Government
- the procurement committee approved the purchase recommendation.

A response to the query on the negotiation process and how the evaluation plan was followed was tabled at the meeting for the committee's consideration.

The minutes also record that the DIT Procurement Committee noted the quality of the purchase recommendation and the rigour applied throughout the process.

10.2.3 Probity advisor's probity report on invitation to supply negotiation

The probity advisor prepared a report dated 14 August 2020 on the invitation to supply negotiation covering activities commencing from the completion of the overall evaluation, negotiations and the purchase recommendation. This report was in addition to previous probity reports issued on 8 December 2019, 17 June 2020, 18 June 2020 and 3 July 2020.

The probity advisor's report notes that a probity audit had not been performed and the work performed was not an assurance engagement. As such, an audit opinion was not expressed and readers were advised that they should draw their own conclusions from the results of the probity review.

The report highlighted the following exclusions from the scope of the review:

- except as otherwise noted in the report, the probity advisor had not performed any testing on the information provided to confirm its completeness or accuracy
- in performing its procedures the probity advisor relied on representations made by DIT representatives.

The probity report noted that during the negotiation period an apparent breach of confidentiality occurred where confidential information may have been inappropriately disclosed. Further, it noted that the matter was subject to separate investigation. The report also included the following findings:

- that up to the date of the letter (14 August 2020) the invitation to supply negotiation process was conducted in line with the approved probity plan and communication protocol and the negotiation plan

- other than matters that are subject to a separate investigation, no material issues of a probity matter were observed
- the negotiation report and purchase recommendation provide a true and accurate reflection of the negotiation and procurement process and outcomes.

The report did not provide details of the confidential information that may have been inappropriately disclosed or the status of the separate investigation.

10.2.4 Probity advisor's final report

On 8 September 2020 the probity advisor issued a probity report to the ARTP Program Director. The report covered activities since the completion of the purchase recommendation and also provided observations and findings on the overall process up to the date of the letter.

The probity advisor found that:

- the procurement process was conducted in line with the approved probity plan and communications protocol, evaluation plans, negotiation plan and probity principles
- no material issues of a probity matter were observed.

The probity advisor reported an exception to this finding with regard to a matter of inappropriate disclosure of confidential information that was subject to a separate review which they could not comment on.

The report also included the outcomes of a specific probity review of matters raised by a proponent. It concluded that on the basis of the agreed-upon procedures conducted, the procurement processes were fair, impartial and unbiased, conducted in the public interest with integrity, and without any known degree of favouritism, appearance of impropriety or unfair advantage.

10.2.5 SA Government approval

TI 8 establishes the approval requirements for contracts. Contracts with a value of \$15 million and over must be approved by Cabinet or the Minister.

In line with TI 8, on 7 September 2020 the SA Government approved entering into a contract with Keolis Downer for an initial contract term of eight years, with an extension option of four years, for a total estimated contract price of \$2.138 billion, including GST over the 12-year term.

10.2.6 Contract execution

An outsourced rail operations agreement between the Rail Commissioner and Keolis Downer was executed on 18 September 2020. Contractual arrangements between the Minister, the Rail Commissioner and Keolis Downer are outlined in section 2.2.1.

10.3 Finding

10.3.1 Final probity report not received prior to approval of the purchase recommendation

Recommendation

For future procurements, DIT should ensure the final probity report is provided to those responsible for approving the purchase recommendation before the approval of the purchase recommendation.

Finding

We found the final probity report of 8 September 2020 was not provided to the DIT Procurement Committee to support its approval of the purchase recommendation as it was completed after they met to approve the purchase recommendation.

The final probity report included information about a separate investigation on probity matters raised by a proponent, that should have been made available to the DIT Procurement Committee to allow it to discharge its responsibility for effective governance of procurement.³²

The probity advisor attended the DIT Procurement Committee meeting for the item where the purchase recommendation was presented. The probity advisor presented the findings of his probity reports on the invitation to supply evaluation and the negotiation phases of the procurement.

We inquired with the probity advisor about what discussions occurred to give comfort to the DIT Procurement Committee at the meeting of 21 August 2020 about the leaking of information and the probity of the process. The probity advisor indicated that, from a probity and procurement perspective there was no evidence to suggest the disclosure of information occurred prior to the completion of the evaluation process.

It is good practice to provide the final probity report to those responsible for approving the purchase recommendation as it provides them with independent confirmation that the procurement met appropriate probity standards.

DIT response

Recommendation accepted in principle.

DIT's Probity Policy and/or related procedures will be amended to reflect this requirement.

It is noted however that the final probity report also is required to cover whether the purchase recommendation was approved appropriately, and accordingly it may be difficult to implement this recommendation in full as stated.

³² The DIT Procurement Committee responsibilities are documented in its terms of reference, July 2020.

11 Probity management arrangements

What we found

DIT appointed a probity advisor to provide independent probity advice for the procurement.

The probity advisor was engaged early in the procurement process. The probity advisor prepared regular probity reports, including a final written report on the probity of the procurement process.

DIT developed a probity plan that included communication protocols. In addition DIT designed and implemented a number of processes and controls to manage the probity risks of communications/interactions with proponents.

DIT obtained conflict of interest declarations and signed confidentiality agreements from officers involved in the procurement, including external advisors.

Notwithstanding these arrangements, there was evidence that unauthorised confidential information relating to the procurement process was disclosed. This unauthorised release of information was reviewed by the probity advisor and is currently being investigated by DIT.

The review by the probity advisor found that, aside from the matter that was subject to review by DIT, the procurement process was conducted in line with the probity plan and communication protocols, evaluation and negotiation plans and probity principles. Further, the report noted that the information disclosed was not of a nature that provided any bias, competitive advantage or disadvantage to any proponents or affected the outcome of the process.

At the time of finalising this Report, DIT's investigation had not been concluded. DIT had committed significant time and resources to investigate the unauthorised disclosure of information.

Our examination of the available evidence on this matter did not identify any issue that indicated that any proponent was advantaged or disadvantaged by the unauthorised disclosure.

It is our view, however that disclosure of confidential information during the process was a breach of the procurement probity principles.

Further, we identified the following areas where processes conducted were not consistent with reasonable probity standards:

- Records of matters discussed in some meetings with proponents were not maintained.
- The probity register did not include specific details of probity matters raised, specific actions taken and how the matter was resolved.

- DIT did not ensure the probity advisor provided probity reports as detailed in the acquisition plan and that the probity reports included information on the probity implications of concerns raised by a proponent and amendments made to the market documents.
- Probity assurance arrangements were not clearly defined, documented and agreed with the probity advisor before the engagement started.

In addition we identified some processes and practices that should be improved for future procurements including:

- the procurement communication register did not include all interactions/communications with proponents
- there was only one State representative at two interactions with proponents
- records of confidential documents printed and confirmation that they were securely destroyed were not obtained
- the probity plan did not consider some probity risks and did not outline the nature and scope of probity services including the sign-off required by the probity advisor
- conflict of interest declarations were not obtained from consulting firms engaged to assist in the procurement
- the probity plan requirement to advise the chair of the ARTP Steering Committee of conflict of interest disclosures and actions taken did not occur.

What we recommend

For future procurements, DIT should ensure:

- records are maintained of matters discussed in meetings with proponents
- the register that records probity matters reported includes specific details on the nature of the probity matter, the specific actions taken and how the matter was resolved
- all meetings/interactions are recorded in the communication register
- at least two State representatives attend meetings/interactions with proponents
- the nature and extent of probity reporting required is documented and agreed in detail before the engagement starts
- systems and processes are implemented to ensure confidential documents are securely maintained and destroyed where required
- the probity plan clearly identifies relevant probity risks and the management strategy to mitigate them, and assign specific responsibility for ensuring the management strategy is implemented
- a conflict of interest declaration is obtained from consulting firms engaged to assist in the procurement
- all conflict of interest disclosures are assessed and reported in line with the procurement probity plan.

11.1 Audit approach

We assessed whether DIT managed the probity of the procurement process in line with its policies and procedures and the key probity principles as described in section 3.4.

For this review we considered:

- the SPB's *Probity and Ethical Procurement Guideline*
- DIT's probity plan for the procurement
- DIT's processes to manage probity issues
- DIT's processes to identify and manage conflict of interests
- the disclosure of confidential information.

We also made inquiries with the probity advisor to understand his role in the procurement and to discuss observations on probity.

11.2 Overview of probity management arrangements

11.2.1 Importance of probity in procurement

Probity is the evidence of ethical behaviour commonly associated with the practice of adopting and following well considered procedures and processes to ensure procurement decisions are fair, transparent and defensible.³³

The SPB's *Probity and Ethical Procurement Guideline* states:

Implementing good probity and ethical practices in procurement will:

- *ensure the achievement of value-for-money*
- *reduce the risk to the Government in terms of legal and/or financial loss*
- *provide potential suppliers with the confidence that they will be treated fairly.*³⁴

11.2.2 A probity plan was developed for the procurement

Identifying foreseeable probity issues, and the specific controls to deal with these issues, is of critical importance in monitoring the probity of the conduct of a tender process.³⁵ An effective probity plan details probity issues and specific controls.

The SPB's *Probity and Ethical Procurement Guideline* states that a probity plan should be used for higher value and risk procurements.³⁶

³³ State Procurement Board, *Probity and Ethical Procurement Guideline*, issued August 2019, page 3.

³⁴ *ibid*, page 4.

³⁵ *Report on the Auditor-General's Examination, Pursuant to Section 39 of the Passenger Transport Act 1994, of Certain Bus Contracts and the Probity of Processes Leading up to the Awarding of the Contracts*, 2005, page 39.

³⁶ State Procurement Board, *Probity and Ethical Procurement Guideline*, issued August 2019, page 9.

A probity plan was developed and adopted by the ARTP Steering Committee in September 2019. It addressed:

- probity principles
- the need to maintain confidentiality
- the need to identify and manage actual and/or potential conflict of interests
- communication protocols.

11.2.3 DIT appointed a probity advisor for the procurement

Due to the complexity and value of the procurement DIT engaged a consultancy firm on 3 July 2019 to provide independent probity advice for the procurement process. The timing of engaging the probity advisor was reasonable as it occurred early in the procurement process. This enabled the probity advisor to provide probity advice through all stages of the procurement process.

Role of a probity advisor

A probity advisor is typically engaged to provide independent advice and assist management on probity/process issues. A probity advisor actively and contemporaneously works with the evaluation team to ensure probity issues are considered and actioned during the procurement process.

Engaging a probity advisor does not release, remove or replace the responsibilities of those involved in the procurement process to conduct the procurement consistent with reasonable probity standards.

The probity advisor performed a range of probity assurance activities including:

- providing probity briefings to officers involved in the procurement process
- presenting probity principles and protocols at industry and invitation to supply briefings
- reviewing key procurement documents from a probity perspective
- attending market soundings, proponent interactive sessions and the opening of expression of interest and invitation to supply responses
- providing advice to the ARTP Project Team on probity matters
- attending evaluation team meetings and negotiation meetings
- providing reports to DIT on the probity of the procurement process.

Probity reporting

A probity advisor should provide a report concluding whether the procurement process conducted was consistent with requirements outlined in the probity plan and probity standards and principles. The probity advisor's report should state what probity advice was provided and the extent to which all probity risks and issues were satisfactorily managed.

In addition to a final written report on the probity of the procurement process, the procurement acquisition plan required the probity advisor to provide a written report on probity at specific milestones.

11.2.4 Participants in the procurement were required to complete a conflict of interest declaration and confidentiality agreement

Identifying and managing actual, potential and perceived conflicts of interest and maintaining confidentiality are two important probity considerations for procurement.

Officers involved in the procurement process, including external advisors, were required to complete a conflict of interest declaration and confidentiality agreement.

11.2.5 Managing communications with proponents

To ensure fairness, transparency and equity in the procurement process, communications within the ARTP Project Team and with proponents must be carefully managed to mitigate any probity risks to the procurement process.

The following processes and controls were implemented to manage the probity risks of communications/interactions with proponents:

- Communication protocols, that formed part of the probity plan, addressed communications within the ARTP Project Team, with proponents and with project stakeholders.
- Interactions/communications with proponents were managed through the electronic data room and the tender rules required that proponents only communicate with the ARTP Project Team through the electronic data room.
- A communication register to record communications and meetings with proponents including purpose, parties involved and a link to the records of the interaction/communication.

11.2.6 Security and confidentiality of documents, submissions and commercial information

A key probity requirement is ensuring the security and confidentiality of documents and commercial information. To manage this requirement DIT implemented the following processes and controls:

- Officers involved in the procurement process signed a confidentiality agreement before being provided access to procurement documents.
- Documents were required to be secured within an IT environment with access restricted to relevant team members.
- Password controls were applied to key confidential documents.
- Printed (hard copy) documents used by the evaluation team were to be stored in a locked storage facility when not in use.

11.3 Disclosure of confidential information

11.3.1 Introduction

During the procurement, a range of matters were raised in Parliament and in the media about the procurement. This occurred before and after the procurement result was announced. The matters included concerns about the probity of the process, the prime focus of this audit.

As a result of these events, we conducted the following audit procedures to enable us to conclude on the impact on the probity of the procurement:

- examined documentation
- reviewed the approach taken by the probity advisor to review this matter
- interviewed selected individuals involved in the process including those participating in the evaluation process, unsuccessful proponents, the probity advisor and some members of the ARTP Steering Committee.

11.3.2 Events regarding disclosure of confidential information

The probity advisor report of 8 September 2020 outlined its understanding of the events that alerted DIT to a potential unauthorised disclosure of confidential information as follows:

- On 30 July 2020, during the negotiating period, the ARTP Program Director called a member of the Adelaide Next consortium to reply to a text message the director received on 29 July 2020.
- In the call, the Adelaide Next consortium member advised of being approached by a journalist who seemed to have access to confidential ARTP information.
- In the call the ARTP Program Director advised that the process was being conducted according to the process and timelines outlined in the invitation to supply. This included completing the evaluation by July 2020 and conducting negotiations in July 2020 and August 2020, with approvals scheduled to occur in August 2020/September 2020.
- The ARTP Program Director advised the process was still in progress and discussions with a proponent on a number of matters were occurring, but emphasised that no decisions had been made or conclusions reached.

As a result of the call, DIT arranged for the probity advisor to investigate the matters raised by Adelaide Next on the disclosure of information.

We note that negotiations were in progress with Keolis Downer, having commenced on 15 July 2020 and concluded on 7 August 2020. The probity advisor was present at all negotiation meetings between DIT and Keolis Downer.

On 13 August 2020, the negotiation team signed off the negotiation report, concluding that the Keolis Downer base scenario offer as modified by negotiations could be accepted as the basis for a contract.

On 14 August 2020, during the conduct of the probity advisor investigations, ARTP related confidential information was published in the Adelaide media.³⁷

The media article referred to the \$1 million offer cost contribution for unsuccessful proponents. This should have been confidential to the procurement parties. The offer cost contribution is discussed in section 7.2.12. The media article also referred to proponents seeking to withdraw and to Keolis Downer as the leading bidder. As noted in section 9.2.8, following completion of negotiations, it was concluded that an acceptable negotiation outcome had been achieved.

As noted, negotiations concluded the Keolis Downer offer could be accepted.

DIT advised all proponents on 14 August 2020 of the published article, that it would not respond further to the matters raised and that when the SA Government had made a decision a public announcement on the procurement outcome would be made.

On 18 August 2020, the probity advisor received a letter from the President of Bombardier, a member of the Adelaide Next consortium, raising concerns about the disclosure of certain ARTP confidential information to the media and about Bombardier having received negligible questions in relation to any aspect of its submission. In light of the concerns about the disclosures, Bombardier formally requested the probity advisor arrange for a full and independent probity investigation into the bid process, including the matters raised in the media reports, and provide a report to all bidders on the integrity of the bid process.

All proponents were advised on 21 August 2020 by the ARTP Program Director that because of the recent media enquiries, the probity advisor was conducting a review of the circumstances that led to the media having access to certain ARTP confidential information. The proponents were also advised that any probity-related issues identified would be addressed as part of the probity advisor's review and reports.

The communication to proponents also advised:

... that the Department of Infrastructure and Transport is also taking this matter and its obligations in relation to the matter extremely seriously, it is highly likely that one or more other investigations will be conducted in addition to that of the probity adviser.

On 21 August 2020, the DIT Procurement Committee approved a recommendation that a contract be awarded to Keolis Downer. It was subject to SA Government approval. Refer to section 10.

On 24 August 2020, the probity advisor also responded to the letter from the President of Bombardier dated 18 August 2020, noting among other things:

³⁷ Smith M, 2020, 'Claims companies were offered \$1m taxpayer-funded 'loser fee' for \$1b contract to privatise Adelaide's rail network', *The Advertiser*, 14 August 2020, <<https://www.adelaidenow.com.au/news/south-australia/claims-companies-were-offered-1m-taxpayerfunded-loser-fee-for-1b-contract-to-privatise-adelaides-rail-network/news-story/9e4212a0d1054f4f82dfb2fb8df272c9>>.

The Invitation to Supply (ITS) Stage Guidelines requires all communications in relation to the ARTP to be via each Proponent's nominated 'Proponent's Main Contact'. However, your observations of the importance of ongoing confidentiality of ARTP related matters are duly noted, and as you would appreciate, this is one of the key probity principles that BDO (as appointed probity advisers in relation to the ARTP) takes very seriously and requires strict adherence by all parties.

On 4 September 2020, the probity advisor received a response from the President of Bombardier that noted the probity advisor was investigating, and that DIT was likely to investigate, matters raised in relation to the integrity of the process. The letter also stated that they:

... assume that no further steps will be taken in respect of the procurement process until those investigations have been completed and the findings are made available for consideration by each of the consortia involved in the procurement process.

On 7 September 2020, the SA Government approved the Minister to direct the Rail Commissioner to enter into a contract with Keolis Downer.

On 8 September 2020, the probity advisor reported the result of its investigation to the ARTP Program Director. It found that, aside from the matter that was subject to separate review by DIT, the procurement process was conducted in line with the probity plan and communication protocols, evaluation and negotiation plans, and probity principles. The probity advisor's report noted that it was plausible that confidential information was inappropriately disclosed, however they could not establish the source of the disclosure. Further, the report noted that the information disclosed was not of a nature that provided any bias, competitive advantage or disadvantage to any proponents or affected the outcome of the process.

On 9 September 2020, the probity advisor replied to the President of Bombardier restating its 24 August 2020 advice and saying it was not in a position to comment on DIT's intentions for this matter.

On 15 September 2020, the President of Bombardier (BTA) again wrote to the probity advisor saying in the letter:

BTA understands that BDO cannot necessarily comment on the intentions of DIT, however, as the investigations concern BDO as the probity adviser and the DIT as the proponent of the ARTP tender process, and the concerns raised are in relation to disclosure of ARTP confidential information within the DIT, it is not clear how the next steps to be taken by DIT in the ARTP tender process can be de-coupled from conclusion of all probity investigations and implementation of necessary steps to address any probity issues which are identified.

BTA would appreciate receiving an explanation of BDO's response in the context of the concerns raised in relation to the DIT.

On 18 September 2020, the Rail Commissioner signed the contract documentation for the OROA. The SA Government announced Keolis Downer was awarded a contract to operate the Adelaide metropolitan passenger rail network from the end of January 2021.

On 22 September 2020 the probity advisor responded to the Bombardier letter dated 15 September 2020 advising its review into aspects of disclosure of ARTP information was complete. It advised the review focused:

- on the veracity of the information claimed to have been held by the journalist that contacted the Adelaide Next consortium member
- identification of persons who may have had access to that information.

It also advised:

- the information the journalist put to the Adelaide Next consortium member was accurate in some aspects but inaccurate in others
- the information disclosed was not of a nature providing competitive advantage or disadvantage to a proponent or affected the outcome of the process.
- they could not draw any conclusion as to the source of that information to the journalist
- DIT had initiated further investigations into this matter.

On 24 September 2020, aspects of the procurement were debated in the House of Assembly.³⁸ A media report about the debate referenced the 18 August 2020 letter the probity advisor received from the President of Bombardier and the advice to all proponents of 21 August 2020 by the ARTP Program Director.³⁹ A further media report on 24 September 2020 referenced the 18 August 2020 letter the probity advisor received.⁴⁰

On 30 September 2020 a media report⁴¹ referenced much of the correspondence between the President of Bombardier and the probity advisor, namely:

- the 18 August 2020 President of Bombardier's letter to the probity advisor
- the probity advisor reply of 24 August 2020 to the President of Bombardier

³⁸ South Australia, Parliamentary Debates, House of Assembly, 24 September 2020, pages 2782-2791, 2793-2794, 2802-2803, <<http://www.hansardpublic.parliament.sa.gov.au/#/search/1/2020>>.

³⁹ Smith M, 2020, 'Transport Minister Corey Wingard backs handling of \$2.14 billion rail contract amid calls for a corruption probe', *The Advertiser*, 24 September 2020, <<https://www.adelaidenow.com.au/news/south-australia/transport-minister-corey-wingard-backs-handling-of-214-billion-rail-contract-amid-calls-for-a-corruption-probe/news-story/8cbb535390ae4885001c2e2611f14af0>>.

⁴⁰ Smith M, 2020, 'Leaked documents reveal Bombardier Transportation call for probe before Keolis Downer won Adelaide rail contract', *The Advertiser*, 24 September 2020, <<https://www.adelaidenow.com.au/news/south-australia/leaked-documents-reveal-bombardier-transportation-call-for-probe-before-keolis-downer-won-adelaide-rail-contract/news-story/dc891c886a70932854f67b7d7f4710a0>>.

⁴¹ Richardson T, 2020, 'Govt launched multiple probes on rail privatisation ahead of contract', *InDaily*, 30 September 2020, <<https://indaily.com.au/news/2020/09/30/govt-launched-multiple-probes-on-rail-privatisation-ahead-of-contract/>>.

- the 4 September 2020 President of Bombardier reply to the probity advisor's 24 August 2020 letter
- a further probity advisor letter dated 9 September 2020 to the President of Bombardier
- a further letter dated 15 September 2020 from the President of Bombardier to the probity advisor.

These articles showed disclosure of information that should have been confidential to the process.

11.4 Audit conclusion about the disclosure of confidential ARTP information

Based on evidence available to us from our audit, that included examination of documentation and conduct of interviews, I concluded that the information disclosed was not of a nature that provided any advantage or disadvantage to any proponents.

I note that DIT referred this matter to the former Independent Commissioner Against Corruption who then referred the matter back to DIT to investigate. At the time of finalising this Report, this separate investigation had not been completed. DIT has committed significant time and resources to investigate the inappropriate disclosure of information.

It is clear ARTP correspondence was disclosed outside of the procurement parties and in breach of the confidentiality rules set out for the procurement process.

The fact of disclosures occurring was first investigated by DIT through the probity advisor immediately after Adelaide Next made DIT aware of the issue on 30 July 2020.

My review of documentation and conduct of interviews identified some procurement information that was disclosed. In my view the information was not of a nature that gave any evidence that a party was unfairly treated.

The disclosure of the \$1 million offer cost contribution in the 14 August 2020 media report, was a breach of confidentiality. The amendment condition was made available to all the proponents as one item in a package of amendments introduced to progress the procurement.

The view of Keolis Downer as the leading proponent reported in the media also indicates disclosure of confidential information from the process. However, it is my view that these disclosures do not suggest any advantage or disadvantage to a proponent.

The other disclosures of correspondence all occurred after the negotiation stage was completed and the negotiation report signed on 13 August 2020.

11.5 Findings

11.5.1 Records of matters discussed in meetings with proponents were not always maintained

Recommendation

For future procurements, DIT should prepare and maintain records of matters discussed in meetings with proponents.

Finding

We found the ARTP Project Team did not maintain records of the matters discussed at the weekly COVID-19 update meetings held with proponents during the procurement process (refer to section 7.2.7). The probity advisor attended these meetings and made notes of these meetings. The probity advisor advised these notes were written from a probity advisor perspective, based on what was required for him to fulfil his role. These notes were not a substitute for DIT maintaining its own records of matters discussed.

In addition we found there was no record maintained of a telephone meeting between the DIT Chief Executive and Keolis Downer Chief Executive on 9 April 2020 (refer to section 7.2.11). We have been advised that this meeting was not directly related to the heavy rail procurement. As the meeting gives rise to probity risks, appropriate records should have been maintained for this meeting.

The SPB's *Probity and Ethical Procurement Guideline* explains that officers should pay particular attention to documenting all relevant communication with prospective suppliers. It requires that appropriate records, such as meeting minutes and file notes of telephone conversations, should be maintained for relevant verbal discussions during the procurement process.

Maintaining records of all meetings and discussions with proponents during a procurement process is important to demonstrate transparency and therefore the probity of the meeting/discussion.

DIT response

Recommendation accepted.

DIT's Probity Policy and/or related procedures will be modified to reflect a requirement to keep a record of key matters discussed in all meetings with proponents.

11.5.2 Procurement communications register did not include all interactions/communications with proponents

Recommendation

For future procurements, DIT should record all meetings/interactions in the communications

register and assess and document the impact on the probity of the procurement and any responses.

Finding

We found that not all interactions/communications with proponents during the procurement process were recorded in the communications register. This included certain:

- meetings/interactions the DIT Chief Executive had with proponents
- meetings/interactions the ARTP Program Director/probity advisor had with proponents
- correspondence from proponents received by the probity advisor and the probity advisor's response.

The ARTP Project Team established a communications register to record communications/interactions with proponents. The register was to record details of all communications and interactions inclusive of letters (aside from correspondence captured in the data room) and meetings. It was to include information on the interactions such as key purpose, parties involved and a link to the records of the interaction/communication.

We also noted that some of the meetings/interactions not recorded in the communications register had been recorded in the probity register maintained by the probity advisor. However the probity register did not include detailed information on the meeting/interaction, ie who attended, the purpose of the meeting and a link to the detailed records maintained on matters discussed at the meeting.

Maintaining a complete communication register as a consolidated register is important to demonstrate the proper management of probity risks to the procurement from interactions/communications with proponents.

DIT response

Recommendation accepted.

DIT's Probity Policy and/or related procedures will be modified to make the requirement explicit to record all interactions/communications in the Communications Register; and the Probity Policy and/or related procedures updated to reflect this.

11.5.3 Only one State representative at two interactions with a proponent during the procurement process

Recommendation

For future procurements, DIT should ensure that at least two State representatives attend meetings/interactions with proponents during a procurement process where it is important for managing perceived or inherent probity risk.

Finding

For two telephone meetings with a proponent we found there was only one State representative who attended. These meetings were between the DIT Chief Executive and Keolis Downer Chief Executive (refer to section 7.2.11 for discussion on these meetings).

The DIT Chief Executive advised that both meetings were not related to the heavy rail procurement. Further, he prepared a file note for one of the meetings that he provided to the probity advisor.

Such meetings give rise to probity risks including the perception that a proponent may be getting favourable treatment. To mitigate any perceived or unintended probity risks we consider that it is sound practice that at least two State representatives attend meetings with proponents.

DIT response

Recommendation accepted.

DIT's Probity Policy and/or related procedures will be updated to include a requirement to ensure that at least two SA Government representatives attend any meetings/interactions with proponents during the procurement process, where those representatives are involved in the procurement process, including those in which the subject matter to be discussed is not connected with the procurement.

11.5.4 Probity assurance arrangements were not clearly defined, documented and agreed

Recommendation

DIT should ensure that the nature and extent of probity assurance services to be provided, key deliverables and reporting requirements are documented and agreed in detail before a probity engagement starts.

Finding

The signed agreement with the probity advisor contained only two deliverables which were 'probity services as required and a final report on probity of the projects for ARTP'. It did not clearly define the nature and extent of probity assurance services to be provided, key deliverables and reporting requirements.

We noted the acquisition plan included more details of the probity advisor scope of services. However there was no sign-off by the probity advisor prior to their engagement to confirm and evidence that they understood the probity services to be provided, the key deliverables and reporting requirements. We noted from June 2020 the probity advisor referred in its probity reports to its scope of services as detailed in the acquisition plan.

We have recommended in past reports that the nature and extent of probity assurance services to be provided, key deliverable and reporting requirements are documented and agreed in detail before a probity engagement starts.

DIT response

Recommendation accepted in principle.

It is noted that not all probity assurance services to be provided will be known before a probity engagement starts. A number of events could occur that would give rise to a need additional probity assurance services or a variation to the scope of the services during the procurement process. Accordingly, a structured process will be developed to specify the requirements to start, and to review and update them to the extent necessary at milestones or triggers.

11.5.5 Probity plan did not consider some probity risks

Recommendation

For future procurements, DIT should ensure the probity plan clearly identifies relevant probity risks and the management strategy to mitigate them, and should assign specific responsibility to relevant officers for ensuring the strategy is implemented.

Finding

We found the probity plan did not identify the following probity risks, along with management strategies to mitigate them:

- inconsistent management of time frames, deadlines and extensions⁴²
- team members not being familiar with relevant documentation and policies⁴³
- non-compliance with legislation and regulations and agency guidelines, policies and procedures
- the procurement process not conducted in line with the approved acquisition, evaluation and negotiation plans.

It is also our view that it is sound practice for the probity plan to include strategies to ensure the probity plan requirements are complied with during the procurement process.

DIT response

Recommendation accepted.

The additional guidance provided here by the Auditor-General as to how to interpret and apply the SPB guidelines will be incorporated into DIT's Probity Policy and/or related procedures.

⁴² The SPB's *Probity and Ethical Procurement Guideline* identifies this as a probity matter that should be considered in probity plans.

⁴³ *ibid.*

11.5.6 Probity advisor did not report as detailed in the acquisition plan

Recommendation

For future procurements where a probity advisor is engaged, DIT should ensure the nature and extent of probity reporting required is documented and agreed in detail before the engagement starts.

Finding

The nature, extent and scope of probity reporting required to be performed by the probity advisor was not detailed in the service agreement between DIT and the probity advisor.

The acquisition plan indicated that the probity advisor was to provide a written report on probity for the following milestones:

- before releasing the invitation to supply
- after meetings involving proponents (a single report covering all meetings was sufficient)
- the opening of tenders
- the evaluation process.

DIT did not ensure the probity advisor provided probity reports as detailed in the acquisition plan.

We found the probity advisor did not provide a probity report on meetings with proponents. Further, while a report on the probity of the expression of interest process was provided, there was no specific report on the probity before release of the invitation to supply.

DIT response

Recommendation accepted. Further response as with 11.5.4 and 11.5.5.

11.5.7 Probity advisor's report did not include information on probity of key events

Recommendation

For future procurements where a probity advisor is engaged, DIT should ensure the information and the assurance required from the probity advisor in its reports is defined and agreed with the probity advisor.

Finding

The reports prepared by the probity advisor did not provide sufficient details to enable DIT and/or relevant external parties to fully understand the probity of certain events that occurred during the procurement process.

We found the probity advisor's reports did not include detail on:

- the letter Transdev sent the probity advisor on concerns it had with the process (refer to section 7.2.3), how these concerns were addressed and the implications for the probity of the procurement process
- the probity of amendments DIT made to the market documents including:
 - extension of the invitation to supply closing date (refer to section 7.2.12)
 - reimbursement of additional offer costs incurred by unsuccessful proponents as a direct result of COVID-19 (refer to section 7.2.12)
 - changes made to the invitation to supply to address proponents limited ability to inspect rail assets (refer to section 7.2.14).

We found that neither the probity advisor's contract or the probity plan outlined the information and sign-off (ie the extent of assurance) that DIT required the probity advisor to provide in its reports.

As DIT is responsible for the probity of the procurement it should have:

- defined the information and sign-off (ie assurance) required in the probity advisor's reports
- ensured the probity advisor clearly understood the information and sign-off required from them, with this appropriately documented, for example in the probity plan.

If the information and sign-off required in probity reports is not defined and communicated there is increased risk that the probity reports will not provide information necessary to understand the impact on probity of key events. This is particularly important if the probity of the procurement process is challenged.

DIT response

Recommendation accepted. Further responses as with 11.5.4 and 11.5.5.

11.5.8 Conflict of interest declaration not obtained from consulting firms engaged

Recommendation

For future procurements DIT should obtain a written conflict of interest declaration from consulting firms engaged.

Finding

We found DIT did not obtain a conflict of interest declaration from the consulting firms it engaged to assist with the procurement process.

While individual officers within these firms involved in the project completed a conflict of interest declaration, a declaration from the consulting firm itself was not obtained.

In our view, it is prudent to obtain a conflict of interest declaration from consulting firms prior to their engagement, as there could be relationships that may create actual and/or perceived conflicts of interest that the individual members of the firm are not aware of, and therefore unable to disclose in their individual declarations.

The Acting Executive Director, People and Corporate Services Division advised us that DIT obtained verbal legal advice. The advice confirmed that the consulting firms were contractually required to declare in writing any conflicts of interest that occurs and that a separate conflict of interest declaration form is not required.

Notwithstanding the contractual requirement, to effectively manage probity risks we consider it sound practice to obtain positive written confirmation on conflict of interests from consulting firms prior to their engagement.

Where a potential or perceived conflict of interest exists and it is not identified and managed appropriately there is a risk that the procurement process may be challenged.

DIT response

Noted.

The Auditor-General has concluded that the preferred practice is to obtain a conflict of interest declaration from the consulting firms engaged to assist with the procurement process. This is dealt with in the standard form contract. This matter will be referred to the Crown Solicitor's Office for consideration. The matter is considered to be of low risk and the change in process will add further administrative process in an already comprehensive process.

11.5.9 Chair of the ARTP Steering Committee not advised of conflict of interest disclosures as required by the probity plan

Recommendation

For future procurements, DIT should ensure all conflict of interest disclosures are assessed and reported in line with the procurement probity plan. Where a decision is made to not implement a control outlined in the probity plan, the reasons should be documented and the approach endorsed by those responsible for the procurement.

Finding

The probity plan outlined a framework for considering conflict of interest disclosures, that included advising the Chair of the ARTP Steering Committee of disclosures made, together with details of the action taken to respond to it.

Some officers involved in the procurement made a disclosure in their conflict of interest declaration. We found the Chair of the ARTP Steering Committee was not advised of these disclosures, together with details of the action taken (or not taken) to respond to them as required by the probity plan.

The DIT Chief Executive advised that probity matters, including conflict of interest matters was a standard agenda item at ARTP Steering Committee meetings from December 2019 and any relevant matters were raised and discussed in these meetings. While a pro-forma report covering conflict of interest disclosures assessed and reported was not provided at each meeting, all ARTP Steering Committee members were briefed on relevant conflict of interest matters and action taken in response to it.

Our review of the ARTP Steering Committee minutes found that they did not record members being briefed on disclosures made and the actions taken in response to it.

Failure to follow the probity plan increases the risk that the agency managing the procurement may not be able to demonstrate that probity risks have been addressed and the probity of the process was not compromised.

DIT response

Recommendation accepted. Further response as with 11.5.5.

11.5.10 Probity register did not include specific details of probity matters raised, specific actions taken and how the matter was resolved

Recommendation

DIT should ensure the register that records probity matters identified includes specific details on the nature of the probity matter, the specific actions taken and how the matter was resolved. It should also provide the probity register to those responsible for the procurement process regularly throughout the process and before the procurement is finalised.

Finding

The probity advisor's scope of service, as defined in the acquisition plan, included maintaining a register of probity matters reported and how they were addressed.

A probity register was maintained in the form of a record of activities performed by the probity advisor. In the instances where a probity matter was recorded in the register, we noted that specific details of the nature of the probity matter, the specific actions taken and how the matter was resolved were not recorded in the register.

We also noted that the probity register was not provided to the ARTP Steering Committee periodically throughout the procurement or before its finalisation.

Maintaining a register of probity matters and how they were addressed helps those responsible for the procurement process to understand the probity issues, and therefore the probity of the procurement process.

DIT response

Recommendation accepted. Further response as with 11.5.5.

11.5.11 Records of documents printed and confirmation that they were securely destroyed not obtained

Recommendation

For future procurements, implement systems and processes to ensure confidential documents are securely maintained and destroyed where required, and obtain confirmation these systems and processes were effectively implemented.

Finding

We found the ARTP Project Team did not establish arrangements to receive confirmation of the secure destruction of all confidential documents that were printed by members of the invitation to supply evaluation team.

To provide control over the confidentiality of evaluation documents, members of the invitation to supply evaluation team were required to maintain a record of documents they had printed and at the end of the evaluation ensure those hard copy documents were securely destroyed.

We were advised the ARTP Project Team did not obtain:

- the records of documents that were printed by the invitation to supply evaluation team members
- confirmation from the invitation to supply evaluation team members that any documents printed were securely destroyed.

Without obtaining these records DIT will not know what confidential documents have been printed and have assurance that that these documents have been securely destroyed.

DIT response

Accepted in principle. Potential IT systems enhancements will be investigated to establish enhanced document security features that enable traceability; complemented by physical controls in a secure space; and a declaration signed by each relevant team member at the conclusion of the process attesting to completion of relevant requirements, including document destruction.

12 Compliance with *Passenger Transport Act 1994*

What we found

Except for one minor matter, the Minister complied with the requirements of the PTA leading up to and following the awarding of the OROA. We did find one instance of non-compliance.

The Minister's report to the Economic and Finance Committee was not provided within the time frame required by the PTA. We consider this matter is minor in nature and did not impact the procurement process.

The OROA entered into with Keolis Downer addressed the mandatory requirements set out in sections 40(1) and 41(1) of the PTA.

What we recommend

For future passenger transport service tender processes DIT should ensure the Minister's report on the tender and assessment process is forwarded to the Economic and Finance Committee within 14 days of the invitation being published.

12.1 Introduction

12.1.1 Requirements of the PTA for the process leading up to and following the awarding of a service contract

The PTA requires the Minister to do specific things in conducting the processes leading up to and following the awarding of any service contract. These include the Minister:

- appointing a person or people to conduct the tender process if the Minister determines that a service contract should be awarded by tender under section 39(2a)(a)
- providing reports to certain parties including:
 - the Economic and Finance Committee on the proposed tender and assessment process (section 39(2a)(b))
 - the Parliament on the contract awarded and how certain principles were applied in awarding the contract (section 39(3b))
 - the Auditor-General on the process leading to the awarding of the contract along with a copy of the contract awarded (section 39(3e))

- observing the following principles in awarding service contracts within metropolitan Adelaide:
 - avoiding a monopoly
 - developing sustainable competition
 - integrating passenger transport services
 - ensuring efficiency and promoting innovation (section 39(3)(a)(i-iv))
- reporting on ministerial directions in connection with the process of awarding a service contract (section 39(2a)(c)).

Figure A2.1 in Appendix 2 summarises the results of our review of whether the Minister complied with the requirements of the PTA leading up to and following the awarding of the OROA.

12.1.2 Application of the monopoly and sustainable competition principles

Section 39(3)(a) of the PTA requires the Minister, when awarding contracts for regular passenger services within metropolitan Adelaide, to consider the following principles:

- Service contracts should not be awarded so as to allow a single operator to obtain a monopoly, or a market share that is close to a monopoly, in the provision of regular passenger services within metropolitan Adelaide (section 39(3)(a)(i)).
- Sustainable competition in the provision of regular passenger services should be developed and maintained (section 39(3)(a)(ii)).

The Minister engaged the services of Deloitte to review the monopoly and sustainable competition impacts of the current passenger transport procurements. Further, Minter Ellison provided advice on these principles in the context of the heavy rail procurement.

We reviewed the advice provided by Deloitte and Minter Ellison and found that appropriate consideration was given to the monopoly and sustainable competition principles in line with the PTA.

12.1.3 Service contracts required to make provision for certain mandatory requirements

The PTA requires the service contract to make provision for certain requirements detailed in sections 40(1) and 41(1). Other sections of the PTA, for example sections 40(2) and 41(2), detail other requirements that may (but are not required to) be included in the service contract.

Figure A2.2 in Appendix 2 summarises the results of our assessment of the compliance of the OROA with the PTA.

12.2 Finding

12.2.1 Minister's report to Economic and Finance Committee was not provided within the time frame required by the PTA

Recommendation

For future passenger transport service tender processes, DIT should ensure the Minister's report on the tender and assessment process is forwarded to the Economic and Finance Committee within 14 days of the invitation being published.

Finding

There was non-compliance with section 39(2a)(b) of the PTA, as the Minister's report on the tender and assessment process was not forwarded to the Economic and Finance Committee within 14 days after the tender invitation was published.

We found the Minister's report was forwarded to the Economic and Finance Committee on 13 March 2020. As the invitation to supply was issued on 24 February 2020 the report should have been forwarded to the Economic and Finance Committee by 9 March 2020.

DIT response

Recommendation accepted.

Administrative oversight caused the report to be provided 3 days late.

13 Key contractual provisions to protect the State's interests

What we found

The OROA provides the basis for adequate protection to the State and passengers in terms of the ongoing and uninterrupted performance of the train services. This is dependent on the arrangements in the OROA being effectively managed and monitored.

13.1 Provisions in the OROA designed to protect the State's interests

In summarising the provisions in the OROA we have not disclosed certain financial figures. DIT sought legal advice and has determined figures contained in certain provision are commercial-in-confidence.

13.1.1 Provision of services

The service specification for Keolis Downer's delivery of the train services is set out in schedule 5 of the OROA.

The Rail Commissioner has discretion to amend the service specification including designating additional services and/or special event services to be provided by Keolis Downer.

Keolis Downer must provide the train services in a manner reasonably required of an experienced, efficient and competent passenger rail operator. They must provide the train services in line with the master timetable, Adelaide metropolitan passenger rail network service plan and the train service delivery plan approved by the Rail Commissioner.

Keolis Downer is to comply with the requirements of any applicable legislation including the requirement to hold all relevant accreditations/authorisations.

The OROA requires Keolis Downer to use all reasonable endeavours to continuously improve all aspects of the train business. To support this, Keolis Downer must implement a continuous improvement business process model approved by the Rail Commissioner. It must review its continuous improvement process annually and report the results to the Rail Commissioner.

Maintenance arrangements

Under the OROA, Keolis Downer is responsible for maintaining and renewing the rail infrastructure (including the Operations Control Management System)⁴⁴ and rolling stock, and assume the associated cost risk.

Specific maintenance obligations and minimum renewal requirements are detailed in schedules to the OROA.

⁴⁴ Refers to all systems, software and related components used for the operational control and management of the Adelaide metropolitan passenger rail network.

Keolis Downer must maintain and renew the assets in line with the:

- strategic asset management plan
- annual works plan
- technical maintenance plans
- safety plan.

The OROA outlines requirements for the manner and conduct of maintenance and renewal works, including:

- completion of works in a proper manner carried out by suitably qualified and experienced people who have accreditation required under all relevant safety law
- performance of works in a manner that is consistent with a prudent, efficient and experienced rail asset manager
- whole-of-life approach to asset maintenance
- performance of works with due skill, care and diligence
- compliance with asset standards
- replacement and renewal of assets with modern equivalent assets of similar form, fit or function.

The Rail Commissioner can ask Keolis Downer to rectify, at its cost, maintenance and renewal work that does not meet the standards outlined in the OROA. If Keolis Downer dispute the appropriateness of this request, it can refer this to an independent expert for determination.

Infrastructure escrow

An escrow mechanism is used to ensure that funds for infrastructure maintenance and renewal are quarantined and any unspent amounts can be accumulated across financial periods.

Under the arrangements a portion of the payment sum is withheld and placed into an escrow account (a general ledger account established by the Rail Commissioner). Payments are made to Keolis Downer from the escrow account to reimburse it for costs incurred in maintaining and renewing infrastructure assets.

If the escrow funds are insufficient to conduct the required works set out in the annual work plans, Keolis Downer will be required to top-up the escrow balance.

Payment for rolling stock overhauls

Keolis Downer is required to pay for the cost of rolling stock overhauls for the term of the OROA.

Up to 31 December 2022, Keolis Downer is required to engage Bombardier to conduct rolling stock overhauls and will make payment to Bombardier directly for the cost of rolling stock overhauls. The State will subsequently reimburse Keolis Downer for the payments made.

From 1 January 2023, the Rail Commissioner will withhold amounts for rolling stock overhauls from the payment sum. The withheld amounts will be paid to Keolis Downer on completion of the overhauls, but with the balance of the withheld funds not to reduce to less than zero as a consequence.

Accordingly, the Rail Commissioner is not required to pay Keolis Downer unless and until sufficient funds have otherwise been retained to cover the cost of rolling stock overhauls claimed. Further, for rolling stock overhauls completed in addition to those detailed in the OROA, the Rail Commissioner is not required to pay Keolis Downer any amount more than the withheld amounts.

Keolis Downer not required to conduct certain major renewals

The OROA details several excluded major renewal works that Keolis Downer is not required to conduct. Excluded major renewal works include:

- rectifying defects and any additional maintenance works required due to defective workmanship for certain project works (Flinders Link, Ovingham level crossing removal, Hove level crossing removal, Gawler rail electrification)
- replacing rail track and ballast on the Grange Line over and above minimum renewals set out in the OROA
- upgrading existing assets to meet current codes or standards
- maintenance and renewal of turnouts⁴⁵ on the Gawler corridor and the Adelaide Yard
- resurfacing station carpark pavements and speed bump replacements.

However if Keolis Downer becomes aware that excluded major renewal works need to be conducted it must promptly notify the Rail Commissioner in writing and meet to discuss the steps to be conducted. If the Rail Commissioner and Keolis Downer cannot agree whether excluded major renewal works need to be conducted, either party may refer the matter in dispute to an independent expert for determination.

The OROA provides for adjustment to Keolis Downer's contract payment for the net financial impact of excluded major renewal works.

Risk and insurance

Keolis Downer expressly agrees to conduct the train business, including the provision of the train services and use of the State's assets, at its own risk. Further, it must have certain insurances in place and provide the Rail Commissioner with proof of insurance prior to commencement of the services and when reasonably requested thereafter.

Keolis Downer must indemnify the Rail Commissioner against any potential liability to third parties that arises out of anything done by it during its provision of the train services or any breach of the contract documents. Accordingly, any risk of third party liability from the provision of the train services lies expressly with Keolis Downer.

⁴⁵ A turnout is an installation used to shift trains from one track to another.

Performance bond, security and guarantees

The consequences of any non-compliance in the performance of the train services are risks assumed by both Keolis Downer and the guarantor (Downer EDI and Keolis SA).

Before the OROA commences, Keolis Downer must procure and issue to the Rail Commissioner a performance bond. Further, during the term of the OROA, Keolis Downer provides certain financial undertakings to the Rail Commissioner including:

- maintaining the minimum shareholders' funds amount
- ensuring the performance bond is valid and enforceable
- not reducing its capital below its initial equity amount
- refraining from entering into any competing security arrangements.

The guarantor expressly guarantees Keolis Downer's due and punctual performance of its contractual obligations. The guarantor also indemnifies the Rail Commissioner against loss and damage and any costs or expenses the Rail Commissioner may incur directly or indirectly out of any breach by Keolis Downer of its obligations under the OROA. The total amount recoverable from the guarantor is capped and subject to indexation by the consumer price index.

Keolis Downer must also procure and provide security deeds to the Rail Commissioner as a condition precedent. The deeds provide further security over the assets of Keolis Downer and its shareholder(s) in the event of any liability under the contract documents that Keolis Downer is unable to satisfy.

13.1.2 Performance monitoring

The OROA requires regular and comprehensive reporting by Keolis Downer on its performance of the train services. This includes operational and financial reporting.

The Rail Commissioner also has general audit and information gathering powers to review Keolis Downer's performance at any time.

Keolis Downer is required to immediately notify the Rail Commissioner of any:

- instances of disruption to the train services
- incidents in its provision of the train services
- failures to comply with its contractual obligations.

Key performance indicators

Keolis Downer must meet a series of prescribed KPIs. The KPIs set the minimum acceptable service level for key performance areas such as:

- revenue protection, patronage growth and customer satisfaction
- service reliability/timeliness and quality
- safety
- asset (rolling stock) performance reliability.

A failure by Keolis Downer to achieve the performance benchmark for a particular KPI is deemed a KPI Failure, regardless of the cause. The occurrence of a KPI Failure can lead to the application of negative adjustments or abatements to the contract payment to Keolis Downer, depending on the severity of the failure.

To encourage and incentivise continuous improvement throughout the contract term, certain KPIs for patronage growth and customer satisfaction are considered incentive KPIs. If Keolis Downer exceed the performance target for these KPIs it will be entitled to a performance incentive payment.

KPI Failures may also provide a basis for the Rail Commissioner to issue a call-in notice requiring Keolis Downer to implement a plan to remediate the performance issue. Further, the occurrence of three performance call-in events within a 12-month period results in a non-compliance event. In this case Keolis Downer will be required to provide a cure plan setting out actions to rectify the underlying event and alleviate its impact.

KPI Failures can also cause a termination event where poor performance is ongoing.

The Rail Commissioner can review the KPIs, including performance benchmarks and performance targets, and make changes to them acting reasonably.

13.1.3 Defaults, Rail Commissioner step-in powers and termination

Any failure by Keolis Downer to provide the services in line with the terms and conditions of the contract documents, or any other default or breach of its obligations can trigger various consequences under the OROA, including:

- notification of a call-in event
- the requirement to prepare and implement a cure plan
- activation of the dispute resolution processes, including referral of the matter to an independent expert
- exercise of the Rail Commissioner's step-in powers
- termination rights, depending on the gravity and persistence of Keolis Downer's failures.

Call-in event

Call-in events arise from a failure or breach by Keolis Downer of its obligations under the contract documents.

Keolis Downer must notify the Rail Commissioner of any potential call-in events as soon as it becomes aware of it. When a call-in event occurs, the Rail Commissioner may issue a call-in notice and require Keolis Downer to provide a remedial plan to correct the non-performance. In addition, the Rail Commissioner may request further information from Keolis Downer for the relevant event, require that the parties meet to discuss matters, that an internal review be conducted and/or other corrective action.

If there are three call-in events, other than a performance call-in event, of the same type within a 36-month period, the Rail Commissioner may elect to treat the third call-in event as a non-compliance event.

Non-compliance event

A non-compliance event⁴⁶ triggers the Rail Commissioner's rights to give Keolis Downer a written breach notice and requires Keolis Downer to investigate the reason for the failure and to prepare a cure plan to attempt to cure the non-compliance event.

Rail Commissioner's step-in powers

The Rail Commissioner has step-in powers in certain circumstances including when:

- there is a termination event
- there is a non-compliance event that threatens, or is likely to threaten, the delivery of the train services and which is not cured to satisfaction of the Rail Commissioner
- there is a risk or threat of imminent death or injury to customers on the train services or the services of any other transport operator, or harm or damage to the public interest
- it is necessary for the Rail Commissioner to take immediate action to discharge its duties or powers under the law.

The Rail Commissioner step-in powers include:

- directing Keolis Downer to stop or suspend its performance of any or all of its obligations
- taking over provision of the train services
- operating and managing all or any assets used in the operation of the train services.

Keolis Downer remains liable in relation to the exercise of the step-in powers and indemnifies and releases the Rail Commissioner and/or the relevant step-in party⁴⁷ against any claim or liability that may be sustained in the exercise of any step-in powers.

The Rail Commissioner must continue to make contract payments even if step-in powers are being exercised. Except where the event giving rise to the step-in was not caused by Keolis Downer or its associates, the Rail Commissioner may deduct amounts for any claim or liability it reasonably believes will be incurred by the step-in party from exercising step-in-powers.

Termination

The Rail Commissioner can terminate the OROA in certain circumstances including where:

- Keolis Downer becomes insolvent

⁴⁶ Non-compliance events include KPI Failures, breaches of the accessibility and inclusion requirements, payment misrepresentations or a record and reporting misrepresentation, multiple call-in events, non-compliance with safety and risk management provisions, and any other breaches by Keolis Downer of any of its obligations under the transaction documents.

⁴⁷ Step-in party refers to the Rail Commissioner, its agent, attorney or nominee.

- Keolis Downer's performance remains below required levels, measured in terms of KPI Failures over a 24-month rolling period
- a material breach by Keolis Downer remains un-remedied
- Keolis Downer's accreditation or other authorisations for the train business is repealed, revoked, terminated or expires.

Any outstanding payment obligations survive the termination of the OROA.

There are provisions in the OROA to facilitate the retendering of the train business and the transfer of the train assets without disruption in the event of termination of the OROA.

Termination for convenience

The Rail Commissioner can at any time, and without cause, elect to terminate the OROA for convenience, ie without any breach by Keolis Downer. This is subject to providing 12-months' notice in writing.

If the Rail Commissioner terminates the OROA for convenience, Keolis Downer is entitled to payment of the net present value of the termination sum in the OROA. No termination sum is payable if the agreement is terminated after the initial term, ie 4 February 2029.

In addition to payment of the termination sum, Keolis Downer is also entitled to reimbursement of the following termination costs:

- reasonable costs of disengagement in excess of the costs of providing the train services during the process of disengagement
- the net present value of costs that Keolis Downer has incurred or is committed to before receiving the Rail Commissioner's termination notice.

Keolis Downer is not entitled, in the termination payment, to compensation for the loss of its bargain.⁴⁸

Keolis Downer must calculate the termination costs and provide the Rail Commissioner with details and supporting information of its calculation. The Rail Commissioner can reject Keolis Downer's determination and calculation of the termination costs if it believes (acting reasonably):

- the termination costs have not been calculated correctly
- they are not supported by sufficient supporting information to verify the termination costs
- Keolis Downer has not complied with the spirit and intent of the OROA.

⁴⁸ Loss of bargain refers to the difference between the position that Keolis Downer would have been in if the contract had been performed, and the actual position as a result of termination.

Any dispute between the parties on the determination of termination costs will be determined in line with the dispute resolution process outlined in the OROA.

13.1.4 Dispute resolution

If either party is dissatisfied with the other's performance of its obligations under the OROA, the dissatisfied party may issue a notice of dispute. The parties are required to try to resolve the issue, first through their appointed representatives in a negotiation and then, if the matter remains unresolved, through the parties' respective most senior executive officers.

If the parties cannot resolve the issue, then either party may refer the matter to an independent expert, in which case both parties are bound by the decision of the expert. In certain circumstances, the particular provision under which the dispute has arisen expressly provides for the dispute to be referred directly to an independent expert. In the event that this process fails to resolve matters, either party may issue court proceedings.

13.1.5 Disengagement

The OROA provides a detailed regime for Keolis Downer's disengagement from operating the train services and its replacement by a successor operator if the term expires or the agreement is terminated. This includes Keolis Downer preparing and maintaining a transition-out plan to minimise any disruption to the train services and the operation of the train business.

Further, during the final 12 months of the term or during the period triggered by the Rail Commissioner issuing a termination notice, the Rail Commissioner has increased rights of access and inspection, and the oversight and approval of modifications or amendments to key contract documents.

Appendix 1 – Chronology of events

Date	Event
2019	
27 May	SA Government approves development of a detailed implementation plan to transition from government-operated heavy rail passenger services to a contracted services model with a private sector operator, procured through a competitive tender process.
1 July	South Australian Public Transport Authority is established.
3 July	Probity advisor is appointed.
August	ARTP Project Team conducts the first round of market sounding.
4 September	ARTP Steering Committee terms of reference is approved.
20 September	Acquisition plan is endorsed by the Chair, ARTP Steering Committee and the Chair, DIT Procurement Committee.
Early October	ARTP Project Team conducts the second round of market sounding sessions.
14 October	Acquisition plan is approved by the SPB's Procurement Approvals Committee. Purchasing approval is delegated to the DIT Procurement Committee.
28 October	SA Government approves the former Minister's recommendation for DIT to proceed with a competitive tender process for the provision of heavy rail passenger services for the Adelaide metropolitan rail network in line with section 39(2) of the PTA.
29 October	DIT Chief Executive is appointed by the former Minister to conduct the procurement process under section 39(2a)(a) of the PTA. DIT Chief Executive notes deviations from SPB-approved acquisition plan and approves a revised acquisition plan. DIT Chief Executive approves the expression of interest documents to be released to the market.
30 October	Expression of interest is released to the market.
6 November	Expression of interest evaluation plan is approved by the DIT Chief Executive.
8 November	Status report on the expression of interest process is provided to the Economic and Finance Committee by the former Minister.
25 November	DIT Chief Executive approves deviations to the acquisition plan and expression of interest evaluation plan. DIT Chief Executive approves a revised acquisition plan and a revised expression of interest evaluation plan.
26 November	Expression of interest closed.
8 December	Probity advisor provides a written probity report on the expression of interest.
16 December	Evaluation panel report and recommendation for the expression of interest is approved by the DIT Chief Executive as the appointed responsible person under the PTA.
19 December	SA Government announces three proponents short-listed from the expression of interest phase.

Date	Event
2020	
14 February	Probity advisor provides a report on the invitation to supply procurement documents and evaluation plan.
24 February	Invitation to supply is released to the three proponents short-listed from the expression of interest process.
9 March	Transdev (a member of the TrainCo consortium) write to the probity advisor raising concerns about the invitation to supply, including the potential imbalance of information that exists between proponents.
11 March	SA Government announces \$350 million economic stimulus package to respond to the COVID-19 crisis.
13 March	Report on the invitation to supply process is provided to the Economic and Finance Committee by the former Minister.
14 March	Mandatory site visit is attended by representatives from the State, the three proponents and the probity advisor.
15 March	COVID-19 declared to be a public health emergency in South Australia.
17 March	Probity advisor responds to Transdev's concerns detailed in the 9 March 2020 letter.
18 March – 19 May	Weekly video conferencing meetings are held between the ARTP Project Team and individual proponents to actively monitor the impacts of the pandemic on proponent's bid preparation.
20 March	Transdev (a member of the TrainCo consortium) write to the ARTP Program Director about the impact of COVID-19.
24 March	Closure of South Australian borders due to COVID-19. Amendments are made to the invitation to supply including removal of a required offer, reducing the information required to be provided in tender responses and extending the submission date for assumptions used in preparing the offers. Transdev (a member of the TrainCo consortium) write to the ARTP Program Director to reiterate the impacts of COVID-19.
26 March	SA Government announces \$650 million jobs rescue package responding to the COVID-19 emergency.
27 March	Transdev (a member of the TrainCo consortium) write to the ARTP Program Director to advise that TrainCo will be unable to comply with the tender close date of 18 May 2021 due to impacts of COVID-19, noting that their continued participation in the tender can only be achieved if the tender is suspended.
2 April	Mid-point health check meetings are held individually with each proponent. Meetings are attended by the DIT Chief Executive, ARTP Program Director, proponent's chief executive and other key staff involved in preparing the bid.
3 April	Telephone meeting is held between the Keolis Downer Chief Executive and the DIT Chief Executive to discuss concerns raised at the health check meeting.

Date	Event
6 April	Amendments are made to the invitation to supply, including a two-week extension to the closing date and introduction of an offer cost contribution for unsuccessful proponents.
7 April	TrainCo advises DIT that without the tender being suspended, they will not be able to participate in the invitation to supply.
8 April	Adelaide Next and Keolis Downer confirm with DIT that they intend to continue to participate in the invitation to supply.
9 April	Telephone meeting is held between the Keolis Downer Chief Executive and the DIT Chief Executive to discuss a matter the DIT Chief Executive agreed to follow up from their telephone meeting on 3 April 2020.
20 April	Draft OROA is amended to include provisions designed to address proponents limited ability to inspect the condition of rail network assets during the procurement.
11 May	Invitation to supply evaluation plan is approved by the DIT Chief Executive.
25 May	Invitation to supply evaluation plan is endorsed by the SPB's Procurement Approvals Committee.
28 May	Keolis Downer requests the invitation to supply closing date be extended from 1 June 2020 to 5 June 2020.
29 May	<p>The ARTP Program Director and probity advisor meet with Keolis Downer representatives to discuss the request to extend the invitation to supply closing date.</p> <p>ARTP Program Director advises Keolis Downer that the invitation to supply closing date and time would remain unchanged.</p>
1 June	Invitation to supply is closed with the exception of certain supporting financial information which closed on 9 June 2020.
18-19 June	Specialist assessment team reports are presented to the evaluation panel.
23 June	Finance and commercial specialist assessment team reports are presented to the evaluation panel.
24 June	Evaluation panel meets to conduct the value-for-money assessment and an overall evaluation of the offers.
3 July	Probity advisor provides a written probity report on the evaluation of the invitation to supply.
8 July	ARTP Steering Committee notes the evaluation report.
13 July	DIT Chief Executive approves the negotiation plan.
15 July	DIT starts negotiations with Keolis Downer.
14 August	Probity advisor provides a written probity report on the negotiation and purchase recommendation.
19 August	ARTP Steering Committee endorse the purchase recommendation that includes the negotiation report.

Date	Event
21 August	DIT Procurement Committee approves the purchase recommendation to award Keolis Downer the contract for the provision of heavy rail services.
7 September	SA Government approves: <ul style="list-style-type: none"> the Minister to enter into three head agreements with the Rail Commissioner for rail infrastructure access, rolling stock access and operation of the train passenger transport network in line with section 39 of the PTA the Rail Commissioner to enter into a contract with Keolis Downer.
8 September	Probity advisor issues final probity report.
18 September	Rail Commissioner and Keolis Downer execute the contract documents including the OROA for the provision of heavy rail services.
1 October	John Holland (a member of the Adelaide Next consortium) submits an offer costs claim.
15 October	The Minister submits a report to the Auditor-General on the procurement process in line with section 39(3e) of the PTA.
2021	
15 January	DIT Chief Executive approves Adelaide Next's offer costs claim.
31 January	Keolis Downer starts to provide heavy rail services.

Appendix 2 – Compliance with sections 39, 40 and 41 of the PTA

Figure A2.1: Compliance with the PTA in the process leading up to and following the awarding of contracts

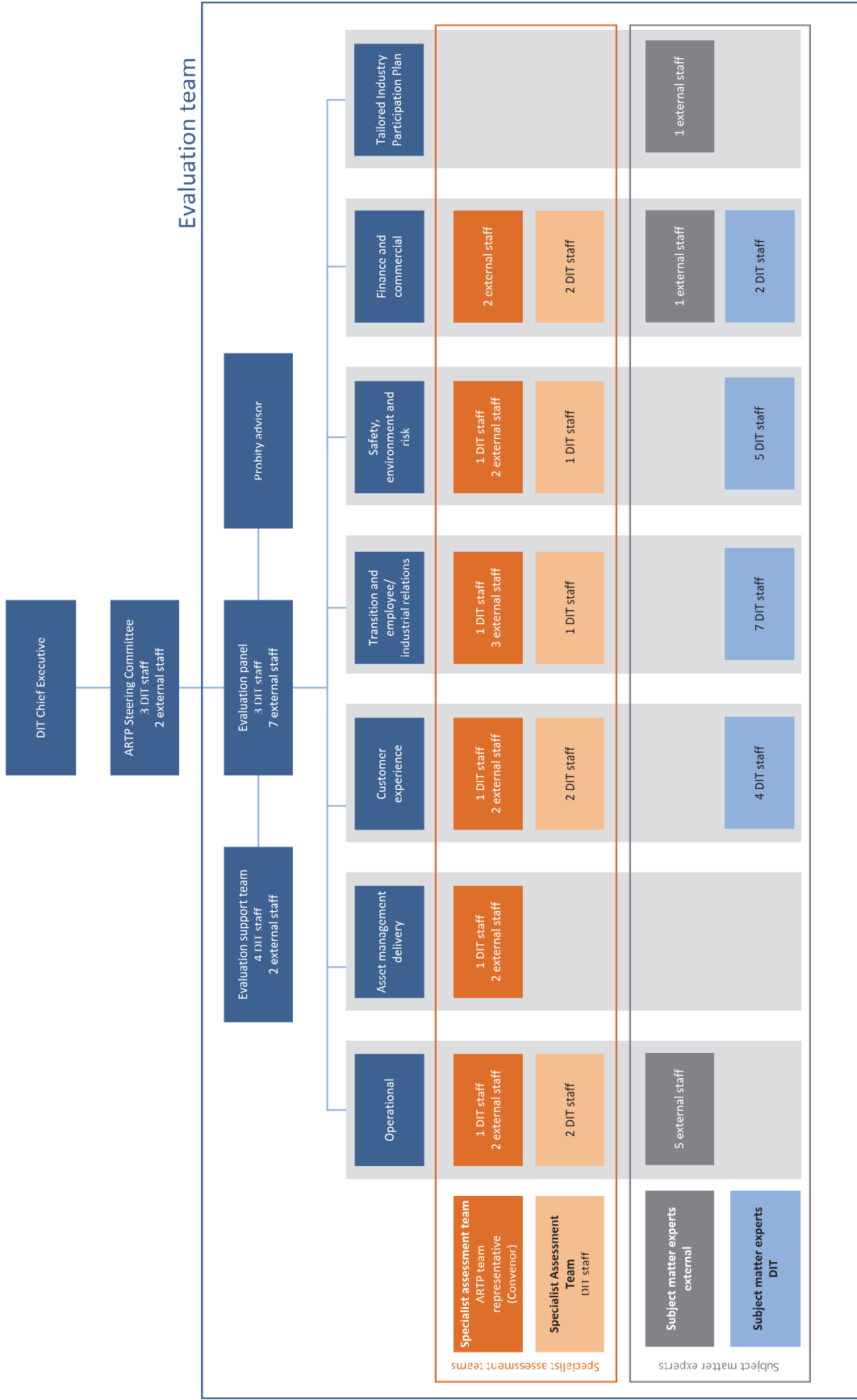
Section of the PTA	Summary of requirement	Audit findings
39(1) – Contract for passenger transport services	The terms and conditions for passenger transport services are to be set out in a service contract between an operator and the Minister.	The Minister complied with section 39(1) of the PTA.
39(2a)(a) – Minister’s appointment of person(s) to conduct the tender process	The Minister must appoint a person(s) to conduct the tender process, including the assessment of responses.	The Minister complied with section 39(2a)(a) of the PTA.
39(2a)(b) – Report to the Economic and Finance Committee	<p>The Minister must prepare and forward a report to the Economic and Finance Committee within 14 days after the tender invitation is published.</p> <p>The report is to include details of the proposed tender and assessment process.</p>	<p>The Minister complied with section 39(2a)(b) of the PTA with one exception.</p> <p>The Minister’s report to the Economic and Finance Committee was not provided within 14 days after the tender invitation was published.</p>
39(2a)(c) – Minister’s directions during the assessment or selection process	<p>The Minister must forward a statement of any directions made during the assessment process to the Economic and Finance Committee within 14 days of the direction being given.</p> <p>Any directions must also be published in the annual report of the Minister’s department for the relevant financial year.</p>	The Minister did not make any directions during the assessment process.
39(3)(a)(i) – Monopoly principle	<p>The Minister must consider the monopoly principle in awarding service contracts.</p> <p>A contractor should not obtain a monopoly or a market share that is close to one.</p>	The Minister complied with section 39(3)(a)(i) of the PTA.

Section of the PTA	Summary of requirement	Audit findings
39(3)(a)(ii) – Sustainable competition principle	<p>The Minister must consider the sustainable competition principle in awarding service contracts.</p> <p>Sustainable competition in providing passenger transport services should be developed and maintained.</p>	The Minister complied with section 39(3)(a)(ii) of the PTA.
39(3)(a)(iii) – Integration principle	<p>The Minister must consider the integration principle in awarding service contracts.</p> <p>The integration of passenger transport services should be encouraged and enhanced.</p>	The Minister complied with section 39(3)(a)(iii) of the PTA.
39(3)(a)(iv) – Efficient and innovation principle	<p>The Minister must consider the efficient and innovation principle in awarding service contracts.</p> <p>The service contracts should support efficient operation and promote innovation to meet the needs of commuters.</p>	The Minister complied with section 39(3)(a)(iv) of the PTA.
39(3b) – Preparing report to Parliament	<p>The Minister must prepare a report to Parliament within 14 days after awarding a contract.</p> <p>The report is to include information on the contractor, term of the contract, regions or routes, amounts payable under the contract and how the principles have been applied.</p>	The Minister complied with section 39(3b) of the PTA.
39(3d) – Tabling report to Parliament	The Minister must have the report tabled in both Houses of Parliament within six sitting days of the report being completed.	The Minister complied with section 39(3d) of the PTA.
39(3e) – Report to the Auditor-General	The Minister must forward a copy of the contract and a report that describes the processes leading up to the awarding of the contract to the Auditor-General within 28 days of awarding the contract if the total contract value exceeds \$4 million.	The Minister complied with section 39(3e) of the PTA.

Figure A2.2: Service contract compliance with mandatory requirements in the PTA

Section of the PTA	Summary of requirement	Audit findings
40(1)(a) – Period of operation	The service contract must include the period for which it operates.	The OROA complied with section 40(1)(a) of the PTA.
40(1)(b) – Termination	The service contract must include the manner in which it may be terminated.	The OROA complied with section 40(1)(b) of the PTA.
40(1)(c) – Standard of services	The service contract must include standards relating to the provision of services.	The OROA complied with section 40(1)(c) of the PTA.
40(1)(d) – Scale of service levels	The service contract must include a scale of service levels. This refers to the periods of time when services are to be operated, the extent of operations and the frequency of operations during the specified periods.	The OROA complied with section 40(1)(d) of the PTA.
40(1)(e) – Fares	The service contract must include the fares to be charged.	The OROA complied with section 40(1)(e) of the PTA.
40(1)(f) – Remuneration	The service contract must include the manner in which the contractor will be remunerated or gain revenue from the provision of services, including any subsidy arrangements.	The OROA complied with section 40(1)(f) of the PTA.
40(1)(g) – Other matters	The service contract must include other matters required by the PTA or the regulations to be specified in the service contract.	The OROA complied with section 40(1)(g) of the PTA.
41(1) – Regions or routes	The service contract must specify a region or route of operation.	The OROA complied with section 41(1) of the PTA.

Appendix 3 – Invitation to supply evaluation team



Source: Audit analysis of the evaluation plan for the invitation to supply.

Appendix 4 – Response from the Chief Executive, DIT under section 37(2) of the PFAA



Government of South Australia

Department for Infrastructure and Transport

*In reply please quote
Enquiries to Office of the Chief Executive
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Mr Andrew Richardson
Auditor-General
Auditor-General's Department

records@audit.sa.gov.au

Dear Mr Richardson,

The Department for Infrastructure and Transport (the Department) welcomes the Auditor-General's findings that the procurement for heavy rail passenger transport services for Metropolitan Adelaide:

- was set up with processes consistent with sound probity principles and in accordance with State Procurement Board guidelines
- maintained strong process controls throughout, supported by extensive documentation, without any evidence of any compromise to the probity of the procurement; and
- met the requirements of the *Passenger Transport Act 1994* (PTA).

The Department further notes that this audit finds:

- amendments made during the process as a consequence of the COVID-19 outbreak were a reasonable response and did not compromise the procurement process; and
- there is no evidence that any proponent was advantaged or disadvantaged by the unauthorised disclosure of confidential information during the procurement process; consistent with the probity advice provided to the Department at the time .

The Department has carefully considered the recommendations made by the Auditor-General about certain aspects of the Department's processes. Generally, the matters raised relate to either administrative oversight or minor issues that will now be addressed to further improve the robustness of the processes and practices used to assure probity in procurement processes.

Finally, we thank the Auditor-General for confirming that our efforts have delivered a service contract that meets the requirements of the PTA and contain a broad range of contractual provisions that will assist in protecting the State's interest over the 12-year term.

Yours sincerely,



Tony Braxton-Smith
Chief Executive

17 May 2021

Appendix 5 – Glossary of abbreviations and terms

Abbreviation/Term	Description
ARTP	Adelaide Rail Transformation Program
DIT	Department for Infrastructure and Transport
former Minister	Minister for Infrastructure, Transport and Local Government
KPI	Key performance indicator
Minister	Minister for Infrastructure and Transport
OROA	Outsourced Rail Operations Agreement
PFAA	<i>Public Finance and Audit Act 1987</i>
PTA	<i>Passenger Transport Act 1994</i>
SPB	State Procurement Board
TI 8	Treasurer's Instructions 8 <i>Financial Authorisations</i>

