

MEDIA RELEASE**16 September 2022**

Procurement and contracting activities for the Acton Waterfront Project

Auditor-General, Mr Michael Harris, today presented a report on **Procurement and contracting activities for the Acton Waterfront Project** to the Speaker for tabling in the ACT Legislative Assembly. The audit considers ACT Government agencies' management and administration of the procurement and contracting activities for the Acton Waterfront Project for the period 2014 to 2020.

The audit found that publicly available information on the procurement and contracting activities of the Acton Waterfront Project has been limited. In late 2014 the Land Development Agency issued a Request for Tender (RFT) for a contractor to undertake an estimated five hectares of public realm works. The construction work was expected to cost \$28 million and be completed by October 2016. By the time the contract was executed eleven months later (November 2015), the project's scope had been significantly reduced. The revised project at the time of contract execution was expected to cost \$9 million. By February 2018 two thirds of the revised scope of works identified in the executed contract had been completed for a Contract Price that had increased to \$13.6 million. Further work not within the scope of the executed contract but within the scope of the original RFT has since been agreed, and by September 2020 the Contract Price had increased to \$46.8 million for what is approximately two thirds of the works identified in the original RFT.

The audit found that ACT Government agencies' management of the procurement and the contract in the period 2014 to 2020 has been ineffective. For example:

- the 2014 RFT was poorly designed and did not provide an adequate basis for the execution of the \$9 million design and construct contract that eventuated 11 months later;
- following the execution of the Contract, the Land Development Agency varied the Contract with insufficient regard to value for money considerations; and
- on its assumption of the Contract on 1 July 2017, the City Renewal Authority did not robustly assess the risks of continuing with the Contract against alternative options.

The audit makes seven recommendations that, if addressed, will improve Government agencies' prospects of securing value for money from procurement and contracting activities. The summary of **Procurement and contracting activities for the Acton Waterfront Project: Report No. 5/2022**, with audit conclusions and key findings are attached to this media release.

Procurement and contracting activities for the Acton Waterfront Project: Report No 5/2022 is available to download from the ACT Audit Office's website www.audit.act.gov.au. If you need assistance accessing the report please phone 6207 0833.

SUMMARY

The Acton Waterfront Project involves the reclamation of approximately three hectares of lake-bed from Lake Burley Griffin's West Basin and the creation of a similar-sized area of high-quality public realm along the foreshore. The public realm improvements will facilitate the development of an area of approximately five hectares for mixed residential and commercial use adjacent to the foreshore. The exact location and size of the development area is dependent ultimately on the engineering solution adopted for overcoming the barrier which is currently presented by Parkes Way.

In 2014 the Acton Waterfront Project was identified as an important and necessary activity that should precede phased land release that was to commence by 2018-19. The Acton Waterfront Project was one of a number of high-profile City to the Lake projects that were being considered at the time, including the Australia Forum, an aquatic centre and a city stadium. No public commitment to Light Rail Stage 2 (or 2A) had been made at that time.

In late 2014 the Land Development Agency issued a Request for Tender (RFT) for a contractor to undertake an estimated five hectares of public realm works for the purpose of the Acton Waterfront Project. The construction work was expected to cost \$28 million and be completed by October 2016.

The local civil engineering firm Chincivil Pty Ltd (Chincivil) won the tender. By the time the contract was executed eleven months later, the project's scope had been reduced to the creation of a small urban park of approximately one hectare at the south-eastern end of the waterfront and two new signalised intersections on Commonwealth Avenue. The revised project at the time of contract execution was expected to cost \$9 million with the park to be completed by November 2016.

By February 2018 two thirds of the revised scope of works identified in the executed contract had been completed for a Contract Price that had increased to \$13.6 million. Further work not within the scope of the executed contract but within the scope of the original RFT has since been agreed and by September 2020 the Contract Price had increased to \$46.8 million for what is approximately two thirds of the works identified in the original RFT.

This audit considers ACT Government agencies' management and administration of the procurement and contracting activities for the Acton Waterfront Project for the period 2014 to 2020. The audit seeks to assist a wider understanding of how the construction of the Acton Waterfront Project has been procured and assesses whether the agencies' administration of the procurement has been effective. It does not assess whether the project's overall outcome represents value for money for the ACT Government and community.

Overall conclusion

Publicly available information on the procurement and contracting activities of the Acton Waterfront Project is limited. The Land Development Agency and City Renewal Authority have not provided sufficient information to support public transparency in the delivery of this important and prominent project.

Land Development Agency

ACT Government agencies' management of the procurement and contract in the period 2014 to 2020 has been ineffective.

The 2014 Request for Tender (RFT) was poorly designed. The risk and reward mechanisms of the procurement were changed during the tender process and again prior to contract execution. The RFT process did not provide for a satisfactory, fair and open competition that was capable of demonstrating value for money. The

RFT process was an inadequate basis for the execution of a \$9.01 million design and construct contract in November 2015. The Land Development Agency was principally responsible for this. It should have reopened the RFT process in November 2015 but did not.

Following the execution of the Contract, the Land Development Agency varied the Contract with insufficient regard to value for money considerations. By June 2017 the Contract Price had risen to \$13.6 million, although this was for only one element of a revised project brief.

City Renewal Authority

When the City Renewal Authority was established on 1 July 2017, the Contractor was on-site and works relating to two work packages were already underway. On its assumption of the Contract on 1 July 2017, the City Renewal Authority did not robustly assess the risks of continuing with the Contract against alternative options. Further variations were made, increasing the Contract Price to \$46.8 million by September 2020. Insufficient attention was given to value for money considerations when contemplating Contract variations. The level of consideration given was insufficient to compensate for the unsatisfactory RFT process, particularly since the project's estimated cost by July 2017 had risen to \$80 million. The City Renewal Authority should have examined alternatives to remaining with the incumbent Contractor well ahead of consideration of the major Contract Price increase in April 2020 for the next element of the project, an additional element to the scope defined in the Revised Project Brief.

Board Oversight

The attention the project's procurement has received from authorising entities, namely the Land Development Agency Board and the City Renewal Authority Board, has been inadequate. Aspects of officials' briefings and reports to the boards have been unsatisfactory and the boards have not equipped themselves adequately to fulfil their respective responsibilities for the project. Proponents' interactions with the Government Procurement Board have also not been effective.

This report has primarily considered the activities of the Land Development Agency and City Renewal Authority, as well as some aspects of the operation of the Government Procurement Board. The Audit Office intends to conduct further performance audit activity with respect to the Government Procurement Board and its role in advising on major procurements. A further performance audit may examine more closely the intersection between procurement proponents and those responsible for providing advice on specific procurements and for endorsing procurement practices and methods.

Contractor performance

Weaknesses in the administration of the procurement and contracting arrangements are the responsibility of the ACT Government agencies. There is no evidence that the Contractor, Chincivil, has acted inappropriately. The City Renewal Authority has advised that at each stage of the project the Contractor's performance has met expectations.

Chapter conclusions

ACTON WATERFRONT PROJECT

Construction of the Acton Waterfront Project was initially intended to be completed by late 2016, but it has not progressed at the pace originally anticipated. Prior to the approach to market in December 2014, the interests of the National Capital Authority were inadequately identified, assessed and planned for by the Land Development Agency. Two matters of importance to the National Capital Authority became

apparent in mid-2015 after the completion of the Request for Tender (RFT): the closure of Barrine Drive; and compensation for relinquishing land development rights. In order to resolve these matters the scope, timing and estimated cost of the Acton Waterfront Project have changed substantially. In planning the project's procurement, the Land Development Agency did not appropriately anticipate and mitigate the risk of these changes. The approach to market was premature.

SELECTION OF A CONTRACTOR

The Request for Tender (RFT) that was issued in December 2014 sought a contractor for the delivery of a project with a construction cost of \$27,500,000. However, the project delivery model within the RFT was poorly designed and implemented. The model's risk and reward mechanisms, which relied on the use of a Target Construction Sum, were changed midway through the open RFT process. The design role was also poorly expressed, meaning it was not possible for tenderers to effectively price in design or to gauge the level of responsibility the contractor would take on. The RFT did not provide a sound basis for the procurement of a \$27,500,000 construction contract (should that have eventuated, as intended at the time). The prospects of securing a value for money outcome from the procurement were severely compromised by the design of the RFT.

Ten months elapsed between the closure of the Request for Tender (RFT) and the execution of the Contract. By November 2015, and immediately prior to executing the Contract, Land Development Agency officials acknowledged in a briefing to the delegate that the procurement was for a 'construction project of an unknown scope and value at the time of advertising and that the contractual mechanism was unclear to officials at the time of the RFT'. Nevertheless, the December 2014 RFT and the resulting tender evaluation process was relied on as the basis for selecting the preferred tenderer and executing the Contract.

A compounding problem is that the scope of the project incorporated into the executed Contract was materially changed in the November 2015 *Revised Project Brief*. The risk and reward mechanisms of the project delivery model were again amended, further undermining the logic of the use of the Target Construction Sum, the use of which was central to the Land Development Agency's initial plans for ensuring a value for money outcome from the procurement.

Weaknesses in documentation and in the presentation of information to decision-makers and advisory bodies were also evident:

- planning documentation at times grossly understated the value of the procurement. This potentially impacted how procurement risk was perceived and what delegate authority was applied, and without doubt this affected the advice provided;
- the timing of the engagement of the Government Procurement Board in the procurement process effectively diminished the role the Board was able to perform; and
- the briefing document prepared in support of the decision to approve the execution of the Contract provided an inadequate appraisal of the risks of proceeding with the Contract. It did not provide an effective basis for decision making.

The original design of the RFT, the changes made to the project delivery model during the open RFT and again prior to the execution of the Contract, as well as changes to the scope of the project hampered the prospects of the Land Development Agency obtaining a value for money outcome through an open and fair procurement opportunity. In November 2015 a new procurement should have been commenced

rather than relying on the RFT that had been issued. The RFT did not provide a sound basis for the selection of the Contractor.

CHANGED CONTRACTUAL ARRANGEMENTS

The Contract Price increased from \$9,011,955 (GST inc) at Contract execution in November 2015 to \$46,768,267 (GST inc) in September 2020. Sixteen variations have been made to the Contract. Not all have been notified on the ACT Government Contracts Register. Variation 11 for \$619,892 (GST inc) was not notified. Other than that provided on the Register, publicly available information on the procurement and contracting activities of the Acton Waterfront Project is limited.

The timing, nature and price of design work changed following Contract execution. This was facilitated by ten of the sixteen variations to the Contract. An additional \$1.1 million in design work has been undertaken which was not tendered but has instead been resolved based on negotiations with the incumbent Contractor. This has redistributed design-related costs and risks associated with the project in favour of the Contractor.

The project delivery model mechanisms of the Target Construction Sum and Guaranteed Construction Sum have not been effectively utilised. Negotiation has been the only practical mechanism by which the Principal and the Contractor have resolved Contract Price increases resulting from Guaranteed Construction Sum offers from the Contractor. A 7 per cent reduction was achieved between offer and acceptance, on \$43,538,981 (GST inc) of project expenditure, informed by Quantity Surveyor advice. Negotiations over Managing Contractor percentage margins were partially productive in achieving this reduction, with two exceptions. Other mechanisms such as 'locked in' prices, open letting of subcontracts and limiting self-performed work by the Contractor have not been effective. The 'price certainty' that was intended in the RFT and executed Contract has not been achieved. While improvements in the pricing element of the value for money consideration are evident, value for money has not been obtained in the way intended by the project delivery model. Only a small percentage (the Stage One fee of \$361,955 of \$46,768,267, that is 0.7 per cent) of the Contract Price has been demonstrably subject to open tendering processes as stated, and the associated competitive tension this creates.

The City Renewal Authority's assumption of the Contract in July 2017 followed the cessation of the Land Development Agency. It was an opportune time to review the Contract and the merits of using the incumbent Contractor for further work associated with the Acton Waterfront Project or to identify alternative delivery options for future work. The City Renewal Authority did not rigorously review the merits of extending the Contract or alternative options for future work activity, despite the Government Procurement Board receiving advice from the Land Development Agency on two occasions (May 2016 and May 2017) that all further elements of the project would be put out to a new tender.

Board engagement with the procurement has been ineffective. The Land Development Agency Board did not have oversight of the procurement and contracting arrangements, while the City Renewal Authority Board did not sufficiently challenge the presumption of continuation with the incumbent although it had the best opportunity to do so. The Government Procurement Board has provided advice in response to inconsistent and incomplete briefings on the procurement.

Recommendations

RECOMMENDATION 1 PUBLIC INTEREST IN THE ACTON WATERFRONT PROJECT

The City Renewal Authority should improve the level of information publicly available in relation to the procurement and contractual arrangements for the Acton Waterfront Project by ensuring:

- a) a complete account is available of the original procurement intentions (based on the RFT) as well as the Contract that eventuates; and
- b) all subsequent variations are clearly identified and reported, including an explanation of their purpose.

RECOMMENDATION 2 VARIATIONS AND PROVISIONAL SUM PROCESSES

The City Renewal Authority Board should review its processes and controls for the management of Provisional Sums and the making of contract variations.

RECOMMENDATION 3 VALUE FOR MONEY DRIVERS

As part of its procurement and contracting practices, the City Renewal Authority should document:

- a) the key value for money drivers that a procurement proposal will rely on;
- b) the intended purpose and operation of the driver in question (e.g. a Target Construction Sum in conjunction with a Guaranteed Construction Sum, design responsibilities and an incentive clause); and
- c) the source of advice e.g. *The Capital Framework* or otherwise, procurement and contracting better practice, that informs the use of the value for money driver.

RECOMMENDATION 4 ASSUMPTION OF LEGACY CONTRACTS

As part of due diligence following changes in administrative arrangements, ACT Government entities should conduct a risk-based assessment of the procurement and contracting arrangements supporting any legacy contracts that have been assumed by the entities. The assessment should provide:

- a) assurance over the probity of the Government entity's administrative processes relating to the procurement prior to the letting of the contract; and
- b) advice as to the remaining potential for price and time variations to the contract given the original intent of the procurement, in order to maintain the integrity of the agreed VFM consideration.

RECOMMENDATION 5 RETENDERING

As part of its procurement and contracting practices, the City Renewal Authority should periodically examine, particularly in advance of major variations to a contract, the merits of remaining with the incumbent versus alternative procurement options for delivery of a project. Options presented to decision makers (e.g. delegates, boards) should be accompanied by sufficient analysis to demonstrate these have been robustly investigated and assessed.

RECOMMENDATION 6**VFM CONSIDERATION AND REVIEW**

As part of its procurement and contracting practices, the City Renewal Authority should, when contemplating contract variations, review and test the procurement's value for money with reference to prior consideration:

- a) during procurement planning, up to and including the market response to the RFT; and
- b) at contract execution, specifically with respect to whether any material departure has occurred due to negotiation and / or the passage of time and changing requirements.

RECOMMENDATION 7**BRIEFINGS AND ADVICE TO DECISION-MAKERS AND BOARDS**

As part of its procurement and contracting practices the City Renewal Authority should fully and completely brief decision makers, delegates and those exercising a statutory advisory responsibility (e.g. the Government Procurement Board) in order to ensure:

- a) accuracy and balance is achieved;
- b) assurances made are able to be supported with robust analysis;
- c) previously reported advice is built upon;
- d) salient facts are raised and reprised consistently; and
- e) the timing of the matters raised leaves sufficient time for decision makers, delegates and advisors to contemplate alternatives.