

MEDIA RELEASE**22 December 2021****Campbell Primary School Modernisation Project Procurement**

Auditor-General, Mr Michael Harris, today presented the **Campbell Primary School Modernisation Project Procurement** performance audit report to the Speaker for tabling in the ACT Legislative Assembly. The audit considered the procurement for design and construction services for the Campbell Primary School Modernisation Project.

Mr Harris says ‘the procurement process for the Campbell Primary School Modernisation Project lacked probity. Tenderers were not dealt with fairly, impartially and consistently’. The audit found that the decision to award the tender was not based on the weighted evaluation criteria with which the Territory approached the market and sought tenders; the evaluation criteria were effectively re-weighted and re-prioritised. Accordingly, probity was not demonstrated in the procurement process to ‘deal fairly, impartially and consistently with suppliers’.

The audit also found a number of governance and administrative shortcomings in the procurement process. These relate to the documentation of roles and responsibilities, procurement risk management (including probity risk management), the use of *Confidentiality and Conflict of Interest Undertaking forms* by participants and communication processes with tenderers.

The audit report makes six recommendations for improvement.

The summary of the **Campbell Primary School Modernisation Project Procurement** audit, with audit conclusions, key findings and recommendations is attached to this media release.

Copies of **Campbell Primary School Modernisation Project Procurement: Report No. 13/2021** 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.

SUMMARY

A procurement for design and construction services for the Campbell Primary School Modernisation Project was undertaken between July 2019 and September 2020. From a broader Request for Expressions of Interest (REOI) process to which six firms responded, two tenderers were invited to participate in a Request for Tender (RFT); Lendlease Building Pty Ltd and Manteena Commercial Pty Ltd. Lendlease was awarded the contract for services in September 2020 and work commenced under the contract in January 2021.

In November 2020 a representation was made to the ACT Audit Office in relation to the conduct of the procurement process. In April 2021 the Auditor-General commenced a performance audit which considered the effectiveness of the procurement process. The performance audit considered the probity of the procurement process, as well as governance and administrative arrangements.

Conclusions

THE PROCUREMENT PROCESS

The procurement process for the Campbell Primary School Modernisation Project lacked probity. Tenderers were not dealt with fairly, impartially and consistently.

Manteena was identified as the preferred tenderer by two different tender evaluation teams at two key stages of the procurement process; the Request for Tender stage and the subsequent Best and Final Offer stage. Manteena received the highest scores against the weighted evaluation criteria and quoted a lower price for the services. Despite this Lendlease was awarded the contract for the services.

In June 2020 the Tender Evaluation Team prepared a Tender Evaluation Report that identified Manteena as the preferred tenderer. The Delegate disagreed with the Tender Evaluation Team's recommendation and instead recommended to the Director-General that Lendlease be identified as the preferred tenderer because they offered the 'best value for money'. In making this recommendation the Delegate noted that Lendlease outscored Manteena on three of the six weighted evaluation criteria (comprising 30 percent of the criteria) and asserted that these criteria 'are reliable long term indicators of a company's ability to deliver quality projects and government initiatives such as Secure Local Jobs'. The Delegate acknowledged that Manteena outscored Lendlease on the other three criteria, including the design solution submitted as part of the tender process, but that because intellectual property in the design submissions put forward by the tenderers vested in the Territory 'the best elements of each design can be used in the upcoming design development phase'.

In making the recommendation to the Director-General the Delegate effectively re-weighted and re-prioritised the evaluation criteria. Decision-making was not based on the evaluation criteria with

which the Territory approached the market and sought tenders. Probity was not demonstrated in the procurement process to ‘deal fairly, impartially and consistently with suppliers’.

GOVERNANCE AND ADMINISTRATIVE MATTERS

During the course of the audit a number of governance and administrative shortcomings in the procurement process were identified. These relate to the documentation of roles and responsibilities, procurement risk management (including probity risk management), the use of *Confidentiality and Conflict of Interest Undertaking forms* by participants, communication processes with tenderers and the tender debrief process.

A risk relating to the probity of the procurement process was the participation and involvement of various staff from Major Projects Canberra and the Education Directorate whose roles and responsibilities were not specifically and explicitly documented in procurement governance documents such as the *Tender Evaluation Plan* (July 2019) or *Procurement Plan Minute* (July 2019). Managers and supervisors had an ‘oversight’ and ‘quality assurance’ role which involved reviewing draft tender evaluation reports completed by the Tender Evaluation Teams. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose.

The procurement process was also characterised by informal, uncontrolled and poorly documented communication with tenderers and other parties. This undermines the probity of the procurement process.

Key findings

THE PROCUREMENT PROCESS

Paragraph

Manteena and Lendlease submitted tenders on time and in conformance with the requirements of the RFT. Manteena provided a total tender price of \$17,303,579 (GST ex) and Lendlease provided a total tender price of \$18,768,465 (GST ex). Manteena was over the Territory’s budgeted amount by 11.4 percent and Lendlease was over the budgeted amount by 20.8 percent. The members of the Tender Evaluation Team separately reviewed the tenders that were received, met to discuss their assessments of the tenders and prepared a draft Tender Evaluation Report. The draft Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers’ assessment against each criterion and a proposed recommendation. Manteena was given a total score of 79 and Lendlease was given a total score of 52. The draft Tender Evaluation Report recommended Manteena as the preferred tenderer and that the Tender Evaluation Team ‘be authorised to enter into contract negotiations ... [to] identify areas of de-scoping and cost savings, in conjunction with the TET, to bring the project within the target cost of the design and construction component of the project’. The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate),

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became apprised of the proposed outcome of the RFT process and indicated their disinclination to agree with the draft Tender Evaluation Report.

The Delegate for the procurement, the Acting Executive Group Manager, Business Services Division (Education Directorate), engaged in the procurement process prior to the Tender Evaluation Team having the opportunity to conclude its evaluation of the tenders and make a recommendation. This is not consistent with probity better practice or the *Tender Evaluation Plan* (July 2019) and this allowed the Delegate to influence the recommendation of the Tender Evaluation Team. 2.51

The draft Tender Evaluation Report recommended that a 'value management process' be entered into with Manteena. This is a process that can be used in circumstances where the tendered price exceeds the available budget. However, the Acting Executive Group Manager, Business Services Division (Education Directorate), as the delegate for the procurement, requested consideration of a Best and Final Offer (BAFO) process. The conduct of a BAFO process was inherently more beneficial to Lendlease than it was to Manteena, based on the Tender Evaluation Team's assessment, as identified in the draft Tender Evaluation Report. Manteena had identified a lower tender price and had scored significantly higher against the evaluation criteria; there was much more potential for Lendlease to improve its tender, relative to Manteena. Legal advice was sought from the ACT Government Solicitor's Office, which identified that the conduct of the BAFO process was permissible provided certain criteria and requirements were met. 2.82

The Tender Evaluation Team produced an amended and signed version of the draft Tender Evaluation Report (i.e. the first signed Tender Evaluation Report) on 18 March 2020. Similar to the draft Tender Evaluation Report, the first signed Tender Evaluation Report included scores against each of the criteria, a brief description of the tenderers' assessment against each criterion and a proposed recommendation. The score and ranking of the two tenderers was the same as in the draft Tender Evaluation Report, but there were differences in the qualitative assessment of each tender proposal compared with the draft Tender Evaluation Report. The first signed Tender Evaluation Report was not signed or endorsed by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the delegate. The first Tender Evaluation Team was subsequently asked to re-evaluate the tenders, but at least one member of the Tender Evaluation Team identified that they did not wish to participate in a re-evaluation process and the first Tender Evaluation Team was disbanded. 2.94

On 27 March 2020 the Acting Executive Group Manager, Business Services Division (Education Directorate) agreed to the appointment of a second Tender Evaluation Team. Similar to the first Tender Evaluation Team, the second Tender Evaluation Team included representatives from both Major Projects Canberra as well as the Education Directorate. The second Tender Evaluation Team produced a Tender Evaluation Report, which was signed by the two members and the chair on 6 April 2020 respectively. Manteena was given a total score of 69.1 and Lendlease was given a total score of 68.4. The report identified that the two tenderers 'both presented strong technical proposals and were low risk for the Territory' and that 'the scores based on each submitted tender were too close to clearly recommend a preferred tenderer'. The report concluded a BAFO process be entered into. The second signed 2.107

Tender Evaluation Report made the same recommendation as the first signed Tender Evaluation Report but the scores between the two tenderers were much narrower. The second signed Tender Evaluation Report was approved by the Acting Executive Group Manager, Business Services Division (Education Directorate) as the Delegate on 8 April 2020.

In response to a request for a Best and Final Offer from the two tenderers, Manteena provided a revised tender price of \$15,100,000 (GST ex) and Lendlease provided a revised tender price of \$15,997,366 (GST ex). The tenderers were asked to revise their tenders against three of the six weighted criteria from the original RFT process, namely: WC3: a demonstration that the project will be completed within the contract period (20 percent); WC4: a clear understanding of the project (30 percent); and WC5: financial offer (20 percent). The scores for the remaining three criteria from the original RFT process were to remain. A third signed and final Tender Evaluation Report was prepared and signed by the second Tender Evaluation Team. The report gave Manteena a score of 76.1 and Lendlease a score of 67.4. The report stated 'Manteena have presented a strong and cost-efficient design proposal that provides best value for money, and the lowest risk profile' and sought approval to enter into a contract for Phase 1 of the project with Manteena. At the time the Acting Executive Group Manager, Business Services Division (Education Directorate) did not sign or endorse the third signed Tender Evaluation Report, but instead provided an Executive Brief to the Director-General of the Education Directorate that sought approval to enter into a contract for Phase 1 of the project with Lendlease.

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The reasoning for the recommendation to the Director-General is embodied in four paragraphs in the Executive Brief. In making the alternative recommendation to the Director-General, the Acting Executive Group Manager, Business Services Division (Education Directorate) was seeking to over-rule the professional advice of the Tender Evaluation Team. It was therefore incumbent on the Acting Executive Group Manager, Business Services Division (Education Directorate) to adequately and appropriately document their rationale and reasoning. This did not occur. There was inadequate documentation to support the recommendation to enter into a contract with Lendlease, as opposed to Manteena. A key factor in the decision was an expectation that the Directorate was assigned the Intellectual Property of the tenderers, in the form of the re-design of the buildings, so that the 'best elements of each design can be used in the upcoming design development phase'. The Audit Office considers that the assignation of the Intellectual Property rights for the re-design of the school buildings from the unsuccessful tenderer was not a *fait accompli*, and the presumption that 'the best elements of each design can be used in the upcoming design development phase' was incorrect.

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The Acting Executive Group Manager, Business Services Division (Education Directorate) produced a document in February 2021 that sought to provide further insight and explanation as to their recommendation to the Director-General to enter into a contract with Lendlease. The February 2021 document acknowledged that 'Manteena outscored Lend Lease on the criteria directly influenced by their design' but that Lendlease 'had closed the pricing gap (based on the limited feedback they received as part of the BAFO) ... [and] in a design and construct contract, those design refinements could be continued by whichever company was in contract with the

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territory in a detailed design phase'. This is unfair. Such an assessment does not fairly value or reward the efforts of a tenderer and the merits of their tender.

The February 2021 document identified that the protracted procurement process for the Campbell Primary School Modernisation Project created risks for the delivery of the project and it asserted that Lendlease was in a stronger position to manage these risks due to 'long term factors'. In doing so, the Acting Executive Group Manager, Business Services Division (Education Directorate) referred to their previous role as the Secure Local Jobs Code Registrar between November 2018 and January 2020, and how knowledge and understanding from this experience had influenced their consideration. The conduct and timing of the procurement process, including the decision to go to a BAFO process, was within the responsibility and control of the Territory; it is unfair to identify risks deriving from the protracted procurement process as a basis on which to penalise a tenderer that had consistently been identified as the preferred supplier throughout the process. The Acting Executive Group Manager, Business Services Division (Education Directorate) asserted that Lendlease was likely to perform better based on 'long term factors'. In their response to the draft proposed report the Acting Executive Group Manager, Business Services Division (Education Directorate) advised that this assessment was based on the second Tender Evaluation Team's assessment of the RFT responses and the scoring of 'WC1 – past performance' (Lendlease received a score of 8 and Manteena received a score of 7).

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The *Tender Evaluation Plan* (July 2019) allowed for an 'overall assessment of value for money' and countenanced that the preferred tenderer might not be the 'the tenderer with the highest score'. In doing so, however, the *Tender Evaluation Plan* (July 2019) required that 'full justification for selection of another will be provided'. This did not occur at the time of the decision by the Director-General of the Education Directorate. Subsequently, in February 2021 and in June 2021 in an interview under oath or affirmation, the Acting Executive Group Manager, Business Services Division (Education Directorate) sought to provide a rationale as to why they believed the tenderer with the higher price and lower score against the weighted evaluation criteria offered 'overall value for money'. In doing so they effectively re-weighted and re-prioritised the evaluation criteria with which the Territory approached the market and sought tenders. Probity was not demonstrated in the procurement process to 'deal fairly, impartially and consistently with suppliers', as provided for by *Procurement Policy Circular PC 21: Probity and Ethical Behaviour*.

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GOVERNANCE AND ADMINISTRATIVE MATTERS

Paragraph

In its response to the RFT, Lendlease identified a number of proposed departures from the Territory's standard contractual terms and conditions. The most significant proposed departure sought to limit the sum payable as compensation to the Territory for any loss arising from a breach of contract by Lendlease to 50 percent of the value of the contract. There is evidence that the Chair of the first Tender Evaluation Team identified the proposed changes to the standard contractual terms and conditions as a risk in February 2020, but they were not specifically and explicitly documented in any of the tender evaluation reports that were subsequently produced by either of the Tender Evaluation Teams. Following the identification of Lendlease as the preferred tenderer in late June 2020 Major Projects Canberra

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commenced negotiations with Lendlease, with the major focus of negotiation being the proposed cap on general liability. Considerable effort was put into the negotiations, which were finally concluded on 10 September 2020, with Lendlease agreeing to a cap on general liability of 200 percent of the value of the works. The effect of accepting a lower cap on liability is that the Territory has less recourse to pursue the contractor for damages, costs and any losses incurred. The time taken to negotiate the final contract put further pressure on the delivery of the project.

The *Procurement Plan Minute* (July 2019) and the *Tender Evaluation Plan* (July 2019) identified four members of the Tender Evaluation Team and documented their role and responsibilities in the procurement process. In addition to the Tender Evaluation Teams, a range of staff in both Major Projects Canberra and the Education Directorate were involved in the procurement. Managers and supervisors had an ‘oversight’ and ‘quality assurance’ role, which involved reviewing draft tender evaluation reports completed by the Tender Evaluation Teams. There is also evidence that advice was sought from other Major Projects Canberra officers at various times during the procurement. The *Tender Evaluation Plan* (July 2019) notes the ‘[Tender Evaluation Team] may, as required, utilise specialist advice to assist in the evaluation process’ and that ‘the areas of expertise may include ... probity and technical procurement advice, including from the ACT Government Solicitor and IFCW Directors/Managers (such advice may include, but not be limited to, technical drafting advice and review of draft evaluation reports for clarity and consistency with the *Government Procurement Act 2001* (ACT) and the [Request for Tender]’. There is no further information with respect to the roles and responsibilities of these other participants and the nature and purpose of their participation. This allows for potential influence or interference to occur without explicit and specific clarity on their role and purpose. The lack of clarity associated with the role and responsibilities of these other participants increases the probity risks for the procurement.

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A Procurement Risk Management Plan was developed for the Campbell Primary School Modernisation Project procurement. The Plan was an attachment to the *Procurement Plan Minute* (July 2019). The Plan identified a range of risks that were relevant at the outset of the procurement, with related treatments and responsible owners identified to manage each risk. There was no evidence that the Procurement Risk Management Plan was reviewed or updated during the procurement process. By not reviewing and updating the Procurement Risk Management Plan as necessary during the procurement, there was a missed opportunity to use it as an ongoing tool to help manage the increasing risks associated with the procurement.

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There was limited consideration of probity considerations in the Procurement Risk Management Plan. One probity-related risk was identified (unethical tender process or inadequate tender and evaluation leads to a breach of probity) for which the controls to manage this risk were identified as ‘effective’. There is no evidence that this probity risk was monitored and reported against throughout the procurement; the risk was not updated, and the controls re-assessed, at key developments of the procurement process which appeared to give rise to additional or enhanced risks.

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The *Tender Evaluation Plan* (July 2019) required ‘evaluation team members, specialist advisors and Consultants ... to provide written acknowledgement of confidentiality and declaration of conflicts of interest prior to the commencement of

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the evaluation process using the appropriate form'. To assist with this Major Projects Canberra has developed a *Confidentiality and Conflict of Interest Undertaking form*'. A *Confidentiality and Conflict of Interest Undertaking form* was evident for five of the six members of the Tender Evaluation Teams that had responsibility for evaluating the tenders as well as the officer identified as having an Observer role for the first Tender Evaluation Team (the Audit Office was advised that a form was completed for one of the members of the Second Evaluation Team but it was unable to be produced). No forms were prepared for any of the other participants in the procurement process. By not ensuring that a *Confidentiality and Conflict of Interest Undertaking form* is completed by all participants in the procurement process, Major Projects Canberra is not rigorously and comprehensively ensuring that all potential conflicts of interest are acknowledged as appropriate.

Appropriate, controlled and transparent communication processes are necessary in a procurement process to ensure all suppliers are dealt with fairly and equitably. Communication with tenderers was not appropriate, controlled or adequately documented. There was evidence of: individual communication with tenderers; communication not being recorded; and communication with third parties in relation to the procurement process. No specific Communications Plan or Communications Protocol was developed or implemented for the procurement. By not consistently and transparently communicating with tenderers, and communicating with third parties in relation to the procurement, the probity risks associated with the procurement process are increased. 3.79

A tender debrief process is a useful process to help identify for unsuccessful tenderers why they were not selected and how they can improve future tender submissions. The *Tender Evaluation Plan (2019)* identified that the Tender Evaluation Team would be responsible for 'debriefing unsuccessful respondents'. The usual practice was for the tender debrief process to be facilitated by Major Projects Canberra staff, who typically occupy the position of the chair of the tender evaluation team. Following the decision to appoint Lendlease as the preferred tenderer, contrary to the recommendation of the Tender Evaluation Team, the Director-General of Major Projects Canberra instructed that the tender debrief process was to be undertaken by Education Directorate representatives and that no Major Projects Canberra staff were to be involved. 3.88

On the basis of information provided in interviews under oath or affirmation, it is apparent that a meeting occurred online to discuss the tender process and it is apparent that it was attended by representatives of Manteena, the Acting Executive Group Manager, Business Services Division (Education Directorate) and the two Education Directorate members of the second Tender Evaluation Team. There is no documentary evidence or record maintained by the Education Directorate of this meeting. Participants recalled the tender process and assessment was discussed at this meeting. The Acting Executive Group Manager, Business Services Division (Education Directorate) recalled another meeting taking place in a coffee shop at which the tender process and assessment was discussed and this 'was very similar to what a debrief was, but it wasn't the debrief'. Notwithstanding the meetings at which the tender process and evaluation was discussed the Education Directorate and Acting Executive Group Manager, Business Services Division (Education Directorate) advised that the absence of Major Projects Canberra staff meant that a 3.89

tender debrief did not occur. A tender debrief was not conducted in an open, transparent and accountable manner.

Recommendations

RECOMMENDATION 1 PROBITY ADVICE

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement guidance documentation, and associated templates, to explicitly require the preparation of independent probity advice where a delegate or decision-maker seeks to overrule the recommendation of the tender evaluation team.

RECOMMENDATION 2 DOCUMENTATION OF ROLES AND RESPONSIBILITIES

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement planning and tender evaluation templates and guidance documents to require:

- a) the identification and acknowledgement of all participants in the procurement process, including the Delegate and those with managerial and supervisory responsibilities; and
- b) the identification and documentation of the specific roles and responsibilities of all participants in the process.

RECOMMENDATION 3 RISK MANAGEMENT

Major Projects Canberra, in cooperation with Procurement ACT, should review and update its procedures for the management of risk as part of procurement processes. The revised procedures should require procurement managers to actively review risks, including probity risks, and their treatment throughout the entire process. The review should be explicitly documented.

RECOMMENDATION 4 CONFIDENTIALITY AND CONFLICT OF INTEREST UNDERTAKINGS

Major Projects Canberra, in cooperation with Procurement ACT, should review and update its procedures for the management of confidentiality and conflicts of interest as part of procurement processes. The revised procedures should require *Confidentiality and Conflict of Interest Undertaking* forms to be completed for all staff who have a role in a procurement process.

RECOMMENDATION 5 PROBITY AWARENESS TRAINING

Major Projects Canberra and the Education Directorate should require staff to have received probity awareness training before participating in procurement activities. The training should also identify how staff can elevate and raise any concerns with probity or conduct during a procurement.

RECOMMENDATION 6 TENDERER COMMUNICATION PROCESSES

Major Projects Canberra, in cooperation with Procurement ACT, should review and revise its procurement planning and tender evaluation templates and guidance documents to require, during the tender process, that:

- a) unless otherwise authorised by the chair of the tender evaluation team, the chair be solely responsible for communicating with tenderers in relation to the tender up until the delegate has approved a preferred tenderer; and
- b) the identification and authorisation of communication methods that allow records of communication to be captured in a timely and accurate manner.

Response from entities

In accordance with subsection 18(2) of the *Auditor-General Act 1996*, the Education Directorate and Major Projects Canberra were provided with:

- a draft proposed report for comment. All comments were considered and required changes were reflected in the final proposed report; and
- a final proposed report for further comment. As part of this process, recipients were offered the opportunity to provide a statement for inclusion in the final report in the Summary chapter.

In accordance with subsection 18(3) of the *Auditor-General Act 1996* other entities considered to have a direct interest in the report were also provided with extracts of the draft proposed and final proposed reports for comment. All comments on the extracts of the draft proposed report were considered and required changes made in the final proposed report.

Comments for inclusion in the Summary chapter were provided as follows:

Manteena

Manteena welcomes the Audit Office's performance audit of the Campbell Primary School Modernisation Project Procurement. While we are very disappointed in the outcomes of the procurement process, which have significantly affected Manteena and many other local Canberra based professional consulting and subcontracting organisations who contributed to the tender process, we are hopeful that all future procurement processes will not encounter similar failings in probity, fairness, impartiality and consistency.

Acting Executive Group Manager, Business Services Division (Education Directorate)

I'd like to acknowledge the areas identified for process improvement in this proposed report and fully support the recommendations which will serve to strengthen probity and provide the necessary clarity of roles and responsibilities, appropriate documentation and guidance for all parties involved in the procurement process.