ACT Audit Office

AUDITOR-GENERAL AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

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Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson

Today a report on the **Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson** was tabled in the ACT Legislative Assembly.

Dr Cooper says ‘The Economic Development Directorate did not conduct the tender process for Block 30 Section 34 effectively. It did not achieve the sale objective of pursuing an open, contestable and transparent market process and there are indications it did not achieve value for money from the sale.’

The Territory sold Block 30 (formerly known as Block 20) Section 34, Dickson to the Canberra Tradesmen’s Union Club Ltd (the Tradies) for $3.18 million excluding GST in return for the Territory agreeing to purchase from the Tradies:

- Block 6 Section 72 for $3.55 million excluding GST; and
- Block 25 Section 72 for $45,000 excluding GST.

The Territory will end up paying the Tradies approximately $414,000, which is the difference in value arising from the land exchange.

Dr Cooper says ‘Significant weaknesses in the Directorate’s management of the tender means there is a high risk it has relinquished considerable financial value to the Canberra Tradesmen’s Union Club Ltd (Tradies). There is also a high risk that the Directorate sold Block 30 Section 34 to the Tradies in breach of the *Planning and Development Act 2007*’.

The Summary of the **Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson** audit**,** with audit conclusions, key findings and the five recommendations is attached to this media release.

Copies of **Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson: Report No. 03/2018** are available from the ACT Audit Office’s website, www.audit.act.gov.au. If you need assistance accessing the report please phone 6207 0833 or go to 11 Moore Street, Canberra City.

EXTRACT OF SUMMARY CHAPTER

Summary

On 15 December 2014 the Territory sold Block 30 (formerly known as Block 20) Section 34, Dickson to the Canberra Tradesmen's Union Club Ltd (the Tradies) for $3.18 million excluding GST in an exchange of contracts following negotiations that resulted in the parties agreeing to payment occurring via a land swap arrangement. Settlement has yet to occur and, contractually can only take place within 30 days after a certificate of occupancy is issued in respect of improvement works affecting the nearby car park on Block 21 Section 30, Dickson.

A Request for Tender (RFT) was initiated and publicly advertised in the *Canberra Times* on 8 September 2012. Two tenders were received by the closing date on 26 November 2012: from the Tradies offering $2.2 million excluding GST and Fabcot Pty Ltd, a solely owned subsidiary of Woolworths, offering $1.6 million excluding GST.

The Tradies were identified as the preferred tenderer in December 2012 and protracted negotiations occurred over a two year period resulting in the land swap arrangement. Specifically, the Tradies agreed to pay the Territory $3.18 million excluding GST for Block 30 Section 34 in return for the Territory agreeing to purchase from the Tradies:

- Block 6 Section 72 for $3.55 million excluding GST; and
- Block 25 Section 72 for $45,000 excluding GST.

The Territory will end up paying the Tradies approximately $414,000, which is the difference in value arising from the land exchange.

Overall Conclusion

The Economic Development Directorate did not conduct the tender process for Block 30 Section 34 effectively. It did not achieve the sale objective of pursuing an open, contestable and transparent market process and there are indications it did not achieve value for money from the sale. Significant weaknesses in the Directorate's management of the tender means there is a high risk it has relinquished considerable financial value to the Canberra Tradesmen's Union Club Ltd (Tradies). There is also a high risk that the Directorate sold Block 30 Section 34 to the Tradies in breach of the *Planning and Development Act 2007*.

There is no evidence that the decision to proceed with the transaction, in the circumstances, gave sufficient regard to these risks. Systems need to be implemented to prevent this occurring in the future; importantly, all staff involved in undertaking land transactions also need to have clarity regarding expected behaviours through well-articulated values, particularly with respect to managing the integration of probity and commercial considerations.

Chapter conclusions

ACHIEVEMENT OF SALE OBJECTIVES

The Economic Development Directorate did not achieve an open, transparent and contestable sale process for Block 30 Section 34 because of weaknesses in how it managed the tender process.

Specifically, the land swap transaction endorsed by the former Director-General is materially at odds with the RFT, the terms and sale process approved by government, and was achieved through a process that lacked probity and transparency.

The Directorate's decision to proceed with the sale in light of material departures, and without explicitly addressing obvious probity risks, was not prudent. This is because it had credible information before proceeding that departing from the RFT and the requirements of the *Planning and Development Act 2007* could compromise the validity of the sale.

There is no evidence the Directorate assessed or advised the government of these risks, or that it kept adequate records of its numerous tender negotiations to demonstrate adherence to probity. Consequently, the merit and rationale underpinning the sale is not evident. This means that the Directorate did not achieve the government's objective of ensuring the tender was 'open to all interested parties and is fully transparent'.

The Directorate's actions, post-selection of the Tradies as the preferred tenderer, demonstrate that there was a strong and ongoing focus on achieving a negotiated outcome with the Tradies. This was achieved with significant concessions being granted to the Tradies during the negotiation process and without evidence of probity and transparency risks being fully assessed. Along with improvements to governance and administrative processes, there is a need to give particular attention to clearly articulating, demonstrating and embedding organisational values to guide and influence staff behaviours.

VALUE FOR MONEY

The Economic Development Directorate did not rigorously assess the final negotiated land swap transaction and did not demonstrate the benefits to the Territory. There are indications that the outcome the Directorate has negotiated with the Tradies does not represent value for money; there is a high risk the Directorate has relinquished value up to an estimated $2.4 million to

$2.65 million to the Tradies. This is due to significant inadequacies with how the negotiations and tender process were managed. There is a high risk that:

- the Territory sold Block 30 Section 34 to the Tradies for less than its value. The price the Tradies will pay at settlement for the block reflects the original 5 November 2012 MMJ Real Estate valuation produced for the RFT, which has not been adjusted to take account of the fewer replacement car parks offered by the Tradies in its tender and the resulting uplift in value from this and other changes during the negotiations; and
- the commercial terms of the sale of Block 6 Section 72 resulted in the Territory paying above valuation with conditions that offered no evident additional value to the Territory but benefited the Tradies.

Key findings

ACHIEVEMENT OF SALE OBJECTIVES

	Paragraph
The RFT was advertised in the *Canberra Times* on 8 September 2012, prior to Cabinet's consideration of, and agreement to, the sale and there is evidence to indicate that the RFT documentation was made available through either the Land Development Agency or Economic Development Directorate website. The advertisement was not run in the *Australian Financial Review* as planned. Not advertising the RFT nationally as planned potentially limited the competitiveness of the sale process, raising 'the question as to whether the relevant markets were properly informed and tested'. However, the former Director-General of the Economic Development Directorate, Director, Sustainable Land Strategy and Chief Executive Officer of the Tradies indicated confidence that that there was sufficient opportunity for information on the sale to be disseminated more broadly due to business networks that operate to disseminate such information.	2.16
A Tender Evaluation Plan was established for the sale of Block 30 Section 34. The Tender Evaluation Plan identified criteria for the sale of Block 30 Section 34. These criteria were provided to prospective tenderers as part of the Request for Tender and, when communicated to prospective tenderers as part of this process, were assigned a weighting. The Tender Evaluation Plan identified a numerical rating that was to be applied to each of the criteria.	2.24
There was no guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating. For example, on how the numerical rating was to be applied to the following criterion: 'Tenderers should provide a schematic development plan for the site showing the floor plans elevations and proposed uses within the development'. The lack of guidance on how to interpret	2.25

the criteria and apply the numerical rating introduces risks of inconsistency in practice and assessment.

The analysis and commentary in the Tender Evaluation Panel's December 2012 *Tender Evaluation Report* to show how assessment criteria (the provision of schematic development plans for the site, compliance with the Dickson Centre Master Plan and estimated timeframes for the redevelopment of the site) were applied and the tenders assessed was inadequately documented. 2.46

Not having adequate documentation is compounded by inadequate guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating as there is no means by which the Tender Evaluation Panel decision to select the Tradies as the preferred tenderer can be substantiated. However, it would be inappropriate to assume that the Tradies tender was not the better one. 2.47

Following the selection of the Tradies as the preferred tenderer in December 2012, protracted negotiations for the sale of Block 30 Section 34 ensued over the following two years. The two-year negotiations with the Tradies resulted in numerous changes to the sale conditions that were originally advertised in the RFT. The changes to the sale conditions that the Economic Development Directorate agreed to during negotiations fundamentally and materially altered the sale conditions from those advertised with the RFT. Had these been agreed and communicated to prospective tenderers at the commencement of the tender process it may have led to: 2.56

- greater interest and thus increased competition;
- different proposals from those submitted based on the more restrictive clause; and
- a different outcome from the tender process.

Although it was open to the Tradies to propose amendments during the negotiations, it was incumbent on the Economic Development Directorate to set clear expectations on the scope of matters that could reasonably be negotiated in light of the advertised RFT process and, importantly, on which matters could not be negotiated because of the implications this would have for probity and the integrity of the tender. 2.73

There is no evidence that the Economic Development Directorate: 2.74

- set clear expectations with the Tradies on the scope of matters to be covered by the negotiations and the associated probity requirements;
- adequately assessed the risks or impacts of replacing the Project Delivery Agreement and security bond with conditions on the Crown lease for Block 30 Section 34 and amendments to the Precinct Code;

- sought the government's approval prior to dispensing with these RFT requirements; and
- assured that proposed changes to the RFT conditions were thoroughly scrutinised and properly approved by executive management.

The matters considered by agencies during negotiations, how they were assessed, and who authorised decisions (apart from the final outcome) are unclear. The paucity of the evidence trail around key tender decisions, negotiations and probity means the Economic Development Directorate did not comply with ACT procurement policy, or meet widely accepted standards of transparency and good practice in procurement. 2.91

The Economic Development Directorate's acceptance of the Tradies' requested changes calls into question the validity of using the RFT process as the basis for engaging with the Tradies for the sale of Block 30, Section 34, Dickson. The material changes to many of the advertised RFT conditions during the ensuing negotiations warranted careful and explicit consideration of the resultant probity risks, including the appropriateness of re-starting the tender process. However, this did not occur. Consequently, the Directorate engaged in a very different sale process with the Tradies than what was originally advertised to the market and offered to other prospective tenderers. 2.94

The former Land Development Agency Director of Sales, and Deputy Director-General, Economic Development Directorate were provided with advice by the ACT Government Solicitor's Office in October 2014 that indicated accepting the Tradies' requested concessions posed a risk as it could result in the transaction being so divergent from the RFT that it was a direct sale rather than the outcome of the tender process. Representatives from the ACT Government Solicitor's Office and the Land Development Agency met with the Director-General on 19 November 2014 to discuss the Tradies' requested concessions and how to proceed. Subsequently the Director-General agreed to the Tradies' requested concessions. There is no documentary evidence of how the risk of non-compliance with the *Planning and Development Act 2007* was reviewed by the Director-General and mitigated by the Economic Development Directorate at the time. 2.103

In advice to the ACT Audit Office, the Australian Government Solicitor advised that changes to the sale terms and conditions that were subsequently negotiated with the Tradies represented significant departures from the RFT and 'based on these departures from the RFT, it would be reasonable to conclude that the eventual sale to Tradies departed so far from the provisions of the RFT as advertised that it could reasonably be regarded as a direct sale rather than the outcome of the RFT. This poses a significant risk to the validity of the negotiated transaction as only the 2.107

government has authority under section 240 of the *Planning and Development Act 2007* to approve a direct sale in these circumstances'. Such approval was not secured.

The former Director-General of the Economic Development Directorate advised 'the GSO had oversight of the tender process in its dual role of probity and legal adviser' and the former Director, Sustainable Land Strategy advised that ACT Government Solicitor's Office staff involvement 'was **routine and ongoing** … [and] at no time did any of these legal advisers find that the process was conducted other than in the appropriate manner'. The ACT Government Solicitor's Office disagrees with the characterisation of its role as having 'oversight' of the tender process, noting that '[the] carriage of a tender process is a matter for the individual Directorate. The ACTGS provides legal and probity advice on an as needed basis and in response to specific requests for advice… The ACTGS provides advice on relevant matters which may inform the client, however we do not have the responsibility of guiding the every action of officers'. 2.111

The ACT Government Solicitor's Office has also advised that 'the involvement of the Probity Officer was limited and confined to responding to specific requests for discrete advice from representatives of the client' and that 'the role of the ACTGS officers who were engaged as legal advisers was predominantly limited to the preparation and drafting of the applicable sale and purchase contracts, and other consequential legal documents'. It is apparent that there is a misunderstanding between participants in the tender process with respect to the role of the ACT Government Solicitor's Office. 2.112

No codified roles and responsibilities were established for the sale of Block 30 Section 34 including the roles of executive management, Cabinet and the minister in decision-making and negotiation with the Tradies. The lack of codified roles and responsibilities has contributed to a lack of accountability in the ensuing negotiations with the Tradies. 2.119

The weaknesses in the Economic Development Directorate's governance and administrative arrangements for the RFT highlight the need for Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency executive management to give priority to identifying and addressing the risks associated with the future sale (and purchase) of Territory land. In doing so it will be important to clearly articulate and subsequently demonstrate, requisite organisational values to guide and influence staff behaviours. 2.127

VALUE FOR MONEY

Paragraph

The Economic Development Directorate used the November 2012 MMJ Real Estate 3.10
valuation of Block 30 Section 34 of $3.18 million (excluding GST) as the basis for setting a reserve price for the block for the purpose of the tender process. Subsequent negotiations between the Directorate and the Tradies were pursued with the intention of obtaining the Tradies' agreement to pay the reserve price.

The assumptions on which the $3.18 million valuation was based were stated in the 3.12
valuation report, including the provision of a total of 445 car parks which includes 154 replacement public car parks for those to be 'lost' from the existing public car parking site. Subsequently, the two tenderers were evaluated against a requirement of 139 replacement car parks. Fewer replacement carparks increases the value of the land, but the valuation was not adjusted to reflect this.

As part of its December 2012 evaluation of tenders, the Tender Evaluation Panel 3.18
recognised that the Tradies' commitment to only replace 84 of the existing public car parks that were to be 'lost' due to the redevelopment (instead of the 139 assumed by the Economic Development Directorate in the RFT process or the 154 that formed the basis of MMJ Real Estate's valuation of the land at $3.18 million) would result in a higher value for the block. The *Tender Evaluation Report* noted that, after taking into account the reduced number of car parks and the earlier settlement date offered by the Tradies as part of its tender, 'the MMJ Real estate revised valuation would be of the order of $3.65 to $3.7 million'.

In April 2013, Colliers International provided advice to the Economic Development 3.26
Directorate after reviewing the assumptions and method underpinning the November 2012 MMJ Real Estate valuation and provided an 'opinion of value for the purposes of a direct sale to the Tradies Group'. The Colliers International advice was based on similar assumptions to those underpinning the MMJ Real Estate valuation. It also assumed that 'the use of car park will be added to the list of uses given that 154 spaces are to be reinstated on site and will be commercially leased'. Colliers International advised that the value of Block 30 Section 34 would be $2,750,000 or 'closer to $3,100,000 - $3,150,000' if the developer did not have to contribute to the cost of constructing an easement road between Badham Street and Dickson Place.

The assumptions on which the Colliers International advice were based were stated 3.27
in the advice, including the assumption that 154 car parking spaces were to be replaced. In advice to the Audit Office in response to the draft proposed report (4 December 2017), the State Chief Executive, ACT of Colliers International advised 'there were no instructions or information provided to Colliers International in

March or April 2013 to show any negotiation of 84 replacement cars'. It is not clear why Colliers International was asked to value the block on the assumption that 154 car parking spaces were to be replaced, when it was apparent that the Economic Development Directorate were in negotiations with the Tradies on the basis of 84 publically available replacement car parking spaces.

Capital Valuers Pty Ltd advised that the following two factors have the greatest impact on the value of Block 30 Section 34: 3.29

- the Tradies proposal to include a special condition in the contract for sale permitting them to remove an easement on the land designed to ensure pedestrian access over and along the ground floor for no commensurate cost: and
- the Tradies offer to only provide 84 replacement car parks – i.e. 55 less than the 139 assumed by the Tender Evaluation Panel to underpin the reserve price.

Capital Valuers Pty Ltd estimated that the value to the Tradies of not having to construct an easement on Block 30 Section 34 as between $200,000 to $300,000. 3.33

Capital Valuers Pty Ltd estimated that the value to the Tradies of only having to provide 84 replacement public car parks (instead of 154) as part of the redevelopment of Block 30 Section 34 as approximately $1,570,000. 3.43

The MMJ Real Estate valuation (5 November 2012) of Block 30 Section 34 was based on an assumption that all current publically available car parking on the site (i.e. 154 carpark spaces) was to be replaced. However, on 6 November 2012 the Economic Development Directorate advised prospective tenderers that it would support 'a minimum of 84 spaces' and the Tradies subsequently responded that its tender was predicated on the 'provision of 84 public parking spaces in the development as replacement parking as per the RFT'. Although the Director, Sustainable Land Strategy advised that the replacement car parking would be provided by the Tradies on its adjacent block(s) the Audit Office has not identified any documentation to support this claim. The number of replacement car parks is an important consideration affecting the value for money for the Territory from the transaction. 3.47

Taking into account the overall effects on value from reduced requirements for easement access and the replacement of only 84 car parking spaces Capital Valuers Pty Ltd advised of an estimated 'adjusted value range' for Block 30 Section 34 of between $4,750,000 and $5,000,000. This is approximately $1.57 million to $1.82 million more than the November 2012 MMJ Real Estate valuation of the block of $3.18 million, which was used to establish the reserve price for the block, and which represented the final price that was agreed to between the Economic Development 3.48

Directorate and the Tradies. If 154 publically available replacement car parking spaces (rather than the 84 offered by the Tradies as part of the tender) are provided for Block 30 Section 34, as part of any future development, this would ameliorate the loss in value to the Territory. This however is an uncertainty.

During negotiations between the Economic Development Directorate and the Tradies following the identification of the Tradies in December 2012 as the preferred tenderer for the sale of Block 30 Section 34, the Directorate agreed to the purchase of Blocks 6 and 25, Section 72. The Directorate obtained valuations for these blocks in April 2013 in order to guide its negotiations with the Tradies. An April 2013 valuation of Block 6, Section 72 (with a rent-free period of 18 months) by Colliers International valued the site at $3.25 million. During negotiations between the Directorate and the Tradies the Directorate agreed to a rent-free period of 42 months. Capital Valuers Pty Ltd advised that by adopting the method outlined in the Colliers International April 2013 valuation of the block, a discount to the assessed value for a 42 month rent-free period would result in an estimated value of $2.42 million for the site, which is approximately $830,000 less than what the Territory agreed to pay the Tradies. 3.61

There is no evidence that the economic benefits to the Territory of the final land swap arrangement and related commercial terms were ever assessed. While it is asserted that the acquisition of Blocks 6 and 25 Section 72 will provide land for future affordable housing, there is no evidence of how the Economic Development Directorate analysed the nature of these perceived benefits, or valued these benefits, in order to support the land swap arrangement. 3.75

The Territory sold Block 30 Section 34 on favourable terms to the Tradies (estimated to be in the range of up to $1.57 million to $1.82 million less than the potential value of the block) and acquired Block 6 Section 72 from the Tradies for an estimated $830,000 more than its potential worth. The lack of documentation associated with the assessment of the benefits, costs and risks associated with the land swap arrangement means that the value of the land swap arrangement to the Territory is not demonstrated. 3.76

A key document that formed the basis for decision-making on 17 December 2013 was a 13 December 2013 minute to the Director-General of the Economic Development Directorate from the Director, Sustainable Land Strategy. The minute misrepresented the value of Block 6 Section 72 by advising of a value of $3,550,000 and implying that this value included ‘a 40 month rent free component to the Tradies’. This was not the case, as the value of $3,550,000 was on the basis of vacant possession. As the minute preceded the final transaction including further negotiations that occurred over the course of 2014, it also could not identify that 3.87

concessions given to the Tradies in the course of ensuing negotiations resulted in Block 30 Section 34 being potentially worth more than the November 2012 valuation of $3.18 million. This highlights the opportunity cost to the Territory from the Economic Development Directorate's decision to proceed with the final exchange of contracts in the absence of an updated valuation and rigorous assessment of value for money.

Recommendations

RECOMMENDATION 1 REMEDY DEFICIENCIES IN THE TENDER PROCESS

Consistent with its administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate should:

a) brief the Minister administering the *Planning and Development Act 2007* and Cabinet on the implications of the risk to legislative compliance identified by this report and advise on options for remedying the deficiencies with the tender process; and

b) develop and implement mechanisms to mitigate potential noncompliance.

RECOMMENDATION 2 STRENGTHEN PROBITY

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should strengthen accountability for probity in procurement by:

a) establishing clear standards of conduct and record-keeping for all staff engaged in tenders that, at a minimum, address communications with prospective and actual tenders, negotiations with preferred and winning bidders, and evaluations of both initially submitted and final bids;

b) facilitating training on probity for all staff involved in procurement processes; and

c) introducing controls and reporting requirements at key procurement (including tender) stages that assure and transparently demonstrate consideration of probity risks.

RECOMMENDATION 3 STRENGTHEN GOVERNANCE AND ASSURANCE

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should strengthen governance and accountability arrangements for staff involved in land procurements by establishing and implementing controls to assure:

a) consistent adherence to clearly defined roles and responsibilities for tender oversight, conduct and probity management;

b) tender negotiations are transparent, appropriately documented and approved, and that they meet probity requirements; and

c) tender decisions, particularly those arising from complex and lengthy negotiations, are independently reviewed and quality assured against defined procedural and probity requirements prior to approval.

RECOMMENDATION 4 REINFORCE ORGANISATIONAL VALUES

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should reinforce organisational values by:

a) clearly articulating their values and providing guidance to staff on how these are to be implemented; and

b) implementing procedures that reinforce and infuse the values throughout the organisation.

Responses from entities

In accordance with subsection 18(2) of the *Auditor-General Act 1996* and consistent with administrative responsibilities since July 2017, the Environment, Planning and Sustainable Development Directorate was provided with various *proposed reports* (refer to paragraphs 1.64 to1.67).

The Environment, Planning and Sustainable Development Directorate did not provide comments for inclusion in this Summary Chapter.

In accordance with subsection 18(3) of the *Auditor-General Act 1996* other persons who the Auditor-General considered had a direct interest in the report were also provided with *proposed reports* (or extracts thereof) (refer to paragraphs 1.68 to 1.73).

The substance of comments received from other persons who responded to *proposed reports* (or extracts thereof) have been incorporated in this report.

A statement from the former Director-General of the Economic Development Directorate is included below.

Statement from the former Director-General, Economic Development Directorate

In response to the third final proposed report (24 January 2018) the former Director-General of the Economic Development Directorate provided the following:

> *There is no doubt that the documentation relating to the Tender process was deficient. Those deficiencies have been addressed by actions arising out of previous audits and after the McPhee Review, which I instigated.*

The report observes in particular that there is no evidence of how the "risk of non-compliance" with the Planning and Development Act 2007 was reviewed following discussions with EDD officers and GSO representatives on 19 November 20014 regarding the Tradies' requested concessions and how to proceed. I do not recall that any concerns were put to me in those terms at that meeting or subsequently. I share the Auditor-General's disappointment that inadequate records of these discussions were kept by those present.

The conclusions in the report relating to value for money have not taken into account the overall value of the financial and social outcomes achieved by the totality of the land which the Territory acquired through the land swap with the Tradies. In particular, the purchase of Blocks 6 and 25 Section 72 provided the Territory with a large parcel of land to provide social housing and for other community uses. It appears that the assessment of the Auditor-General in relation to value for money is selective as she has not undertaken the same analysis of the purchase of Block 25 for $45,000 plus GST, which was part of this transaction, which would have identified that the value of that site at the time was greater than $45,000.