

**SOUTH AUSTRALIA**

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**Report**  
**of the**  
**Auditor-General**

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*Tabled in the House of Assembly and ordered to be published, 12 September 2005*

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**Fourth Session, Fiftieth Parliament**

**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**

By Authority: J. D. Ferguson, Government Printer, South Australia

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2005





Government  
of South Australia



**Auditor-General's  
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29 July 2005

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Gentlemen,

**AUDITOR-GENERAL'S REPORT: 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**

Pursuant to section 39 of the *Passenger Transport Act 1994*, I herewith provide to each of you a copy of my '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'.

Yours sincerely,

K I MacPherson  
**AUDITOR-GENERAL**



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# **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<sup>1</sup>**

## **1. EXECUTIVE SUMMARY**

### **1.1 Introduction**

Passenger transport services in Metropolitan Adelaide are provided by contracted operators who have been engaged by the Minister for Transport to operate bus, train and tram services on the Minister's behalf.

The *Passenger Transport Act 1994* requires the Minister, upon concluding new contracts for operation of passenger transport services entered into as a result of a tender process, to provide the Auditor-General with a report on the contracts and tender processes. As required by section 39(3)(f) of the *Passenger Transport Act 1994*, I have examined the contracts executed by the Minister on 17 February 2005 and the probity of the processes leading up to the awarding of the contract. The results of this audit review are detailed in this Report.

The contracts, which are the subject of this Report, are for the operation of bus services on behalf of the Minister for Transport in three of seven bus contract areas within Metropolitan Adelaide. In 1999, the Minister entered contracts for all seven bus contract areas for terms of five years with operators having a right of renewal for a further five years.

The two contracts have a estimated annual cost to the Government of \$59 million and approximately \$300 million over the life of the contract and are significant elements in the delivery of public transport services by the South Australian Government.

### **1.2 The Tender Process and Arrangements for Entering the Contracts**

The processes leading up to the awarding of the contracts for bus services, which are the subject of this review, involve a series of sequential steps which are summarised herein. The Project Steering Committee, established by the Minister to conduct the tendering and contracting process, developed and implemented the processes having regard to the procurement guidelines established by the State Supply Board and the Department of Transport and Urban Planning Probity and Professional Conduct Policy.

### **1.3 The Probity Framework**

In reviewing the probity of the processes leading up to the awarding of the contract, consideration was given to a probity framework which reflects common law principles and concepts and the requirements of authoritative guidance provided by the State Supply Board and the Department of Transport and Urban Planning. Consideration was also given to provisions of the Request for Tender document which established procedures which were to be followed in the tender process.

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<sup>1</sup> Throughout this Report a reference to 'part' is a reference to the separate heading numbers.

The principles or concepts adopted by the courts in determining the requirements of probity are discussed later in this report. They include requirements that government tendering processes must demonstrate procedural fairness and that parties responding to government tenders have a legitimate expectation that government will follow the procedures to which it has committed itself and will act fairly. Courts have also determined that a process contract may be implied between the issuer of a Request for Tender and the parties who respond to the request which requires the parties to follow the processes implied in the Request for Tender.

The guidelines issued by the State Supply Board and the Department of Transport and Urban Planning build on these principles and concepts and provide specific guidance. Key elements of the guidelines are requirements that procurement practices:

- comply with the law, reflect ethical behaviour, are conducted honestly and fairly and are capable of withstanding scrutiny;
- involve transparent decision making processes which are appropriately documented;
- support procuring without fear, favour, or prejudice;
- recognise and respond appropriately to conflicts of interest;
- respect the confidentiality of information obtained as part of procurement processes;
- ensure fair and equal consideration is given to each tender and selection is based upon the lowest total cost compliant bid.

The Department of Transport and Urban Planning guidelines specifically require measures to be taken to assist bidders in understanding the requirements of the Department and the processes which will be followed in the procurement process.

#### **1.4 Key Features of the Contracts**

The contracts provide for the contracted operator to operate bus services within the contract areas, in the main using buses and infrastructure, such as depots, owned and provided by the Minister. The services which the operator is required to provide within the contract areas are specified in the contract through description of routes, timetables and service standards. The operators responsibility to maintain the buses and other assets provided by the Minister are also specified within the contracts.

Provisions are incorporated into the contracts which support, with the agreement of the Minister, identification and implementation of opportunities for service improvements by the contractors.

The contracts also support arrangements implemented by the Government to encourage integration of contracted bus services, both between contract areas, and with train and tram services. These arrangements include the development of new infrastructure, coordination of routes and timetables, and the implementation of a common fare and ticketing system across Metropolitan Adelaide passenger transport services.

The basis upon which the Minister pays the contracted operators for operation of services within the contract areas are also specified in the contracts.

## **1.5 Requirements of the *Passenger Transport Act 1994***

The *Passenger Transport Act 1994* incorporates provisions which require the Minister to do specific things in the conduct of processes for awarding of contracts for provision of passenger transport services, and mandate specific matters to be reflected in the contracts. This review has considered whether the processes leading up to the awarding of the contract and the contracts entered by the Minister have complied with all requirements of the *Passenger Transport Act 1994*.

## **1.6 Outcome of the Review**

At the conclusion of this Report I have provided an Audit Opinion with respect to the review of statutory compliance, the examination of the Contracts entered into by the Minister, and the review of the probity of processes leading up to the awarding of the contracts. In summary I have concluded that:

- The Minister, and the people appointed to assist in the tender process, have complied with requirements of relevant legislation;
- The Contracts entered by the Minister meet the requirements of the *Passenger Transport Act 1994* and, on the whole, protect the State's interests;
- The Minister, and the people appointed to assist in the tender process, adopted a procurement process which was, on the whole, consistent with appropriate probity standards.

The review disclosed, and this Report details, a number of matters where specific practices and procedures, action taken, or measures implemented were not, in my opinion, adequate. Nonetheless these matters, considered individually and together, did not compromise the overall conclusion expressed above. These matters are recorded in this report for completeness, and to ensure future procurement processes and future contracts are strengthened to protect the State's interests.

The more significant matters arising from the review are:

- The Evaluation Plan and the evaluation process did not consider the tenderer's compliance with conditions of participation reflected in the Request for Tender. I recommend that future tender processes should provide mechanisms for monitoring tenderer's compliance with any conditions of participation.
- The role of the Chief Executive of the Department of Transport and Urban Planning in the tender process was not documented in the Acquisition Plan, the Evaluation Plan or the Request for Tender documentation. In future, I recommend that these documents should reflect the role and reporting responsibilities of all departmental officers and other parties involved in the tender process.
- The Contracts include provisions requiring both the Government and the contractors to act with utmost good faith. In my view, it is not appropriate for a party contracting on behalf of the State to have an obligation to act with utmost good faith, although that party should nevertheless act as a moral exemplar in the public interest.

- Clarification sessions were conducted with four short listed tenderers notwithstanding that the Project Steering Committee considered that one of these short listed tenderers should not be considered further. Consequently, this tenderer may have incurred additional avoidable expense in preparing for and responding to the clarification session. In my view the decision to invite this tenderer to participate in the clarification session was not appropriate.
- Although it was not possible to say definitively that the Minister gave directions concerning the conduct of the tender process within the meaning of section 39(2a)(c) of the *Passenger Transport Act 1994*, the Minister did provide certain input concerning the conduct of the tender process which were acted upon by the Department as if they constituted formal directions. A clarification or definition of the concept of a 'direction' would be beneficial.
- A clear methodology should be developed for addressing each of the requirements set out in section 39(3)(a)(i)-(iv) of the *Passenger Transport Act 1994* prior to the commencement of the tender process. I consider that the analysis and consideration of sustainable competition and the avoidance of a monopoly was inadequate.

## 2. RECOMMENDATIONS

I recommend that, in preparing for future tender arrangements, the matters referred to in this Report be taken into account by Executive Government agencies, as may be appropriate, having regard to the particular factual circumstances involved.

With respect to the matter of future tender processes undertaken pursuant to section 39 (2) of the *Passenger Transport Act 1994*, I recommend as follows:

- (1) All directions by the Minister that may be given during the conduct of the assessment or selection processes should be in writing and signed by the Minister.<sup>2</sup>
- (2) The acquisition and evaluation plans that are developed and adopted for the conduct of the tender process should fully describe the role and reporting responsibilities of all departmental officers and other external advisers, eg probity adviser, etc, who are involved in the conduct of the tender process.
- (3) A clear methodology should be developed for addressing each of the requirements set out in section 39 (3) (a) (i)-(iv) of the *Passenger Transport Act 1994* prior to the commencement of the tender process. The manner in which these requirements have been addressed, both before, and in the course of the processes associated with the tender, should be clearly documented and capable of audit confirmation.
- (4) The person charged by the Minister with the conduct of the tender process pursuant to section 39 (2a) (a) of the *Passenger Transport Act 1994* should ensure that a risk management plan (including mitigation strategies) for the conduct of the tender be developed prior to the commencement of the tender process. The risk management plan should be regularly reviewed and updated as may be necessary in the light of experience throughout the conduct of the tender process.
- (5) The procedures adopted for the handling and storage of confidential tender documents should ensure that tender material cannot be removed from secure storage, and/or an appropriately designated control area, by those involved in undertaking the evaluation of the tenders.
- (6) Where a probity adviser has been engaged, all occasions upon which probity advice is provided during the course of the tender process should be documented and capable of audit confirmation.
- (7) Where a tender has been evaluated as being clearly non-competitive when compared with other tenders that have been received, the tenderer concerned should not be put to the additional expense of responding to requests for clarification or provision of additional information where there is no prospect that the response that is being sought could affect that evaluation.
- (8) In my opinion, in future tender processes, formal legal advice, in the way of a 'sign-off' on the relevant contractual documents, should be obtained from Crown Law before Cabinet, or the relevant decision maker if not Cabinet, approves the award of the contract.

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<sup>2</sup> That is, all matters that are intended by the Minister to be adopted by those having responsibility for the tender process.

### **3. INTRODUCTION**

This is the first occasion that the Auditor-General has been specifically mandated by the Parliament to opine on probity and contractual processes associated with the 'provision of services' to government by private contractors.<sup>3</sup>

Probity matters in the context of governmental contractual relationships are of importance in ensuring that the integrity of governmental processes are not subject to legal challenge and/or concerns that could undermine public confidence in the processes/procedures of government institutions. This becomes a matter of significance in the context of the announced government policy that Public Private Partnerships will be undertaken for the purpose of developing infrastructure projects in this State.

The contractual arrangements associated with the bus contracts involves the expenditure of approximately \$300 million of public monies over the life of the contract. In these circumstances strict compliance with both statutory and probity requirements is important.

#### **3.1 Matter of Emphasis**

Notwithstanding the fact that this Report raises a number of matters that, in my view, are of importance and should be brought to the attention of the Government and the Parliament, it should be stated that, in my opinion, the arrangements that have been undertaken did not raise any matter that undermined the overall integrity of the process.

#### **3.2 Standard of Proof**

In Australia, the two standards of proof are the criminal standard and the civil standard. In all investigations by the Auditor-General the standard of proof is the civil standard, ie reasonable satisfaction on the balance of probabilities. It is the civil standard that has been applied consistently with respect to all matters associated with this Report.<sup>4</sup>

#### **3.3 Natural Justice/Procedural Fairness Procedures**

In the interests of natural justice, I provided, on a strictly confidential basis, a draft of this Report to the Minister and several other persons. My purpose in so doing was to give to the Minister and those persons an opportunity to provide any comments on the draft text for consideration by me in finalising this Report. Changes to the draft in finalising this Report were made with the purpose of providing additional information or explanation in relation to certain matters and including any amendments that were necessary as a result of the natural justice process.

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<sup>3</sup> The leasing/sale associated with the Electricity Trust of South Australia involved different considerations to those that have arisen with respect to the probity analysis associated with these contracts.

<sup>4</sup> See *Bringinshaw v Bringinshaw* (1938) 60 CLR 366.

## **4. AUDIT MANDATE**

### **4.1 Section 39 Passenger Transport Act 1994**

Section 39 (3) of the *Passenger Transport Act 1994* requires the Minister for Transport to provide the Auditor-General with certain contracts and a report on the processes for awarding the contracts. It further requires the Auditor-General to examine the contracts and to prepare a report to Parliament on the probity of processes for awarding the contracts. The specific provisions of the *Passenger Transport Act 1994* are:

- (3e) *If under a service contract awarded under this section the Minister is, or is reasonably expected to be, liable to make payments equal to or exceeding \$4 000 000 (in total) over the term of the contract, the Minister must, within 28 days after awarding the contract, forward to the Auditor-General—*
  - (a) *a copy of the contract; and*
  - (b) *a report which describes the processes that applied with respect to the awarding of the contract.*
  
- (3f) *The Auditor-General must, within the period of 4 months after the receipt of a service contract and report under subsection (3e)—*
  - (a) *examine the contract; and*
  - (b) *prepare a report on the probity of the processes leading up to the awarding of the contract.*
  
- (3g) *Section 34 of the Public Finance and Audit Act 1987 applies with respect to the examination of a service contract, and the preparation of a report, under subsection (3f).*
  
- (3h) *The Auditor-General must deliver copies of a report prepared under subsection (3f) to the President of the Legislative Council and the Speaker of the House of Assembly.*

The requirement in subsection 39(3f) of the *Passenger Transport Act 1994* that I examine a service contract and prepare a report on the probity of the processes leading up to the awarding of the contract was inserted into the *Passenger Transport Act 1994* in 2003.<sup>5</sup>

### **4.2 Section 34 Public Finance and Audit Act 1987**

Section 39(3g) of the *Passenger Transport Act 1994* provides for the Auditor-General to exercise the powers provided by section 34 of the *Public Finance and Audit Act 1987* when conducting the review required by the *Passenger Transport Act 1994*. The following extracts from the *Public Finance and Audit Act 1987* are relevant:

#### **34 Powers of the Auditor-General to obtain information**

- (1) *The Auditor-General or an authorised officer may, in order to conduct an audit or make an examination under this Act—*

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<sup>5</sup> By subsection 26(11) of the *Passenger Transport (Dissolution of the Passenger Transport Board) Amendment Act 2003*, Act Number 54 of 2003, which commenced on 1 January 2004 (see Gazette, 18 December 2003, page 4525).

- (a) *by summons, require the appearance of any persons or the production of any relevant accounts, records or other documents;*
- (b) *inspect any such accounts, records or other documents and retain them for such reasonable period as he or she thinks fit, and make copies of them or of any of their contents;*
- (c) *require a person who has access to information that is, in the opinion of the Auditor General or the authorised officer, relevant to the audit or examination, to provide that information to the Auditor General or the authorised officer in writing;*
- (d) *require a person appearing before him or her to make an oath or affirmation (which the Auditor General or authorised officer may administer) to answer truthfully all questions relating to an audit or examination under this Act and to any accounts, records or other documents that are the subject of, or are related to, an audit or examination under this Act;*

### **4.3 The Meaning of Probity**

In the context of a government tender or procurement process, probity is often used in a general sense to mean a defensible process which is able to withstand internal and external scrutiny – one which achieves both accountability and transparency and provides tenderers with fair and equitable treatment.

Public awareness and scrutiny of government's management of probity and process related issues are significant and increasing. There are a number of reasons for this, including:

- increased concern with ethics and accountability in public life;
- greater media scrutiny;
- the time and resources required from bidders in formulating and submitting bids, leading to demands for accountability and transparency in procurement processes.

Failing to conduct a procurement process with due regard to probity and fair dealing may potentially leave it open to challenge. Defending challenges is time consuming, costly, can undermine public confidence, affect reputations, and act as a distraction from government's core functions. Outcomes of any challenge (whether or not ultimately successful) are negative and involve consequences for government, senior management and, potentially, for staff and advisers generally.

A probity adviser is usually an adviser who is external to, and independent of, *the process*, who will scrutinise (by way of observing and reviewing) the tender and evaluation process, provide advice on probity issues which may arise before and during the tender process, and advise whether the process is equitable and conducted with integrity.

The probity adviser does not undertake the evaluation and is not responsible for advising on the legal issues that arise from the conduct of the tender process. However, the probity adviser will provide advice on the conduct of the tender process (including the

tender evaluation procedures), advise whether the tender rules and procedures are followed, and whether the tender process has been conducted fairly and the tenders received are assessed in accordance with the stated evaluation criteria.

In the period following the release of the Request for Tender, for example, the probity adviser may advise on issues such as bidder communications and bid receipt, including the treatment of late bids. In respect of the evaluation phase, the probity adviser may advise on matters such as the establishment of an evaluation team, assessment of risk and score adjustment, and the assessment of value for money. The probity adviser can also conduct, or arrange for a third party to conduct, various types of probity and security investigations on a particular company and/or its directors and secretaries. The probity adviser will normally advise and report to the project steering group, and may attend and monitor meetings of other tender committees. Often the probity adviser will also provide all tender evaluation team members with a probity briefing before the actual commencement of tender evaluation.

At the conclusion of the tender process, the probity adviser usually provides confirmation (or sign off) that the process has met all probity and process requirements. This would normally involve the provision of a sign off which confirms that the process followed applicable government policies and the agreed probity plan, and that the tender evaluation was conducted in accordance with the process as set out in the tender evaluation plan.

#### **4.4 Difference between a Probity Adviser and a Probity Auditor**

The terms probity auditor and probity adviser are also often used interchangeably. However, there is a distinct difference between these roles. A probity adviser works closely with those conducting the procurement process from the beginning, providing advice on probity/process issues which may arise, and providing advice on strategies to overcome potential problems. The probity adviser is therefore expected to give advice which is proactive and strategic in nature. A probity adviser is closely involved in the procurement process, and so cannot be regarded as an 'independent' party.

In contrast, a probity auditor's role is more generally an 'after the fact' role, auditing the process after the process is completed, or at key stages during the process. The process and associated documentation are audited and any probity issues are identified. The issues are addressed in a probity audit report. A probity auditor must be completely independent, and therefore cannot be the legal adviser or otherwise involved in the project. Often the probity auditor is engaged by an interested person who is external to those conducting the procurement process to obtain a level of assurance as to how the process was conducted.

The Auditor-General's role in the present process is set out in subsection 39(3f) of the *Passenger Transport Act 1994* and is that of a probity auditor with the statutory responsibility to provide an audit level of assurance to the Parliament.

## **5. OVERVIEW OF PROCESS FOR AWARDING CONTRACTS**

### **5.1 Summary of Timeline for Process for Entering the Contract**

#### **5.1.1 Overview**

This part of this Report outlines the timeline of the process for awarding the service contracts for regular passenger services in three of the seven regions of operation<sup>6</sup> under the *Passenger Transport Act 1994*.

#### **5.1.2 Non-Renewal by the Former Provider**

The need for new service contracts to be awarded arose as a result of the then current provider of bus services, Serco Adelaide Buses, advising the Department of Transport and Urban Planning in April 2004<sup>7</sup> that it did not wish to renew<sup>8</sup> its then existing Contract in respect of three contract areas.<sup>9</sup> Serco had previously informed the Minister for Transport<sup>10</sup> that it was not willing to continue to operate the bus services for a further five years on the terms contained in the then existing Contract.

On 11 May 2004, Serco made a submission to the Department of Transport and Urban Planning proposing to operate the bus services in the contract areas on new terms and conditions. This submission was rejected by the Department of Transport and Urban Planning in a letter to Serco dated 23 July 2004.

#### **5.1.3 Appointment of Ms H Webster as the Person to Conduct the Process and Appointment of the Members of the Project Steering Committee**

Paragraph 39(2a)(a) of the *Passenger Transport Act 1994* provides that the Minister must appoint a person to conduct the tender process for awarding bus services contracts.

In Audit's review of the documentation it has not found any document formally appointing a person to conduct the process in accordance with paragraph 39(2a)(a). However, it was accepted by the Minister and Departmental officials that Ms Webster was the person appointed by the Minister for the purposes of this paragraph.

The Minister and Departmental officials indicated during examinations that Ms Webster's appointment was contained in a Briefing Minute that also recommended that the Minister approve the members of the Project Steering Committee. However, this is inconsistent with the Evaluation Report, which states that the Project Steering Committee was appointed by the Chief Executive of the Department of Transport and Urban Planning.

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<sup>6</sup> Section 41 of the *Passenger Transport Act 1994*. In this Report, regions of operation are referred to as Contract Areas.

<sup>7</sup> This was done by way of letter from Serco to the Chief Executive of the Department of Transport and Urban Planning dated 21 April 2004.

<sup>8</sup> Clause 6 of the Contract gave Serco the right to renew the contract for a period of 3 years.

<sup>9</sup> North-South, Outer North and Outer North-East.

<sup>10</sup> By letter on 18 March 2004.

The members of the Project Steering Committee were as follows:

- Ms Heather Webster, (Chair) – Executive Director, Department of Transport and Urban Planning - Office of Public Transport;
- Ms Heather Haselgrove, Director Operations, Department of Transport and Urban Planning - Office of Public Transport;
- Ms Trudi Meakins, Executive Director, Department of Transport and Urban Planning – Transport Planning;
- Mr Peter Sandeman, Director, Department of Transport and Urban Planning - Office of the North;
- Mr Greg Fenn, Director Accounts Management, Department of Treasury and Finance;
- Mr Terry Evans, Deputy Chief Executive, Justice Portfolio and Attorney General’s Department.

The Project Steering Committee’s responsibilities included:

- approving the evaluation plan;
- evaluating all Tenders, having regard to both price and non-price (qualitative) characteristics of the Tenders, using the evaluation criteria outlined in the Request for Tender and detailed in the Evaluation Plan;
- ranking the Tenderers who have satisfied the Project Steering Committee that they can provide passenger transport services at an acceptable standard and with acceptable risk to government; and
- making a recommendation of the preferred Tenderers for consideration by the Minister and Cabinet.

#### **5.1.4 Establishment of Project Advisory Group**

In addition to the Project Steering Committee, a second committee, called the Project Advisory Group, was also established.

#### **5.1.5 Appointment of External Advisers**

Two external advisers; a probity adviser and a financial consultant, were appointed to assist the Project Steering Committee perform its functions in respect of the tender process.

##### *The Probity Adviser*

The Project Steering Committee engaged the services of Contracting and Tendering Services Pty Ltd as probity adviser in respect of the tender process. Contracting and Tendering Services Pty Ltd was one of a number of providers on a panel of advisers for the provision of probity advice and related services to the Department of Transport and Urban Planning which was established in 2002.

The Minister approved the appointment of a probity adviser from the Department's panel in respect of the tender process on 28 June 2004. Contracting and Tendering Services Pty Ltd was notified of their appointment in a letter from Ms Haselgrove dated 5 July 2004.

The first meeting of the Project Steering Committee on 7 July 2004 noted the appointment of Contracting and Tendering Services Pty Ltd as the probity advisers of the tender process.

#### *The Financial Consultant*

In addition to the Probity Adviser, a financial adviser, ABFA Pty Ltd, was also appointed to assist with the financial evaluation of tenders.

On 23 August 2004, a Briefing Note recommended that the Minister approve the engagement of ABFA Pty Ltd as the financial adviser to assist with the financial evaluation of tenders. The copy of the Briefing Note sighted by Audit contains a handwritten note stating as follows: 'Discussion with HH to seek at least three tenderers prior to sending this to Mins office'.

On 30 August 2004, Ms Haselgrove sent a Request for Tender for the provision of assistance with the financial evaluation of tenders to four organisations. All four organisations submitted tenders.<sup>11</sup>

An evaluation of the tenders by Ms Haselgrove, Mr Fenn and Mr Tim Delaney<sup>12</sup> concluded that the three tenderers who had lodged conforming tenders had the capability to perform the services required, and eliminated two of the remaining tenderers on price. Accordingly, in a Briefing Note to the Minister dated 6 September 2004, Ms Webster recommended that the Minister approve the engagement of the tenderer whose price was lowest as the financial adviser to assist in the evaluation of tenders. This was ABFA Pty Ltd.

The Minister approved the appointment of ABFA Pty Ltd on 24 September 2004.

#### **5.1.6 Approval of the Acquisition Strategy**

Cabinet approved the decision to proceed with an open tender process in respect of the three contract areas<sup>13</sup> on 15 June 2004.

The Department of Transport and Urban Planning's Accredited Purchasing Unit endorsed an Acquisition Plan for the tendering of the bus services on 14 July 2004.<sup>14</sup> The

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<sup>11</sup> One of the tenders was non-conforming as the bidder was unavailable to perform the services during the time period specified in the Request for Tender but, nevertheless, submitted a proposal to provide additional ad hoc services when available.

<sup>12</sup> Manager, Corporate Finance, Office of Public Transport and member of the Finance and Corporate Capability Tender Evaluation Team.

<sup>13</sup> North-South, Outer North and Outer North-East.

<sup>14</sup> Report to State Supply Board, paragraph 1.4. State Supply Board Policy Number 2 Contracting Approvals and Processes provides as follows: 'Accredited Purchasing Units will be expected to evaluate and endorse that processes and activities undertaken (in relation to planning purchasing processes) meet the Board's requirements'.

Acquisition Plan was then sent to the State Supply Board,<sup>15</sup> which approved the Acquisition Plan on 20 July 2004<sup>16</sup> in the following terms:

*In granting approval the Board noted [the Department] is seeking Cabinet approval in July 2004 for a revised package of bus services in the subject contract areas and associated funding and notes that a copy of the evaluation plan will be provided to the Director, Contract Services, [Department of Administrative and Information Services] for review prior to approval by the [Project Steering Committee].<sup>17</sup>*

The Probity Adviser has advised that normally an Acquisition Plan would have taken three months to prepare but this tender process was conducted as an accelerated procurement process to allow the minimum time necessary for transition should a change in contractor occur. The consequence of an accelerated procurement process was that some elements of procurement best practice were omitted.

### **5.1.7 Formulation of the Request for Tender Documentation**

The Request for Tender documentation was developed by the Project Steering Committee. Cabinet approved the release of the Request for Tender on 2 August 2004.

The tender documentation required tenderers to bid on the existing configuration of services (Option 1 - Existing Services Package or Conforming Tender).<sup>18</sup> The submission of a conforming tender was mandatory. In addition, tenderers were also able to bid on the package developed by the Department of Transport and Urban Planning (Option 2 – referred to in the evaluation processes Service Package A)<sup>19</sup> or to submit their own preferred mix of services (Option 3 – referred to in the evaluation process as Service Package B). Tenders in respect of Options 2 or 3 were also referred to as Alternative Tenderers or, in the case of a bid in respect of more than one contract area, Joint Tenders.

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<sup>15</sup> As required by the *State Supply Act 1985* and State Supply Board Policy 2, which provides as follows:

*Agencies wishing to purchase goods and services with a value over their agency's accredited contracting delegation should prepare a **formal acquisition plan** (which, after endorsement by the APU, will be reviewed by Contract Services on behalf of the Board or by the State Supply Board itself in some cases). The tendering process for these acquisitions will remain the responsibility of the initiating agency. [emphasis in original]*

The Department of Transport and Urban Planning's accreditation level is Level Three Accreditation, giving the Department of Transport and Urban Planning the ability to carry out procurement of goods and services up to \$1 100 000. For more information on the State Supply Board's levels of accreditation, see State Supply Board Policy 1, pages 18-20.

<sup>16</sup> The Department of Transport and Urban Planning was notified of the State Supply Board's approval by letter from the Chairman of the Board to Mr O'Loughlin dated 22 July 2004.

<sup>17</sup> This is discussed further below.

<sup>18</sup> Tenderers were required to bid based on the existing timetables – the same routes, same number of services provided and same times of operation. The requirements for a Conforming Tender were set out in the Request for Tender.

<sup>19</sup> The South Australian Strategic Plan - Creating Opportunity states the Government's Commitment to 'double the use of public transport to 10 percent of weekday travel by 2018'. The State Strategic Plan was included in the Request for Tender document on the supplementary information Disc 6. The State Strategic Plan is also available at the following website address: at <http://www.stateplan.sa.gov.au/home.php>. In response to the commitment, in the Plan to doubling public transport usage, the Department of Transport and Urban Planning reviewed public transport services in the northern and southern suburbs. This review included consultation with the communities, local government and other stakeholders. This service package option sought to increase patronage by substituting new services for the most poorly patronised of the existing services. Evaluation Report, page 16. The Request for Tender described Alternative Tenders at paragraph 8.4.

The Request for Tender documentation is discussed in further detail at 7.5 'Tender Documentation and Evaluation by Transport including Role of Advisers'.

At this same time as the Request for Tender documentation was being developed, Heather Haselgrove and the Probity Adviser were drafting a probity plan, which ultimately appeared in a document titled 'Probity Adviser's Role'. This document is discussed in further detail Part 7. of this Report.

#### **5.1.8 Announcement of the Tender Process by the Minister**

The Minister announced during a radio interview on 8 July 2004 that the three contract areas which were currently operated by Serco would be tendered. Despite this announcement, Serco's submission to continue to conduct the services but on new terms, made on 11 May 2004, was not formally rejected by the Department of Transport and Urban Planning until 23 July 2004.

When given an opportunity to comment on a draft of this Report, Ms Haselgrove noted that Serco was advised of the Minister's decision not to accept its submission to continue to provide the services in the Contract Areas on new terms and conditions by telephone shortly before the Minister's announcement on radio. Audit did not see any documented evidence of this telephone conversation.

#### **5.1.9 Advertising the Request for Tender**

The Request for Tender process effectively commenced with the placement of an advertisement in the Adelaide Advertiser,<sup>20</sup> the Australian<sup>21</sup> and on the South Australian Government's tender website, TenderSA.<sup>22</sup> In addition, the Department of Transport and Urban Planning advised some 28 industry participants (identified by the Department as organisations who might be interested in tendering) of the tender process and invited those organisation to respond to the Request for Tender.

Nineteen organisations registered interest in tendering and were sent the Request for Tender documentation.

#### **5.1.10 Industry Briefing and Depot Inspections**

The Department of Transport and Urban Planning held an industry briefing on 27 August 2004 at Noarlunga Theatre, and depot and vehicle inspections were conducted on 28 August 2004 and 29 September 2004. In addition to the industry briefing and depot inspections, a data room containing information in the Department of Transport and Urban Planning's possession relating to the services, vehicles and depots was also made available from 23 August 2004 until 10 days before tenders closed. These matters are discussed further at 7.4 'Communication with Tenderers and Potential Tenderers'.

#### **5.1.11 Further Information or Clarification**

During the period from 23 August 2004 to 11 October 2004, several of the bidders (and potential bidders) sought further information or clarification from the Department of Transport and Urban Planning in respect of a wide ranger of matters. These matters are discussed further at 7.4 'Communication with Tenderers and Potential Tenderers'.

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<sup>20</sup> On 16 August 2004. The advertisement appeared in the Government Tenders Section (Evaluation Report page 8).

<sup>21</sup> On 17 August 2004.

<sup>22</sup> On 16 August 2004. The TenderSA website is maintained by the Department for Administrative and Information Services. The website address of the TenderSA website is [www.tenders.sa.gov.au](http://www.tenders.sa.gov.au).

### **5.1.12 Formulation of the Evaluation Plan**

The Request for Tender at paragraph 7.1 provided that tenders which:

- met the mandatory requirements in relation to insurance, the bank guarantee,<sup>23</sup> InSkill<sup>24</sup> and submission of a conforming tender;
- having acceptable financial and commercial assessments;
- demonstrate ability to deliver the services at an acceptable quality in respect of service delivery and design, customer service, infrastructure, safety and security and implementation and management; and
- have acceptable risk to government;<sup>25</sup>

were to be ranked in order of tendered price adjusted in accordance with clause 7.2 of the Request for Tender.<sup>26</sup>

The Evaluation Plan was approved by the Project Steering Committee before tenders closed on 25 October 2004, and the Department of Transport and Urban Planning received advice from Contract Services in the Department for Administrative and Information Services that it had no concerns with the Evaluation Plan.

In summary, the evaluation process detailed in the Evaluation Plan covered the following:

- Opening and Registration of Tenders;
- Preliminary evaluation;<sup>27</sup>
- Qualitative evaluation;<sup>28</sup>
- Price evaluation;<sup>29</sup>
- Short listing;

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<sup>23</sup> Or an acceptable alternative to a bank guarantee as security for the contractors performance obligations.

<sup>24</sup> InSkill SA is a South Australian Government program, administered by the Department of Further Education, Employment, Science and Technology, that 'provides partnership with industry in sharing the responsibility for employment creation', and is an employment and training initiative linked to government procurement. State Supply Board Policy Number 14 contains 'typical' clauses that must be inserted into tender documentation for procurement in respect of which the Policy applies. The InSkill clause appeared at paragraph 4.15 of the Request for Tender.

<sup>25</sup> Which the Request for Tender stated included but was not limited to 'legal/contractual risk and sustainability'.

<sup>26</sup> Generally speaking, clause 7.2 provided that tendered prices would be adjusted for the number of buses used in a tender above or below the number specified in the Request for Tender and also 'any adjustments necessary to fairly compare different Tenders so as to calculate the total cost to government'. The manner in which clause 7.2 of the Request for Tender set out how tendered prices were to be adjusted is discussed in more detail at 7.5 'Tender Documentation and Evaluation by Transport Including Role of Advisers'.

<sup>27</sup> This stage comprised a preliminary evaluation and review to ensure tenderers have complied with tender requirements.

<sup>28</sup> This stage comprised detailed evaluations of the qualitative characteristics of all tenders to ensure that the tenderer had capacity to provide the services and the quality of the service provision to levels which were acceptable to government.

<sup>29</sup> This stage comprised ranking of acceptable confirming tenders in order of their tender adjusted price to government. and, secondly, ranking of all acceptable tenders (confirming and alternate) in order of tender adjusted price to government.

- Negotiation;
- Approvals.

The details of these stages are discussed in further detail at 7.5 'Tender Documentation and Evaluation by Transport Including Role of Advisers'.

### **5.1.13 Tender Receipt and Opening**

The Request for Tender stated that tenders closed on 15 October 2004. In response to a request from a bidder, the closing date for tenders was extended to 25 October 2004. All organisations which had registered interest in the tender process were informed of the change in the closing date on 9 September 2004.

Tenders were received by the Probity Adviser at its offices.

The Evaluation Report notes that one tenderer contacted Ms Haselgrove after the closing time on 25 October and informed her that its tender documents did not contain a number of attachments relating to their organisational structure, customer relationship management and signage. This information was delivered to the Probity Adviser on 26 October 2004 at 8:30 am. The Probity Adviser advised the Project Steering Committee orally that no tenders were opened prior to receiving the additional information and that there was no benefit gained from the late submission of the additional information. Consequently, the additional information was considered in the evaluation of the tenders.

In respect of the opening of the tenders, the Evaluation Report notes that:

*Tenders were retained overnight at the offices of the Probity Adviser and transported by secure courier to the Office of Public Transport, Level 11, Roma Mitchell House, 136 North Terrace, Adelaide on Tuesday 26 October 2004.*

*Tenders were then opened in accordance with the Evaluation Plan with the Probity Adviser in attendance.*

Fifty-seven tenders (conforming, alternative and joint) were received from the following five tenderers:

- Australian Transit Enterprises;
- Serco;
- Torrens Transit;
- Trandev/Transfield;
- Transitplus.

### **5.1.14 Evaluation of the Tenders Received**

Upon opening of the tenders on 26 October 2004, the preliminary evaluation was conducted.

The relevant sections of the tenders were then provided to six Tender Evaluation Teams on 27 October 2004. These teams had been established to review and evaluate the following aspects of the tenders received:

- Service Design;
- Customer Service;

- Infrastructure and Security;
- Implementation and Management;
- Finance and Corporate Capacity;
- Legal/Contractual/Risk.

The Tender Evaluation Teams comprised Departmental employees selected by Ms Webster and Ms Haselgrove after an expression of interest was made throughout the Department of Transport and Urban Planning calling for persons with relevant skills and experience to be members of the teams. The Project Steering Committee endorsed the matters of the Tender Evaluation Teams when approving the Evaluation Plan.

Tender Evaluation Team members received a briefing from the Probity Adviser on protocols to maintain probity and accountability during the evaluation process, including:

- confidentiality requirements;
- security procedures;
- conflicts of interest and the need to declare and manage conflicts of interest, if they exist or arise;
- the evaluation methodology;
- the need to conduct the evaluation in a professional manner, objectively and fairly.

Relevant sections of the tenders were distributed to the Evaluation Teams on 27 October 2004.

#### **5.1.15 Requests for Clarification**

During the evaluation process, all tenderers were asked to provide answers to requests for clarification from the Department of Transport and Urban Planning in respect of a wide range of matters. Some of the requests for clarification related to all tenderers, while others related specifically to particular aspects of tenders. These matters are discussed further at 7.4 'Communication with Tenderers and Potential Tenderers'.

#### **5.1.16 Interactive Clarification Sessions**

On 29 and 30 November and 1 December 2004, interactive clarification sessions were held with all five tenderers. The sessions were attended by Ms Haselgrove, Mr Neil Whittaker,<sup>30</sup> Mr Jack Turner<sup>31</sup> and the Financial Consultant.<sup>32</sup>

The following issues were discussed with the tenderers during these sessions:

- Fuel prices – diesel and compressed natural gas;
  - Costs associated with preventative security;
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<sup>30</sup> Manager, Contract Services, Office of Public Transport.

<sup>31</sup> Manager, Public Transport and Infrastructure, Office of Public Transport.

<sup>32</sup> Because the Probity Adviser was not present at these sessions, each session was taped.

- Different provisions for long service leave and sick leave arising from the transmission of business;
- Different use of government supplied buses;
- Different requirements for indexation of wages;
- Transition plan(s);
- Capped liability (in respect of two of the bidders' tenders);
- Other issues raised by the evaluation teams;

The discussion at 7.4 'Communication with Tenderers and Potential Tenderers' considers the clarification sessions in further detail.

### **5.1.17 Shortlisting**

Four of the tenderers were found by the Tender Evaluation Teams to have:

*... acceptable financial and commercial assessments; have demonstrated they can provide services at an acceptable quality and have acceptable risk to government. Their prices are competitive.*

The Tender Evaluation Teams ranked the other tenderer as having the lowest performance in all areas being evaluated, as well as presenting an unacceptable risk to government. An Evaluation Report and Shortlisting was drafted recommending that the Project Steering Committee advise the Minister that four of the tenderers be shortlisted.

At its meeting on 11 November 2004, the Project Steering Committee endorsed a draft Evaluation Report and Shortlisting and agreed on the tenderers proposed to be shortlisted. The Minister was provided with the Evaluation Report and Shortlisting and decided not to take the recommendation on shortlisting tenderers to Cabinet.

When given an opportunity to comment on a draft of this Report, the Hon P White MP noted that her view was that this was not a necessary step, as she would be 'going back to Cabinet anyway with a recommendation on preferred tenderers and seeking permission to finalise contracts with them'. She also commented that the Cabinet submissions of 15 June and 2 August 2004 contained implementation schedules which listed only one further Cabinet submission being made (which was to consider the award of the contracts).

The documentation reviewed by Audit does not indicate when the Minister endorsed the Project Steering Committee's decision to shortlist. Accordingly, Audit could not establish whether there was a delay in notifying the tenderer who was unsuccessful in being shortlisted and whether this tenderer was put to additional cost by attending its interactive clarification session on 1 December 2004.

When given an opportunity to comment on a draft of this Report, Ms Haselgrove noted that the tenderer that was unsuccessful in being shortlisted:

*... was not notified until the process was complete. It was just not included in any further clarifications or negotiations.*

In my opinion, if the decision to shortlist was made by the Project Steering Committee on 11 November 2004, then the tenderer that was unsuccessful in being shortlisted should have been excluded from the process from that time (even if it was not notified until the tender process was complete). It did not appear clear to Audit that it was so excluded, because it attended a clarification session on 1 December 2004.

### **5.1.18 Negotiations and the Process to Further Shortlist Tenderers to Three**

At its meeting on 9 December 2004, the Project Steering Committee decided to further shortlist the tenders from four to three, and that Ms Haselgrove should proceed to finalise prices for the three service packages with the three remaining tenderers.

The Minister was provided with a Briefing Note on 14 December 2004 that provided an update on shortlisting and negotiation. The Note does not expressly mention that the further shortlisting (from four to three tenderers) had occurred.<sup>33</sup>

Further clarification meetings were held with the three remaining tenderers on 13, 15 and 17 December 2004. The Request for Clarification Session documents sent by the Department of Transport and Urban Planning to the tenderers noted that the following matters would be discussed at the sessions:

- tender pricing information;
- financial templates;
- changes to Depot Leases;
- indexation regime;
- employee entitlements;
- option to renew the new contracts for a further term of five years;
- and other proposals made by the tenderers in their tenders.

Mr O'Loughlin met with the three shortlisted tenderers at the clarification session on 17 December 2004 and discussed the abilities of tenderers to deliver an improved quality of services, in terms of clause 7.1 of the Request for Tender.

The relevant part of clause 7.1 of the Request for Tender provided as follows:

*If the Office of Public Transport has to make a decision between two or more Tenders in respect of which there is no material difference in adjusted price, the Office of Public Transport may also have regard to other relevant factors including, but not limited to:-*

- *the extent to which the Tenderer proposes or has the capacity to improve the quality of the Services and their cost effectiveness to the Office of Public Transport; and*
- *the extent to which the Tenderer enhances the performance of the Minister's statutory functions and is consistent with the policies expressed in ss.39(3) of the Act.*

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<sup>33</sup> There appeared to be some confusion about the mention of three clarification sessions in this Note. It was not clear to the Minister that the three clarification sessions were only being held with three tenderers and not the fourth. When given an opportunity to comment on a draft of this Report the Hon P White MP confirmed this by commenting that it had not been made clear to her at the time she was asked to approve finalising outcomes with shortlisted tenderers that there had been two rounds of shortlisting.

A further Briefing Note was provided to the Minister on 21 December 2004 which recommended that the Minister endorse the Department of Transport and Urban Planning finalising an outcome with the three shortlisted tenderers. This recommendation was not endorsed by the Minister. The Minister took advice on this matter from Mr O'Loughlin, who did not support the recommendation to further shortlist the tenderers from four to three.

When given an opportunity to comment on a draft of this Report, the Hon P White MP noted as follows:

*The use of the words "endorse DTUP finalising an outcome with the three shortlisted tenderers" in the recommendation of the Minute of 21 December 2004 created an impression that the Department meant to jump to finalising contracts with the tenderer chosen for each of the three contract areas (and I hadn't seen anything about which bids had been chosen). In other words, it appeared to me that the Department had got ahead of itself and had chosen three **bids** (one for each contract area) rather than just **tenderers** with whom to negotiate, and I was aware that there was a Cabinet process to be undertaken before [the] finalising of contract with preferred tenderers could take place. Hence I sent the file back for clarification but also did not approve finalisation at the time (the [Chief Executive's] advice that nothing would be finalised before my return from annual leave was also influential here and I referred the Department to his note). [emphasis in original]*

On 22 December 2004, Ms Haselgrove contacted the fourth ranked tenderer (which was proposed to be cut in the further shortlisting process) by fax and advised that she and Mr O'Loughlin were available for a meeting on 23 December 2004. The purpose of the meeting was said to be to 'finalise various matters', which were the same matters discussed with the other tenderers on 13, 15 and 17 December.

#### **5.1.19 Project Steering Committee's Recommendation to Minister and Minister's Recommendation to Cabinet**

At its meeting on 11 January 2005, the Project Steering Committee considered a draft version of the final evaluation report and agreed that it would make a recommendation to the Minister for each service package in line with the materiality test.<sup>34</sup>

The Minister was also provided with a separate Briefing Note from Mr O'Loughlin which provides 'additional information with regard to contractor recommendations from the Project Steering Committee'. Unlike the Project Steering Committee's recommendations, this Briefing Note also contained a recommendation about which service package option should be chosen.

The Minister agreed with recommendations from both the Project Steering Committee and Mr O'Loughlin, and submitted the recommendation to Cabinet.<sup>35</sup>

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<sup>34</sup> The materiality test referred to the material difference in adjusted price between the tenders. No level of materiality was set in the Request for Tender, but was set by the Project Steering Committee at 1 percent.

<sup>35</sup> This occurs in an unnumbered Briefing Note from the Department of Transport and Urban Planning to the Minister. Audit has viewed the copy of the Briefing Note signed by the Minister but notes the date the Minister signed the Briefing Note is not recorded. There are date stamps showing that the Briefing Note was received in the Minister's Office on 21 January 2005 and returned to the Department of Transport and Urban Planning on 22 February 2005.

### **5.1.20 Cabinet Approval**

Although subsection 39(1) of the *Passenger Transport Act 1994* provides the Minister with the authority to enter into contracts in respect of regular passenger services, consistent with long standing government practice regarding material contracts, the decision to award the new contracts was approved by Cabinet on 7 February 2005.<sup>36</sup>

A 'formal' Crown Law sign-off on the contract documents<sup>37</sup> was not obtained prior to Cabinet's decision.

### **Audit Comment**

In my opinion, in future tender processes, formal legal advice, in the way of a 'sign-off' on the relevant contractual documents, should be obtained from Crown Law before Cabinet, or the relevant decision maker if not Cabinet, approves the award of the contract.

### **5.1.21 Submission of Purchase Recommendation to the State Supply Board**

The Department of Transport and Urban Planning Accredited Purchasing Unit considered a draft purchase recommendation at its meeting on 25 January 2005. A purchase recommendation was submitted to the State Supply Board.<sup>38</sup>

### **5.1.22 New Contracts Signed, Award of Contracts Announced and Commence**

The new contracts, between the Minister<sup>39</sup> (on behalf of the Crown)<sup>40</sup> were executed by the Minister on 17 February 2005. The Minister announced the awarding of the new contracts on 17 February 2005. Both new contracts commenced operation on 24 April 2005.<sup>41</sup>

### **5.1.23 Reports on the Process**

The Project Steering Committee provided a Report to the State Supply Board on the outcome of the tender process on 3 March 2005.

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<sup>36</sup> Seeking of Cabinet approval before entering into the contracts is consistent with Treasurer's Instruction 8.13.3 which provides that where an enabling Act does not confer a specific authority to enter into a contract, approval of Cabinet is required before entering into a contract where the contract expenditure (inclusive of GST) is equal to or greater than \$11 million.

<sup>37</sup> Comprising the Service Contracts, the Bus Hire Agreement and Depot Leases.

<sup>38</sup> State Supply Board Policy Number 2 Contracting Approvals and Processes requires Accredited Purchasing Units to ensure that a 'sufficiently detailed purchase recommendation is submitted' to the State Supply Board which 'demonstrates that the acquisition processes and practices undertaken have been consistent and fair, competently managed and reflect high standards of professionalism, ethics and probity' before contractual arrangements are finalised (page 10).

<sup>39</sup> The Minister is a body corporate created by proclamation under the *Administrative Arrangements Act 1994*.

<sup>40</sup> Subsection 39(1) of the *Passenger Transport Act 1994*.

<sup>41</sup> It is beyond the scope of this Report to consider the transition from the old contractor to the new contractors.

The Minister tabled her Report to Parliament prepared under subsection 39(3b) of the *Passenger Transport Act 1994* on 10 March 2005 in accordance with subsection 39(3c) of the Act.

On 15 March 2005, the Minister provided the Auditor-General with copies of the contracts and a report which described the processes that applied with respect to the awarding of the contracts in accordance with her obligations under subsection 39(3e) of the *Passenger Transport Act 1994*.

## **5.2 Context Contract Areas, Interaction with Trams and Trains and Between Contract Areas, Accreditation**

### **5.2.1 Contract Areas**

The provision of bus services as part of the Metropolitan Adelaide passenger transport system is based on contracting bus operators to provide bus services within defined contract areas. The establishment of contract areas is consistent with the *Passenger Transport Act 1994* which provides:

- at section 39, for the establishment of service contracts for provision of passenger transport services;
- at section 40, for the nature of the service contract; and
- at section 41, for service contracts to specify a region or route to which the contract relates.

The configuration of the contract areas has been amended from time to time and currently reflects the following contract areas:

- Outer North;
- North South;
- Outer North East;
- East West;
- City Free;
- Outer South;
- Hills.

Of these contract areas, the Outer North, North South and Outer North East contract areas were tendered as part of the process subject to this review.

Ms Haselgrove advised that the configuration of the contract areas by the Office of Public Transport reflects consideration of factors which would attract bidders to provide bus operating services and consideration of operational efficiency. The more significant changes to the configuration of the contract areas, implemented in 1999 when bus contracts were last tendered, were a reduction in the number of contract areas and the introduction of through running in the North South and East West contract areas.

### **5.2.2 Interaction of Bus, Train and Tram Services**

The Metropolitan Adelaide Passenger Transport system is intended to be an integrated service which enables passengers to readily transfer both between bus services and between bus and either tram or train services. Effective integration is based on alignment of routes and timetables, establishment of specific infrastructure and the operation of an integrated ticketing system.

Ms Haselgrove advised that an important consideration in designing routes and timetables is avoiding competition between train and bus services and in maximising the respective advantages of each mode of transport. An example was provided of integrating bus and train services from outer metropolitan areas by avoiding establishing bus services from the outer suburbs to the CBD in preference for regular feeder bus services to train stations to support travel to the CBD by train which should be both more efficient and quicker.

Contractual arrangements incorporate provision for service improvement initiatives which identify opportunity for better integration of services. The Government has also built interchanges where bus and train services meet and where significant bus services meet.

### **5.2.3 Accreditation**

The *Passenger Transport Act 1994* provides for accreditation of operators of passenger transport services and of drivers of passenger transport vehicles. The *Passenger Transport Act 1994* also requires all operators of passenger transport services to be accredited.

The *Passenger Transport Act 1994* requires accredited operators to be of good repute, to be fit and proper, to be responsible for operation of a passenger transport service, and capable of meeting prescribed standards in operating the service.

## **5.3 Role of Minister in Approving Timetables and Fares**

The Request for Tender required bidders to provide bids for operation of the services reflected in the routes and time tables which were operating within the tendered contract zones at the time of the tender. Bidders were also invited to submit alternate bids reflecting variations from the existing routes and timetables.

The proposed contracts provided for the Minister to require implementation of variations to services, subject to compensating the contractor if the changes involve additional costs to the contractor, and for contractors to implement minor variations to services, in accordance with specified guidelines.

Provision is made for the Minister and contractors to work together to identify service improvement initiatives which will maximise patronage of and the efficient use of resources in the provision of services, both within the contractors' service areas and between service areas and with other forms of passenger transport.

## **5.4 The Fares System**

An integrated fare and ticketing system is operated by the Office of Public Transport which encompasses all Metropolitan Adelaide bus contract areas as well as Metropolitan train and tram services. Tickets are issued by the Office, are sold to passengers through licensed ticket agents and on board the buses, trains and trams with fare revenue retained by the Office. Tickets are either multi trip, allowing for ten trips using one ticket, or single trip allowing one trip only. Ticket prices are set by government.

The same fare rates and structures apply across bus contract areas and tickets allow for free transfers between connecting buses and between buses, trams and trains in a two hour period from the commencement of a trip.

Ticketing arrangements provide for collection of details of trips taken by passengers when they validate their tickets upon boarding buses, trams or trains and also when transferring between services

## **5.5 Provision of Buses and Depots to Operators**

### **5.5.1 Buses**

The arrangements for contracting of bus operations in Metropolitan Adelaide have involved the Minister for Transport providing the bus operators with most of the buses used by the contractors. Pursuant to these arrangements contractors have entered Bus Hire Agreements with the Minister which specify the buses provided to the contractor and the responsibilities of the contractor and the Minister. The agreement specifies, amongst other things, the permitted uses of the buses by the contractor, the fee payable by the contractor for hire of the buses and the contractors responsibility for maintaining the buses provided by the Minister.

The contractual arrangements have provided for the contractors to supply buses for use in delivering the contracted bus services. The Request for Tender documentation records that the previous contractor supplied ten buses for use in the contract areas.

### **5.5.2 Depots**

Arrangements for contracting bus services include provision for the Minister for Transport to lease government owned depots to contracted bus operators for use in providing the contracted bus services. The Request for Tender documentation provided bidders with flexibility in use of these depots or use of other depots. Use of the leased depots is governed by Depot Leases.

## **6. FRAMEWORK FOR ANALYSIS AND REPORT**

### **6.1 Procedural Fairness**

#### **6.1.1 Application to Government Tendering**

Public tendering of government contracts, has become commonplace in Australia. In the environment in which government and the private sector find themselves, the concept of procedural fairness, when conducting tender and other competitive bidding processes, has been brought into sharp focus as cases in Australia have demonstrated.<sup>42</sup>

Since 1967 in the United Kingdom<sup>43</sup> and since 1985 in Australia,<sup>44</sup> the expression 'natural justice' has been used interchangeably with the expression 'duty to act fairly' or, particularly in Australia, 'procedural fairness'.

In one Australian case<sup>45</sup> it has been held that, because government tendering decisions have a public law element, judicial review of government tendering decisions could also be undertaken on a common law basis. This means that the rules of natural justice or, to use the more recent terminology, 'procedural fairness', apply in situations where a public authority conducts a competitive bidding process.

Public tendering by government departments and agencies is something that necessarily and justifiably attracts or implies the notion of procedural fairness in its exercise. It is a particularly important issue for government which is publicly accountable for all its actions and decisions. Ultimately, of course, the responsible Minister of State is politically (and, ipso facto, publicly) accountable for decisions made by officers of his or her department and statutory authorities for which the Minister is responsible. Procedural regularity is also important for a government in that it must at all times adopt high standards and principles in the conduct of its commercial dealings. Government must, by its example, present itself as a model for others in the market place to emulate, ie there are 'moral exemplar' expectations and requirements placed upon a government.

It is therefore an important part of the analysis of the tender process for metropolitan bus services to consider whether procedural fairness has been observed. Before describing that analysis it is worthwhile to examine the interests that are protected by procedural fairness and the consequent obligations on government in conducting a competitive bidding process.

#### **6.1.2 Legitimate Expectations**

Since 1969 a 'legitimate expectation' has also been recognised as an interest that is protected by procedural fairness. A legitimate expectation is something short of a legal

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<sup>42</sup> *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, *William Grange Pty Ltd v Yarra City Council* (1997) SC Vic 7427/97, *MBA Land Holdings v Gungahlin Development Authority* (2000) ACTSC 89) and *Cubic Transportation Systems v New South Wales* (2002) NSWSC 656.

<sup>43</sup> *Re HK (An Infant)* (1967) 2 QB 617; (1967) 1 All ER 226.

<sup>44</sup> *Kioa v West* (1985) 159 CLR 550; sub nom *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321.

<sup>45</sup> *MBA Land Holdings v Gungahlin Development Authority* (2000) ACTSC 89.

right, namely a reasonable expectation that a legal right or liberty will be obtained, or renewed, or will not be unfairly withdrawn without a hearing.

In *Attorney-General of Hong Kong v Ng Yuen-Shiu* Lord Fraser explained 'legitimate expectations' as justifiably arising on the footing that 'when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty'.<sup>46</sup>

In *Kioa v West*,<sup>47</sup> a case involving an attempt to deport illegal immigrants, Brennan J (as he then was), in reviewing the general principles of law which applied, addressed the treatment of 'legitimate expectations' which he said was a relevant description of the almost infinite variety of interests which are protected by the principles of natural justice. In the course of delivering his judgment, in which his Honour traced the judicial evolution of the concept of legitimate expectations and implied natural justice, he observed as follows:

*There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interest — licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials — intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights.*

In that same case Mason J (as he then was) said as follows:

*The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations ...*<sup>48</sup>

*Procedural impropriety or unfairness may occur, not just by failing to observe the rules of natural justice, but also, for example, in situations where the decision-maker asserts that one set of rules, guidelines or protocols would be observed and then proceeds to disregard them and observe a different set or a variety of sets.*

### **6.1.3 Implied Obligation to Act Fairly**

In Australia, the potential for legal challenge for a breach of an implied condition to act fairly was addressed in *Hughes Aircraft Systems International v Airservices Australia*.<sup>49</sup>

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<sup>46</sup> (1983) 2 All ER at 350.

<sup>47</sup> (1985) 159 CLR 550; 62 ALR 321.

<sup>48</sup> *ibid*, (CLR) at 584; (ALR) at 346.

<sup>49</sup> 1997 146 ALR 1.

The Hughes case established for the first time in Australia, legal authority for the existence of a 'process contract', that is, a contract existing between the entity conducting the tender process and each tenderer to govern the conduct of that tender process, and that a breach of that process contract can involve damage to the tenderer for which the latter may seek an appropriate remedy at law. The plaintiff in the Hughes case succeeded in an action based upon the breach of the terms of the process contract and on a breach of section 52 of the *Trade Practices Act 1974* which prohibits misleading or deceptive conduct by corporations or government agencies that are carrying on a business.

It was held in the Hughes case that the terms of the process contract were a combination of the express terms contained in the conditions of tender and two implied terms, one of which was stated to be implied as a matter of law<sup>50</sup> to the effect that the government entity would exhibit fair dealing in the performance of the process contract. The decision has implications for the conduct of all tender processes, and in particular where the contract to be let involves the expenditure of 'publicly owned' funds.

The principles established in the Hughes case were followed in *Willow Grange Pty Ltd and Anor v Yarra City Council*,<sup>51</sup> where Byrne J found the Yarra City Council, which was conducting a tender process, was contractually bound in its performance of the tender process to act fairly to each of its tenderers. Byrne J commented that relevant factors to him forming his view that a contract was established included that the Yarra City Council had a tendering code of practice; the nature of the tender process was such that tenderers were to a very large extent entirely in the hands of the Yarra City Council given the nature of the tender process itself; and that in exercising its powers in the tender process the Yarra City Council was exercising public functions, which 'the public is entitled to expect will be exercised in a proper and honourable way'.

A further review of implied terms within process contracts occurred in *Cubic Transportation Systems v New South Wales*.<sup>52</sup> In particular, the Court observed that the broad powers reserved to the Government in the tender process required the implication of a term that the Government was obliged to act honestly, reasonably and fairly in exercising these powers.

## **6.2 Probity Framework Applicable to the Metropolitan Bus Services Request for Tender Process**

### **6.2.1 State Supply Board Guidelines**

In recognition of the need for agencies to observe the highest standards of integrity, probity and professional conduct in procurement processes the State Supply Board has issued Guidelines<sup>53</sup> which require Chief Executives to:

- ensure all aspects of agency procurement practice comply with legal requirements, are conducted in an ethical manner, with honesty and fairness, and will stand up to disclosure and public scrutiny;

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<sup>50</sup> 1997 146 ALR at 38-42.

<sup>51</sup> Supreme Court of Victoria (1/12/1997) SC Vic 7427/97.

<sup>52</sup> (2002) NSWSC 656.

<sup>53</sup> See State Supply Board Policies Reissued No 2, March 2005.

- ensure that procurement decisions are transparent and that processes and decisions are documented in accordance with probity and audit requirements;
- procure without fear or favour or prejudice and ensure that all suppliers are treated equally and that no officer accepts individually, or on behalf of the agency, gifts or favours from suppliers or potential suppliers;
- require that conflicts of interest are identified, declared and appropriately managed;
- ensure that no unauthorised person will have access to or divulge to any unauthorised person the commercial-in-confidence information on the contracts; and
- establish and maintain procedures to ensure that fair and equal consideration is given to each tender or quotation received and selection is based upon the lowest total cost compliant bid.

### **6.2.2 *Probity and Professional Conduct Policy***

The Department of Transport and Urban Planning Probity and Professional Conduct Policy<sup>54</sup> applies to all tendering processes managed by the Department of Transport and Urban Planning particularly those involving the procurement of complex or high value contracts.

The policy establishes a number of probity principles which operate to require the Department of Transport and Urban Planning to promote open and fair competition in contracting and procurement by:

- Conducting all dealings with suppliers in an honest and impartial manner;
- Ensuring open and competitive tendering through public scrutiny of the process and by providing all suppliers with equal opportunity to do business with government;
- Including evaluation criteria and methodology in requests for tender or quotation to assist suppliers to understand requirements and offer best solutions;
- Conducting pre-tender meetings where necessary to explain and consult on all aspects of the tender, including the specification, contract conditions, evaluation methodology and process;
- Ensuring a transparent decision making process and provide feedback on procurement decisions;
- Providing all suppliers with the same information;
- Ensuring adequate records of transactions/meetings be kept so as to provide an audit trail;

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<sup>54</sup> See the Department of Transport and Urban Planning Policy PR114 Probity and Professional Conduct.

- Ensure probity at all times in the procurement process; and
- Ensuring that specifications promote open and fair competition by focussing on expected outcomes, clearly defining functional and performance requirements and not being biased in favour of a particular supplier and product.

### **6.2.3 Request for Tender**

The Request for Tender for the provision of Bus services in the Outer North and/or North South and/or Outer North East Contract areas of Metropolitan Adelaide Request for Tender seeks to specifically disclaim the existence of a process contract. It provides:

*This invitation (or acceptance of it by any Tenderer) does not give rise to or amount to a contract whether or not any tender is submitted in response to it.*

As noted at 6.1.3 'Implied Obligation to Act Fairly' of this Report, there is now a significant body of case law to support the proposition that no matter how carefully drafted the Request for Tender or request for proposal might be, when a government is conducting a tender process, Courts may well find that the tender constitutes a process contract incorporating an implied obligation requiring the Government to exhibit fair dealing.

Whilst stating that the Request for Tender does not itself give rise to expectations, Clause 6.5 contains the following representation to Tenderers:

Tenderers may expect that the Office of Public Transport will:

- preserve the confidentiality of Tenderer's confidential information (subject to clause 6.8);
- afford every Tenderer the opportunity to compete fairly;
- consider a Tender which is submitted in accordance with these instructions by a Tenderer who has complied with the Office of Public Transport's expectations as to probity and other matters (see clause 6.7)

### **Audit Comment**

I am of the opinion that the tender process for the provision of Bus services in the Outer North and/or North South and/or Outer North East Contract areas of Metropolitan Adelaide was conducted within an effective probity framework as established through the State Supply Board Guidelines and Department of Transport and Urban Planning's Probity and Professional Conduct Policy.

I am also of the opinion that, notwithstanding the express disclaimer of a process contract contained in the Request for Tender, there is a significant risk that a Court might take the view that in conducting the tender process for Metropolitan Bus Services there was an implied obligation upon the State to act fairly and to accord tenderers procedural fairness.

## 6.3 Statutory Compliance of the Service Contracts

### 6.3.1 Overview

As mentioned in a previous part of this Report, the *Passenger Transport Act 1994*, in sections 40 and 41, sets out certain matters that a service contract must contain (mandatory requirements). Those sections also list matters that a service contract may contain (discretionary requirements).

This part of this Report discusses those provisions, and also whether the new contracts comply with the requirements contained in those provisions. It does not discuss the broader issue of whether the tender process complied with the relevant provisions of the *Passenger Transport Act 1994*.<sup>55</sup> The broader issue of whether the new contracts protect the interests of the State is dealt with below at 7.6 'Examination of Contract Documentation' of this Report.

### 6.3.2 Mandatory Requirements for Service Contracts

Section 40 of the *Passenger Transport Act 1994*<sup>56</sup> provides that a service contract must make provision with respect to the period of the contract, its termination, and matters

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<sup>55</sup> This is dealt with at 8. 'Consideration of Statutory Compliance' of this Report.

<sup>56</sup> Section 40 provides:

#### **40—Nature of contracts**

- (1) A service contract must make provision with respect to—
  - (a) the period for which it operates; and
  - (b) the manner in which it may be terminated; and
  - (c) standards relating to the provision of services under the contract; and
  - (d) a scale of service levels (determined according to such things as the periods of time during which services are to be operated, the extent of operation of services, and the frequency of operation of services during specified periods); and
  - (e) the fares to be charged; and
  - (f) the manner in which the holder of the service contract will be remunerated or gain revenue from the provision of services under the contract (including arrangements as to any subsidy); and
  - (g) other matters required by this Act or the regulations to be specified in a service contract.
- (2) A service contract may make provision for or with respect to—
  - (a) reviewing or altering the fares or fare system in circumstances specified in the contract; and
  - (b) monetary or other penalties for breaches of the contract and the recovery of monetary penalties; and
  - (c) bonds for the performance of the obligations, or specified obligations, under the contract; and
  - (d) the variation of the contract; and
  - (e) the renewal of the contract; and
  - (f) such other matters as the parties think fit to include in the circumstances of the case.
- (3) The contract may provide for the periodic review, in a manner and at such periods as the contract may specify, of any matter for the time being determined by or under it.
- (4) The Minister must, for the purposes of subsection (1)(c), establish various standards that will apply to all service contracts of the same kind with a view to ensuring that standards relating to the provision of services are, so far as is reasonably practicable and appropriate, maintained at the highest possible levels.
- (5) The Minister must, in relation to the fares payable by passengers on regular passenger services within Metropolitan Adelaide, ensure—
  - (a) that the standard adult fare allows for unlimited travel on regular passenger services provided within a specified zone or zones (subject to those services being available and stopping within that zone or those zones), for a specified period, or until the expiration of a specified period; and
  - (b) that concession fares do not exceed 60 per cent of the standard adult fare for the same service (if provided at the same time), subject to the qualification that this paragraph does not apply to special fares that are payable during a particular part of the day, that are set for special events or purposes, or that are excluded from the ambit of this paragraph by the regulations.
- (6) An alteration to the fares or fare system under a service contract may only be undertaken as part of an across the board alteration of the fares or fare systems under all service contracts of the same kind that relate to Metropolitan Adelaide.

relating to the provision of the services such as standards, fares, scale and remuneration. Section 41 of the *Passenger Transport Act 1994*<sup>57</sup> provides that a contract must specify a region or route of operation.

### **6.3.3 Other Provisions of the Passenger Transport Act 1994 Relating to Service Contracts**

Sections 42 to 44<sup>58</sup> of the *Passenger Transport Act 1994* also impose certain requirements in relation to the following matters:

- assignment of rights under a service contract;

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<sup>57</sup> Section 41 provides:

#### **41—Regions or routes of operation**

- (1) A service contract must specify a region or route of operation.
- (2) A service contract may—
  - (a) confer on the holder of the contract an exclusive right to operate a regular passenger service of the relevant kind within the specified region, or on, or in proximity to, the specified route (or part of that region or route); and
  - (b) provide for other matters relevant to the operation of passenger transport services (including new services) within the specified region, or on, or in proximity to, the specified route.
- (3) A right conferred on the holder of a contract—
  - (a) cannot affect or limit the ability of another person to operate a service of a kind specified by the regulations (or specified in the contract itself) during the term of the contract; and
  - (b) will be subject to such other qualifications as may be prescribed by the regulations (or specified in the contract itself) during the term of contract.

<sup>58</sup> These sections provide:

#### **42—Assignment of rights under a contract**

- (1) The holder of a service contract must not transfer, assign, subcontract or otherwise deal with a right, power or duty under the contract except with the consent of the Minister.  
*Penalty: Division 4 fine.*
- (2) The Minister must not consent to the transfer, assignment, subcontracting or other dealing unless it is satisfied—
  - (a) that adequate provision will be made for the operation of the relevant service; and
  - (b) as to any other matter the Minister considers relevant.
- (3) A person to whom a right, power or duty under a service contract is transferred, assigned or subcontracted must, according to the extent and nature of the particular dealing, perform the obligations of the contract holder under the contract (and, unless otherwise determined by the Minister, will be taken to be a party to the contract).
- (4) A purported dealing in contravention of subsection (1) is void.

#### **43—Variation, suspension or cancellation of service contracts**

- (1) A service contract may be varied, suspended or cancelled by the Minister if—
  - (a) there has been a serious or frequent failure to observe the terms and conditions of the contract; or
  - (b) the holder is convicted of an offence against this Act or the regulations.
- (2) A person who is the holder of a service contract and is aggrieved by a decision of the Minister under subsection (1) may appeal to the District Court.
- (3) Division 6 of Part 4 will apply with respect to the appeal with such modifications or variations as may be necessary or appropriate, or as may be prescribed.
- (4) A service contract is automatically cancelled if the holder of the contract ceases to be an accredited person or ceases to be an accredited person of an appropriate kind.
- (5) Nothing in this Act prevents the Minister from making such arrangements as the Minister thinks fit for the provision, by an accredited person, of temporary services (for a period not exceeding 12 months) in place of a regular passenger service for the time being discontinued by a variation, suspension or cancellation under this section.

#### **44—Fees**

- (1) In addition to any other fee payable under this Act (including any fee payable pursuant to a tender), the Minister may require the payment of—
  - (a) a fee for lodging a tender under this Part; and
  - (b) a fee for administering a service contract under this Part (which fee may vary from contract to contract, and may be payable from time to time during the term of the contract).
- (2) The Minister may determine the amount of such a fee, subject to any limits prescribed by the regulations.

- variation, suspension or cancellation of a service contract; and
- fees.

Unlike subsections 40(1) and 41(1) of the *Passenger Transport Act 1994*, sections 42 to 44 do not provide that the matters must be required to be dealt with in a service contract. In other words, they are discretionary matters.

#### **6.3.4 Compliance with the *Passenger Transport Act 1994***

Audit's review of the new contracts<sup>59</sup> found that both contain the mandatory requirements for service contracts set out in subsections 40(1) and 41(1) of the *Passenger Transport Act 1994*. Many of the other (discretionary) matters contained in sections 42 to 44 of the *Passenger Transport Act 1994* are also contained in the new contracts.

Attachments to this Report, include tables which set out the clauses of the new contracts that correspond with the mandatory (Attachment 1) and discretionary (Attachment 2) provisions of the *Passenger Transport Act 1994*. The tables also contain comments about the way in which the clauses operate.

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<sup>59</sup> Between the Minister and Torrens Transit in respect of North-South and Outer North East contract areas (the Torrens Transit Contract) and between the Minister and Australian Transit Enterprises in respect of the Outer North contract area (the Australian Transit Enterprises Contract).

## **7. CONSIDERATION OF PROBITY PRINCIPLES**

### **7.1 Role of the Probity Adviser**

#### **7.1.1 Engagement of Probity Adviser**

The Department of Transport and Urban Planning engaged the services of Contracting and Tendering Services Pty Ltd to act as the probity adviser for the tender process for the Metropolitan Bus Services Request for Tender process. Contracting and Tendering Services Pty Ltd was selected based on previous work undertaken for the Department of Transport and Urban Planning from a pre-existing panel of Transport SA probity advisers and contracted on the basis of an existing Probity Adviser Panel Contract (205C01). The Department of Transport and Urban Planning did not request proposals from any other panel members but instead relied upon past experience of dealing with Contracting and Tendering Services Pty Ltd to justify their selection.

Contracting and Tendering Services Pty Ltd has noted that the need for expediency drove the selection process. Contracting and Tendering Services Pty Ltd is of the view that a competitive process for selecting a probity adviser could not be used in the time available because details of the project became known only in early July and a competitive process would have meant arrangements could not have been settled until mid-August.

#### **Audit Comment**

In my view, six weeks would be an excessive estimate of the time need to select a firm from an existing panel through a competitive process. In my experience a far shorter turn-around time is frequently utilised for such work. I am of the opinion, given the importance and sensitivity of the Metropolitan Bus Request for Tender process and the critical role of the probity adviser in that process, that consideration should have been given to approaching all firms on the Transport SA Probity Adviser panel for a proposal to undertake the project. The fact that certain members of the Department of Transport and Urban Planning team involved in conducting the Metropolitan Bus Request for Tender process were familiar with Contracting and Tendering Services Pty Ltd is not of itself a reason for not seeking proposals from other panel members. There is no adverse inference that should be drawn that is critical of Contracting and Tendering Services Pty Ltd in this comment.

#### **7.1.2 Conflict of Interest**

On the basis of Audit's review of the documentation concerning the conduct of the Metropolitan Bus Services Request for Tender Process, there is no evidence to indicate that the Department of Transport and Urban Planning at any stage formally asked Contracting and Tendering Services Pty Ltd to provide any form of written conflict of interest declaration in respect of Contracting and Tendering Services Pty Ltd role in the process, notwithstanding the obligation, contained in the Evaluation Plan adopted for the process, on parties involved in the process to execute Conflict of Interest and Confidentiality Agreements.

Although the existing Probity Adviser Panel Contract (205C01) with Transport SA included a general obligation on probity advisers engaged under that panel contract to ensure confidentiality it did not deal with the issue of conflict of interest.

In my opinion, the Department of Transport and Urban Planning should have required Contracting and Tendering Services Pty Ltd to provide a formal written conflict declaration specific to the Metropolitan Bus Services Request for Tender process before commencing work on the project. There is no apparent justification as to why Contracting and Tendering Services Pty Ltd was treated differently in this regard from other parties who were involved in the process.

I note that Contracting and Tendering Services Pty Ltd did make an oral conflict declaration to the Project Steering Committee on 9 September 2004. In an interview conducted with the Probity Adviser on 9 June 2005, Mr Dawson of Contracting and Tendering Services Pty Ltd advised:

*We also advised the Steering Committee of a potential conflict when the names of the tenderers became known, in that we were acting for TransAdelaide as probity adviser on another matter. The Steering Committee decided that no conflict existed.*

This is supported by the Minutes of the Steering Committee meeting on 9 September 2004 which record:

*John Dawson advised that his company Contracting and Tendering Services Pty Ltd is the Probity Adviser for TransAdelaide's Rail Maintenance Tender. All agreed there was no conflict of interest.*

#### **Audit Comment**

I note the advice of the Probity Adviser that the selection of Contracting and Tendering Services Pty Ltd as Probity Adviser was made with the knowledge that Contracting and Tendering Services Pty Ltd was acting as the Probity Adviser for TransAdelaide on another matter. At that stage it was possible that TransAdelaide would be a tenderer in the bus services process. Given the need for expediency in this process, I am surprised that the Department of Transport of Urban Planning proceeded with the appointment of Contracting and Tendering Services Pty Ltd in those circumstances and ran the risk that Contracting and Tendering Services Pty Ltd might have to withdraw if TransAdelaide submitted a tender.

TransAdelaide is a significant shareholder in one of the tenderers, Transitplus. The reasons for the view reached by the Project Steering Committee are not recorded. Given the financial interest that TransAdelaide has in Transitplus, it was reasonable for the Probity Adviser to disclose the working arrangement as there existed the potential for the perception to arise that the Probity Adviser had a conflict of interest in working for both TransAdelaide and the Department of Transport and Urban Planning. There was also a real risk that the public could gain the perception that Transitplus had an unfair advantage through the potential for TransAdelaide to access information regarding the conduct of the Metropolitan Bus Services Request for Tender through the common adviser. This perception could have been addressed by measures such as ensuring that Contracting and Tendering Services Pty Ltd personnel for each role did not overlap and that adequate security measures were in place to prevent access to information. It is not sufficient simply to take action to address a perceived conflict of interest; that perception and mitigating action must also be documented, so as to leave an appropriate audit trail of the consideration of these issues.

Audit asked a number of follow-up questions of both Mr Dawson and Ms Haselgrove, in an attempt to establish how the Project Steering Committee made the decision that no conflict existed. Ms Haselgrove was asked:

*On 9 September John Dawson of CTS declared a potential conflict of interest to the PSC in that CTS was also working as a probity adviser for Tran Adelaide in relation to their rail maintenance tender. TransAdelaide is a significant shareholder in one of the tenderers in the Bus services process, namely Transitplus. The Minutes record that the PSC decided that no conflict of interest existed.*

Q1 *What were the reasons for this decision?*

Q2 *Did the PSC ask CTS any of the following questions and if so what information was provided?*

- Who were the CTS personnel working on the TransAdelaide matter?*
- Who were the TransAdelaide personnel that CTS were dealing with and to the knowledge of CTS did any of these personnel have any involvement at all in the tender by Transitplus for the Bus Services?*
- What arrangements did CTS have in place to safeguard against access to information concerning the bus services process generally and in particular by CTS personnel working on the TransAdelaide matter?*

Q3 *Was CTS at any stage asked to provide a formal written conflict of interest declaration and if so at what stage of the tender process was this request made?*

Ms Haselgrove responded that the Project Steering Committee relied on the Probity Adviser's assurance that there was no conflict, taking into account that TransAdelaide had not registered as a tenderer, TransAdelaide does not provide bus services, the Probity Adviser was not a decision maker in the process and that the Probity Adviser had a duty to both parties to keep information confidential. Further, Ms Haselgrove responded that the Project Steering Committee relied upon Mr Dawson raising with them any further probity issue that arose out of this situation.

Mr Dawson was asked:

*On 9 September you declared a potential conflict of interest to the PSC in that CTS was also working as a probity adviser for TransAdelaide in relation to their rail maintenance tender. TransAdelaide is a significant shareholder in one of the tenderers in the Bus services process, namely Transitplus. The Minutes record that the PSC decided that no conflict of interest existed.*

Q1 *Who were the CTS personnel working on the TransAdelaide matter?*

- Q2 *What arrangements did CTS have in place to safeguard against access to information concerning the bus services tender process generally and in particular by CTS personnel working on the TransAdelaide matter?*
- Q3 *Did CTS provide a formal written conflict of interest declaration and if so at what stage in the tender process was this provided?*

Mr Dawson responded that he was of the view that a conflict would arise only if TransAdelaide submitted a tender. He confirmed that the same personnel working on the bus services tender were working on the TransAdelaide matter. Having regard to all of the evidence this matter was appropriately managed by Mr Dawson.

In my opinion, the fact that TransAdelaide was not a tenderer did not fully dispose of the conflict issue. TransAdelaide was a significant shareholder in a tenderer, and could have benefited from information concerning the bus services tender process. Audit has found no evidence that information provided to the Probity Adviser in relation to the bus services Request for Tender process was shared with TransAdelaide and is not suggesting that this may have occurred. However, the public may have perceived a risk of such information-sharing and it is that perception of a conflict of interest that needed to be addressed. The Project Steering Committee was able to select probity advisers from an established panel, so it would have been relatively simple to replace the Probity Adviser at this point in the process. Having decided to continue with the Probity Adviser, the Project Steering Committee should, in my opinion have put in place appropriate mechanisms to monitor the issue rather than relying upon the Probity Adviser to raise it again.

### **7.1.3 Role of Contracting and Tendering Services Pty Ltd as Probity Adviser**

Contracting and Tendering Services Pty Ltd was not specifically requested to develop a probity plan for the Metropolitan Bus Services Request for Tender Process. The Department of Transport and Urban Planning prepared a document titled 'Probity Adviser's Role' which was then provided to Contracting and Tendering Services Pty Ltd for input and comment.

In his interview on 9 June 2005, Mr Dawson commented:

*The intention when we started was that we would develop a probity plan but it became clear the document being developed in fact, was rather a definition of the probity adviser's role and that was the document that got signed and really, that's all it is, that is a definition of probity adviser's role although it incorporates within [it] the principles which would be applied.'*

and,

*I think the final version though was prepared by Heather<sup>60</sup> or her staff.*

This document became the Probity Plan for the Metropolitan Bus Services Request for Tender process. Contracting and Tendering Services Pty Ltd has confirmed in interview that they provided input to, and agreed this document with the Department of Transport and Urban Planning.

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<sup>60</sup> This is a reference to Ms Webster from the Office of Public Transport, who was the Chair of the Steering Committee.

The role of the Probity Adviser was to review the process for selecting a bus contractor prior to and during each stage of the process to ensure that the Department of Transport and Urban Planning did not discriminate against any respondent and otherwise treated all respondents fairly. In addition, the Probity Adviser was required to ensure that the process followed government procedures and policies and that the tender evaluation was consistent with the Request for Tender document, the Administration Plan and the Evaluation Plan.

The role of Contracting and Tendering Services Pty Ltd encompassed the following procurement processes and stages:

- Request for Tender Preparation;
- Request for Tender Invitation;
- Receipt of Tenders and Attendance at opening of Tenders;
- Evaluation of Tenders/Negotiation;
- Recommendation;
- Contract Award.

The duties of the Probity Adviser were stated in the document titled 'Probity Adviser's Role' as including:

- Acceptance of the Probity Plan (as noted previously, a separate Probity Plan as such was not developed);
- Briefing of the evaluation teams on probity issues and procedures;
- Advising the Project Steering Committee and Director, Operations with respect to the relevant procedures and processes chosen to implement the Project, including the Evaluation Plan;
- Provision of Tender Box receipt and storage at the offices of Contracting and Tendering Services Pty Ltd, from tender release until tender close, including appropriate document receipt and handling procedures within the office of Contracting and Tendering Services Pty Ltd;
- Attendance at the tender opening and providing advice relating to acceptance/rejection of any late tenders;
- Monitoring the activities of those involved in the selection process throughout the evaluation period;
- Being available to the Project Steering Committee and Director Operations for ad hoc consultation;
- Advising the Project Steering Committee on any matter which the adviser perceives may affect the probity of the project;
- Keeping comprehensive records of all meetings and telephone attendances (including a record of any advice given or opinion stated);
- Providing interim reports at milestones to the Project Steering Committee Chair so as to keep the Chief Executive, Department of Transport of Urban Planning, fully apprised as to the status of the probity of the competitive tendering process;

- Provision of a Final Report to the Project Steering Committee Chair, comprising full details of the probity of the competitive tendering process, to be submitted by no later than one month after the last contract was signed, which was expected to be in January 2005;
- Attendance at meetings as requested by the Project Steering Committee Chair;
- Other ad hoc duties at the request of the Project Steering Committee Chair.

The Probity Adviser's role specifically excluded:

- Participation in any substantive evaluation or decision making process;
- Consideration of actions and behaviours of Office of Public Transport's personnel and external stakeholders who are not involved with the procurement processes and stages identified above;
- Certifying the ethical conduct of individuals (Public sector integrity was assumed);
- Approval processes, ie submissions to Cabinet;
- Content of documents that were in existence at the commencement of the contract with the Probity Adviser, where the Probity Adviser had no involvement in the development of these documents or plans; and
- The provision or seeking of legal advice where required as a result of the provision of probity advice.

#### **7.1.4 Issues Identified by Audit's Review of the Conduct of the Probity Adviser Role**

Although I am of the opinion that the engagement of, and the role performed, by Contracting and Tendering Services Pty Ltd as probity adviser contributed significantly to ensuring that the Metropolitan Bus Services Request for Tender process was conducted within an effective probity framework, I have identified a number of issues as a result of Audit's review of the conduct of the Metropolitan Bus Services Request for Tender process. The Probity Adviser has responded that it was necessary to conduct the process as an accelerated procurement process to allow a sufficient transition time should a change in contractor occur. In order to meet the project critical path elements of normal practice had to be sacrificed. As a result elements of procurement best practice outlined in the following paragraphs were omitted.

*Responsibility for Ensuring Compliance with Government Procedures and Policies.*

Although the Probity Adviser was required to ensure that the process followed the Department of Transport and Urban Planning and government procedures and policies, at interview the Probity Adviser advised that he did not see this as a probity issue and that this was not an obligation which Contracting and Tendering Services Pty Ltd had ever undertaken. The Probity Adviser further noted that it was assumed that this would be the responsibility of the Chair of the Project Steering Committee.

At interview, Mr Dawson provided the following answer:

- Q. Did anyone specifically have responsibility for ensuring for instance that the process was conducted in compliance with the Passenger Transport Act requirements, or the State Supply Board requirements?*

- A. *Well, I assume that would be the responsibility of the Executive in charge, Heather Webster. I certainly don't see it as a probity issue and to my knowledge we have never undertaken that obligation, which is more legal than probity.*

Accordingly, the Probity Adviser did not provide any form of sign off or opinion confirming compliance with the Department of Transport and Urban Planning and government procedures and policies.

Although it is understood that the Project Steering Committee had overall responsibility for ensuring compliance, having specifically included this obligation as part of the envisaged role of the Probity Adviser I am of the opinion that the Project Steering Committee should have ensured that this occurred. By leaving this responsibility solely with the members of the Project Steering Committee the processes adopted by the Project Steering Committee were not subjected to any form of external or independent objective review or scrutiny.

Whilst I have no reason to conclude that the processes adopted by the Project Steering Committee did not comply with applicable the Department of Transport and Urban Planning and government policies and procedures, I have not been able to identify any specific plan or methodology which was developed by the Project Steering Committee for ensuring this compliance. Accordingly, no clear audit trail of the steps actually taken to ensure compliance is available for Audit consideration and the Project Steering Committee did not itself have available to it any form of checklist detailing all applicable requirements in order to ensure that all were being fully addressed. The approach adopted was ad hoc and could, if adopted in the future, potentially result in certain requirements being missed or not properly addressed.

I am, accordingly, of the opinion, that in future the methodology for ensuring compliance with all applicable Department of Transport and Urban Planning and government policies and procedures, including legislative requirements should be formally documented at the outset of the project with the implementation of, and compliance with, this methodology then reviewed by the Project Steering Committee on an ongoing basis throughout the Project. I am also of the opinion that in future the process would benefit from ensuring that the methodology adopted, and steps then taken, by the Project Steering Committee are subjected to independent and objective review, with the Project Steering Committee then obtaining the benefit of an independent sign off on compliance as initially envisaged by the intended role of the Probity Adviser.

#### *Probity Plan – Identification of Potential Probity Issues and Applicable Control Measures*

The document titled 'Probity Adviser's Role' describes the role of Contracting and Tendering Services Pty Ltd in the project but does not seek to identify any potential probity issues or any specific controls to address these issues.

The identification of potential probity issues, and specific controls to deal with these issues, is of critical importance in monitoring the probity of the conduct of a tender process. It cannot be assumed that all parties who are involved in the conduct of the process will be familiar with the potential probity issues which might arise. In my opinion, one of the key areas in which a probity adviser can add significant value is in the identification of control procedures to deal with potential probity issues, and the allocation of responsibility for implementing those controls to specific people charged with the responsibility of conducting the process. In this way a probity adviser can

establish an effective probity framework, against which the conduct of the process can be monitored, thus providing a high level of assurance to government concerning the probity of the process.

#### *Development of a Risk Management Plan*

A common control document to identify and manage risks in the conduct of a major tender process is a risk management plan. In response to the question of whether or not a risk management plan was adopted for the process, Mr Dawson of Contracting and Tendering Services Pty Ltd advised that preparation of a risk management plan is a standard practice for major procurement activities today.

A risk management plan would normally seek to identify all areas of risk associated with the conduct of the tender process (including those of a probity nature) and outline strategies to mitigate these risks. Progress against the plan would then be reviewed on an ongoing basis throughout the conduct of the tender process and the plan updated as appropriate. Whilst this plan would normally be developed by those charged with responsibility for the conduct of the tender process (in this case the Department of Transport and Urban Planning) it would normally be a control measure which is identified as being required by the Probity Adviser.

My review of the Metropolitan Bus Request for Tender process indicated that no formal risk management plan was adopted for that process by the Department of Transport and Urban Planning (or the Project Steering Committee).

Mr Dawson of Contracting and Tendering Services Pty Ltd at interview commented:

*We reviewed all of the documentation that were included in the RFT. I don't recall a risk management plan, no.*

I am of the opinion, that the development and ongoing monitoring of such a plan is good practice and should be adopted in future for major tender processes.

#### *Probity Protocols and Procedures*

With the exception of a pro forma Confidentiality and Conflict of Interest Undertaking, the document titled 'Probity Adviser's Role' does not itself refer to or contain any other protocols or procedural documents such as document security control and handling procedures; tender opening procedures, or protocols governing interaction with tenderers such as the process for dealing with tender clarifications or meetings with tenderers.

A set of procedures for the handling of documents, including document security arrangements and a Procedure for Receiving and Storing Tenders, developed by Contracting and Tendering Services Pty Ltd are, however, included in the Evaluation Plan for the Metropolitan Bus Services Request for Tender process which was adopted by the Project Steering Committee on 25 October 2004.

The Probity Adviser has advised that specific protocols for meetings with tenderers were not developed but that a probity briefing was provided prior to any such meetings taking place. In response to the question of whether or not any such protocols were issued, Mr Dawson of Contracting and Tendering Services Pty Ltd advised:

*No, we have a meeting. I instructed what was expected but not in writing.*

Audit was also advised that detailed internal procedures for the handling of tenderer clarifications were developed by the Project Steering Committee and reviewed by the Probity Adviser.

The tasks to be performed by the Probity Adviser included:

*Providing Interim Reports at milestones to the Project Steering Committee Chair so as to keep the Chief Executive, DTUP, fully apprised of the status of the probity of the competitive tendering process;*

and

*Provision of a Full Report to the Project Steering Committee Chair, comprising full details of the probity of the competitive tendering process.*

however, the 'Probity Adviser's Role' document does not establish or set out the milestones at which such Interim Reports were required to be provided nor does the document contain an outline of the form of Final Report or sign off opinion required from the Probity Adviser.

In my opinion, in future tender processes the probity adviser should be required to develop a specific Probity Plan for the project upon which the Department of Transport and Urban Planning can then provide comment. Included in that plan should be:

- an identification of potential probity issues which might arise at the different stages of the project;
- advice on specific control measures which are recommended by the probity adviser to manage these issues;
- copies of any protocols or procedures recommended by the probity adviser to deal with such matters as document handling, control and security, confidentiality, conflict of interest, and interaction with tenderers;
- a clear identification of the stages or milestones in the project at which reports from the Probity Adviser will be required; and
- an initial draft of the form of Final Report or sign off opinion which will be required from the probity adviser.

#### *Record Keeping*

One of the probity adviser's objectives was to ensure that adequate records of transactions and meetings were kept so as to provide an audit trail. In addition, the scope of duties of the probity adviser included:

*Keeping comprehensive records of all meetings and telephone attendances (including a record of any advice given or opinion stated).*

The probity adviser was also obliged to retain the following records:

- Copies of reports as outlined in the probity adviser methodology in section 5 of the document titled 'Probity Adviser's Role'; and
- Copies of any written advice provided.

Audit's review of the records indicates that both the Department of Transport and Urban Planning and the Probity Adviser did maintain fairly comprehensive records of the process, however, it is apparent that written records have not been retained of all probity advice which was provided by the Probity Adviser over the course of the Project.

In particular, I note that the Probity Adviser provided a briefing to all members of the tender evaluation team on probity issues prior to the commencement of the tender evaluation process. While Audit saw an agenda for this briefing, no minutes or notes of the briefing were identified by Audit's review. It is understood that the Probity Adviser provided probity briefings to the Department of Transport and Urban Planning personnel prior to meetings being held with various tenderers at different stages of the project. Audit did not find any written notes of these briefings. Further, the Probity Adviser has advised that oral advice was sought on the approach which should be adopted to dealing with certain tender clarifications. Audit's review did not identify any specific records of the advice which was provided on these clarifications. The Probity Adviser has advised that it considers probity advice is provided in response to a formal request for advice. That advice was provided in writing. Oral advice was procurement or general management advice and not probity advice.

In my opinion, although the extent of record keeping for the Metropolitan Bus Tender Request for Tender process is reasonably comprehensive, there is scope for improvement by ensuring that in future written records are made of all probity advice (including probity briefings) provided during the course of the project. In my opinion, advice provided by the Probity Adviser in relation to the approach to be adopted to tender clarifications is probity advice. The records could then be retained as part of the overall project audit trail. Despite the Probity Adviser's view that an audit trail is not created for probity advice work as it would be for a probity audit, I am of the opinion that an audit trail of the probity advice provided is important because it supports the reasoning of the procurement decision taken and assures those involved in the process that the process was conducted with the requisite integrity.

There was, having regard to the short timeframe for undertaking this procurement process, the sacrifice of some elements of normal practices. There is no intention in this Report to criticise the Probity Advisers for these circumstances.

## **7.2 Procurement Strategy**

### **7.2.1 Overview**

This part of this Report considers the procurement strategy developed and implemented in respect of the bus services in the three contract areas.<sup>61</sup>

In this regard, subsection 39(2) of the *Passenger Transport Act 1994* provides as follows:

*The Minister may invite contracts by tender or in such other manner as the Minister thinks fit.*

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<sup>61</sup> North South, Outer North and Outer North East.

### 7.2.2 Procurement Options

The Acquisition Plan developed by the Department of Transport and Urban Planning reveals that the following options were considered in respect of the provision of bus services in the contract areas:

- insourcing
- sole sourcing
- selective tender
- open tender.

It is worthwhile examining these options, and the Department of Transport and Urban Planning's conclusions in respect of each, in more detail.

#### *Insourcing*

This option involved 'bringing the provision of bus services in Outer North, North South and Outer North East back into government'. This option was the subject of an Internal Departmental Memorandum from Ms Haselgrove to Mr O'Loughlin and a Briefing Note to the Minister. Both the Memorandum and Briefing Note are dated after the Cabinet Decision approving the open tender process.<sup>62</sup>

The Acquisition Plan provides the following by way of discussion of this option:

*TransAdelaide failed to win any contract area when it bid in 1999 – this was solely due to the price it bid. Government policy is to insource when this is [a] financially viable option. Based on prices bid by TransAdelaide in 1999, cost increase may be significant. Whether this price differential would still apply is difficult to assess.*

#### *Sole Sourcing with the then Existing Provider*

As already noted above, on 11 May 2004, the then current provider of bus services in respect of the three contract areas, Serco Adelaide Buses, made a submission to the Department of Transport and Urban Planning proposing to operate the bus services in the contract areas on new terms and conditions.<sup>63</sup> This submission was rejected by the Department of Transport and Urban Planning in a letter to Serco dated 23 July 2004.

The Acquisition Plan discussed the sole sourcing option as follows:

*Sole negotiation with Serco to achieve a price acceptable to both Serco and government. There will still be a price increase, negotiations are likely to be protracted and it will be difficult to determine if the best value for money has been achieved for government.*

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<sup>62</sup> On 15 June 2004.

<sup>63</sup> This was after Serco had informed the Minister for Transport by letter on 18 March 2004 that it was not willing to continue to operate the bus services for a further three years on the terms contained in the then existing Contract.

### *Selective Tender*

Another option was a selective tender involving the other existing operators of bus services in Adelaide (including Serco). The Acquisition Plan noted that those providers had met the 'Renewal Benchmark Test' and were selected from a competitive tender in 1999'. A negative of such a selective tender noted in the Acquisition Plan was that other interested bidders may criticise the Government as a result of them not having the opportunity to participate in the process.<sup>64</sup> It is not clear whether the Minister was provided with written advice specifically discussing this option.

### *Open Tender*

The other option considered by the Department of Transport and Urban Planning, and ultimately utilised, was conducting an open tender. The Acquisition Plan noted the advantages of such a process as follows:

*... all parties can participate, timeframe is controlled by government and the tender will be evaluated on value for money. Whilst there may be a price increase, government can be certain that the best value for money has been achieved.*

On 15 June 2004, Cabinet approved the open tender of bus services in the contract areas.

### **7.2.3 Consultation with Stakeholders**

The Acquisition Plan notes that there was consultation in respect of the procurement strategy with the:

- Minister;
- Chief Executive of the Department of Transport and Urban Planning;
- Director, Contract Services, Department for Administration and Information Services; and
- Department of Treasury and Finance.

### **Audit Comment**

Subsection 39(2) of the *Passenger Transport Act 1994* makes it clear that the Minister is not constrained in the manner by which he or she determines to award service contracts for the provision of regular passenger services under Part 5 of the *Passenger Transport Act 1994*. Having said that, it is not clear to Audit, on the basis of the documents reviewed, that the Minister was provided with written advice on all of the options considered by the Department of Transport and Urban Planning before she made her decision to recommend to Cabinet that an open tender process be utilised.

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<sup>64</sup> State Supply Board Policy Number 1 which provides as follows:

*Competition facilitates the achievement of value for money and provides fair access by suppliers to government procurement opportunities.*

*Despite this requirement for open and fair competition, selective tendering is not precluded as a procurement strategy in certain circumstances: see State Supply Board Policy Number 5, page 4.*

Additionally, it is also not clear to Audit that the cost to government of undertaking each of the various options was included in the consideration of how each option addressed overall value for money. These costs can be significant and, in my opinion, they should be taken into account when considering a procurement strategy.

Notwithstanding these comments on the process for analysis of the options, I agree that the decision to utilise an open tender process is justifiable.

### **7.3 The Position of the Incumbent Service Provider**

Following the enactment of the *Passenger Transport Act 1994*, competitive tendering for the provision of public passenger transport services was introduced in South Australia.<sup>65</sup>

In 1999, the Government completed its third round of tendering to provide bus services in Metropolitan Adelaide. A contract for the Outer North, North South and Outer North East areas was entered into with Serco. This contract was for five years with the option to renew for a further five years subject to satisfactory performance and agreement on price.

In April 2004, Serco advised that it did not want to renew its contract under the same terms and conditions. Following consideration of a revised proposal from Serco, the Government decided to competitively tender the bus services operated by Serco.

As the incumbent service provider, the potential existed for Serco to have an information/knowledge advantage over other tenderers. To assist tenderers and to ensure a level playing field, the Department of Transport and Urban Planning provided an industry briefing for all potential tenderers at the commencement of the tender process. In addition, tenderers were afforded the opportunity to inspect a range of Government supplied vehicles and depots. A formal data room, containing relevant background information was also established. Tenderers were also afforded the opportunity of attending clarification sessions with Office of Public Transport staff and could make formal written requests for clarification or information.

The Probity Adviser attended the industry briefing and formal clarification sessions with Tenderers. In addition, the Probity Adviser's advice was also sought in respect of certain formal written requests or clarifications from Tenderers. The Probity Adviser did not attend vehicle or depot inspections but did provide a probity briefing to the Department of Transport and Urban Planning staff who were involved in conducting these visits.

#### **Audit Comment**

I am of the opinion, that to the extent possible, the Department of Transport and Urban Planning endeavoured to ensure that all tenderers were provided with equal access to all information necessary to enable them to submit their tenders for the relevant services.

Serco, as the incumbent service provider, may have had some advantage over other tenderers in terms of its level of knowledge and information of the various bus routes, however, in my opinion, this is an inherent advantage which any incumbent service provider would be reasonably expected to have from the experience gained in operating

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<sup>65</sup> See section 39(2a) of the *Passenger Transport Act 1994*.

the various bus routes over the previous 5 year contract period. As such it is not an unfair advantage, provided no undue restriction is placed on the ability of other tenderers to learn about the tendered services.

In my opinion, the Department of Transport and Urban Planning took all reasonable steps in the circumstances to ensure that a level playing field, in respect of information, was established for all tenderers.

#### **7.4 Communication with Tenderers and Potential Tenderers**

At the commencement of the tender process, all tenderers were provided with an opportunity to attend an Industry Briefing. The aim of this briefing was to provide tenderers with background information, to explain the tender process, and to give tenderers the opportunity to seek clarification and/or ask questions concerning the process.

The Probity Adviser attended the Industry briefing. In addition, the Office of Public Transport provided an opportunity for tenderers to inspect a range of government supplied vehicles and inspect each of the Government supplied depots. As noted above, the Probity Adviser did not personally attend these site visits but did provide a briefing to Office of Public Transport staff conducting these visits before they commenced.

Early in the tender process clarification sessions were held between each potential tenderer and selected Office of Public Transport staff. This enabled tenderers to seek further background information and ask additional questions concerning the conduct of the tender process. The Probity Adviser attended these clarification sessions and has confirmed that potential tenderers were provided with an equal opportunity to ask questions.

A process was also established to enable potential tenderers to submit written requests for clarification, or requests for information, to the nominated contact person in the Request for Tender (Ms Haselgrove). The Office of Public Transport reserved the right to provide to all potential tenderers the details of any response provided to a query raised by a tenderer.

Tenderers were advised that the only person authorised to communicate with any tenderer, in respect of the Request for Tender was the Director Operations, Office of Public Transport, Ms Haselgrove. Tenderers were also advised, that they were not entitled to rely on communications with any other person. A condition of ongoing participation in the tender process was a requirement that tenderers only make inquiries and otherwise liaise with Ms Haselgrove.

#### **Audit Comment**

Although internal procedures were established for the handling and distribution of requests for clarification and/or information from tenderers and for the provision of responses to these requests (all requests and responses were channelled through Ms Haselgrove for consideration and review), Audit has found no evidence in the documentation reviewed that these internal procedures were formally documented.

I am satisfied that the Probity Adviser did review the procedure but did not create a formal record of that review. I am of the opinion, that the internal procedures for the

handling of all tenderer requests for clarification should have been documented and subject to formal review by the Probity Adviser.

Audit's review discovered that the Department of Transport and Urban Planning did not maintain any formal tenderer contact log for the tender process. The use of such a log, together with a requirement for all those involved in the conduct of the tender process on behalf of the State to enter into the log any contact they may have with a tenderer, would, in my opinion, have established an effective and auditable record of contact with tenderers during the course of the tender process. Compliance with the condition of participation could have been effectively and efficiently monitored through review of this log, satisfying both the requirements of probity and tenderer compliance.

Although there is no evidence to suggest that tenderers breached the condition of participation, Audit's review of the documentation has found no written evidence to demonstrate that compliance with this condition of participation was formally reviewed as part of the overall evaluation of tenders. Neither the Tender Evaluation Plan, nor the Tender Evaluation report, for the Metropolitan Bus tender process detail how compliance with this condition of participation was assessed.

I am of the opinion that, having stipulated that it was a condition of participation in the tender process, that tenderers should only communicate with the nominated contact person under the Request for Tender, the Department of Transport and Urban Planning should have established a clear and auditable process to demonstrate how compliance with this condition of participation was evaluated.

I am also of the opinion, that in future processes, consideration should be given to the establishment of a formal tenderer contact log so as to enable a clear written record of any and all contact with tenderers to be maintained.

## **7.5 Tender Documentation and Evaluation by Transport including Role of Advisers**

### **7.5.1 Overview**

This part of this Report considers the Request for Tender documentation and the evaluation of tenders received.

### **7.5.2 Types of Tenders that could be Submitted (Service Packages)**

Three basic types of tender (referred to in the Evaluation Plan and Report and other documentation as service packages) could be submitted:

- **Conforming Tenders** — or provision of services in a single Contract Area and which meet the specified set of requirements;
- **Alternative Tenders** — or provision of services in a single Contract Area,<sup>66</sup> and which do not meet all of the specified requirements for a Conforming Tender; or
- **Tenders for Two or More Contract Areas** — for provision of services in more than one Contract Area.

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<sup>66</sup> That is, any of the North South, Outer North or Outer North East contract areas.

It was mandatory for tenderers to submit a Conforming Tender. The Request for Tender provided that Alternative Tenders for a Contract Area and Tenders for Two or More Contract Areas would not be considered unless a Conforming Tender had been submitted for each of the Contract Areas.

In the case of certain contract areas, the provision of special events and services were also required to be taken into account.<sup>67</sup>

### **7.5.3 Essential Requirements for all Tenders**

Paragraph 8.2 of the Request for Tender provided that all tenders submitted<sup>68</sup> must comply with the following:

- All prices must be quoted as at 30 September 2004, exclusive of GST, and in Australian currency.
- Any measures or prices must be clearly stated.
- Any alterations must be initialled by an appropriately authorised person.
- In addition, all tenders submitted were required to:
  - Satisfy the requirements for the operation of services specified in the Service Contract – refer Part B.
  - Use the ticketing system detailed on Request for Tender Disc 1.
  - Use the radio system detailed on Request for Tender Disc 1.

### **7.5.4 Requirements for Conforming Tenders**

As mentioned above, a Conforming Tender was described as being a tender for a single contract area. A Conforming Tender was required to meet all the requirements set out in paragraph 8.2 of the Request for Tender<sup>69</sup> and the following additional requirements:

- The services offered in the tender were in accordance with the specifications as detailed in Part E.
- The term of the service contract was for five years.<sup>70</sup>
- Acceptance of the contractual terms set out in Part B (Service Contract), Part C (Bus Hire Agreement) and Part D (Depot Lease).

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<sup>67</sup> Examples of special events listed in the Request for Tender included New Year's Eve, Skyshow and the Adelaide Royal Show. Special services listed in the Request for Tender included the Footy Express and Wandering Star Services.

<sup>68</sup> That is, Conforming Tenders, Alternative Tenders and Tenders for Two or More Contract Areas.

<sup>69</sup> For a discussion of the requirement of paragraph 8.2 of the Request for Tender, see the preceding part of this Report.

<sup>70</sup> Alternative Tenders could be submitted for longer terms.

- Acceptance of the requirement for Insurance Cover of the quantum and form specified in paragraph 4.17 of the Request for Tender.<sup>71</sup>
- Accept the requirement for a Performance Guarantee of the quantum and in the form specified in Part A (Section 4.18).

### **7.5.5 Requirements for Alternative Tenders**

As mentioned above, an Alternative Tender was described as being a tender for a single contract area which meets all the requirements set out in paragraph 8.2 of the Request for Tender, but did not meet all the requirements for Conforming Tenders set out in paragraph 8.3 of the Request for Tender.

In Alternative Tenders, tenderers were invited to propose:

- a package of services which 'overall provides the same or a similar number of revenue kilometres and which does not require an increase in the number of government supplied vehicles'; or
- the services (as described in Part E) for a different term, for example, 5 years with the right to renew for a further 5 years or a 10 year term; or
- a combination of the first two options above, that is, changed services and a different term.

The Department of Transport and Urban Planning expected the package of services proposed in an Alternative Tender to also:

*... address the Government's goal of increasing patronage (State Strategic Plan) and also meet Government's social inclusion objectives.*

The Request for Tender provided that Alternative Tenders should clearly set out:

- *in what respects the Tender does not meet the requirements specified for Conforming Tenders;*
- *the particular benefits and/or cost or savings to Office of Public Transport of the alternative.*

Paragraph 8.4 of the Request for Tender also stated that:

*The Office of Public Transport reserves the right not to evaluate an Alternative Tender.*

### **7.5.6 Requirements for Tenders for Two or More Contracts Areas**

In situations where a tenderer submitted a Conforming Tender for two or more of the contract areas, the tenderer could also submit a tender for those contract areas combined.

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<sup>71</sup> Paragraph 4.18 of the Request for Tender set out the Department of Transport and Urban Planning's expectations in relation to the insurance coverage required to be held by contractors.

Paragraph 8.6 of the Request for Tender elaborated on what the Department of Transport and Urban Planning considered to be a tender for two or more contract areas as follows:

*A Tender for Two or More Contract Areas is a Tender for provision of Services by a Tenderer in more than one Contract Area which is offered to the Office of Public Transport on condition that the pricing and other aspects of the offer for each of the nominated Contract areas be accepted jointly.*

It was expected that a tender for two or more contract areas would be submitted only where the tender provided cost savings and/or benefits to government.

#### **7.5.7 Tender Response Format**

Part F of the Request for Tender contained a Tender Response template. Tenderers were encouraged to use the template to assist in their submission preparation, to ensure that they provided all relevant information in their submissions. The Request for Tender provided that the evaluation of tenders had been designed around the Tender Response Template.

Tenderers were required to submit one Tender Response Template for each individual Conforming, Alternative or Tender for Two or More Contract Areas.

#### **7.5.8 Compliance with Service Contract, Bus Hire Agreement and Depot Lease**

Tenderers were required to indicate compliance with each clause of the Service Contract, Bus Hire Agreement and Depot Lease, as part of their tender. Where tenderers did not wish, or were unable, to comply, they were asked to submit an alternative clause for evaluation.

#### **7.5.9 Summary of Other Information provided in the Tender Documentation**

The Request for Tender also contained more general information for potential tenderers on a wide range of matters. I briefly consider that general information in this part of this Report.

##### *Contract Areas*

Paragraph 4.1 and Part E of the Request for Tender provided information on the contract areas being tendered.<sup>72</sup>

##### *Contract Term*

The Request for Tender notes that the Government proposed to award the services contracts for a term of 5 years, but also stated that the Government would consider entering into longer term contracts if the Government believed it would benefit from doing so.

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<sup>72</sup> In particular, Part E set out details of specific routes including school bus and industrial routes which were included in the Services.

### *Fare and Ticketing Arrangements*

With the exception of Wandering Star and Footy Express services, Adelaide Metropolitan buses utilise an integrated ticketing system. The Request for Tender provided details of that system at paragraph 4.2 and in the document titled 'Ticket and Revenue Procedure Manual' which was included on Request for Tender Disc 1.

Paragraph 4.14 of the Request for Tender provided that:

*The Contractor must:*

- *only use the Ticketing System, tickets and fares approved by the Office of Public Transport;*
- *pay sundry costs associated with the operation of the Ticketing System;*
- *not use the Ticketing System for the purpose of providing services other than those contracted with the Office of Public Transport;*
- *not give access to the Ticketing System to any third party other than the Office of Public Transport Authorised Officers for any purpose whatsoever;*
- *not attempt to access or modify raw patronage or revenue data stored in the Ticketing System; and*
- *operate the Ticketing System in accordance with the Office of Public Transport's Manual of Ticketing and Revenue Procedures.*

### *Subcontractors*

Tenderers intending to subcontract any part of the services were required to provide details of the subcontractor intended to be used and that part of the services that were intended to be subcontracted.

### *Service Improvements and Service Quality*

As mentioned above, tenderers were able to propose changes to the services set out in Part E as part of an Alternative Tender. In this regard, the Department of Transport and Urban Planning's Service Planning Guidelines were provided on CD-ROM Disk 1.

Tenderers' attention was also drawn to the requirement in the Service Contract that the Contractor implement a quality system equivalent to ISO 9001:2000 or similar within 12 months of the commencement date of the contract. The Contractor was required to ensure that the quality system is appropriately documented. The documentation was to be made available to the Office of Public Transport as required from time to time.

The general service specifications were detailed in Schedule 3 of the Service Contract, which was provided at Part B of the Request for Tender.

Details were also provided of inspections required under the *Road Traffic Act 1961*, as well as the inspections required by the Service Contract to be undertaken.

### *Accessible Passenger Transport*

Paragraph 20(1)(i) of the *Passenger Transport Act 1994* provides that the Minister is required 'to facilitate the use of passenger transport services by people with disabilities'. The Request for Tender set out the requirements of the Service Contract in this regard.

### *Marketing and Customer Information*

Tenderers were required to be familiar with the Department of Transport and Urban Planning's Customer Service and Style Guide.

The Request for Tender reiterated the requirement in the Service Contract that the Contractor was required to provide to the Office of Public Transport:

- One copy of the Working Timetable – at least 10 business days (for minor change), or 1 month (for major change) prior to the date of any service change.
- Amendments to Working Timetables.
- Special work arrangements.
- Passenger briefings.
- Other information sheets.
- Public timetables.

### *Safety and Security*

The Request for Tender outlined the requirements of the Service Contract in relation to safety and security, including the requirement for the contractor to submit a Security Plan.

Tenderers were required to submit an example of a Security Plan as part of their tender.

### *Vehicles*

Paragraph 4.11 of the Request for Tender provided that the successful tenderer would be required to use the Government-owned fleet under lease from the Minister. The detail of the fleet was provided at Table 4.4.<sup>73</sup>

Where a tenderer considered that the number of government-supplied vehicles allocated to a contract area was in excess of the tenderer's requirements, the tenderer was expected to indicate the number and type of buses<sup>74</sup> they expected to use in the Tender Response Template.

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<sup>73</sup> The Request for Tender also set out when replacement vehicles were anticipated to be made available.

<sup>74</sup> The Request for Tender provided that the contractor would be expected to revise its prices downward if the Government replaced diesel vehicles with vehicles using Compressed Natural Gas. Audit was unable to locate a clause in the Service Contract or the Bus Hire Agreement that gave effect to this intention.

### *Depots*

Three depots owned by the Government, and each allocated to a particular contract area the subject of the tender, were available for lease. It was not mandatory for a tenderer to use those depots, and the Request for Tender provided that tenderers were able to make arrangements for other depots or a different allocation of depots.

Potential tenderers were also 'encouraged to explore opportunities' in respect of the location and utilisation of depots. The Request for Tender stated that a map showing government-owned vacant land in the Adelaide metropolitan area would be included in the Data Room and made available at the Industry Briefing.

### *Staff Training – InSkill SA*

The Request for Tender contained information about staff training and InSkill SA, which corresponds with the template clauses for requests for tender contained in State Supply Board Policy Number 14.

### *Insurance*

The Request for Tender set out the risk and insurance requirements of the Service Contract.

### *Performance Guarantee*

The Request for Tender also dealt with the requirement for the successful tenderer/s to give a performance guarantee as part of its obligations under the Service Contract. Paragraph 4.19 of the Request for Tender stated as follows:

*The quantum of the Performance Guarantee required is 10% of the annual payment to which the Contractor would be entitled under the Contract for each Contract Area. Contractors are not required to provide additional financial guarantees in respect to the Government-supplied bus fleet and depots.*

*The Office of Public Transport is prepared to consider a lower quantum where alternative security of at least an equivalent amount and similar priority is available on terms satisfactory to the Office of Public Transport or alternative approaches to the provision of a performance guarantee which a Tenderer may wish to propose.*

### *Environmental Care*

Tenderers were 'encouraged to develop products and processes with due regard for environmental considerations'.

### *Further Information for Tenderers*

The Request for Tender also contained details of the industry briefing, depot and vehicle inspections data room, clarification sessions and clarifications or requests for information.

### **7.5.10 Expectations of the Parties**

#### *Tenderers' Expectations*

Paragraph 6.5 of the Request for Tender set out what a tenderer could expect from the Office of Public Transport in relation to its tender. The paragraph states that the Office of Public Transport will:

- preserve the confidentiality of tenderers' confidential information;
- afford every tenderer the opportunity to compete fairly;
- consider a tender which is submitted in accordance with the Request for Tender by a tenderer who has complied with the Office of Public Transport's expectations as to probity and other matters.

The Request for Tender goes on to provide as follows:

*The Request for Tender does not in itself give rise to expectations. The Office of Public Transport may change these Instructions if notice is given to all parties provided with the Request for Tender documents.*

#### *Office of Public Transport's Expectations*

Paragraph 6.6 of the Request for Tender provides that the Office of Public Transport expects that each tenderer:

- has the necessary skills, knowledge and experience to comply with the Service Specifications;
- has fully informed itself of all facts, and conditions of all things relating to the Request for Tender;
- has taken into account all costs, expenses, freight and insurance charges, imposts, taxes, rates and government charges that may be applicable;
- has submitted firm prices, unless the Tender clearly provides that the prices are variable.

### **7.5.11 Reservation of State's Rights**

Paragraph 6.11 of the Request for Tender provided as follows:

*The Office of Public Transport expects to finish evaluation of the Tenders during November 2004. It may then, in respect of each Contract Area, either:*

- (a) *accept a Tender and conclude a Contract to give effect to its terms and conditions; or*
- (b) *begin negotiations with one or more of the Tenderers with a view to obtaining a Tender which Government is prepared to accept.*

*The Office of Public Transport reserves the right to permit amendments to Tenders during the course of the negotiations described in paragraph (b) without having to allow the same opportunity to other Tenderers who have*

*already been excluded or who have indicated that their position is not negotiable in respect of the issue to which the amendment relates. Furthermore, Tenderers with whom those negotiations are conducted may be invited to make best and final offers if the Office of Public Transport considers it appropriate in the circumstances.*

*The Office of Public Transport also reserves the right to:*

- extend the closing time;*
- amend the contract requirements or the Service specifications at any time prior to the closing time provided that the amendment is notified to prospective Tenderers;*
- seek clarification of any aspect of a Tender after the Closing Time;*
- negotiate with any one or more Tenderers before the Closing Time;*
- negotiate with one or more of the Tenderers after the evaluation of Tenders;*
- discontinue negotiations at any time with any Tenderer;*
- enter into negotiations with any other person or entity;*
- allow a Tenderer to change its Tender if the same opportunity is given the other Tenderers (except as provided for under (b) above);*
- abandon this Invitation whether before or after the receipt of Tenders;*
- seek the advice of external consultants to assist the Office of Public Transport in the evaluation or review of Tenders;*
- invite any person to submit a Tender or to commence negotiations with another party with respect to the Services;*
- make enquires of any person, company or organisation to ascertain information about the Tender, the Tenderer or any matter related to the Tender;*
- consider an incomplete Tender;*
- consider a Tender submitted otherwise than in accordance with these Instructions.*

#### **7.5.12 Acceptance of Tenders**

Paragraph 6.12 of the Request for Tender provides as follows:

*The Office of Public Transport is not obliged to accept any Tender.*

*If the Office of Public Transport does accept a Tender it is not obliged to accept the lowest priced Tender.*

*The Office of Public Transport may consider or accept (at the Office of Public Transport's sole discretion) any Tender including without limitation a*

*late Tender or the Tender of a Tenderer who has failed to submit a Tender in accordance with these Instructions.*

*No acceptance of a Tender nor any invitation to negotiate or to make an offer will constitute a Contract or to create any legitimate expectation on the part of the Tenderer unless:*

- *it is unconditional, in writing and signed by the Minister for Transport; or*
- *a formal written Contract is executed by both parties.*

*Notification to the Tenderer that it is the preferred Tenderer will not constitute an acceptance of the Tender but an invitation to negotiate.*

*The Office of Public Transport will notify all Tenderers of the result of this Invitation or if the Invitation is withdrawn, without being obliged to give any reasons for the result or the withdrawal. [emphasis added]*

Reference has already been made in this Report to the rise of 'legitimate expectations' as an interest which is protected by procedural fairness.<sup>75</sup>

### **Audit Comment**

I am satisfied that the statements made in paragraphs 6.11 and 6.12 of the Request for Tender purport to exclude the operation of a 'process contract'<sup>76</sup> in the pre-award phase of the tender process. However, as I have already commented, notwithstanding the express disclaimer of a process contract contained in those paragraphs of the Request for Tender, there is a significant risk that a Court might take the view that in conducting the tender process there was an implied obligation upon the State to act fairly and to accord tenderers procedural fairness.

#### **7.5.13 Conditions of Participation**

Paragraph 6.7 of the Request for Tender specified certain 'conditions of participation' for the tender process as follows:

*Tenderers are required to:*

- *maintain the confidentiality of the documents and information provided to them, including answers to queries, whether oral or written;*
- *make inquiries and otherwise liaise on matters relating to the Tender only with the person nominated as the Contact Person;*
- *declare any actual or potential conflict of interest;*
- *not collude with any other respondent or potential respondent (obviously, this does not mean that members of a consortium or a prospect consortium may not engage in genuine consultation with each other);*

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<sup>75</sup> Report, paragraph 6.1.2.

<sup>76</sup> See *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, esp at 118.

- *comply with all laws in force in South Australia applicable to the Tender process;*
- *not attempt to influence the outcome of the Tender by offering any employment, payment or any other incentive to or in any way seek to improperly influence any person employed or engaged by the Office of Public Transport; and*
- *not make any news releases or responses to media enquires and questions pertaining to the Tender or the subsequent selection process without appropriate Office of Public Transport approval.*

These requirements were expressed to be an 'ongoing condition' of the tenderer's participation in the process and:

*Each Tenderer must honour the obligation until the Office of Public Transport executes a formal release in a Tenderer's favour. If any Tenderer does not honour this obligation, the Office of Public Transport may at its discretion:*

- *not consider a Tender submitted by that Tenderer;*
- *terminate negotiations with that Tenderer; or*
- *terminate any Contract that may have been executed by the Office of Public Transport and that Tenderer without incurring any liability to that Tenderer.*

### **Audit Comment**

In my opinion, and as the following discussion of the evaluation process shows, there appears to have been no evaluation of, or process by which to evaluate, tenderers' compliance with those conditions of participation.

In this regard, I note that one of the tenderers was a joint venture company.<sup>77</sup> One of the shareholders of this tenderer also bid in its own right.<sup>78</sup>

While there was no evidence that there was collusion between tenderers, there were no probity arrangements in place to examine whether or not collusion, or the other 'conditions of participation' set out in paragraph 6.7 of the Request for Tender, were complied with throughout the process by tenderers.

#### **7.5.14 Evaluation Process**

The methodology for the evaluation of the tenders submitted in response to the Request for Tender was set out in the Evaluation Plan.

The Evaluation Plan detailed the evaluation process as follows:

- Opening and Registration of Tenders;

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<sup>77</sup> Transitplus.

<sup>78</sup> Australian Transit Enterprises.

- Preliminary evaluation;
- Qualitative evaluation;
- Price evaluation;
- Risk assessment;
- Short listing;
- Negotiation;
- Approval.

The closing date for tenders was 25 October 2004. The tenders were lodged at the office of the Probity Adviser in accordance with the Request for Tender.

The tenders were received and recorded by the Probity Adviser in accordance with the Evaluation Plan. The Evaluation Report notes as follows:

*One tenderer, Transdev/Transfield contacted the Director Operations, after closing time, to advise that its tender documents did not include a number of attachments related to their organisation structure, customer relationship management and signage. This information (letter, 3 organisational charts and CD) was submitted at the offices of the Probity Adviser on 26 October 2004 at 8:30 am.*

The Project Steering Committee was advised that:

*Transdev/Transfield advised on the omission from their original tenders, and no Tenders were opened prior to receiving the late information.*

*There was no benefit gained by Transdev/Transfield from their late submission of information, nor had any disadvantage been caused to the other Tenderers. Consequently the late information was provided to the relevant Tender Evaluation Team for evaluation.*

Tenders were retained overnight at the offices of the Probity Adviser and transported by secure courier to the Office of Public Transport on Tuesday 26 October 2004.

The Evaluation Plan stated that:

*Tenders will be opened by a member of the Office of Public Transport's Tender Opening Committee in the presence of Director Operations and the Probity Adviser.*

The Evaluation Report noted that opening and registration of the tenders received was carried out in accordance with the Evaluation Plan.

#### *Preliminary Evaluation*

The Evaluation Report states that:

*The preliminary evaluation and compliance review was undertaken before any detailed evaluation was commenced. The review comprised three parts:*

- *Has the tenderer provided sufficient detail to enable the tender to be evaluated (ie using the templates provided)?*

- *Has the tenderer met the essential requirements?*
- *Has the tenderer submitted a conforming tender?*

The preliminary evaluation was carried out by Ms Haselgrove and Mr Priadko on 26 October 2004. This was done in accordance with section 7 of the Evaluation Plan. All tenders submitted met the criteria and proceeded to the next stage of evaluation.

#### *Qualitative Evaluation*

The qualitative evaluation of tenders was undertaken by six Tender Evaluation Teams in the following areas:

- Financial and Corporate Capacity (excluding price);<sup>79</sup>
- Legal/Contractual/Risk;
- Service Delivery and Design;
- Customer Service;
- Infrastructure and Security;
- Implementation and Management.

Each Tender Evaluation Team assessed these factors:

- Acceptable financial and commercial assessments;
- Demonstrated ability to deliver the services at an acceptable quality;
  - Service Delivery and Design,
  - Customer Service,
  - Infrastructure, Safety and Security,
  - Implementation and Management;
- Acceptable risk to government (including but not limited to legal/contractual risk and sustainability).

In assessing these factors, the Tender Evaluation Teams used a proforma assessment template. A summary of each of the reports of the Tender Evaluation Teams in respect of the qualitative assessment appears at Appendix 9 of the Evaluation Report.

#### *Price Evaluation*

Paragraph 7.1 of the Request for Tender set out the framework for evaluation of the tenders received as follows:

##### *Tenders which:*

- meet the mandatory requirements in relation to:
  - Insurance
  - Bank guarantee or acceptable alternative
  - InSkill
  - Submission of a Conforming Tender

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<sup>79</sup> The Financial Tender Evaluation Team was chaired by Mark Priadko of ABFA Pty Ltd, the financial consultant.

**and**

- have acceptable financial and commercial assessments;

**and**

- demonstrate ability to deliver the services at an acceptable quality:
  - Service Delivery and Design
  - Customer Service
  - Infrastructure, Safety and Security
  - Implementation and Management

**and**

- have acceptable risk to government (including but not limited to legal/contractual risk and sustainability).

*will be ranked in order of tendered price adjusted ...*

The Evaluation Report notes that the Financial and Corporate Capability Tender Evaluation Team prepared the three reports for the Project Steering Committee's consideration, namely the:

- Initial Report (CTC 4 - Financial Evaluation);<sup>80</sup>
- CTC 4 - Financial Evaluation - Second Report;<sup>81</sup> and
- CTC 4 - Financial Evaluation - Third Report.

These reports ranked tenders according to price in respect of each of the three service options that tenderers were able to bid on.<sup>82</sup>

#### *Risk Assessment*

The Legal/Contractual/Risk Tender Evaluation Team assessed the tenders for risk to government by analysing the tenders' responses to the Service Contract, Bus Hire Agreement and Depot Leases, including any special conditions sought by tenderers.

#### *Short Listing*

After completion of the qualitative evaluation and preparation of the Financial Evaluation - Second Report of the Financial and Corporate Capability Tender Evaluation Team, a document titled 'Evaluation Report and Shortlisting' was prepared for the Project Steering Committee recommending that the Project Steering Committee recommend to the Minister shortlisting four of the five tenderers.

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<sup>80</sup> Which was attached as Appendix 2 to the Evaluation Report and Shortlisting, appearing at Appendix 8 of the Evaluation Report.

<sup>81</sup> Prepared after the first rounds of clarification sessions held with tenderers and used by the Project Steering Committee in the shortlisting process.

<sup>82</sup> That is, Existing Services, Alternative Service Package A (net reduction in service kilometres) and Alternative Service Package B (same kilometres as existing services but offering other service improvements).

As mentioned earlier in this Report, at its meeting on 11 November 2004, the Project Steering Committee endorsed the draft 'Evaluation Report and Shortlisting' that was presented to it and agreed on the recommendation to the Minister that four of the tenderers be shortlisted. The Minister was provided with the Evaluation Report and Shortlisting and decided not to take the recommendation on shortlisting tenderers to Cabinet.<sup>83</sup>

Given the decision to recommend shortlisting to the Minister was made by the Project Steering Committee on 11 November 2004, there may have been a delay in excluding the tenderer who was unsuccessful in being shortlisted from further participation in the process with the result that that tenderer was put to further expense by attending a clarification session on 1 December 2004.

#### *Process to Further Shortlist to Three Tenderers*

As mentioned earlier in this Report, at its meeting on 9 December 2004, the Project Steering Committee decided to further shortlist the tenders from four to three, and that Ms Haselgrove should proceed to finalise prices for the three service packages with the three remaining tenderers.

The Minister was provided with a Briefing Note on 14 December 2004 that provided an update on shortlisting and negotiation. The Note does not expressly mention that the further shortlisting (from four to three tenderers) had occurred.<sup>84</sup>

A further Briefing Note was provided to the Minister on 21 December 2004 which recommended that the Minister endorse the Department of Transport and Urban Planning finalising an outcome with the three shortlisted tenderers. This recommendation was not endorsed by the Minister. The Minister took advice on this matter from Mr O'Loughlin, who did not support the recommendation to further shortlist the tenderers from four to three.

On 22 December 2004, Ms Haselgrove contacted the fourth ranked tenderer (which was proposed to be cut in the further shortlisting process) by fax and advised that she and Mr O'Loughlin were available for a meeting on 23 December 2004. The purpose of the meeting was said to be to 'finalise various matters', which were same matters discussed with the other tenderers on 13, 15 and 17 December 2004.

#### **Audit Comment**

The further shortlisting process was not dealt with in the Evaluation Plan or in the Request for Tender.

#### *Negotiation*

The issue of negotiation with tenderers is dealt with at 7.10 'Negotiation with Bidders' of this Report.

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<sup>83</sup> The only document that mentions this decision is Minutes of the Project Steering Committee meeting held on 2 December 2004.

<sup>84</sup> There appeared to be some confusion about the mention of three clarification sessions in this Note. It was not clear to the Minister that the three clarification sessions were only being held with three tenderers and not the fourth.

## Referee Checks

Paragraph 7.3 of the Request for Tender provided as follows:

*Office of Public Transport may seek referee reports or undertake site visits to verify, as much as possible, that information provided in Tenders is reliable.*

The Department of Transport and Urban Planning requested referee checks on the four shortlisted tenderers. Where the tenderer was providing bus services in another jurisdiction a referee report was sought from the other jurisdiction.<sup>85</sup>

Additionally, as all four tenderers provided services to the South Australian Government, referee report were also obtained from the Office of Public Transport.

## Further Matters Considered in Respect of the Evaluation of Tenders

Paragraph 7.1 of the Request for Tender provided as follows:

*If the Office of Public Transport has to make a decision between two or more Tenders in respect of which there is no material difference in adjusted price, the Office of Public Transport may also have regard to other relevant factors including, but not limited to:-*

- *the extent to which the Tenderer proposes or has the capacity to improve the quality of the Services and their cost effectiveness to the Office of Public Transport; and*
- *the extent to which the Tenderer enhances the performance of the Minister's statutory functions and is consistent with the policies expressed in ss.39(3) of the Act.*

The Evaluation Report noted that:

*For each Service Package, ie Existing Services, Package A and Package B, there are several options for which there is no material difference.*

The Evaluation Report goes on to state that, accordingly, consideration was given to the quality of tenders including information provided by referees, the risk to government, and the extent to which a tenderer proposed improvements to, or had the capacity to improve, the quality of the services.

## Audit Comment

It appears from the Evaluation Report that during this consideration regard was not had to the extent to which the tenders were consistent with the policies expressed in subsection 39(3) of the *Passenger Transport Act 1994*.

In my opinion, regard should have been had to the extent to which the tenders were consistent with the policies expressed in subsection 39(3) of the *Passenger Transport Act 1994*, as this would have assisted the Minister discharge her functions under that subsection.

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<sup>85</sup> This occurred in respect of Torrens Transit and Australian Transit Enterprises, which provided bus services to the Western Australian Government.

## *Approval*

The Project Steering Committee in its Evaluation Report set out recommendations to the Minister in respect of each of the three service packages.<sup>86</sup> The Evaluation Report did not contain a recommendation in respect of which service package should be adopted.

Mr O'Loughlin also provided the Minister with a Briefing Note separate from the Evaluation Report which contained separate recommendations in respect of the awarding of the tender as well as a recommendation on the service package which should be adopted.

### **Audit Comment**

The role of Mr O'Loughlin, as Chief Executive of the Department of Transport and Urban Planning, in the evaluation of tenders was not set out in the Acquisition Plan, the Request for Tender or the Evaluation Plan.

### *Audit Conclusion*

I am of the opinion that, notwithstanding the express disclaimer of a process contract contained in the Request for Tender, there is a significant risk that a Court might take the view that, in conducting the tender process for Metropolitan Bus Services, there was an implied obligation upon the State to act fairly and to accord tenderers procedural fairness.

As mentioned above, I am of the opinion that the Evaluation Plan, and the evaluation process, did not consider the issue of tenderers' compliance with the conditions of participation set out in paragraph 6.7 of the Request for Tender.

In my opinion, persons responsible for future tender processes, which specify similar 'conditions of participation' in Request for Tender documentation, should ensure that there is a mechanism by which tenderers' compliance with these conditions are monitored throughout the process.

On the whole, the evaluation process conducted by the Project Steering Committee and Tender Evaluation Teams was consistent with the Acquisition Plan, the Request for Tender and the Evaluation Plan. However, the role of the Chief Executive of the Department of Transport and Urban Planning in the evaluation of tenders was not documented in any of these documents.

In my opinion, acquisition and evaluation plans that are developed and adopted for the conduct of future tender processes, should fully describe the role and reporting responsibilities of all departmental officers (including Departmental chief executives) and other external advisers who are involved in the conduct of the tender process.

## **7.6 Examination of Contract Documentation**

### **7.6.1 Overview**

This part of this Report reviews the contract documentation prepared and executed for the new contracts for the provision of regular passenger services under Part 5 of the *Passenger Transport Act 1994*.

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<sup>86</sup> That is, Existing Services, Package A (reduction in service kilometres) and Package B (revised services with no reduction in service kilometres). See Evaluation Report, section 1, page 5.

The new contracts were:

- between the Minister and Torrens Transit Pty Ltd in respect of North-South and Outer North East contract areas (the Torrens Transit Contract); and
- between the Minister and Australian Transit Enterprises Pty Ltd in respect of the Outer North contract area (the Australian Transit Enterprises Contract).

The contract documentation comprised the following documents:

- Services Contract;
- Bus Hire Agreement;
- Depot Lease.

Service contracts for the provision of regular passenger services under Part 5 of the *Passenger Transport Act 1994* are required to deal with certain matters set out in the Act.<sup>87</sup> Compliance with those requirements in respect of the new service contracts was considered above at 6.2 'Probity Framework Applicable to the Metropolitan Bus Services Request for Tender Process' of the Report. This part of this Report reviews the services contracts more broadly to ascertain whether the documentation protects the interests of the State and achieves the objectives of the *Passenger Transport Act 1994*.<sup>88</sup> It is beyond the scope of this Report to consider the terms of the Bus Hire Agreements and Depot Leases.

As both contracts are generally in the same terms, Audit has considered them together where appropriate.

### **7.6.2 The Parties to the Contracts**

The Torrens Transit Contract was entered into between Torrens Transit Pty Ltd (as the Contractor) and the Minister for Transport<sup>89</sup> (the Minister).

The Australian Transit Enterprises Contract was entered into between Australian Transit Enterprises Pty Ltd (as the Contractor) and the Minister for Transport (the Minister).

In each Contract the Contractor and the Minister are together referred to throughout the Contract as the 'Operating Parties'.

### **7.6.3 Relationship Between the Parties**

Clause 5.1 of the Contract provides that the relationship of the Minister and the Contractor is that of principal and contractor. The Contractor is prohibited by clause 5.3 from holding itself out as agent of the Minister unless either it has express written consent to do so or the Contract expressly authorises it to do so.

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<sup>87</sup> Subsections 40(1) and 41(1).

<sup>88</sup> Section 3.

<sup>89</sup> The Minister for Transport is a body corporate created by proclamation under the *Administrative Arrangements Act 1994*.

Clause 5.2 contains the following broader statement about the relationship between the parties.

*... the parties have a common interest in increasing the demand for the Services and meeting that demand in efficient, cost effective and innovative ways, and they agree that the achievement of their common interest will be facilitated if their relationship is one of mutual trust and confidence. Therefore in dealings between them concerning both the performance of their respective obligations and the exercise of their respective rights under this Agreement, each of them will act with **perfect fairness and utmost good faith**, as if they were partners. [my emphasis]*

A requirement elsewhere in the Contract for the parties to negotiate or otherwise deal with each other in good faith is included for emphasis only and does not limit the parties' obligation under clause 5.2 in dealing with each other under provisions of the Contracts in respect of which there is no specific requirement to act in good faith.

### **Audit Comment**

The law concerning utmost good faith is found in the common law and numerous statutory provisions.<sup>90</sup> The most common manifestation of the duty of contracting parties to act in the utmost good faith to each other is in contracts of insurance. This is a requirement under both common law and statute.<sup>91</sup> The duty of utmost good faith also applies in relation to contracts between persons in a fiduciary relationship such as partnerships, principal and agent, solicitor and client, and trustee and beneficiary.<sup>92</sup> At common law, a breach of the requirement to act with the utmost good faith to the other contracting party enables the innocent party to avoid the contract from its inception.<sup>93</sup>

It is unusual to find such an obligation in contracts for services, such as the contracts presently under consideration.

### **7.6.4 Contract Term**

Both Contracts begin on 24 April 2005 and end, subject to the terms of the Contracts, on 24 April 2010.

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<sup>90</sup> Most notably, sections 13 and 14 of the *Insurance Contracts Act 1984* (Commonwealth). Fiduciary obligations are also expressed as duties of utmost good faith: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 407 and *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 12 per Mason, Brennan and Deane JJ, at 16 per Dawson J. The basis of the principle is that one of the parties is in a position exclusively to know facts which the other will regard as material and it is generally accepted that the principle is based upon Lord Mansfield's decision in *Carter v Boehm* (1766) 3 Burr 1905 [97 ER 1162]. For more information on the duty between contracting party to perform a contract in good faith see HK Lucke, 'Good faith and contractual performance' in PD Finn (ed), *Essays on Contract* (Sydney: LBC, 1987), 155.

<sup>91</sup> See eg *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* (1991) 2 AC 249 and *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 1 AC 501 and sections 13 and 14 of the *Insurance Contracts Act 1984* (Commonwealth) and 23 of the *Marine Insurance Act 1909* (Commonwealth).

<sup>92</sup> See eg *Floydd v Cheney* (1970) Chapter 602; *Boardman v Phipps* (1967) 2 AC 46; *Metlej v Kavanagh* (1981) 2 NSWLR 339; and *Cameron v Murdoch* (1986) 63 ALR 575 at 587 and *Stewart v Layton (t/as BM Salmon Layton & Co)* (1992) 111 ALR 687.

<sup>93</sup> See eg *Guardian Assurance Co Ltd v Condogianis* (1919) 26 CLR 231; *Saunders v Queensland Insurance Co Ltd* (1931) 45 CLR 557 and *Australian Motorists and General Insurance Co Pty Ltd v Andrews* (1974) 48 ALJR 195.

### **7.6.5 Definition of Services**

The term 'Services' is a central concept in the Contracts. It is defined in clause 1.1 to mean the Standard Services,<sup>94</sup> the Additional Services<sup>95</sup> and the Special Event Services.<sup>96</sup>

Clause 9.1 provides that the Contractor must provide the Services in accordance with the Contract and, without limiting that obligation:

- in a proper, competent and professional manner;
- in accordance with the best practices current in the passenger transport industry worldwide;
- with due care, skill and diligence;
- in a timely and expeditious way;
- in a way that is designed to prevent injury to or death of persons and damage to property;
- strictly in accordance with the Specifications, the Plans and all laws and any relevant standards applicable to the Services;<sup>97</sup>
- any policies, protocols and directions that relate to the operation of Metroticket Services by Vehicles and are issued by the Minister from time to time; and
- the Customer Services and Style Guide;
- using Vehicles that comply with the standards described in the Code of Practice and the Utility Standards and with the other requirements of this Agreement;
- so as to avoid any unnecessary disruption of or interference to the business or other activities of the Minister, Other Contractors or other road users; and
- where relevant, in coordination with any other associated services or activities performed or undertaken by or on behalf or at the behest of the Minister.

The Operating Parties agree in clause 11.4 to:

*... work together to develop and implement a program that is designed to identify changes to the Services (especially to Routes and Timetables)*

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<sup>94</sup> Defined in clause 1.1 to mean the Metroticket Services described in the Specifications.

<sup>95</sup> Defined in clause 1.1 to mean to mean a Passenger Transport Service which the Operating Parties agree that the Contractor will provide to the Minister on terms regulated by this Agreement but which is neither included in the Standard Services nor a Special Event Service.

<sup>96</sup> Defined in clause 8.3 as the provision of Passenger Transport Services to and from Special Events that meet passenger demand, that meet reasonable community expectations and are an efficient use of all relevant resources. Clause 8.1 defines Special Events.

<sup>97</sup> Clause 9.3 also requires the Contractor to comply with the *Passenger Transport Act 1994* and any other legislation which imposes an obligation on the Contractor in relation to or as provider of the Services.

*which will maximise patronage of and the efficient use of resources in the provision of Passenger Transport Services.*

This is referred to as the 'Service Improvement Strategy'.

#### **7.6.6 Inability to Provide the Services**

If the Contractor becomes aware of any possibility that it will be unable to provide the Services at any time during the Term the Contractor must immediately notify the Minister and:

- take all steps reasonably to notify prospective passengers of any change or disruption to the time at which or the Routes on which scheduled Services will run; and
- provide the Minister with sufficient information to enable the Minister, if he or she wishes, also to notify prospective passengers of any such change or disruption.

#### **7.6.7 Contract Areas**

The Contracts set out details of the relevant Contract Areas<sup>98</sup> in Schedules 2 and 4. The Torrens Transit Contract contains one Schedule 2 (Contract Area) and two Schedule 4's (Area Specifications), one in respect of the North-South Contract Area and the other in respect of the Outer North East Contract Area.

#### **Audit Comment**

In my opinion, it would have been better practice for the two Schedule 4's in the Torrens Transit Contract to be combined into the one Schedule, that clearly set out the area specifications of each of the North-South Contract Area and the Outer North East Contract Area.

When given the opportunity to comment on a draft of this Report, Ms Haselgrove stated that the two Schedule 4's were deliberately kept separate to enable the Minister to terminate only one Contract Area if it became necessary to do so, or to make changes to the services in one of the Contract Areas.

#### **7.6.8 Exclusivity to Provide Regular Passenger Services within the Contract Areas**

Clause 7.3 provides that, except as provided elsewhere in the Contract, the Minister may not authorise any person, other than the Contractor, to provide any of the Services contracted to the Contractor under this Agreement in the Contract Area without the consent of the Contractor, which consent must not be unreasonably withheld.<sup>99</sup>

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<sup>98</sup> This is, the North South, Outer North and Outer North East areas. The expression 'Contract Area' is not used in the *Passenger Transport Act 1994* which refers to a 'region or route of operation': section 41.

<sup>99</sup> Paragraph 41(2)(a) of the *Passenger Transport Act 1994* provides that a service contract may confer on the holder of the contract an exclusive right to operate a regular passenger transport service of the relevant kind within the specified region, or on, or in, proximity to, the specified route (or part of that region or route).

### **7.6.9 Payments and Financial Arrangements**

Clause 12 sets out the payment and financial arrangements that apply in respect of the provision of the Services by the Contractor. Clause 12.4 enables a fee variation (increase or decrease) in the event of the change in a Relevant Law.<sup>100</sup>

### **7.6.10 Fares and Ticketing**

The Ticketing System used currently in the Adelaide Metropolitan bus system is the Crouzet Ticketing System. Under the Contracts, the Minister grants the Contractor the right to use the Ticketing System during the Term for the purpose of providing the Services. All fares collected and tickets handled by the Contractor belong to the Minister, and the Contractor is required to:

- account to the Minister for the Fares collected and, in addition, allow the Minister, as required by Schedule 5, any shortfall between the Fares collected and the Tickets issued;
- in collecting the Fares, handling Tickets and dealing with the Fares collected, act with the utmost good faith;
- devise and implement procedures to minimise Fare evasion;
- in all other respects, use its best endeavours to ensure that passengers pay correct Fares; and
- in collecting Fares and handling Tickets, comply strictly with the fare schedules gazetted by the Government from time to time, and the Specifications and Ticket and Revenue Procedures Manual.<sup>101</sup>

### **7.6.11 Infrastructure - Depots, Bus Stops and Bus Shelters**

Clause 20 deals with various items of infrastructure in respect of the provision of the Services under the Contract, including:

- **depots** — the Contractor must not use any depot which is not the subject of a Depot Lease without the Minister's prior written consent;
- **bus stops** — the Contractor must maintain bus stops in accordance with the Specifications;
- **bus shelters** — the Contractor must not erect, alter or place any material or information (other than Timetables) in bus shelters without the Minister's prior written approval.

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<sup>100</sup> A 'Relevant Law' is a law that is made after the Commencement Date of the Contract by enactment (or by Regulation under an enactment) of the Parliament of the State of South Australia and is not a law relating to taxation.

<sup>101</sup> Subregulation 4(1) of the Passenger Transport (Regular Passenger Services; Fares and Charges) Regulations 1994 provides that the Minister may determine the fares, charges and other arrangements for remuneration (including the mode of computing fares, charges or other rates of remuneration) to be paid by a person for a service provided by a person who conducts a regular passenger service and provide for the collection or payment of such fares, charges or other remuneration. Subregulation 4(3) provides that the Minister must ensure that notice of a determination under subregulation (1) is published in the Gazette.

### **7.6.12 Employees and Transmission of Business**

#### *Employees Generally*

The Contractor is responsible under clause 15.1 for ensuring that each person operating a vehicle under the Contract:

- is accredited under the *Passenger Transport Act 1994*;
- has a good knowledge of the Fares, Routes and Timetables and a good working knowledge of the Ticketing System;
- is courteous and helpful to passengers and other road users;
- does not discriminate against any passengers; and
- wears a uniform that conforms with the requirements of the Customer Service and Style Guide.

Clause 15.2 imposes various obligations on the Contractor for occupational health and safety.

#### *Transmission of Business*

Legal advice was sought in relation to the transmission of business issue at various stages during the tender process.

The Contractor is required by clause 12.5(a) to recognise the prior service (if any) of each of its employees with the former contractor<sup>102</sup> as service with the Contractor for the purposes of determining the employee's entitlements to long service leave, sick leave and redundancy payments. No compensation is payable by the Minister to the Contractor by virtue of the Contractor having to comply with clause 12.5(a) or because the prior service of the Contractor's employees is required by any law or industrial award or agreement to be treated as service with the Contractor for the purpose of calculating any other employee entitlement.

Clause 12.5(c) provides as follows:

*If directed by the Minister by notice given not earlier than 20 Business Days before or later than 20 Business Days after the End Date, the Contractor must pay to the Minister, or as the Minister directs, a reasonable allowance (in an amount to be determined by agreement between the Minister and the Contractor or in the absence of agreement, under clause 31) for the potential liability of the Contractor's successors, as providers of the Standard Services or any of them to the Minister, for the long service leave entitlements of those employees of the Contractor who transfer to its immediate successor, based on the length of each such employee's service with the Contractor (including service with the Immediate Predecessor that the Contractor is required to recognize under clause 12.5(a)).*

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<sup>102</sup> Serco Australia Pty Ltd (or any related body corporate) (referred to in the Contract as the 'Immediate Predecessor': clause 12.5(a)).

### **7.6.13 Monitoring and Reporting**

Clause 10 of the Contracts deals with monitoring general service standards, which requires the Contractor to provide the reports described in Schedule 8 at the times set out in that Schedule.

Schedule 8 requires the Contractor to provide the Minister with monthly reports dealing with the following matters:

- service quality;
- performance benchmarks;<sup>103</sup>
- Greenhouse Challenge.<sup>104</sup>

In addition to these monthly reports, the Contractor is required to provide a quarterly report on performance benchmarks 11 and 12 set out in Clause 5 of Schedule 11.

The Contractor is also required to submit an annual return containing a 'general description of the activities undertaken by the Contractor during the previous year as well as any significant initiatives to be introduced in the current year' within 6 weeks of 30 June of each year of the Contract.

Each Operating Party is required to attend any meeting scheduled by the other Operating Party on being given reasonable notice to do so.

Clause 27.1 provides that the Contractor must cooperate in all respects with the Minister to enable the Minister to:

- respond to any matter raised in the Parliament of South Australia, keep Parliament informed, or otherwise discharge the Minister's duties and obligations to the Parliament;
- provide the Government with any information or advice which the Minister considers necessary for the purposes of government.

### **7.6.14 Service Defects**

Clause 13 of the Contract sets up a regime for the Minister to recover a monetary amount fixed by the Contract (called the Defective Services Amount), in the event that the Contractor provides a defective service, such as:

- the Contractor not providing a particular scheduled bus trip;
- a bus arriving or departing later than the scheduled time for arrival or departure; or
- using a defective vehicle to provide a trip.<sup>105</sup>

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<sup>103</sup> Performance benchmarks are set out in Schedule 11. Clause 10.2 sets out what happens if the Contractor fails to meet a Performance Benchmark while clause 10.3 sets out a process for reviewing the Performance Benchmarks annually.

<sup>104</sup> Clause 2.4.3 of Schedule requires the Contractor to participate in a Greenhouse Gas Reduction program, such as Greenhouse Challenge.

<sup>105</sup> Clause 13.2(d). The term 'Defective Vehicle' is defined in the Contract.

The clause is a liquidated or agreed damages clause, and serves the purpose of overcoming difficulty in assessing and proving the Minister's loss as a result of the defective service.<sup>106</sup>

### **7.6.15 Risk and Insurance**

Clause 21.1 provides that the Contractor must provide the Services at its own risk and without risk to the Minister.

By clause 21.2, the Contractor gives the Minister an indemnity in the following terms:

*The Contractor must indemnify the Minister against:*

- (a) *any liability that the Minister incurs to a third party; and*
- (b) *all costs that the Minister incurs in relation to that liability*

*to the extent that they arise out of or in consequence of anything done or omitted to be done by the Contractor either:-*

- (c) *in the course of the provision of the Services; or*
- (d) *in breach of this Agreement.*

The Contractor must, at its own expense, insure itself and the Minister for a prudent amount against all insurable risks in respect of which the Contractor is bound to indemnify the Minister under clause 21.2. Additionally, the Contractor is required to effect and maintain throughout the Term the following insurances:

- Public Liability;
- Comprehensive Insurance and Third Party Property in respect of the Vehicles it uses for any purpose related to the provision of the Services;
- Insurances against loss of, or damage to, the Infrastructure (including but not limited to the Minister's Infrastructure) and loss or damage caused to others by the use of the Infrastructure; and
- Worker's Compensation Insurance.

Proof of these insurances are required to be provided to the Minister. The policies must note the interest of the Minister and provide the Minister with the same protection as it provides the Contractor in respect of the delivery of the Services by the Contractor.

### **Audit Comment**

The indemnity contained in clause 21.2 appears on its face to be very broad. However, courts have generally interpreted indemnities given in respect of 'all liability' as insufficient to cover liability for negligence, although there is no principle that general

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<sup>106</sup> Where a party becomes liable to pay liquidated damages, the obligation gives rise to a debt: *Boucaut Bay Co Ltd (in liq) v Commonwealth* (1927) 40 CLR 98. Liquidated or agreed damages clauses will not be against public policy unless, as a matter of construction, they can be characterised as imposing a penalty for non-performance rather than a genuine pre-estimate of the loss expected from non-performance: *W & J Investments Ltd v Bunting* (1984)S 1 NSWLR 331; *Hughes v Fresh-Pak Fruit & Vegetable Market Pty Ltd* [1965] WAR 199. The burden of proving that the obligation to pay a liquidated sum is a penalty rests with the defendant: *Robophone Facilities Ltd v Blank* (1966) 1 WLR 1428.

words will not be sufficient to exclude liability for negligence.<sup>107</sup> In my opinion, in future contracts the indemnity given by the Contractor should expressly include loss or damage resulting from the Contractor's negligence in order to avoid any risk that the indemnity does not cover loss or damage arising from the Contractor's negligence.

### **7.6.16 Subcontractors**

The Contracts in clause 7.5 provide that the Contractor is able engage sub-contractors to perform its obligations under this Agreement, but only with the Minister's prior consent and then in accordance with any conditions of that consent. Clause 7.5 goes on to provide that the risk of engaging any subcontractor lies with the Contractor.<sup>108</sup>

The Australian Transit Enterprises Contract contains an additional clause 7.6 which provides as follows:

#### **7.6 Approved Subcontractor**

*The company SouthLink Pty Ltd ACN 067 806 544 is approved as a sub-contractor for the purposes of clause 7.5 but only while it remains a wholly-owned subsidiary of the Contractor.*

Clause 16 prohibits the Contractor from entering into certain high-value sub-contracts<sup>109</sup> unless the intended sub-contractor is registered with InSkill SA.

### **7.6.17 Safety and Security**

The Contractor is required by clause 17.1 to do everything necessary and reasonable in the circumstances to ensure the safety of passengers and other members of the public, including (but not limited to):

- reporting promptly to the Minister or other relevant authority any circumstance or thing that may compromise the safety of passengers or other members of the public and is known or ought reasonably to be known to the Contractor;
- cooperating with members of the police or any other law enforcement agency; and
- providing the police or any other law enforcement agency with any information, access or other form of assistance reasonably required for the safety of passengers or the good management of the public transport system in South Australia.

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<sup>107</sup> *Alderslade v Hendon Laundry Ltd* (1945) KB 189 at 192; *Commissioner for Railways (NSW) v Quinn* (1946) 72 CLR 345 at 371; *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642 at 649; *Davis v Commissioner for Main Roads* (1968) 117 CLR 529 at 537; *Henderson v Merrett Syndicates Ltd* (1995) 2 AC 145 at 183; *Casualty and General Insurance Ltd v Chase Manhattan Bank* (2003) 2 Lloyd's Rep 61.

<sup>108</sup> Clause 7.5 provides 'The Contractor:

- (a) *is not, by reason of having engaged a sub-contractor, relieved of any of its liabilities or obligations under this Agreement; and*
- (b) *is responsible for each sub-contractor engaged by it as if all the acts and omissions of the sub-contractor were its own acts or omissions'*

<sup>109</sup> That is, sub-contracts for the provision of goods and services where the total value of the sub-contract is at least \$250 000 (inclusive of GST) and where the value of the services (as distinct from the goods) supplied by the sub-contractor represents at least one half of the total value of the sub-contract.

Clause 17.2 requires the Contractor to provide a Security Plan within three months of the date of commencement of the Contract.<sup>110</sup>

Another clause relevant to safety is clause 18.3. The Contractor must use only Approved Vehicles to provide the Services and maintain enough Approved Vehicles to ensure that it is able to provide the Services in accordance with the Timetables at all times. The term 'Approved Vehicles' means a Vehicle hired by the Contractor under the Bus Hire Agreement, or a Vehicle which complies with the standards prescribed for the use of vehicles of that kind and is approved by the Minister as suitable for the provision of the Standard Services.

#### **7.6.18 Minister's Step-in Rights**

If the Contractor defaults in carrying out its obligations under the Contract and the Services are disrupted, or are likely to be disrupted, then the Minister can take over the provision of the Services, or any of them, and take any other steps that the Minister considers reasonably necessary.

Clauses 29 and 30 of each Contract set out the procedures that are required to be followed in relation to the Minister exercising his or her step-in rights. The Minister is required by clause 29.3 to give the Contractor at least 24 hours' notice of his or her intention to exercise the step-in rights.

The Minister is able to engage another person (who may be another operator of regular passenger transport services) to perform any of the functions that he or she assumes by exercising the right to step-in.

Clause 30.3 provides that the Contractor must indemnify the Minister against all costs, expenses and other liabilities sustained or incurred by her in the exercise of any Step-in Rights including, without limitation, the reasonable costs of engaging a sub-contractor.

#### **Audit Comment**

The ability of the Minister to take over the provision of the Services in the event of the Contractor's default or insolvency is a necessary, and valuable, inclusion in the Contract.

However, I note that the requirement to give at least 24 hours' notice to the Contractor may result in an unnecessary delay in circumstances when it may be necessary for the Minister to exercise his or her step-in right immediately.

#### **7.6.19 Government Policy**

Clause 32 deals with government policy. Essentially, the Contractor is required to give effect to government policy unless to do so would result in the Contractor breaching the Contract.

Clause 32 .3 provides as follows:

*The Contractor is entitled to compensation for costs or losses associated with the implementation of Government policy but only if:*

- (a) the Contractor is able to demonstrate that the implementation of the relevant Government policy caused additional costs or losses that could not have been reasonably avoided; and*

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<sup>110</sup> The Security Plan is required to comprise a Risk Management Plan, General Security Plan, Preventative Security Plan, Incident/Management/Emergency Response Plan and Business Continuity and Recovery Plan.

- (b) *no reasonable activity or strategy of the Contractor could have reduced or offset the costs or losses caused by implementing the policy.*

### **7.6.20 Termination**

Clause 33 sets out the circumstances in which the Contract can be terminated. Clause 33.1 requires the Contractor to give the Minister written notice of the possibility of the happening of any material thing or event which may give the Minister the right to terminate the Contract as soon as the Contractor becomes aware of it.

A material breach of the Contract occurs when an Operating Party fails to make good an Event of Default within the time prescribed by a Default Notice.

The consequence of an Operating Party committing a material breach of this Agreement is that the party not in default may terminate the Contract by giving the defaulting party notice in writing to that effect. The Contract can also be terminated if an event of insolvency occurs to the Contractor, or if the Minister or the Contractor repudiate the Contract.

Clause 33.4 contains a restriction on the ability to terminate the Contract for default if the defaulting party immediately commences, and continues, to efficiently, effectively and without delay, do everything reasonably required to cure the Event of Default.

Clause 33.6 provides for contemporaneous termination of the Contract in the event the Bus Hire Agreement is lawfully terminated by the Minister or the Contractor. In the case of termination of the Bus Hire Agreement by the Minister, the contractor is taken to have repudiated<sup>111</sup> the services contract. In the case of termination of the Bus Hire Agreement by the Contractor, the Minister is taken to have repudiated the services contract.

Clause 33.7 provides that the Minister may terminate the Contract at any time and without cause on not less than six months written notice to the Contractor. In the event that the Minister exercises his or her right under this clause, the Contractor is entitled to compensation calculated in accordance with clause 33.7(b).

In the Torrens Transit Contract, the Minister is also given the ability to nominate that termination is to have effect only in respect of a Particular Contract Area.

### **Audit Comment**

Despite the wording of clause 33.7, the Minister's power to exercise the right to terminate for convenience is probably not an unfettered right. In addition to the contractual obligation to compensate the Contractor under clause 33.7(b), the Minister would be required to exercise the power reasonably and in accordance with his or her obligation of utmost good faith in clause 5.2, demonstrating that the actual decision was undertaken in good faith in the circumstances of the case.

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<sup>111</sup> The legal implication of repudiation is a fundamental breach allowing termination: *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) QB 284 at 310.

In *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited*,<sup>112</sup> Finn J stated, in relation to a termination for convenience clause:

*... I accept that the exercise of such a clause would, of course, be subject to a duty of good faith and fair dealing: Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151 ...*

By way of a general observation, I note that in the context of a breach by the State (in this case the Minister), the Contractor would have the ability to bring an action against the State under the *Crown Proceedings Act 1992* seeking damages for breach of contract.<sup>113</sup>

### **7.6.21 Disengagement**

Clause 34 of the Contract deals with disengagement, and includes the requirement for the Contractor to prepare, and the Minister to approve, a Disengagement Plan. The Disengagement Plan is required:

- to include a timetable which provides comprehensive details of all activities required to be undertaken by the Contractor to ensure that responsibility for provision of the Services is transferred to a new provider on or as soon as reasonably practicable after the End Date and that there is no interruption to the Services as a result of the termination of this Agreement or the transfer of responsibility for the Services to a new provider;
- to be consistent with the requirements for due diligence which a prudent prospective successor to the Contractor as provider of the Services would be likely to undertake.

### **7.6.22 Performance/Parent Company Guarantee**

Clause 3.1 required each Contractor to provide the Minister with an unconditional bank guarantee as a condition precedent to the performance of the Minister's obligations under the Contract.<sup>114</sup> The guarantee is required to be maintained throughout the whole of the term of the Contract and after the term, until the later of 6 months after the end date<sup>115</sup> or if there is any dispute between the parties, when the dispute is finally resolved. Clause 36 sets out when the Minister can make a demand under the Bank Guarantee.

In addition, Clause 35 of the Torrens Transit Contract contains a guarantee and indemnity from four other companies within the Torrens Transit Group.

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<sup>112</sup> (2003) 128 FCR 1.

<sup>113</sup> Paragraphs 5(1)(a) and (b) of the *Crown Proceedings Act 1992*.

<sup>114</sup> Somewhat interestingly, the bank guarantee is not expressly required to be 'irrevocable': see eg, *Lloyd's v Harper* (1880) 16 Ch D 290. The requirement to maintain the guarantee throughout the term of the Contract (and beyond) seems to have been intended to address this issue. Additionally, it appears to be open that the notion of an 'unconditional' guarantee also imports the notion of irrevocability: *Lloyd's v Harper* (1880) 16 Ch D 290 at 319.

<sup>115</sup> That is, 24 April 2010 or the date that the Contract is earlier terminated.

## *Audit Conclusion*

Audit's review of the Contracts reveals that, on the whole, the Contracts protect the State's interests. Having said that, there are a number of areas in which future contracts could be strengthened to better protect the State's interests.

In particular, as I have mentioned above, I do not consider it appropriate for service contracts to contain an obligation on both contracting parties (ie, the recipient and the provider) to act with the utmost good faith to one another. This concept does not, in my opinion, readily translate to situations where the Government has an obligation to provide a service in the public interest.

The Service Contracts, like other contracts for services, require the Contractors to provide the Services in exchange for payment. The Contracts require the Contractor to provide the Services to a certain standard, and provide the Minister remedies in the event that the Services are not delivered, or not delivered to the required standard.<sup>116</sup> Contrary to what clause 5.2 says, the relationship between the Contractor and the Minister under the Services Contract should, in my opinion, be expressed to be one of service provider and recipient,<sup>117</sup> rather than one of partners.

The obligation imposed on the Minister to act with utmost good faith towards the Contractor under clause 5.2 significantly restricts the Minister's ability to take action under the Service Contracts in the event that a Contractor defaults in the performance of its obligations under the Service Contract. Presumably, the duty of utmost good faith will require the Minister to, among other things, make full disclosure of all material information and refrain from conducting himself or herself in a manner which excludes or appears to exclude the Contractor from any benefit or advantage which should accrue to them.<sup>118</sup> This may not be in the State's interests in all circumstances, particularly when the Minister wishes to deduct an amount on account of Defective Services, exercise his or her rights to step-in, or terminate the Service Contract for convenience or partially. In short, the Minister represents the public interest and should not contractually place her/himself in a position whereby the public interest can not at all times be protected by unfettered action by the Government.

In this way the obligation imposed by clause 5.2 that the Minister act with utmost good faith towards the Contractor does not protect the State's interests and should, in my opinion, not be included in future service contracts.

Both Mr Evans and Ms Haselgrove commented on the views expressed above when they were given an opportunity to comment on a draft of this Report.

Mr Evans noted as follows:

*I am aware of no authority that suggests that where two parties have a mutual obligation to deal with the other in utmost good faith, that obligation will limit the right of one to sue for breach by the other.*

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<sup>116</sup> See clauses 9, 10, 13, 14, 29, 30 and 33.

<sup>117</sup> The Minister is the recipient of the services in the sense that the Minister has to discharge certain statutory functions (see section 3) and is contracting with the Contractor in order to discharge those functions.

<sup>118</sup> *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384.

In my opinion, the restriction on the Minister's ability to take action under the Contracts arises as an incident of the obligation of utmost good faith (which I note is a higher standard than merely good faith).<sup>119</sup> In other words, the Minister may be constrained by the obligation of utmost good faith from taking action such as deducting an amount on account of Defective Services or partially terminating the Contract even when it would be in the State's best interest to do so. For example, it could be that it may be more efficient for a particular route to be moved into a different Contract Area,<sup>120</sup> but that because the route is a particularly profitable<sup>121</sup> one for the Contractor the Minister will be constrained by his or her obligation of utmost good faith not to remove the route from the Contract Area. Of course, as in most commercial situations, it would be likely that there would be some outcome agreed between the parties which would resolve the issue.

Both Mr Evans and Ms Haselgrove also commented that, in their opinions, the obligation to act with utmost good faith does no more than give effect to the ethical duty that the Minister has as a 'moral exemplar'.

I would like to respond to these comments. Firstly, and most importantly, the Minister's ethical duty to act as a moral exemplar should be seen in light of the broader duty of the Minister to act in the best interests of the State and its citizens (ie, the public interest). In my opinion, the Minister can discharge his or her obligations, as a moral exemplar, to act with high standards and principles in the conduct of commercial dealings and protect the interests of the State without expressly importing into the Contract an obligation to act with the utmost good faith towards the Contractor. The parties to the Contract (ie, the Minister and the Contractor) are not partners, joint venturers or fiduciaries. Nor should they be. As mentioned above, the Minister has a statutory function to discharge, and has engaged the Contractor to perform part of that function. Would the Minister, as guardian of the public interest, be acting in that interest by having the exercise of his or her rights restricted by an additional obligation, which is not found in other contracts of this type?

Additionally, although there remains some doubt about this,<sup>122</sup> a contractual obligation to act with the utmost good faith may also give rise to a concurrent tortious duty.<sup>123</sup> I should say that, at this point in time, no Australian court has recognised such a right, although several superior courts have indicated some preparedness to import such a tort from American law.<sup>124</sup> The effect of a concurrent tortious duty being established is that exemplary damages are available as a remedy.<sup>125</sup>

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<sup>119</sup> *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9 at 17 citing *Seaman's Direct Buying Service Inc v Standard Oil Co of California* 36 Cal 3d 752 (1984).

<sup>120</sup> Because, for example, it is established that most commuters on that route ultimately travel into the other Contract Area and by moving the route they do not have to change buses.

<sup>121</sup> I use 'profitable' in the sense that the Contractor derives a profit from operating on the route, which does not necessary mean that many commuters travel on the route.

<sup>122</sup> *Lomsargis v National Mutual Life Association of Australasia Ltd* (2005) QSC 199.

<sup>123</sup> *Lomsargis v National Mutual Life Association of Australasia Ltd* (2005) QSC 199 at (27).

<sup>124</sup> *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9 at 34; *Ilievske-Dieva v SGIO Insurance Ltd* (2001) WASCA 161 at (50); cf *Grimson v Victorian Workcover Authority* (1995) 1 VR 209 and *Lomsargis v National Mutual Life Association of Australasia Ltd* (2005) QSC 199.

<sup>125</sup> Exemplary damages cannot be claimed for breach of contract: *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6.

Both Mr Evans and Ms Haselgrove also noted that the clause imposes an equivalent obligation on the Contractor to act with utmost good faith, and that in outsourcing transactions, the State relies much more on the Contractor's good faith in the performance of the Contract. Mr Evans goes on to say:

*... the Contractor's obligations are complex and much of the performance takes place away from the scrutiny of the Government. To have an obligation on the Contractor with utmost good faith can be a helpful tool in managing the Contractor's performance.*

I agree that imposing an obligation of good faith on the Contractor can be a 'helpful tool in managing the Contractor's performance' under the Contract. However, in my opinion, in contracts for the provision of services such as the Bus Services Contract, such an obligation could readily be included in the Contractor's other obligations in respect of the Services contained in clause 9.1. Imposing such an obligation on the Contractor, in my opinion, in no way impinges the Minister's duty as a moral exemplar in his or her commercial dealings. After all, in exchange for performing the Services, the Contractor is operating a commercial enterprises and, presumably, at a profit. The Minister has a duty to act in the best interests of the citizens of South Australia in discharging his or her functions. It is essential that the Minister be able to act in the public interest without being constrained (otherwise than as a moral exemplar).

Ms Haselgrove also commented that an equivalent clause to clause 5.2 had been in the Adelaide Metropolitan bus contracts since April 2000 and that Audit had no raised a concern about it. I note that Audit has not had the opportunity to review the Contract on this basis before.

## **7.7 Management of Conflicts of Interest**

A pro forma Confidentiality and Conflict of Interest Undertaking was attached to the document titled 'Probity Adviser's Role'. The Request for Tender for the Metropolitan Bus services required all Evaluation Panel members to execute a conflict of interest declaration.

Audit has sighted a copy of several conflict declarations, but not a centralised log of these declarations. Audit did, however, receive an assurance from Ms Haselgrove that these were provided by all Tender Evaluation Panel team members and that a spreadsheet record was kept of declarations received.

Audit's review has also found that the advice of the Probity Adviser was sought each time a conflict was declared to the Project Steering Committee during the course of the tender process.

### **Audit Comment**

Apart from the management of the conflict of interest concerning the Probity Adviser, details of which are set out at 7.1 'Role of the Probity Adviser' of this Report, Audit's review confirms that declared conflicts were of a minor and manageable nature and that, subject to my following comments, the Department of Transport and Urban Planning had an effective process in place to identify and seek advice on conflicts as they arose during the course of the tender process.

Audit's review has found that the Probity Adviser was not required to provide any briefing on probity either to the Minister's office or to the members of the State Supply Board involved directly in reviewing the conduct of the tender process. Accordingly, reliance was placed on the public sector and Ministerial codes of conduct to ensure that the people conducting that review declared any actual or perceived conflicts of interest.

## **7.8 Maintaining Confidentiality and Security**

Members of the South Australian Public Service involved in the Metropolitan Bus Services tender process were not required to execute a confidentiality deed in order to access tender and evaluation documentation. Reliance was placed on the general requirement for South Australian public servants to comply with the confidentiality provisions contained in the *Public Sector Management Act 1995* to ensure that confidentiality of material was maintained.

In the case of advisers (ABFA Pty Ltd and Contracting and Tendering Services Pty Ltd), specific confidentiality undertakings were contained in their adviser contracts.

Documented administrative arrangements designed to ensure the maintenance of the confidentiality and security of tender and evaluation documentation were established by the Department of Transport and Urban Planning. This included the establishment of secure tender evaluation rooms with non networked computers. Only evaluation team members had access to these secure rooms.

Documented procedures for the receipt, transfer and opening of tenders were set out in the Tender Evaluation Plan.

Ms Haselgrove, and the Probity Adviser, have both confirmed that the abovementioned procedures and undertakings were complied with during the course of the Metropolitan Bus tender process.

### **Audit Comment**

Whilst in no way suggesting that this did take place, Audit's review has indicated that it would have been physically possible for a member of the tender evaluation teams to remove confidential tender/evaluation material from the secure tender rooms undetected.

Given the importance and sensitivity of this tender process, ie a tender of several hundred million dollars, I am of the opinion that consideration should also have been given by the Department of Transport and Urban Planning to providing for security guards to be posted at each secure room in order to monitor and ensure that no confidential material was removed from these rooms at any stage during the course of the project. I note that this level of security has been adopted by the State for previous sensitive and large scale tender processes including SA Water and the sale of the electricity assets of the Electricity Trust of South Australia.

Based on Audit's review, I have no reason to believe that the confidentiality and security procedures adopted for the tender process were not complied with.

## **7.9 Probity Checks**

Tenderer's representatives wishing to attend the vehicle and depot inspections conducted by the Office of Public Transport or to attend the Data Room established for the Metropolitan Bus Services tender process were required to provide evidence of a satisfactory National Police Clearance. In addition, tenderers' representatives attending the Data Room were also obliged to lodge with the Office of Public Transport, a Consent for Police to Release Further Information Form.

Referee checks were undertaken on all tenderers as provided for in the Request for Tender.

Other potential probity checks, which in my opinion may have been relevant include the following:

- Publicly Available Information:
  - the Australian Securities and Investment Commission (ASIC) ASCOT database for the current company extract of each companies;
  - the ASIC Disqualified Directors database for all company directors and secretaries of each company;
  - the Federal Government's National Personal Insolvency Index for the bankruptcy status of all company directors and secretaries of each company;
  - State Court Registers of Causes, Writs and Orders Affecting Land
  - the Dow Jones Interactive database (media searches) of all companies and their directors and secretaries; and
  - the Internet, where required, to provide additional information on companies.
- Invasive Searches (these checks require authorities from either the company, its directors and secretaries, or both, and are therefore more invasive as they require some input from the company):
  - domestic Criminal History Character Checks for company directors and secretaries through the Australian Federal Police ('the AFP') (Australian companies only);
  - searches of the Interpol database for company directors and secretaries of all companies through the AFP; and,
  - searches of five ASIC confidential databases for companies and their directors and secretaries (Australian companies only).

### **Audit Comment**

Audit's review of the documentation did not find that any consideration was given to undertaking these wider checks nor does it indicate that any advice on the possible conduct of such checks was sought from the Probity Adviser.

In my opinion, notwithstanding the fact that a number of the tenderers were currently providing services to the State, some consideration should have been given to conducting more extensive probity checks on the tenderers given the importance, sensitivity and duration of the bus services contracts.

## **7.10 Negotiation with Bidders**

### **7.10.1 Overview**

This part of this Report considers the process by which negotiation with tenderers was undertaken.

The Request for Tender provided that negotiations with shortlisted tenderers may be undertaken 'with a view to finalising a suite of Contracts for all [of] the Contract Areas that best achieves the Government's objectives'.

### **7.10.2 The Negotiation Team and Negotiation Plan**

The Evaluation Plan provides as follows:

*A negotiation team, appointed by the Project Steering Committee, will negotiate with the Tenderer(s) responsible for the short listed tenders in accordance with the approved negotiation plan.*

#### **Audit Comment**

It is not clear that the Project Steering Committee appointed a negotiation team or approved a negotiation plan.<sup>126</sup>

### **7.10.3 Conduct of the Negotiations**

The negotiations were conducted through further clarification meetings held with three of the tenderers on 13, 15 and 17 December 2004. A clarification meeting with the four tenderers<sup>127</sup> was held on 23 December 2004.

The following matters were discussed at these meetings:

- tender pricing information;
- options for indexation;
- removal of preventative security costs; <sup>128</sup> and
- option to renew the contracts for a further period of five years.

After these meetings, tenderers were also given the opportunity to provide written responses to the matters discussed, and these responses were incorporated into the Financial Evaluation - Third Report.

### **7.10.4 The Chief Executive's Role in the Negotiations**

At the clarification meetings on 17 December 2004, Tim O'Loughlin met with the three tenderers in the presence of the Probity Adviser and discussed the abilities of tenderers to deliver an improved quality of services, in terms of clause 7.1 of the Request for Tender.

Mr O'Loughlin described the purpose of his meeting with the tenderers as follows:

*What I did was when it became apparent to me that the price - that there was little difference between the prices that were being provided and the differences may not have been of sufficient magnitude for the Minister to want to arrive at a decision on price alone, it was obviously incumbent on me, I felt, to provide advice on the other matters. ... So I agreed with the Minister that I would have a discussion for the purposes of preparing my own advice with the tenderers and so with the probity adviser present I met with each of the tenderers ...*

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<sup>126</sup> No reference to either matter is made in the Evaluation Report or the Report to the State Supply Board.

<sup>127</sup> Which was proposed to be cut in a further shortlisting which was ultimately aborted.

<sup>128</sup> This was to be the subject of a separate submission to Cabinet.

When given an opportunity to comment on a draft of this Report, Mr O'Loughlin noted that in these meetings he explained his role in the same terms to each of the shortlisted tenderers at the meetings and that this explanation was discussed and agreed with the Probity Adviser prior to these meetings.

### **Audit Comment**

I have already commented at 7.5 'Tender Documentation and Evaluation by Transport Including Role of Advisers' of this Report that the involvement of Mr O'Loughlin in this way was not contemplated by the Evaluation Plan or in the Request for Tender.

#### **7.10.5 Further Negotiations**

A Request for Information was sent to two of the tenderers, who were ultimately successful in being awarded the service contracts, on 19 January 2005. This Request for Information requested that those tenderers provide the level of patronage growth (in percentage terms) they would commit to achieve in the next three years.

The tenderers' responses on the level of patronage growth were ultimately incorporated into the service contracts as a 'patronage guarantee adjustment'.

#### *Audit Conclusion*

In my opinion, the clarification session with the fourth tenderer, who was proposed to be cut from the process in the further, aborted shortlisting, may have put that tenderer to further expense when it clearly had, at least in the opinion of the Project Steering Committee, no chance of being awarded the service contract.

Additionally, the Chief Executive's involvement in the negotiation process at such a late stage had the potential to confuse tenderers about who within the Department of Transport and Urban Planning was ultimately providing recommendations to the Minister on the award of the service contracts.<sup>129</sup> The Chief Executive's role in the process was not set out in the Request for Tender or Evaluation Plan.

In my opinion, in future tender processes where a Departmental Chief Executive is to have a role in providing advice, whether on policy or process, that role (whatever it encompasses) should be clearly documented in the Request for Tender documentation and Evaluation Plan.

By documenting the role in this way, it should be clear to tenderers and others involved in the process, including Departmental officials, what the respective roles and responsibilities of the various parties are.

### **7.11 Response of Tenderers to the Process**

As part of Audit's examination of the services contracts and probity of the processes leading up to the awarding of the contracts, Audit contacted each of the tenderers and asked them to raise any matters of concern that they had in respect of the process.

None of the tenderers who provided comments expressed any significant concerns with the process for the awarding of the contracts and regarded the process on the whole as being open and fair.

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<sup>129</sup> I note that Mr O'Loughlin, during his examination, stated that he stressed to tenderers the nature and purpose of his meetings with them.

## **8. CONSIDERATION OF STATUTORY COMPLIANCE**

### **8.1 Section 39(3)(a) of the *Passenger Transport Act 1994***

#### **8.1.1 Overview**

Section 39 of the *Passenger Transport Act 1994* was enacted as part of legislative reforms to the South Australian public transport services. The section provides for the contracting out of the operation of regular passenger services.<sup>130</sup> Contracts may be awarded by the Minister by tender or such other manner as the Minister thinks fit.

Section 39 incorporates several 'principles' that the legislation has directed the Minister to take into account in awarding service contracts.<sup>131</sup> Whilst the taking into account of these principles is mandatory, it is expressly provided that these principles are an expression of policy and that they do not give rise to rights or liabilities etc. Nonetheless, the legislative policy is clear in that the Minister must take these principles into account. There were four areas to be considered:

- the avoidance of a monopoly;
- the development of sustainable competition;
- the integration of passenger transport services; and
- efficiency and the promotion of innovation.

I have previously set out the facts relating to the consideration of matters in section 39(a)(iii) (integration) and (iv) (innovation) at 5. 'Overview of Process for Awarding Contracts' of this Report. In my opinion, consideration of these issues was adequate.

However, for the reasons discussed in the following paragraphs of this part of this Report, in my opinion, the analysis and consideration of sustainable competition and the avoidance of a monopoly was inadequate.

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<sup>130</sup> The expression 'regular passenger service' is defined in section 4, so far as relevant for present purposes, to mean a 'passenger transport service conducted according to regular routes and timetables' The expression 'passenger transport service' is defined briefly as:

*A service consisting of the carriage of passengers for a fare or other consideration ... -*

- (a) by motor vehicle; or*
- (b) by train or tram; or*
- (c) by means of an automated ... vehicular system; or*
- (d) by a vehicle drawn by an animal ...; or*
- (e) any other means prescribed by the regulations ...*

<sup>131</sup> Section 39(3) provides:

*The Minister, in awarding service contracts under this Part—*

- (a) in any case involving a contract or contracts for the provision of regular passenger services as part of the operation of the public transport system within Metropolitan Adelaide—must take into account the following principles (and may take into account other principles):*
  - (i) 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;*
  - (ii) sustainable competition in the provision of regular passenger services should be developed and maintained;*
  - (iii) the integration of passenger transport services should be encouraged and enhanced;*
  - (iv) service contracts should support the efficient operation of passenger transport services and promote innovation in the provision of services to meet the needs of customers.*

### 8.1.2 The Concept of a Market

Section 39(3)<sup>132</sup> evinces an intention to promote efficient public transport through competition and to avoid a situation where an operator acquires a monopoly position (or close to a monopoly position). In order to determine whether the awarding of a service contract or contracts for the provision of regular passenger services would place a single operator in a monopoly position, or a market share that is close to a monopoly, it is firstly necessary to define the market. The most comprehensive definition of the concept of what constitutes a 'market' is that provided by the Trade Practices Tribunal in *Re Queensland Cooperative Milling Assoc. Ltd* (QCMA case):<sup>133</sup>

*We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms, or putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if there is sufficient price incentive.*<sup>134</sup>

Accordingly, a market is an area of close competition between firms, a field of rivalry. The defining feature of a market is substitutability. It is necessary to look at the structure of the market in which firms operate in order to determine whether particular firms are in competition with each other and the effect of particular conduct or contracts on competition. The QCMA case stated that the following factors were relevant:

- The number, size and distribution of independent sellers, which includes the degree of market concentration (ie market shares).
- The height of barriers to entry (the ease with which new firms may enter and secure a viable position).
- The extent to which products of firms are differentiated and the extent of sales promotion.

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<sup>132</sup> Section 39(3) provides:

*The Minister, in awarding service contracts under this Part—*

*(a) in any case involving a contract or contracts for the provision of regular passenger services as part of the operation of the public transport system within Metropolitan Adelaide—must take into account the following principles (and may take into account other principles):*

*(i) 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;*

*(ii) sustainable competition in the provision of regular passenger services should be developed and maintained;*

*(iii) the integration of passenger transport services should be encouraged and enhanced;*

*(iv) service contracts should support the efficient operation of passenger transport services and promote innovation in the provision of services to meet the needs of customers*

<sup>133</sup> (1976) 25 FLR 169 at 190; ATPR 40—12.

<sup>134</sup> This statement has been referred to with approval by the High Court in *Qld Wire Industries v BHP Limited* (1989) 167 CLR 177 (*Qld Wire*) and *Boral Besser Masonry v ACCC* (2003) 195 ALR 609 at (133) (*Boral*).

- The character and extent of vertical relationships between customers and sellers (ie the extent of vertical integration).
- The nature and extent of any fundamental arrangements between firms which restrict their ability to function as independent entities.

The purpose of market definition is to aid in assessing whether conduct (which includes a contract) has or will, or is likely to, lessen competition, or to identify whether a firm has market power or is a monopolist. It provides a framework within which the competition analysis occurs and enables the determination of relevant variables, such as market shares, barriers to entry, and product differentiation. The definition of the market is dependent upon the context in which the issue of market definition arises in order to draw out the competition issues arising. In this sense, market definition is purposive. Different market definitions may exist in relation to the same industry because the issue to be considered is different or because the competitive environment has changed with time.

The steps involved in the determination of a market for the purpose of the *Trade Practices Act 1974* were outlined in *Re Tooth & Co P/L* (1979) ATPR 40-113 as follows:

- Identification of the areas of close competition relevant to the goods or services under consideration;
- Comprehension of the maximum range of business activities and the widest geographic area within which, given sufficient price incentive, there will be cross-elasticity of demand and supply;
- Consideration of the long term substitution possibilities as opposed to the short term possibilities;
- Identification of where there is such a break in substitution possibilities that firms within the defined area would collectively have substantial market power;
- Consideration of whether the field of substitution contains sub-markets; and
- Consideration of the multi-dimensional nature of a market including the dimensions of product, functional level, space and time. These dimensions may or may not be independent with one another.

In the practical application of the abovementioned steps, the following considerations apply:

- The 'product market' consists of the goods or services supplied by firms under consideration together with goods or services which could reasonably be used by consumers as substitutes.
- The 'geographic market' is the geographic area in which sellers can feasibly operate to distribute their products and within which buyers will buy products.
- The 'function market' relates to the level on which relevant firms operate, such as the wholesale or retail levels.
- The 'time dimension' is concerned with how long it will take for substitution to be likely to occur. The long run is the relevant period for determining the limits of a market.

The determination of a market involves complex legal and economic issues. There is great scope for argument over market definition. This is demonstrated by the case law decisions concerning claims under Part IV of the *Trade Practices Act 1974*, where litigants have differing views on market definition.<sup>135</sup>

### **8.1.3 Considerations Relevant under Paragraph 39(3)(a)(i) of the Passenger Transport Act 1994**

Taking into account the foregoing matters, in my opinion, the following considerations are relevant to the determination of the market for the purposes of paragraph 39(3)(a)(i) of the *Passenger Transport Act 1994*.

#### *The Terms of the Legislative Provision*

The *Passenger Transport Act 1994* puts in place arrangements and structures for the provision of public transport services in the State of South Australia. The product market and geographic area are those referred to in paragraph 39(3)(a)(i); namely the:

- product market is that for 'regular passenger services';<sup>136</sup>
- geographic market is the area within 'Metropolitan Adelaide'.

#### *The Provisions of the Service Contracts covering Regulated Passenger Services*

Provisions likely to be of importance are those dealing with the following matters:

- nature and scope of services to be undertaken; and
- the duration of the contracts. The service contracts are only operative for a limited period of time. Thereafter, the right to provide services is open to tender or award of a contract by the Minister.

#### *The General Factors Relevant to the Identification of a Market*

The factors set out previously in this part of this Report are also relevant considerations. The factors consist of:

- the functional dimension of the market. This aspect will likely be governed by the service contracts;
- the time dimension. The time dimension will be determined by the duration of the service contracts, being a 5 year period;
- factors relevant to market structure as affected by the provisions of the *Passenger Transport Act 1994* and the service contracts.

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<sup>135</sup> See for example, *ACCC v Australian Safeway Stores* (2001) 119 FCR 1 (Trial Judge) and the Full Federal Court (2003) 129 FCR 339. Market definition was a major issue in the proceeding concerning the refusal by Safeway supermarkets to accept supplies of bread products from major plant bakers. Safeway asserted there was a market for bread that included both the retail and wholesale functional levels. The ACCC alleged there were separate markets at the wholesale and retail levels. The Federal Court upheld the contentions of the ACCC.

<sup>136</sup> Defined in section 4 of the *Passenger Transport Act 1994*.

#### **8.1.4 Definition of a Monopoly**

A monopoly exists where there is only one seller/supplier of a particular product, so that the firm and the industry coincide. There are no close substitutes for the firm's product. A monopoly is the maximum market power attainable. A firm possesses market power when it is able to act in a manner that is unconstrained by its competitors and does so for a sustained period of time. Pricing is ordinarily regarded as the critical test, consisting of the ability to raise price by restricting output. But pricing may not be the only aspect of market behaviour that manifests market power. Other aspects may be predatory pricing, withholding supply, or the power to decide the terms and conditions, apart from price, upon which supply will take place.<sup>137</sup>

The courts have taken into account the following factors to identify whether a firm possesses market power:<sup>138</sup>

- The ability to raise prices above supply cost and restrict output;
- The extent a firm is constrained by competitors or potential competitors;
- The market share of the firm;
- The existence of vertical integration;
- The extent of barriers to entry.

Market share is not generally determinative of market power. A large market share may or may not give power.<sup>139</sup> The presence or absence of barriers to entry is regarded as the ultimate determinant of whether a firm possesses market power.<sup>140</sup>

Barriers to entry may arise in a variety of ways. The following have been recognised:

- Legislation may confer a statutory monopoly, such as that conferred under intellectual property legislation (patents, trade marks and copyright).
- Customer loyalty for particular brands.
- Availability of skilled labour, raw materials and plant and equipment.
- Availability of suitable land.
- Level of capital investment required.
- Availability of commercial information.<sup>141</sup>

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<sup>137</sup> Qld Wire at pages 189 and 200 and Boral at (135 to 139).

<sup>138</sup> *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109; *Qld Wire and Arnotts v TPC* (1990) 24 FCR 313.

<sup>139</sup> For example, in the context of sec 46 of the *Trade Practices Act 1974*, in *Qld Wire*, BHP was found to have market power by reason that it supplied 90 percent of the market for steel products in Australia. In the *Safeway* case, Safeway was found to have market power with a 20 percent market share. In *ACCC v Universal Music* (2001) 115 FCR 442 two distributors of recorded music were each found to have market power with market shares of around 17 percent. (The finding of market power was overturned on appeal on other grounds). In the *Safeway* and *Universal* cases, the firms were found to have market power by reason of a number of factors, and not simply by reason of market share factors.

<sup>140</sup> *Qld Wire* at pages 189 – 190 and *Boral* at paragraph (137).

<sup>141</sup> Decision of the trial judge in *ACCC v Boral Besser Masonry* (1999) 166 ALR 410.

### **8.1.5 Application of Principles**

Paragraph 39(3)(a)(i) of the *Passenger Transport Act 1994* refers to 'a market share that is close to a monopoly'. The paragraph makes 'market share' the criteria for assessing whether a position close to a monopoly exists. The Parliamentary Debates on amendments to the *Passenger Transport Act 1994* introducing the provisions under consideration reveal that the Minister for Transport and Urban Planning was of the view that a definition of the word 'monopoly' was not necessary. There were a number of ways to assess the matter and market share was adopted. The Minister stated that a market share close to a monopoly is 90 to 100 percent. The determination of a monopoly position would be a matter for the Passenger Transport Board to determine, which was aware of the Government's definition and would be aware of the provisions of the tender documents and contracts. The purpose is to ensure that there is not a single operator dominating the market.<sup>142</sup>

In order to apply the statutory provision it would firstly be necessary to define the activity or aspect to be assessed for market share purposes. The question arises - a market share in respect of what? Paragraph 39(3)(a)(i) fails to state to what activity or aspect it is referring to determine whether there exists a position that is 'close to a monopoly'. There are many possibilities. In my view, some of the matters to be taken into account in this context are the share that a firm holds out of the total number or value of the following:

- The number of passengers transported.
- The value of fares collected.
- The number of kilometres travelled.
- The number of routes serviced out.
- The profits derived.
- The share of the monies received by a firm out of the total paid out by government.

The Ministerial Report pursuant to section 39(3b) of the *Passenger Transport Act 1994* dated 2 March 2005 bases the assessment of market shares on the size of the contract areas operated by the operators and the percentage for services operated out of the total for all services. The Report states:

*The combination also complies with the monopoly requirements of the Act.*<sup>143</sup>

In my opinion, the test for determining whether a 'market share close to a monopoly' exists is whether the market share (as defined) of a firm was of such a level that it was close to conferring market power at a monopolistic level; that is, the power to act in a manner that is unconstrained by its competitors and is able to do so for a sustained period of time. Without a proper analysis of the market and the position of the firms carrying on business in that market, it is not, in my opinion, possible to make the determination that the legislation has required of the Minister in paragraph 39(3)(a)(i) of the *Passenger Transport Act 1994*.

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<sup>142</sup> Legislative Council debate following the second reading speech, 24 November 1998. The Second Reading speech does not state the Minister's views on these matters.

<sup>143</sup> See page 4 of the Ministerial Report.

## 8.2 The Crown Law Advice

The Minister obtained advice from Crown Law (Office of the Crown Solicitor) in respect of section 39(3).<sup>144</sup> I read the Crown Law advice as advising on the following principal points:

- Section 39(3) is 'merely an expression of policy and does not give rise to legal rights or liabilities', by reason of section 39(3a) of the *Passenger Transport Act 1994*.
- The Ministers interpretation of the meaning of 'a market share that is close to a monopoly' only needs to be defensible at the political level, rather than in a court of law.
- The 'monopoly referred to is provision of all types of regular passenger services within Metropolitan Adelaide, not just bus services' and 'a monopoly is an exclusive right to provide all those services'.
- The meaning of 'a market share that is close to a monopoly' is a difficult question. The Minister may adopt any 'reasonable interpretation' of the words 'a market share that is close to a monopoly'. Market share could be assessed by reference to either the number of services involved relative to the total number, or alternatively, the revenue kilometres or passenger number or contract areas. A 'close to a monopoly' position is a matter for commonsense judgment and that an operator would need at least 75 percent of the relevant market.

### 8.2.1 Natural Justice Representations by Crown Solicitor

The Crown Solicitor and two of his colleagues were provided with a draft copy of this Report as part of the natural justice process. The Crown Solicitor takes issue with the conclusion and reasoning that is adopted in this Report regarding the meaning of 'market share that is close to a monopoly'.

The Crown Solicitor in his response to me states, inter alia, as follows:

*In my opinion, the interpretation of the phrase 'market share close to monopoly' is to be a reasonable interpretation adopted by the decision making authority (now the Minister) in the circumstances that apply at the time of awarding contracts. This is based on a simple and literal reading of the Act and is supported by a reading of the second reading speech and Parliamentary debate. In my advice I suggested an appropriate reasonable interpretation, in terms of a percentage.*

*The statement of law underlying your comment on my advice, to the effect that the concepts and principles of monopoly and market share contained in the Passenger Transport Act are analogous to or identical with the concept and principles of market power in the Trades Practices Act 1974, is in my opinion wrong.*

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<sup>144</sup> A reference to 'Crown Law' refers to advice from the 'Crown Solicitor'. In this Report these terms are used interchangeably.

## **Audit Comment**

Whilst I, of course, respect the opinion of the Crown Solicitor in these matters, I regrettably find his arguments, in this case, to be unpersuasive. In order to give effect to the intent of Section 39 (3) (a) (i) of the *Passenger Transport Act 1994* according to its terms, market share issues should be the subject of investigation and analysis in the context of actual market conditions. Market share issues are complex. Decisions made in reliance upon personal judgments and in the absence of market information may mean that the intent of the statutory provisions are not achieved.

In my opinion, with respect, the Crown Law advice on the meaning of market share is inadequate for the purposes of assisting the Minister discharge her responsibilities under section 39 (3) of the *Passenger Transport Act 1994*. No foundation is provided in support of the assertions made on this issue. The issue is more complex than the matters set out in the Crown Law advice. No basis is provided for the assertion that at least 75 percent of the market would be needed for an operator to have 'close to a monopoly'. It appears to be based on a personal value judgment.

I also note that the Crown Law advice has not considered or had regard to the economic and competition law aspects relevant to the meaning of the word 'monopoly' and the factors relevant to competition contained in section 39(3), to which I have referred at 8.1 'Section 39(3)(a) of the *Passenger Transport Act 1994*' of this Report. These concepts, in my opinion, require a greater degree of analysis than that contained in the Crown Law advice in order to arrive at a considered conclusion.

## **8.3 Reporting to Parliament and the Auditor-General**

### **8.3.1 Overview**

This part of this Report considers the Minister's obligations under the *Passenger Transport Act 1994* to report to Parliament and to the Auditor-General after awarding a service contract under Part 5.

### **8.3.2 Report to Parliament under Subsection 39(3b)**

Subsection 39(3b) provides as follows:

*The Minister must, within 14 days after awarding a contract to which subsection (3)(a) applies, prepare a report which—*

- (a) sets out the full name of the person to whom the contract has been awarded; and*
- (b) provides information on the term of the contract; and*
- (c) identifies the region or routes of operation under the contract; and*
- (d) provides information on the amount or amounts that will be payable by the Minister under the contract; and*
- (e) provides information on how the principles under subsection (3)(a) have been applied in the circumstances of the particular case; and*
- (f) contains such other information as may be required by the regulations or as the Minister thinks fit.<sup>145</sup>*

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<sup>145</sup> No regulations are prescribed for the purposes of paragraph 39(3b)(f).

The Minister does not have to include specific amounts payable under a contract or other information of a commercial value 'the disclosure of which would diminish its value or unfairly advantage a person or persons in future dealings with the Minister'.<sup>146</sup> Copies of the Minister's report prepared under subsection 39(3b) are required to be laid before both Houses of Parliament within six sitting days after the Minister completes the report.<sup>147</sup>

The decision to award the service contracts was made by Cabinet on 7 February 2005. The Minister announced the successful tenderers and signed the contracts on 17 February 2005.

The Minister tabled her report to Parliament prepared under subsection 39(3b) of the *Passenger Transport Act 1994* on 10 March 2005. The report is dated 2 March 2005.<sup>148</sup>

The report contained the following information:

- Section 1 — Award of contracts;
- Section 2 — Term of the contracts;
- Section 3 — Regions and routes of operation under the contracts;
- Section 4 — Amount or amounts that will be payable by the Minister under the contracts;
- Section 5 — Principles under paragraph 39(3)(a);
- Section 6 — Other matters.

### **Audit Comment**

Audit's review of the Minister's report found that the report contained the matters required by subsection 39(3b) of the *Passenger Transport Act 1994*.

The Minister was required to complete her report under subsection 39(3b) within 14 days of awarding the service contracts. As the contracts were awarded on 17 February 2005,<sup>149</sup> the Minister was required to complete her report by 3 March 2005. The Minister signed her report on 2 March 2005 and therefore complied with the requirement to complete her report within 14 days of awarding the contracts.

Parliament sat on 28 February 2005 and from 1-3 and 7-10 March 2005.<sup>150</sup> As the Minister completed her report on 2 March 2005, the Minister complied with the requirements of subsection 39(3d) by tabling her report on 10 March 2005, which was the fifth sitting day after 2 March 2005.

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<sup>146</sup> Subsection 39(3c).

<sup>147</sup> Subsection 39(3d).

<sup>148</sup> Report to Parliament under Section 39, *Passenger Transport Act 1994*, page 6.

<sup>149</sup> That is, the date that the Minister signed the contracts.

<sup>150</sup> Parliamentary Sitting Dates 2005 issued by the Minister for Infrastructure, Energy and Emergency Services, Fourth Session of the 50th Parliament, viewed at [www.parliament.sa.gov.au/today/sittingdays/CurrentProgram.htm](http://www.parliament.sa.gov.au/today/sittingdays/CurrentProgram.htm) on 5 July 2005. For 7-10 March, only the House of Assembly was sitting.

### **8.3.3 Report to Auditor-General under Subsection 39(3e)**

Subsection 39(3e) of the *Passenger Transport Act 1994* provides as follows:

*If under a service contract awarded under this section the Minister is, or is reasonably expected to be, liable to make payments equal to or exceeding \$4 000 000 (in total) over the term of the contract, the Minister must, within 28 days after awarding the contract, forward to the Auditor-General—*

- (a) *a copy of the contract; and*
- (b) *a report which describes the processes that applied with respect to the awarding of the contract.*

On 15 March 2005, the Minister signed a letter to the Auditor-General enclosing copies of the contracts and a report which described the processes that applied with respect to the awarding of the contracts in accordance with her obligations under subsection 39(3e) of the *Passenger Transport Act 1994*.

The contracts and the Minister's report were received by my Department on 30 March 2005.

#### **Audit Comment**

The Minister signed the contracts on 17 February 2005. Accordingly, the Minister was required to report to the Auditor-General by 17 March 2005. By her letter dated 15 March 2005, the Minister complied with the requirements of subsection 39(3e) of the *Passenger Transport Act 1994*.

#### *Audit Conclusion*

I am satisfied that the Minister complied with her obligations to report to Parliament under subsection 39(3d) of the *Passenger Transport Act 1994*. I am also satisfied that the Minister complied with her obligations to report to me, as Auditor-General, under subsection 39(3e) of the *Passenger Transport Act 1994*.

## **8.4 Prequalification of Tenderers**

### **8.4.1 Overview**

Subsection 39(1) of the *Passenger Transport Act 1994* provides that a service contract is to be entered into between the Minister (on behalf of the Crown) and 'a person who holds an appropriate accreditation' under the Act. Part 4 of the *Passenger Transport Act 1994* deals with the accreditation of providers of passenger transport services (referred to in Part 4 as 'operators') for the purposes of the *Passenger Transport Act 1994*.<sup>151</sup>

This part of this Report contains an analysis of how the matter of operator accreditation was dealt with in the process to award the service contracts.

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<sup>151</sup> Division 1 of Part 4 deals with accreditation for passenger services. Division 2 deals with driver accreditation. The accreditation of centralised booking services is dealt with in Division 3. Division 4 containing general provisions relating to accreditation.

#### **8.4.2 Overview of Statutory Provisions relating to Operator Accreditation**

Section 27 of the *Passenger Transport Act 1994* deals with operator accreditation. It provides as follows:

##### **27—Accreditation of operators**

- (1) *A person must not operate a passenger transport service within (or partly within) the State unless the person holds an appropriate accreditation for that service under this Division.  
Penalty: Division 4 fine.*
  
- (2) *The purpose of accreditation under this Division is—*
  - (a) *to attest—*
    - (i) *that the accredited person (or, in the case of an accredited body corporate, each director, manager or other person who is in a position to control or influence substantially the affairs of the body corporate) is considered to be of good repute and in all other respects fit and proper to be responsible for the operation of a passenger transport service to which the accreditation relates; and*
    - (ii) *that the accredited person is considered to have the capacity to meet prescribed standards relating to—*
      - (A) *the ability to provide passenger transport services; and*
      - (B) *safety of passengers and the public; and*
      - (C) *service to passengers; and*
      - (D) *vehicles and equipment (including their design, service, maintenance and condition); and*
      - (E) *any other matter prescribed by the regulations,*  
*to the degree and in the manner required in respect of services of the kind specified in the accreditation; and*
  - (b) *to provide a scheme to facilitate—*
    - (i) *the provision of an efficient and effective network of passenger transport services within the State; and*
    - (ii) *the observance of appropriate standards by the operators of passenger transport services; and*
  - (c) *to provide for any other matter prescribed by the regulations for the purposes of this section.*

- (3) *Standards for the purposes of subsection (2)*
- (a) *may be prescribed by the regulations; or*
- (b) *to the extent that they are not so prescribed, may be determined by the Minister.*
- (4) *The Minister must ensure that a standard determined by the Minister under subsection (3)(b) is widely published and made reasonably available to interested persons.*
- (5) *An accreditation must specify the kind or kinds of services for which it is appropriate.*

Division 4 of Part 4 of the *Passenger Transport Act 1994* contains general provisions relating to accreditation including:

- the procedure for applications for accreditation;<sup>152</sup>
- conditions on accreditation;<sup>153</sup>
- duration and categories of accreditation;<sup>154</sup>
- periodical fees and returns;<sup>155</sup>
- renewals;<sup>156</sup>
- assignment of accreditation;<sup>157</sup>
- surrenders of accreditation;<sup>158</sup> and
- variation of accreditation.<sup>159</sup>

Subsection 35(5) of the *Passenger Transport Act 1994* provides that no liability attaches to the Minister by virtue of the fact that the Minister has awarded an accreditation to a particular person under the *Passenger Transport Act 1994*.

Part 2 of the *Passenger Transport (General) Regulations 1994* provides further detail on the following matters:

- eligibility of operators;<sup>160</sup>
- conditions on accreditation;<sup>161</sup>
- periodical fees and returns;<sup>162</sup>

<sup>152</sup> Section 30.

<sup>153</sup> Section 31.

<sup>154</sup> Section 32.

<sup>155</sup> Section 33.

<sup>156</sup> Section 34.

<sup>157</sup> Subsections 35(1) and (2).

<sup>158</sup> Subsection 35(3).

<sup>159</sup> Subsection 35(4).

<sup>160</sup> Regulation 6.

<sup>161</sup> Regulation 7.

<sup>162</sup> Regulation 8.

- joint accreditations;<sup>163</sup>
- renewals;<sup>164</sup> and
- procedure for variation of an accreditation.<sup>165</sup>

### **8.4.3 Accreditation was not expressed to be a Pre-qualification to Tendering**

The Request for Tender did not require tenderers to be accredited under the *Passenger Transport Act 1994* as a prerequisite for tendering.<sup>166</sup> Potential tenderers were, however, alerted to the fact that they would be expected to demonstrate compliance with the *Passenger Transport Act 1994*, including accreditation should they be successful. The Request for Tender also emphasised the requirement that potential tenderers demonstrate the capacity to carry out the services, which, in turn, required the potential tenderer to hold an appropriate accreditation under the *Passenger Transport Act 1994*.

### **8.4.4 Tender Requirement to Demonstrate Compliance with the Service Contract**

Tender responses were required to 'satisfy the requirements for the operation of services specified in the Service Contract', which was attached at Part B of the Request for Tender.

Under the Services Contract, the Contractor is required to comply with the *Passenger Transport Act 1994* in relation to the services performed under that Contract. The requirement of an operator to hold an appropriate accreditation is covered by this general requirement to comply with the *Passenger Transport Act 1994*.

#### *Audit Conclusion*

In my opinion, it was not necessary to require tenderers to demonstrate accreditation under the *Passenger Transport Act 1994* as a prerequisite to participating in the tender process. Indeed, imposing such a requirement may have been unduly restrictive by not affording experienced and capable passenger transport operators from jurisdictions other than South Australia, and not holding at that time the appropriate accreditation under the *Passenger Transport Act 1994*, the ability to participate in the tender.

Having said that, and given the importance of the operator accreditation regime under the *Passenger Transport Act 1994*, and particularly the requirement that a service contract only be entered into with the holder of an appropriate accreditation, I am of the opinion that future requests for tender for the provision of passenger transport services under Part 5 of the *Passenger Transport Act 1994* contain an express reference to the requirements for operator accreditation under Part 4 of the *Passenger Transport Act 1994* and that a service contract can not be entered into with a person who does not hold an appropriate accreditation. Future requests for tender should also provide details of the requirements that a person applying for accreditation has to meet in order to gain

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<sup>163</sup> Regulation 16.

<sup>164</sup> Regulation 24.

<sup>165</sup> Regulation 25.

<sup>166</sup> Although this was not expressly stated, section 8.2 of the Request for Tender, which set out the 'Essential Requirements for All Tenders', did not mention tenderers specifying their accreditation.

accreditation so that potential tenders who do not hold an appropriate accreditation at that time can assess and take into account the costs of obtaining accreditation should their tender be successful.

## **8.5 Reporting of Directions by the Minister**

Section 39(2a)(c) of the *Passenger Transport Act 1994* provides:

*If the Minister determines that a services contract should be awarded by tender,*

...

*(c) if the Minister gives a direction to any person during the assessment or selection process, then the Minister must cause a statement of the fact of that direction*

*(i) to be forwarded to the Economic and Finance Committee within 14 days after the direction is given; and*

*(ii) to be published in the annual report of the Minister's department for the relevant year.'*

The term 'direction' is not defined under the *Passenger Transport Act 1994*.<sup>167</sup>

Audit's review has found that the Minister has not caused a statement of the fact of any direction given to any person during the assessment or selection process for the Metropolitan Bus Services to be forwarded to the Economic and Finance Committee.

The key personnel involved in the conduct of the tender process on behalf of the State have advised, under oath, that the Minister did not, in their view, issue any directions within the meaning of section 39(2a)(c) of the *Passenger Transport Act 1994* at any stage during the conduct of the tender and evaluation process.

Audit's review of the tender process for the Metropolitan Bus Services has, however, identified that, at certain key stages of the process, the Minister was briefed on the process and provided input on the future conduct of the process. This input was communicated to the Project Steering Committee by the Chief Executive of the Department of Transport and Urban Planning or implemented personally by the Chief Executive of the Department of Transport and Urban Planning.

It is important to note that none of the matters with respect to which the Minister provided input could be characterised as improper.

### **Audit Comment**

Based on Audit's review of the process, it is not possible to say definitively that the Minister gave directions concerning the conduct of the tender process within the meaning of section 39(2a) (c) of the *Passenger Transport Act 1994*.

In my opinion, a clarification or definition of the concept of a 'direction' as that term is used in section 39(2a) (c) of the *Passenger Transport Act 1994* would be beneficial so as to remove uncertainty and ensure that, where appropriate, directions given during the

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<sup>167</sup> See section 4, *Passenger Transport Act 1994*.

course of the conduct of a tender process pursuant to Section 39 of the *Passenger Transport Act 1994* are forwarded to the Economic and Finance Committee and published in the annual report of the Minister's Department.

Noting the reporting obligations imposed upon the Minister pursuant to section 39(2a)(c) of the *Passenger Transport Act 1994*, I am of the opinion, that in future, if the Minister proposes to provide input to or guidance on the conduct of a tender process conducted pursuant to section 39(2a) of that Act to those charged with responsibility for the conduct of that process, the Minister should be very clear as to whether or not that input or guidance is to be taken to be a direction which must be complied with. Alternatively, the Minister should make it clear that the input or guidance provided is not to be regarded as being binding on those conducting the process. This is, in my opinion, of particular importance given the hierarchical nature of the public service and the position held by the Minister.

In summary, in circumstances where a Minister is involved with a process that is governed by statute, given the hierarchical structure of Departments of State, the Minister needs to exercise caution to clarify whether communications to those involved are to be interpreted as directions which must be complied with. It may well be that to ensure the integrity of the probity of the processes the legislation may require review. Such a review could provide that any direction by the Minister must be in writing. This would be consistent with other legislative arrangements where the Minister is authorised by statute to give directions. This would clarify the political accountability with respect to the Minister's involvement in the administrative processes concerned.

## **9. AUDIT OPINION**

### **9.1 Statutory Compliance**

*The Passenger Transport Act 1994* incorporates a range of requirements to be observed in the conduct of processes leading up to the awarding of the contract and following the awarding of contracts. The provisions include:

- requirements that the Minister provide reports to specified parties;
- reporting upon any directions provided by the Minister in connection with the process of awarding contracts;
- principles which must be observed by the Minister in awarding contracts.

In my opinion, the Minister and the people appointed to assist in the tender process have complied with requirements of relevant legislation. This overall conclusion is qualified by the following observations which have arisen from my review.

I have noted aspects of communication between the Minister and the Project Steering Committee. I accept that the provisions of the *Passenger Transport Act 1994* which require the Minister to report any 'directions' does not clearly define what constitutes 'a direction' and that the Minister had a genuine belief that she did not provide directions which were required to be reported to the Economic and Finance Committee and that this view was confirmed under oath by those with whom she related. The Parliament may wish to review relevant provisions of the *Passenger Transport Act 1994* and consider amendments which clarify what is a direction for the purpose of the Act.

It is evident from this review that the Minister, and the people assisting her in the tender process have taken into account the principles prescribed by the *Passenger Transport Act 1994*. In considering the principle that 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, the Minister and the Project Steering Committee relied on advice from the Crown Solicitor's Office. In my view, for the reasons discussed in this Report, the advice, which defined a market share which was 'close to a monopoly', did not adequately consider all relevant matters. I do not believe that the failure to consider these further matters affected the outcome of the tender process, either in terms of its probity and/or its validity.

### **9.2 Contract Examination**

The review of the contracts entered by the Minister for Transport for the provision of bus services in the tendered contract areas has considered whether the matters required to be incorporated in the contracts by the *Passenger Transport Act 1994* have been effectively addressed and whether the contracts effectively protect the State's interests.

In my opinion the contracts between the Minister and both successful tenderers effectively protect the State's interests and incorporate the provisions required by the *Passenger Transport Act 1994* to be included in contracts for provision of passenger transport services. This conclusion is qualified by the following observations which have arisen from the review.

The contracts include a requirement that both parties to the contract 'will each of them act with perfect fairness and utmost good faith, as if they were partners'. In my opinion, for the reasons set out in this Report, this contractual commitment may impede the Minister's flexibility to act in the public interest.

### **9.3 Probity of Process**

The review of the probity of processes leading up to the awarding of the contracts considered aspects of common law principles and concepts and the requirements of authoritative guidance provided by the State Supply Board and Department of Transport and Urban Planning. Consideration was also given to provisions of the Request for Tender document which established procedures which were to be followed in the tender process.

In my opinion, the processes leading up to the awarding of the contracts, which are the subject of this Report, adequately addressed probity principles and concepts, the requirements of guidance provided by the State Supply Board and the Department of Transport and Urban Planning, and the procedures reflected in tender documents. This opinion is provided subject to the following observations which reflect areas in which future processes could be improved.

- The acquisition and evaluation plans developed with respect to the tender process did not fully describe the role and reporting responsibilities of all Departmental officers. In future tender processes, I recommend that this should occur.
- A risk management plan, which included consideration of mitigation strategies was not prepared for the tender process. In future tender processes, I recommend that this occur and be updated on a regular and timely basis.
- Procedures for maintaining the confidentiality of tender documents did not provide assurance that no documents were removed from the secure tender room and copied. In future tender processes, I recommend that consideration is given to additional security arrangements to ensure confidential documents are not removed from the tender room and copied.
- The review identified instances where advice was provided by the Probity Adviser which was not documented. I recommend that in future all advice provided by the Probity Adviser should be documented.
- A tenderer who was considered by the Project Steering Committee to be non competitive when compared to other tenders was asked to provide clarification. It is not appropriate, in my opinion, to require tenderers to provide clarification, and incur additional expense unless there is a real prospect that the tender will be competitive following provision of the clarification.
- Crown Law provided advice during the course of the tender process but was not required to provide a 'sign off' on contractual documentation before Cabinet was asked to approve the award of the contracts. In my view, formal Crown Law 'sign off' should be provided before approval to award contracts is sought from Cabinet or other parties with responsibility for approving the award of contracts.



## LIST OF ATTACHMENTS

<b>Attachment</b>	<b>Description</b>
1	Compliance with Subsections 40(1) and 41(1) of the <i>Passenger Transport Act 1994</i>
2	Discretionary Matters Set Out in Subsections 40(2) and 41(2) of the <i>Passenger Transport Act 1994</i>
3	Chronological List of Events and Documents



**ATTACHMENT 1**

**COMPLIANCE WITH SUBSECTIONS 40(1) AND 41(1) OF THE PASSENGER TRANSPORT ACT 1994**

<b>Paragraph</b>	<b>Torrens Transit (TT) Contract</b>	<b>Australian Transport Enterprises (ATE) Contract</b>	<b>Comments</b>
The period for which it operates - section 40(1)(a)	<p>Clause 4 Schedule 1, items 1 and 2 (note 'Target Termination Date' - this term is not defined in clause 1.1)</p> <p>Clause 33</p>	<p>Clause 4 Schedule 1, Items 1 and 2 (note 'Target Termination Date' - this term is not defined in clause 1.1)</p> <p>Clause 33</p>	<p>This Agreement begins on the Commencement Date (24 April 2005) and ends (subject to the terms of this Agreement) on the Termination Date (24 April 2010).</p> <p>Subclauses include: notice of potential default (33.1), time to make good (33.2 - 60 days), material breaches (33.3), opportunity to remedy default (33.4), notice of termination (33.5), deemed repudiation (33.6), termination for convenience (33.7 - 6 months), partial termination (33.8 - particular Contract Area), damages contractor's only remedy (33.9) and preservation of remedies (33.10)</p>
The manner in which it may be terminated - section 40(1)(b)	<p>Clause 4 Schedule 1, items 1 and 2 (note 'Target Termination Date' - this term is not defined in clause 1.1)</p> <p>Clause 33</p>	<p>Clause 4 Schedule 1, Items 1 and 2 (note 'Target Termination Date' - this term is not defined in clause 1.1)</p> <p>Clause 33</p>	<p>Clause 9.2 requires contractor to implement Quality Assurance System.</p> <p>Schedule 11 provides a structure for performance assessment for the delivery of the Services.</p>
Standards relating to the provision of services under the contract - section 40(1)(c) <sup>168</sup>	<p>Clause 9 (general service requirements)</p> <p>Clause 10 (monitoring general service standards) and Schedule 11 (performance benchmarks)</p> <p>Clause 11.4 (service improvement strategy)</p> <p>Schedule 12 (utility standards)</p>	<p>Clause 9 (general service requirements)</p> <p>Clause 10 (monitoring general service standards) and Schedule 11 (performance benchmarks)</p> <p>Clause 11.4 (service improvement strategy)</p> <p>Schedule 12 (utility standards)</p>	<p>Clause 9.2 requires contractor to implement Quality Assurance System.</p> <p>Schedule 11 provides a structure for performance assessment for the delivery of the Services.</p>

<sup>168</sup> Subsection 40(4) provides that the Minister must, for the purposes of subsection (1)(c), establish various standards that will apply to all service contracts of the same kind with a view to ensuring that standards relating to the provision of services are, so far as is reasonably practicable and appropriate, maintained at the highest possible levels.

**ATTACHMENT 1**

**COMPLIANCE WITH SUBSECTIONS 40(1) AND 41(1) OF THE PASSENGER TRANSPORT ACT 1994 (cont)**

<b>Paragraph</b>	<b>Torrens Transit (TT) Contract</b>	<b>Australian Transport Enterprises (ATE) Contract</b>	<b>Comments</b>
A scale of service levels – section 40(1)(d)	Clause 7 (the services) Clause 8 (special events) Schedule 3 (general specifications) Schedule 6 (contractor plans)	Clause 7 (the services) Clause 8 (special events) Schedule 3 (general specifications) Schedule 6 (contractor plans)	Items dealt with in Schedule 3 include: operation and design of services (2), bus stop repair and maintenance (3), communications systems (4), greenhouse challenge (5), working timetables (6), service quality audits (7) and public information (8).
The fares to be charged – section 40(1)(e)	Clause 12.4 (fee variation for changes in law) Clause 19 (ticketing system and fare collection) Schedule 5 (financial arrangements) Clause 12 (financial arrangements) Schedule 5 (financial arrangements)	Clause 12.4 (fee variation for changes in law) Clause 19 (ticketing system and fare collection) Schedule 5 (financial arrangements) Clause 12 (financial arrangements) Schedule 5 (financial arrangements)	
The manner in which the holder of the service contract will be remunerated or gain revenue from the provision of services under the contract – section 40(1)(f)	Not applicable	Not applicable	Patronage Guarantee formula contained in Schedule 5.
Other matters required by this Act or the regulations to be specified in a service contract – section 40(1)(g) <sup>169</sup>	Schedule 2 (contract area)	Schedule 2 (contract area)	
Specify a region or route of operation – section 41(1)			

<sup>169</sup> There is nothing in the Regulations prescribing matters under this paragraph.

**ATTACHMENT 2**

**DISCRETIONARY MATTERS SET OUT IN SUBSECTIONS 40(2) AND 41(2) OF THE PASSENGER TRANSPORT ACT 1994**

<b>Paragraph</b>	<b>Torrens Transit(TT) Contract</b>	<b>Australian Transit Enterprises (ATE) Contract</b>	<b>Comments</b>
Reviewing or altering the fares or fare system in circumstances specified in the contract – section 40(2)(a)	Clause 12.4	Clause 12.4	The Passenger Transport (Regular Passenger Services; Fares Charges) Regulations 1994 sets the level of fares.
Monetary or other penalties for breaches of the contract and the recovery of monetary and other penalties - section 40(2)(b)	Clause 13 (service defects) Clause 14 (Minister's right of set-off)	Clause 13 (service defects) Clause 14 (Minister's right of set-off)	Clause 13 entitles the Minister to deduct the Defective Service Amount from the Fee in certain circumstances (eg, late etc).
Bonds for the performance of the obligations under the contract - section 40(2)(c)	Clause 3.1 (guarantee to Minister - condition precedent) Clause 35 (parent company guarantee) Clause 36 (performance guarantee) Schedule 17 bank guarantee	Clause 3.1 (guarantee to Minister - condition precedent) Clause 35 (performance guarantee)	TT - the term 'Guarantee Amount' is defined in clause 1.1 to mean \$3.4 million, subject to adjustment on 30 April 2006.  ATE - the term 'Guarantee Amount' is defined in clause 1.1 to mean \$1.6 million, subject to adjustment on 30 April 2006.
Variation of the contract – section 40(2)(d)	Clause 41.5	Clause 40.5	
Renewal of the contract – section 40(2)(e)	Not dealt with.	Not dealt with.	
Such other matters as the parties think fit to include in the circumstances of the case – section 40(2)(f)	All other clauses.	All other clauses.	
Periodic review of any matter for the time being determined by or under the contract - section 40(3)	Various matters	Various matters	

**ATTACHMENT 2**

**DISCRETIONARY MATTERS SET OUT IN SUBSECTIONS 40(2) AND 41(2) OF THE PASSENGER TRANSPORT ACT 1994 (cont)**

<b>Paragraph</b>	<b>Torrens Transit(TT) Contract</b>	<b>Australian Transit Enterprises (ATE) Contract</b>	<b>Comments</b>
<p>Confer on the holder of the contract an exclusive right to operate a regular passenger transport service of the relevant kind within the specified region, or on, or in proximity to, the specified route (or part of that region or route) – section 41(2)(A)</p>	<p>Clause 7.3</p>	<p>Clause 7.3</p>	
<p>Provide for other matters relevant to the operation of passenger transport services (including new services) within the specified region, or on, or in proximity to, the specified route - section 41(2)(b)</p>	<p>Clause 11 (service changes)</p>	<p>Clause 11 (service changes)</p>	

**ATTACHMENT 3****CHRONOLOGICAL LIST OF EVENTS AND DOCUMENTS**

<b>Date</b>	<b>Event</b>
21 April 2004	Letter from Serco to Mr O'Loughlin advising that Serco did not wish to renew its contract.
11 May 2004	Letter from Serco to Ms Webster containing proposal to operate the buses services in the contract areas on new terms and conditions.
15 June 2004	Cabinet approved the open tender process.
28 June 2004	Briefing Note Minute Number 114/04 - Appointment of Contracting and Tendering Services Pty Ltd (CTS) as probity adviser in respect of the tender process.
5 July 2004	Letter from Ms Haselgrove to CTS confirming appointment of CTS as probity adviser in respect of the tender process.
8 July 2004	Minister for Transport announces decision to go to tender for the three contract areas during a radio interview.
14 July 2004	Department of Transport and Urban Planning's (DTUP) Accredited Purchasing Unit endorsed Acquisition Plan.
16 July 2004	Email from Mr Finlay containing legal advice on subparagraph 39(3)(a)(i) of Passenger Transport Act.
20 July 2004	State Supply Board approved Acquisition Plan.
23 July 2004	Letter from DTUP to Serco rejecting its offer contained in its letter of 11 May 2004.
30 July 2004	Briefing Note Minute 153/04 - recommending that Minister for Transport note legal advice on subparagraph 39(3)(a)(i) of the Passenger Transport Act.
2 August 2004	Cabinet approved package of services tendered in Request for Tender (RFT) documentation and the release of the RFT.
16 & 17 August 2004	Request for Tender advertised in the Adelaide Advertiser and the Australian newspapers and Tender SA website.
23 August 2004 - 11 October 2004	Requests for clarification from bidders and potential bidders. Updates to RFT issued (59 in total).
23 August 2004	Briefing Note Minute 169/04 - Appointment of Financial Consultant. Contains handwritten note to Ms Haselgrove to seek at least three tenderers.
27 August 2004	Industry briefing held at Noarlunga Theatre.
28 August 2004	Vehicle and depot inspections.

**ATTACHMENT 3**

**CHRONOLOGICAL LIST OF EVENTS AND DOCUMENTS (cont)**

<b>Date</b>	<b>Event</b>
30 August 2004	Selective Request for Tender for the provision of assistance with the financial evaluation of tenders.
6 September 2004	Briefing Note Minute 169/04 (amended version) - Appointment of ABFA Pty Ltd as Financial Consultant. Noted by Minister for Transport on 24 September 2004. Bidders and potential bidders advised of change in tender closing date from 15 October 2004 to 25 October 2004.
9, 15 & 16 September 2004	Clarification meetings with potential bidders.
15 September 2004	Probity Adviser's Role (probity plan) signed.
29 September 2004	Second depot and vehicle inspection.
25 October 2004	Tender closing date. Endorsement of Evaluation Plan by Project Steering Committee.
26 October 2004	Late submission of items from Transdev/Transfield. Opening and registration of tenders. Preliminary evaluation conducted.
27 October 2004	Distribution of relevant sections of the tenders distributed to the Tender Evaluation Teams.
9 November 2004	Project Steering Committee Meeting discussed shortlisting.
11 November 2004	Project Steering Committee Meeting endorsed a draft Evaluation Report and Shortlisting and agreed on the tenderers proposed to be shortlisted.
29 & 30 November and 1 December 2004	Interactive clarification sessions with all five tenderers.
2 December 2004	Project Steering Committee Meeting noted that the Evaluation Report and Shortlisting was presented to the Minister for Transport.
9 December 2004	Project Steering Committee Meeting at which decision was taken to further shortlist tenderers from four to three.
13, 15 and 17 December 2004	Clarification meetings with three shortlisted tenderers. Tim O'Loughlin and Probity Adviser attended meeting on 17 December.
14 December 2004	Briefing Note Minute 256/04 - providing update on shortlisting and negotiation. Signed by Minister for Transport on 15 December 2004.
21 December 2004	Briefing Note Minute 263/04 - recommending the Minister for Transport endorse DTUP finalising an outcome with the three shortlisted tenderers. Not endorsed by Minister.

**ATTACHMENT 3****CHRONOLOGICAL LIST OF EVENTS AND DOCUMENTS (cont)**

<b>Date</b>	<b>Event</b>
21 December 2004	Project Steering Committee Meeting agreed that the fourth remaining tenderer should also be provided with the opportunity to meet with Mr O'Loughlin.
22 December 2004.	Ms Haselgrove faxes Request for Clarification to Transitplus stating that she and Mr O'Loughlin were available to meet with Transitplus on 23 December 2004.
11 January 2005	Project Steering Committee Meeting agreed to make a recommendation to the Minister for each service package.
18 January 2005	Briefing Note Minute 289/05 from Mr O'Loughlin to Minister for Transport providing additional information with regard to contractor recommendations from the Project Steering Committee. Noted by Minister on 27 January 2005.
20 January 2005	Briefing Note Minute (unnumbered) containing Cabinet submission on recommendation. Approved by the Minister for Transport but not dated.
25 January 2005	Accredited Purchasing Unit meeting considered draft purchase recommendation.
7 February 2005	Cabinet approved the recommendation for the award of the contracts.
10 February 2005	Letter from State Supply Board approving the process and endorsing the Cabinet decision to award the contracts.
17 February 2005	Minister for Transport signs contracts and announces awarding of contracts.
3 March 2005	Project Steering Committee provided report to State Supply Board on the outcome of the tender process.
10 March 2005	Minister for Transport tabled her Report to Parliament prepared under subsection 39(3b) of the Passenger Transport Act.
15 March 2005	Minister for Transport wrote to Auditor-General's Department in accordance with subsection 39(3e) of the Passenger Transport Act.
24 April 2005	New contracts commenced.