

The Auditor-General
Audit Report No.32 2005–06
Performance Audit

Management of the Tender Process for the Detention Services Contract

Department of Immigration and Multicultural Affairs

Australian National Audit Office

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of Australia 2005

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Canberra ACT
2 March 2006

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit in the Department of Immigration and Multicultural Affairs in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *Management of the Tender Process for the Detention Services Contract*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee'.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations

ACS	Australasian Correctional Services
ACM	Australasian Correctional Management
CPG's	Commonwealth Procurement Guidelines
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs. On 27 January 2006, the office of Indigenous Policy Coordination was moved from the Immigration and Multicultural and Indigenous Affairs portfolio to the new Department of Family, Community Services and Indigenous Affairs. At the time of the ANAO's field work for this audit, detention services were administered by the Department of Multicultural and Indigenous Affairs and is abbreviated to DIMIA throughout the report.
GSL	Global Solutions Limited (Formerly Group 4 Falck Ltd.)
GEO	The GEO Group, formerly Australasian Correctional Services (ACS)
RFT	Request for Tender

Summary and Recommendations

Executive Summary

Foreword

1. On 27 February 1998, DIMIA (Department of Immigration and Multicultural and Indigenous Affairs)¹ entered into a ten year general agreement with Australasian Correctional Services (ACS, now the GEO group) for the provision of detention services at all mainland immigration detention facilities.² This agreement, which remains extant, established a broad framework for the provision of detention services by means of contract. Under the umbrella of the general agreement, DIMIA and ACS entered into individual detention services contracts, which contained the details of specific detention services to be provided. The services contracts were managed by ACS through its operational company Australasian Correctional Management (ACM).
2. The general agreement contains provisions governing the exercise of options under the individual services contracts. In January 2001, under these terms, ACS submitted an offer for the provision of detention services for the term of the first extension of the services contract. After considering the offer and conducting negotiations with ACS, DIMIA decided not to accept the offer and to conduct a competitive tender process on amended terms and conditions. This decision was based on a determination that it was not possible for DIMIA to be satisfied that the ACS offer represented 'best value for money'.
3. The ANAO notes that other provisions in the general agreement meant that it was necessary to seek ACS' consent to the conduct of a tender process on amended terms and conditions. The (then) Secretary wrote to ACS on 5 April 2001 to advise of this decision, and ACS agreed to the approach proposed by DIMIA on 6 June 2001.

¹ On 27 January 2006, the office of Indigenous Policy Coordination was moved from the Immigration and Multicultural and Indigenous Affairs portfolio to the new Department of Family, Community Services and Indigenous Affairs. At the time of the ANAO's field work for this audit, detention services were administered by the Department of Multicultural and Indigenous Affairs and is abbreviated to DIMIA throughout the report.

² Mainland Detention Facilities at this time were located at Port Hedland (WA), Perth (WA) Maribyrnong (Vic), and at Villawood (NSW). In 2000 a centre at Woomera (SA) was opened and in 2003, Baxter (SA) also commenced operations.

4. In summary, there was an obligation on DIMIA to engage ACS to provide the Commonwealth's detention services, where ACS would provide 'the best value for money'. The general agreement also provided that DIMIA was able to engage an alternative service provider where that service provider would present better value for money to DIMIA. Testing the market through a competitive tender process was seen by DIMIA as the best way to determine value for money.

5. Value for money is also central to Australian Government procurement. The *Financial Management and Accountability Act 1997* (FMA Act) and the *Financial Management and Accountability Regulations 1997* (FMA Regulations) govern the management of Commonwealth money or property. Under the FMA Regulations an official performing duties in relation to the procurement of property or services must have regard to the Commonwealth Procurement Guidelines (CPGs). The CPGs (in force at the time of this procurement) provided specific guidance concerning value for money:

Value for money is the core principle underpinning Australian Government procurement. This core principle is underpinned by four supporting principles of: efficiency and effectiveness; accountability and transparency; ethics and industry development. Officials buying goods and services need to be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle.

6. DIMIA and ACM negotiated extensions to the existing arrangements while DIMIA prepared the tender documents. In August 2001, the formal tender and evaluation processes began. Following an evaluation of a call for Expressions of Interest (EOI), four organisations were invited to submit tenders:

- Australasian Correctional Management (ACM);
- Group 4 Falck Global Solutions Ltd (now known as GSL);
- Management and Training Corporation (MTC); and
- Australian Protective Services (APS).³

7. Global Solutions Limited (GSL) was announced as the preferred tenderer in December 2002. Contract negotiations took place with the preferred tenderer from December 2002 until the contract was signed on 27 August 2003. ACM continued to manage the detention centres throughout this period until

³ APS subsequently withdrew its tender before tenders closed.

the transition, which began in December 2003, and was completed on 29 February 2004. DIMIA's tender for the detention services contract represented an overall procurement of \$400 million over the planned four years of the contract.

Audit objective

8. The objective of this audit was to assess DIMIA's management of the tender, evaluation and contract negotiation processes for the Detention Services Contract. Specifically, the audit considered DIMIA's processes for determining value for money based on the department's:

- evaluation of the request for tender, including the announcement of the preferred tenderer;
- negotiations with the successful and unsuccessful tenderers; and
- management of liability, indemnity and insurance.

Key Findings

The Procurement Process (Chapter 2)

Tender objectives

9. Determining value for money was particularly important for this procurement. The pre-existing general agreement with ACS and the Commonwealth Procurement Guidelines (CPGs) required DIMIA to ensure that the decision to award the detention services contract was based on value for money.

10. At the time the tender was conducted, DIMIA had received advice from Senior Counsel that the tender process needed to be conducted strictly in accordance with clause 3.3(a) of the general agreement – *where the Commonwealth will elect to use ACS for any detention service contract, where ACS will provide the best value for money for the Commonwealth.*

11. The ANAO found that DIMIA's processes and documentation of the tender evaluation did not clearly identify whether the provisions of the general agreement were considered in the management of the tender process, and how the agreement was to be taken into account during the tender, evaluation and contract negotiation stages from December 2001 to August 2003.

Governance Arrangements (Chapter 3)

Evaluation framework

12. In preparing for the tender process, DIMIA established a sound evaluation framework that was capable of taking into account the costs and benefits of individual tender proposals over the whole of the procurement cycle.

Probity guidelines and principles

13. Procurement guidance issued by the Department of Finance and Administration emphasise the importance of:

- utilising necessary expertise during the conduct of the procurement process;
- clearly specifying roles and responsibilities of key personnel and ensuring the separation of duties and responsibilities;

- having a clear understanding and agreement on the level of assurance being provided by expert advisors;
- identifying and managing actual or perceived conflicts of interests; and
- creating and maintaining appropriate documentation, particularly surrounding key decisions.

Against these guidelines, the ANAO found the following.

Utilising necessary expertise during the conduct of the tender process

14. The management of a tender process requires an appropriate blend of operational, corporate and procurement experience. At the beginning of the formal process in August 2001, DIMIA's (then) Secretary approved a decision-making framework that comprised:

- an evaluation panel, that was to evaluate tenders and report to a steering committee;
- a steering committee that would be chaired by a deputy secretary and include three first assistant secretaries; (the steering committee was to select the members of the evaluation panel, and consider and guide the report of the evaluation panel); and
- the Secretary, who was to be the final decision maker (referred to as the delegate, and representing the approving authority for the procurement).

15. Given the size and importance of the tender, DIMIA engaged external specialists in law, finance, and probity to provide advice and complement the skills of DIMIA staff. Approximately half way through the evaluation process, a probity auditor was also engaged.

16. In the process of selecting the evaluation panel, the steering committee made changes to the overall, decision-making framework. There are multiple versions of steering committee meeting minutes, from which it is now not possible to determine what was discussed and agreed in relation to the roles and responsibilities of the evaluation teams. However, subsequent evidence indicates that the steering committee assumed the role originally intended for the evaluation panel and later became known as the Tender Evaluation Team (TET) as well as the steering committee. An additional team, the Tender Support Team (TST) was also created. The TST was drawn from senior DIMIA

staff from the detention and compliance divisions, and included the Chief Financial Officer (CFO).

17. The ANAO found that DIMIA's records of relevant meetings did not disclose any consideration of how these changes would impact the separation of responsibilities between the steering and evaluation bodies and whether or not the Secretary, who had originally approved the framework, concurred with these changes.

18. The ANAO found that the subsequent loss of key personnel from the steering committee/TET and the tender support team at the mid-point of the tender evaluation did not trigger a review of skills and capacity necessary to complete the task. The departure of the initial chair of the steering committee effectively abolished one of the senior positions. The three remaining personnel did not assess and report to the delegate on the balance of expertise remaining. There was also no evidence of discussion, and no advice to the delegate, of the decision taken by the steering committee to replace DIMIA's CFO on the tender support team with another officer at a lower level. The replacement was drawn from the detention division and not from the CFO's division which further altered the balance of skills and experience involved in the procurement.

Clearly specified roles and responsibilities of key personnel and ensuring separation of duties

19. The Department of Finance and Administration suggests that 'in large or complex transactions an external probity specialist may be involved to provide independent oversight of the process.'⁴ Generally, the appointment of a probity advisor to a major tender undertaking represents a means of independently monitoring a tender process to ensure it is conducted in accordance with identified probity principles. A probity advisor typically provides advice as requested before and during the course of the process, including on specific issues that arise. While a probity advisor has a level of direct interest in the project, it is essential that they remain independent of the project team and other advisors.⁵ An advantage in engaging a probity advisor is that at least one individual will be completely focussed on the probity of the process and separated from other responsibilities.

⁴ Department of Finance and Administration, 'Procurement Guidance', *Ethics and Probity in Government Procurement*, <http://www.finance.gov.au/ctc/etctic_probity-probity_exper.html>.

⁵ Independent Commission Against Corruption (ICAC), *Probity and probity advising – guidelines for managing public sector projects*, November 2005, pp. 15.

20. In this tender, DIMIA engaged the probity advisor to take on additional responsibilities, including preparation of the tender evaluation plan, and providing the evaluation method and assisting in the evaluation process. Consequently, the probity advisor became involved in other aspects of the tender process, including providing advice on the modification of tender evaluation scores, in response to requests from the steering committee which are not documented.

21. It is important to ensure that the awarding of a contract is not subject to perceptions that appropriate processes may not have been followed. The ANAO found that by engaging the probity advisor to undertake additional responsibilities, DIMIA compromised the independence of this role.

Having a clear understanding and agreement of the level of assurance being provided by expert advisors

22. A probity auditor was formally appointed on 28 October 2002, approximately the mid point of the tender evaluation period. The initial requirement for the probity auditor is not documented. DIMIA's contract with the probity auditor sets out the scope of services to be provided as being a 'desktop review' and provides only a selection of documents to be examined.

23. In his reports, the probity auditor appropriately qualified the level of assurance being provided. In describing the audit procedures, the probity audit report(s) noted;

We have conducted this stage of the Audit in accordance with our retainer, subject to the restriction on our retainer to conduct our audit at a strategic level, based on:

- (a) our discussions with the project director;
- (b) a selective desktop review of files...

24. The ANAO found that the terms of the engagement did not allow the probity auditor to independently determine the nature, timing and extent of audit procedures. As a result, these reports provided a low level of assurance over the probity of the process.

25. The ANAO found that although DIMIA engaged a number of contractors for independent advice, they did not require these contractors, as part of the terms of their engagement, to provide assurance over their advice. Ultimately, the probity auditor recommended that assurance from the contractors be provided. The ANAO was advised that verbal assurance was

provided by DIMIA's advisors at a steering committee meeting on 22 August 2003. However, formal documented assurance was not arranged until the week prior to contract signature and this could not be finalised until the day the contract was signed.

Identifying and managing actual or perceived conflicts of interest

26. In significant procurements, members of an evaluation committee should disclose and manage appropriately any actual, perceived or potential conflicts of interest. At its meeting on 20 August 2002, the steering committee decided that there would be benefit in obtaining a formal referee report from within DIMIA, concerning the performance of ACM.

27. Probity advice was sought and the probity advisor advised against the chair of the steering committee providing the referee's report. This advice was based on the risk of a perceived conflict between the obligation of the chair of the steering committee, to consider the evaluation of each tenderer impartially, and the chair's role as the contract administrator over the previous two years, in which extensive dealings with the incumbent service provider took place.

28. Notwithstanding this advice, the steering committee agreed that the chair of the steering committee was the most appropriate person to provide the reference for ACM, from DIMIA.

29. In his report, in March 2003, the probity auditor had access to the advice of the probity advisor (discussed at paragraph 27 above), that the chair of the steering committee should not provide a referee report for ACM. Noting that this reference had, however, been subsequently provided, the probity auditor recommended that: 'in future tenders, DIMIA should consider (prior to the issue of an RFT) a suitable separation of people who might be performing functions that have inherent tensions, real or perceived.' This recommendation, which was directed towards avoiding the potential for conflicts of interest, was not accepted by the steering committee.

30. There is no record of the delegate being informed of the probity auditor's recommendation, nor of the resolution of the steering committee to disagree with it.

Creating and maintaining appropriate documentation

31. A fundamental requirement of public administration and accountability is adequate record keeping. Records maintained need not be

lengthy. The key test is that they are fit for their purpose, and appropriately managed and stored.

32. The ANAO found examples of different versions of minutes of meetings without any markings to show which was intended to be the final version. In some cases this was simply poor administration. In other cases there were potential probity implications. There are, for instance, two versions of the steering committee minutes of 17 September 2002 where the names of the tenderers are identified in one version but not in the other. Amending the minutes of the meeting to mask the identity of the tenderers indicates that the steering committee (also the tender evaluation team) considered it inappropriate for the record to show that the identity of the tenderers had been revealed at this early stage. The probity audit reports indicate that the probity auditor did not see the version of the minutes in which the tenderers were named.

33. The audit also found that there are no records of steering committee meetings held between 15 May and 21 August 2003. A range of significant matters were managed through this period, including a change in GSL's health services sub-contractor. Given this was directly related to the evaluation of the tender bids, it is reasonable to expect that the steering committee would have met to discuss the options and any impact on its assessment of value for money. However, any meetings held, and the bases for decisions taken during this period, were not recorded.

34. Overall, the ANAO considers that the standard of records created and maintained for the tender process for the detention services contract was inadequate. The records kept are not fit-for-purpose. At various stages in the conduct of this audit, DIMIA experienced difficulty in locating sufficient evidence to assist the ANAO to form an opinion about aspects of the procurement. In responding to key findings of this audit, DIMIA officials made a number of assertions to the ANAO which are inconsistent with the documentary evidence that is available. In the absence of clear reconciliations between the two positions, the actual position is unclear and calls into question the reliability of DIMIA's documentation supporting the evaluation process.

Evaluation of the Tender Bids (Chapter 4)

35. DIMIA's evaluation methodology involved separate assessments of service delivery (referred to by DIMIA as 'technical') and financial (or price) aspects of the tender submissions. The technical and financial evaluations were

then combined by dividing the results of one into the other, in order to arrive at a determination of value for money, in the form of an index. DIMIA prepared value for money indices over a range of scenarios to assess the impact of pricing on different detainee population levels accommodated in combinations of some or all of the (then) operational centres; Villawood, Maribyrnong, Perth, Baxter, Woomera and Christmas Island. One of the scenarios (E) was selected by DIMIA for use as the benchmark scenario to calculate the overall value for money index.

36. The first draft of DIMIA's value for money analysis was completed on 29 October 2002. The technical evaluation showed ACM ahead of the two other tenderers, GSL and MTC, by a clear margin. However, GSL offered a significantly lower price (for scenario E). When DIMIA combined its technical and price evaluations, GSL offered the best value for money, ahead of ACM which was 4.42 per cent behind. The third ranked tenderer, MTC, although comparable to GSL in technical score, was significantly more expensive and in value for money terms, was 22.99 per cent behind GSL.

37. A residual risk analysis conducted by DIMIA's probity advisor identified that GSL was significantly cheaper than the other two tenderers in remote locations. DIMIA's financial advisor had earlier identified this, and recommended that all tenderers be invited to clarify their pricing for remote locations. The ANAO found that this recommendation was not pursued by the steering committee and its reasoning is not documented.

38. Nevertheless, questions from members of the evaluation team apparently triggered a request from GSL, who wrote to DIMIA on 13 November 2002, stating that it had discovered a significant error in its tender spreadsheets and submitted a request to amend its pricing for remote locations. The ANAO found that DIMIA's documentation around the handling of this request was poor, and included three versions of the minutes of a meeting between the steering committee and DIMIA's probity advisor. One version of the meeting record reveals that the risk of GSL's low staff to detainee ratio at the Baxter Immigration Detention Facility, identified by the financial and probity advisors, would be ameliorated if a pricing change was accepted. The matter had not, at that stage, been considered by the steering committee and subsequent versions of this meeting record do not identify this risk.

39. The steering committee met to consider GSL's request for a pricing change on 26 November 2002, and formally agreed to accept the pricing

change on the basis of it being the correction of a genuine error. The ANAO found that this pricing change added \$11.57 million (NPV) to the price of GSL's tender. The steering committee also determined at this meeting that there was a narrow margin in favour of GSL representing better value for money overall, and that consideration of the residual risk factors did not change this value for money margin. The ANAO was not able to determine from the record of this meeting the steering committee's consideration of the precise effect on value for money arising from the decision to accept the pricing change from GSL.

40. The final report of the evaluation was forwarded to the delegate on 29 November 2002, recommending he approve GSL as the preferred tenderer on the basis of value for money.

41. During a subsequent meeting with the steering committee, the delegate asked a number of questions, and the report was re-submitted with answers to his questions on 18 December 2002. The ANAO found that the value for money calculation provided in the final report to the delegate was incorrect. Figures from the pre and post GSL pricing correction were transposed (by DIMIA staff, not the financial advisor) and the delegate was advised that the difference between GSL and ACM was 4.42 per cent on the value for money assessment.

42. The ANAO found that the actual difference, following DIMIA's decision to accept the 13 November 2002 pricing change from GSL, was 0.56 per cent. Although the corrections do not alter the overall position of the tenderers, the margin between them, and the top two in particular, was closer than the delegate was advised. This error remained undetected by DIMIA through the contract negotiation phase of this procurement. The delegate was ultimately informed of this error in February 2005, after the ANAO brought it to the attention of DIMIA officials in November 2004.

43. The ANAO found that the final report to the delegate was deficient in a number of other key areas:

- the delegate was not advised of the discretion open to him under the terms and conditions of the RFT to enter negotiations with more than one tenderer, including its provision to request a 'best and final offer' from all or some of the tenderers;
- the delegate was not advised that the requirement under the CPGs to assess the Industry Development Criteria had not been assessed as part

of the evaluation methodology, although the tenderers were required to comply with this requirement;

- while the delegate was advised that the assessment of the technical worth scores was based on a number of factors, including discussions with nominated referees, he was not advised that:
 - ACM did not nominate DIMIA as a referee;
 - the probity advisor had recommended that the chair of the steering committee should not provide a reference for ACM (because of the potential for a conflict of interest);
 - the steering committee decided to nominate DIMIA as a referee and the Chair of the steering committee provided the reference.

44. The delegate was advised in the final evaluation report on 18 December 2002 that the probity auditor had not raised any issues of significance. While this was true at that point in time, the engagement of the probity auditor at the mid-point of the evaluation meant that the probity auditor had not covered all stages of the procurement. For example, three months after the final report was provided to the delegate, the probity auditor examined the potential for a conflict of interest from the chair of the steering committee and commented adversely upon it.

45. Overall, the ANAO found that the error in the value for money calculation, and other omissions from the final report of the tender evaluation meant that not all relevant information about the tender was placed before the delegate at the time he was asked to make the final decision concerning the selection of a preferred tenderer. GSL was announced as the preferred tenderer on 22 December 2002.

Negotiation with the Successful and Unsuccessful Tenderers (Chapter 5)

46. The assessment of value for money was important in this procurement because of the terms of the pre-existing general agreement as well as the requirements of the Commonwealth Procurement Guidelines. In order to be in the best position to determine value for money, DIMIA's evaluation process needed to be conducted rigorously, so that at the time a tenderer was eliminated, it could be clearly demonstrated why that tenderer was eliminated and, equally, it could also be demonstrated why any remaining tenderer was still under consideration.

47. Prior to the announcement of GSL as preferred tenderer in December 2002, the delegate had decided that in view of the closeness of the two tenderers GSL and ACM, ACM should be invited to keep its tender bid open until completion of contract negotiations.

48. Under these circumstances, the steering committee retained a responsibility to closely monitor and manage the margin between the two final tenderers as contract negotiations went forward, to ensure that value for money was obtained. DIMIA's process for determining value for money was set out in the tender evaluation plan. It included mechanisms for managing capability, price, residual risks and provisions for parallel negotiations and a 'best and final offer'.

49. By February 2003, GSL had requested a number of changes to the draft contract. The requested changes involved, among other things, increases to workers compensation insurance costs, GSL's overhead costs, and the re-amortisation of start-up costs, which impacted the pricing of GSL's bid. The steering committee sought advice from its legal, financial and probity advisors, which were collated and summarised by the probity advisor on 17 February 2003. After entering GSL's proposed price increases into DIMIA's evaluation methodology, this advice highlighted changes in value for money in favour of ACM in the order of 6 or 8 per cent across all scenarios and included a recommendation from the probity advisor that the most effective course of action would be to enter into parallel negotiations. DIMIA and the probity advisor subsequently advised the ANAO that the intent of this advice was to set out a step-by-step process to manage pricing adjustments accepted during contract negotiations to assist in identifying the option of whether or not to proceed to parallel negotiations. DIMIA's management of the pricing adjustments and its monitoring of value for money throughout contract negotiations are examined below.

Monitoring value for money

50. The CPG's require that 'officials need to be satisfied that the best possible outcome has been achieved, taking into account all relevant costs and benefits over the whole of the procurement cycle'. In this context, there are risks in accepting a preferred tenderer too early. Chief among these risks is that non-preferred tenderers cease to have any involvement in the process, but negotiations with the preferred tenderer that are required to finalise the contract may raise issues of significance.

51. Significant issues arising during contract negotiations with a preferred tenderer can involve changes in the level or scope of services the Commonwealth requires, and in the prices offered by the preferred tenderer. It is important to appreciate the probity implications of accepting changes that vary the requirements tenderers were originally asked to tender against. Probity and legal implications can arise if the original RFT requirements or the method of evaluation are amended to such an extent that a re-bidding process becomes necessary.

52. The value for money margin between ACM and GSL as reported to the delegate in the December 2002 evaluation report was small given the size of the tender. To demonstrate value for money, a level of transparency was required in DIMIA's negotiations with GSL where price and scope changes were being considered. In particular, any scope or pricing changes needed to be accurately recorded.

Workers compensation insurance changes – value for money

53. On 28 February 2003, the probity advisor prepared an updated value for money calculation, showing the impact of GSL's requested workers compensation insurance increases on its bid. The probity advisor, and one member of the steering committee have advised the ANAO that this spreadsheet indicates that value for money was being monitored. However, there is no formal record of the steering committee's consideration of this document. Notwithstanding, the spreadsheet clearly shows ACM representing better value for money than GSL following the acceptance of this pricing change.

54. DIMIA's calculations in February 2003, revealed that relatively small changes in workers compensation insurance payments, valued at \$2.093 million (NPV), had placed ACM ahead of GSL in value for money terms. However, in August 2003, in the attachment to the Minute seeking approval to enter into the contract, the delegate was advised these changes were 'due to a scope change and a similar adjustment would be required for all tenders' and as a result, these changes 'did not have any implications for the value for money assessment'. There is no record of the steering committee's decision to classify workers compensation insurance payments as a 'change in scope'. The ANAO considers that the changes to the workers compensation tendered amounts from GSL did not involve the Commonwealth adding or subtracting services to the tender and, therefore, considers that its classification as a change in scope of the tender was doubtful. The assertion that a similar

adjustment would be required for all tenders was also not subject to further analysis or testing by DIMIA.

The closure of Woomera and Christmas Island

55. Following the announcement of the preferred tenderer, it was decided that the Woomera detention centre would be 'mothballed'.⁶ As a result, GSL requested a change to the pricing of its tender to reflect that overhead costs that had been applied to Woomera would now be required to be recovered through other detention centre fees.

56. Analysis by DIMIA's financial advisor had shown that GSL's initial pricing allocated a disproportionately high amount of overhead (fixed) costs to Woomera. Subtracting these costs from the Woomera (and later Christmas Island) centres, meant that significant adjustments were then required to GSL's tendered prices for the remaining centres. Increases to GSL's fixed costs at the operational centres were greater than the amounts subtracted from the mothballed centres.

57. The closure of Woomera and Christmas Island also meant that DIMIA's benchmark scenario (E) developed for the evaluation needed to be modified to take into account the reallocation of overhead costs and the redistribution of anticipated detainee numbers to the other centres. These changes to scenario E were a departure from the stated evaluation criteria used to select the preferred tenderer. There is no evidence DIMIA considered GSL's request against the probity and legal implications of a change to the evaluation criteria and original RFT requirements. DIMIA was unable to provide a document that showed the basis on which the detainee numbers were re-distributed from Woomera and Christmas Island to the other centres, following GSL's request.

58. In considering GSL's request, DIMIA decided that the closure of Woomera (and later Christmas Island) was an 'unforeseeable' modification to the scope of services being offered for tender. DIMIA also decided that this change would affect all tenderers equally and would not change the value for money assessment, although no comparison with other tender bids was undertaken to support this decision. As a result, the price change was accepted and advice from DIMIA's financial advisor showed that GSL's bid increased by \$15.5 million (NPV) over the planned four years of the contract.

⁶ Subsequently it was announced that the facility on Christmas Island would also close, although it reopened later in 2003.

59. The ANAO notes that ACM had earlier⁷ submitted a request to change the way in which its corporate costs would be recovered from the fees it would receive in operating the detention centres.⁸ The steering committee rejected ACM's request, although there was no change in the overall cost of ACM's bid. This request⁹ made it clear that ACM had allocated no corporate costs to the Port Hedland, Woomera or Christmas Island centres and, therefore, it was unlikely that the closure of Woomera and Christmas Island would have affected all tenderers equally. The ANAO considers that GSL's request to re-distribute its overhead costs from Woomera (and later for the same reasons Christmas Island) to the other centres should have been brought to account in DIMIA's value for money calculation.

60. The minute to DIMIA's Secretary in August 2003 recommending that GSL be awarded the contract indicated that the pricing changes that had been allowed to GSL's bid were based on scenario E. However, the manner in which DIMIA had modified the criteria used to calculate scenario E meant that key factors relating to the operation of the Woomera and Christmas Island facilities, (that had been used in the evaluation process up to this point), were inconsistently applied to GSL's pricing change. It also meant that comparisons with ACM's bid could no longer be undertaken on a 'like with like' basis, as the modified criteria were not applied to ACM's tendered prices. In those circumstances, the steering committee should have formally addressed in its advice and recommendations to the delegate, whether its departure from the preferred scenario meant that the value for money basis on which the preferred tenderer had been selected was still valid. That was not the case in this tender process. The final report of the evaluation indicated to the delegate that the comparisons for all price changes accepted were undertaken against the 4 year NPV price for scenario E 'as per the tender evaluation'.

Amortisation of start-up costs

61. In its original tender bid GSL assumed that it would hold the contract for the initial four years on offer through the tender, plus the extension period in the contract of three years. Therefore, it had amortised its start-up costs over a period of seven years. This assumption had the effect, throughout the tender and evaluation process, of making the tendered cost of four-year service

⁷ On 28 August 2002.

⁸ The request from ACM involved a re-distribution of its corporate costs between Maribyrnong, Perth and Villawood IDC's and Baxter IRPC.

⁹ Discussed in more detail at table 4.8.

provision more attractive than its competitors (ACM's bid was based on a four year amortisation of start up costs). In March 2003, GSL sought to modify its pricing to cover the possibility that the Commonwealth exercised its discretion to not extend the term beyond the initial period of four years.

62. This request had been considered earlier by DIMIA's specialist advisors and was covered in the advice to the steering committee of 17 February 2003 that recommended that DIMIA proceed to parallel negotiations. This advice was considered and rejected by the steering committee, in favour of continued negotiations with GSL. These negotiations culminated in a letter from GSL to DIMIA on 17 March 2003, which requested it be allowed to re-amortise its start up costs over four years on the basis that

....the possible consequential expiry of the contract after four years, imposes a substantial risk on our anticipated margins over the full length of the contract.

63. The steering committee subsequently provided GSL with the opportunity to increase its prices through re-amortisation of its start-up costs, although the resultant price increase was not brought to account in DIMIA's value for money calculation.

64. DIMIA determined, in the first instance, that GSL's request was not a re-pricing and that a probity issue did not arise. However, the ANAO notes that a preliminary probity question surrounding GSL's request was whether or not the pricing change was eligible to be considered in accordance with the terms and conditions of the RFT which provided that:

If a Tenderer becomes aware of any clerical or administrative error or omission in its tender ...the Tenderer may lodge ...a written correction to its tender. The Commonwealth, at its discretion, may elect to accept any such correction.

65. The ANAO notes that GSL did not argue that it had made an administrative error or omission in its tender; it argued that its profit margin was at risk if it did not hold the contract for seven years. Whether or not this request complied with the terms and conditions of the RFT was not addressed as part of DIMIA's initial decision.

66. The steering committee also did not bring together differing views between its probity advisor and advice from its other experts as to whether GSL's request should be accepted. In particular, legal advice provided to the steering committee indicated the pricing change should not be allowed. DIMIA's financial advisor also maintained in advice provided to the steering committee, up to and including the day the contract was signed, that the

pricing change should be brought to account as part of the value for money calculation.

67. At the time this pricing change was accepted by the steering committee, ANAO analysis shows that it added \$4.1 million (NPV) to GSL's tendered amount. This increase was subsequently revised downwards following negotiations over the Woomera and Christmas Island overheads re-allocation discussed earlier, and settled at \$2.943 million (NPV). The ANAO notes that in the final minute to the delegate, recommending that the Commonwealth enter into the contract with GSL, the effect of this change on GSL's bid was listed in the attachments as 'TBA'.¹⁰

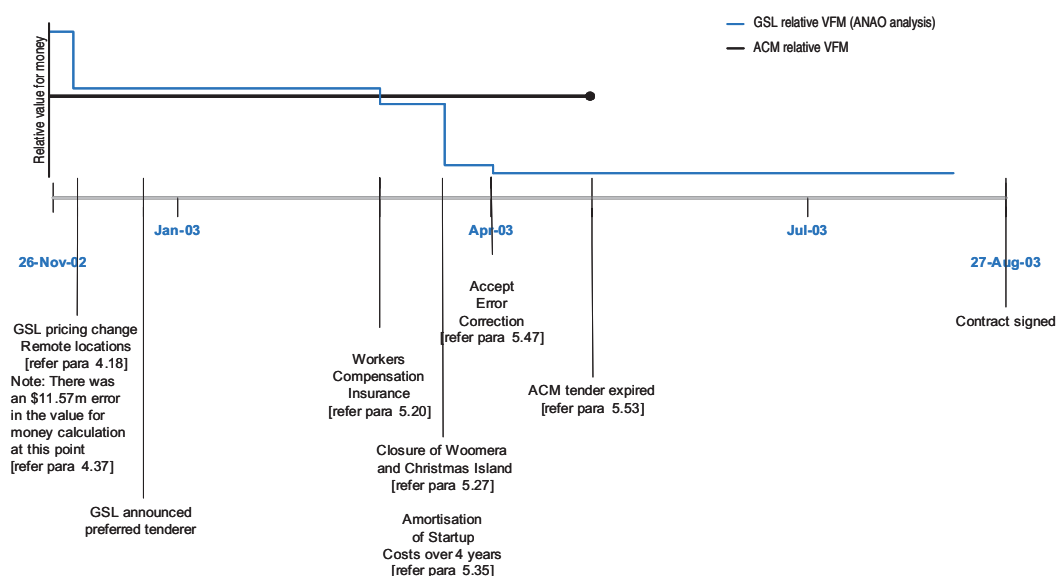
Overall reconciliation of changes in relative value for money

68. Contract negotiations were protracted and many of the adjustments made to GSL's tendered prices were not finalised until very late in the negotiation phase. However, at the time the changes were accepted, the available figures and DIMIA's own analysis showed that the relative position of the tenderers in DIMIA's value for money index had changed. In some instances there is not a clear record of the steering committee formally agreeing to the financial commitment it was accepting on behalf of the Commonwealth that would flow through to the price of the contract, following each pricing change. However, the actual changes were substantial and the ANAO's analysis of movements in relative value for money is shown in Figure 1.

¹⁰ The ANAO assumes this to mean 'to be advised'.

Figure 1

Overall reconciliation of changes in value for money index



Source: ANAO from DIMIA data – paragraph references refer to Chapters in the report.

69. As discussed at paragraph 49 above, the steering committee and the probity advisor have advised the ANAO that in response to early pricing change requests from GSL a step-by-step process was developed to manage pricing adjustments accepted during contract negotiations. That process foreshadowed a reconciliation of GSL's price increases and the conduct of a review of the relative value for money against ACM's tender, 'to ensure the best possible value for money outcome'. The ANAO found no evidence that this review was undertaken.

70. Overall, the ANAO found that there was a lack of transparency in the decision making process in the acceptance of increased prices in the preferred tenderer's bid, particularly in the later stages of the tender. The steering committee did not bring to a conclusion the 'step-by-step' process it set for itself at the meeting of 18 February 2003 and did not reconcile legal and financial advice that differed from probity advice into an overall DIMIA position. This meant there was no systematic basis for reviewing the value for money index system as envisaged by the steering committee. ANAO analysis shows that the cumulative effect of the pricing changes accepted during contract negotiations between February and May 2003 (the point where ACM's tender bid expired) had added \$21 million (NPV) to the price of GSL's bid.

This does not include the \$11.57 million (NPV) adjustment needed to correct the earlier error, discussed at paragraph 41 above.

The elimination of ACM from the tender process

71. In a competitive process, where the two final tenderers could not be separated through any significant measure or indicator, and where the option of parallel negotiations had been rejected, there was an obligation on the steering committee to satisfy itself that contract negotiations with the preferred tenderer would result in the best outcome for the Commonwealth being accepted. ACM had provided a bid that met higher technical (service delivery) standards, and the delegate had decided that ACM should be invited to keep its tender offer open until contract negotiations were finalised. This would have assisted DIMIA in keeping open the available options in the event that GSL sought to increase its prices further, transfer risks to the Commonwealth through the insurance, liability and indemnity regime, or was otherwise unable or unwilling to continue with contract negotiations.

72. Because delays were experienced in contract negotiations with GSL, DIMIA wrote to ACM on three separate occasions, in February, March and April of 2003, to request extensions to its tender offer. On 30 April, on the occasion of the third and final request for ACM to keep its tender offer open, ACM responded that it would be prepared to extend the validity of its tender offer, subject to several conditions related to updated costings. The ANAO found that DIMIA did not respond to ACM's conditions and, as a result, ACM's offer expired on 2 May 2003 (before the completion of contract negotiations with GSL on 27 August 2003).

73. The rationale for the elimination of ACM from the tender process was not documented. As previously noted, there were no steering committee meetings held between 15 May 2003 and 21 August 2003 and, as a result, there is no record of DIMIA's consideration of this matter. There is also no evidence that the delegate was informed that ACM's tender offer had expired. This was a significant development and was at odds with the initial decision of the delegate to keep ACM's tender offer open until completion of contract negotiations. It also meant that there were no alternative tenderers remaining and the negotiating position of the Commonwealth had altered considerably as a result. ACM was ultimately informed that its tender bid was unsuccessful after the contract with GSL was signed on 27 August 2003.

Completion payments for ACM

74. At the same time as DIMIA was writing to ACM requesting extension of the tender offer period, the delegate and the Minister were informed that discussions were continuing with ACM on transition arrangements, including ACM's costs associated with transition. The advice, dated 25 March 2003, stated that DIMIA was proposing to 'encourage' ACM's successful transition out by offering a 'completion payment'. In a pen script note to this advice, the delegate advised the Minister that authorisation for the completion payment would be arranged through an exchange of letters.

75. The ANAO notes that the general agreement makes no provision for completion payments, except where the contract is terminated for convenience, which DIMIA elected not to do. DIMIA was not able to provide evidence of the criteria it used to make its determination to pay ACM \$5.7 million in contract completion payments. The exchange of letters brought the payments into the (then) existing contract with ACM under the 'out of scope' provisions. The ANAO notes that the 'out of scope' provisions of the previous contractual arrangements were intended to cover contingencies associated with the provision of detention services, not payments designed to encourage a successful transition to a new service provider. Accordingly, the basis on which DIMIA made these payments was doubtful.

76. The risks to the tender process arising from the introduction of contract completion payments was not evaluated in any of the tender documentation provided by DIMIA in respect of this procurement. DIMIA was unable to provide evidence of any action by the steering committee to consider and/or evaluate the potential impact of this transaction on achieving a value for money outcome for the Commonwealth.

Management of Liability, Indemnity and Insurance (Chapter 6)

77. A significant risk for the Commonwealth in outsourcing the management of detention centres is the potential for claims arising from major disturbances.¹¹ In their tender submissions, both ACM and GSL placed conditions on being held liable for detainee damage. ACM's conditions related to minor repairs. GSL's conditions related to major incidents leading to significant damage to Commonwealth property or assets. GSL's tender bid was

¹¹ The operation of the insurance, liability and indemnity regime in the Contract is discussed in more detail in ANAO report No. 1 of 2005–06—*Management of the Detention Centre Contracts*—Part B, p.51.

also conditional upon liability caps being provided by the Commonwealth that matched the level of insurance that GSL was able to purchase. The conditions for a cap on liability for detainee damage being requested by GSL represented an arrangement that was of higher inherent risk for the Commonwealth than that offered by ACM.

78. At the time GSL was announced as preferred tenderer, the required insurances had not been finalised by GSL, and the liability caps were not settled. The potential impact of these conditions, and the resultant uncertainties, were not addressed by DIMIA prior to contract negotiations. DIMIA then approached GSL, as the preferred tenderer, to assist in developing 'a realistic proposal for a cap on liability' for detainee damage before holding discussions with Comcover to determine the optimum balance of risks to be carried by the service provider and the Commonwealth. The resultant liability, indemnity, and insurance regime¹² in the Commonwealth's contract with GSL is that GSL's liability is capped at \$0.5 million per event or \$2.5 million per year for all detainee damage claims. There is also a significant risk that the Commonwealth will be deprived of the benefit of the \$20 million of insurance cover purchased by GSL, and designed to cover claims other than those resulting from detainee damage.¹³

79. For a contract of this complexity, it was important that DIMIA identify, analyse and evaluate all risks to ensure that the Commonwealth's commercial position was adequately protected throughout the tender process. The ANAO found that in negotiating, and then setting the insurance, liability and indemnity regime, DIMIA placed the Commonwealth in a disadvantageous position due to a lack of proper consideration and, when necessary, reconsideration of the costs and benefits of the liability and indemnity arrangements. In part this was because the capacity of the Commonwealth to negotiate was diminished by the expiry of ACM's tender offer before contract negotiations were finalised and, in part, because a rigorous assessment of risks was not undertaken.

DIMIA's advice to the delegate and Government

80. The steering committee advised the delegate and the Government that the proposed insurance, liability and indemnity arrangements in the contract represented the best financial outcome for the Commonwealth. However, the

¹² *ibid*, p.61.

¹³ *ibid*, p.62.

ANAO found that although DIMIA had consulted with Comcover, it did not closely engage until after GSL was announced as the preferred tenderer. By this time, significant indemnities had already been provided by DIMIA, and GSL was seeking to increase these further to match its available insurance cover.

81. The requests from GSL to increase the indemnities on offer resulted in DIMIA initiating correspondence between the then Minister for Immigration, the Finance Minister and the Prime Minister. The ANAO found that DIMIA's input into the correspondence was based on an incorrect assessment of the tenderer responses. The significant features were:

- DIMIA did not recognise early that the indemnities being provided would require approval from the Finance Minister under Regulation 10 of the FMA Act;
- when the Regulation 10 matter was raised with Finance, Comcover became involved and highlighted difficulties with the operation of insurance cover given the indemnities DIMIA had provided;
- ACM and GSL bids were not assessed on equal terms after Comcover raised these difficulties with DIMIA. The preferred tenderer was invited to propose 'workable solutions' without DIMIA seeking probity advice and without the ability to consider ACM's offer, the next ranked tenderer; and
- ACM's position on liability for detainee damage was incorrectly stated by DIMIA.

82. DIMIA was also unable to provide evidence of any analysis and costings that would support the assertion made by DIMIA to Ministers that the proposed indemnities represented the best financial outcome for the Commonwealth.

Audit conclusion

83. DIMIA initially established a sound evaluation process that was capable of taking into account the value for money requirements of the Commonwealth Procurement Guidelines, incorporating all costs and benefits over the whole of the procurement cycle. DIMIA's evaluation process provided a method to discriminate between tenderers on the basis of the quality of detention services being proposed, as well as the price being offered. In the event that two or more tenderers could not be separated because of

compensating differences, the process also provided for parallel negotiations, a best and final offer and a residual risk analysis to assist the delegate in making a final decision.

84. In order to be in the best position to determine value for money, DIMIA needed to ensure that the approved evaluation process was followed. Accountability and transparency in DIMIA's process was also required to provide assurance that this procurement, valued at \$400 million, was conducted in a manner that provided fair and equal consideration of all tenders. This in turn would provide assurance that the best offer for the Commonwealth had been identified, and allow the process to withstand external scrutiny.

85. DIMIA's evaluation framework included the appointment of specialist advisors in law, finance and probity. The tender process conducted by DIMIA was a complex, resource intensive activity and in these circumstances it was appropriate to engage advisors and other consultants as necessary to supplement the skills of agency staff. However, the use of specialist expertise, including probity advisors and probity auditors, in the procurement process does not reduce accountability for the outcome. It also does not obviate the need for sound internal management and recordkeeping to support accountability and transparency in a tender process.

86. ACM submitted a tender bid that DIMIA evaluated as having met higher standards of proposed service delivery than either of the other two tenderers, GSL and MTC. The technical evaluation scores, once awarded, were held constant in determining value for money. The only variable DIMIA subsequently changed in deciding value for money was price. Therefore, close attention was required from DIMIA's steering committee to the initial prices submitted by the tenderers; to any requests to amend prices; and to ensure that the overall price to the Commonwealth, including the indemnities being offered, were taken into account.

87. There was an \$11.5 million pricing error in favour of GSL in the initial report to the delegate of the evaluation outcome in November 2002. Although this error did not alter the overall ranking of the two final tenderers GSL and ACM, it brought them to within less than 1 per cent of each other in DIMIA's value for money rating. This error remained undetected through nine months of subsequent contract negotiations. On the basis of the evaluation, the delegate decided to select GSL as the preferred tenderer, and to invite ACM to keep its tender bid open until completion of contract negotiations.

88. After GSL was selected as the preferred tenderer, contract negotiation became protracted. This was due in large part to DIMIA not ensuring that GSL's tender was fully compliant with the insurance, liability and indemnity provisions of the request for tender (RFT) before GSL was recommended as the preferred tenderer. At the same time, contract negotiations included requests from GSL to amend its tendered prices. In considering these requests, DIMIA's specialist advisors identified that accepting the pricing changes would alter the value for money rankings. As a way of managing the impact of pricing changes on the value for money rankings during contract negotiations, advisors suggested DIMIA should re-visit GSL's offer and re-assess that offer through a step-by-step process that would allow an assessment of the need to enter into parallel negotiations with GSL and ACM.

89. DIMIA did not bring this process to a conclusion and there was a lack of transparency in the decision-making processes that led to the acceptance of GSL's revised prices. In response to the ANAO's view that DIMIA did not systematically monitor value for money throughout the process, late in the audit an additional document was provided to the ANAO. This document was not held on DIMIA's files, and while it contained errors, it clearly showed ACM was ahead of GSL in the value for money rankings in February 2003. Notwithstanding assertions by a member of the steering committee that this was an example of monitoring value for money, there is no evidence this document was considered by the steering committee.

90. As contract negotiations continued past May 2003, ACM's tender bid expired. There was a cessation of all formal meetings between the steering committee between May and August 2003. As a result, DIMIA was unable to provide documentation that identified the reasons why ACM's offer was allowed to lapse and the basis on which ACM was eliminated from the process. At the time ACM's bid expired, ANAO analysis shows that a total of \$32.6 million had been added to GSL's tendered price.

91. On 22 August 2003, a document prepared by DIMIA's steering committee invited DIMIA's secretary to approve entering into the contract with GSL on the basis of value for money. This minute also invited the secretary to note that ACM would be (after contract signature on 27 August 2003) formally advised that its tender was unsuccessful. This advice to the delegate represented the outcome of a procurement process that took 27 months to complete. At important stages of the process, DIMIA's steering committee did not follow the approved evaluation method, for reasons that are not well documented. This led to a number of errors and omissions in both the

evaluation and contract negotiation phases of this procurement. Errors that occurred during the evaluation stage compromised the Commonwealth's negotiation of the contract with GSL. The ANAO was, for example, unable to verify the basis of the claim DIMIA made to the Government that the negotiated outcome of the insurance, liability and indemnity regime represented the best financial outcome for the Commonwealth.

92. At the point of selection of GSL as the preferred tenderer, the cost-benefit ratio of GSL's proposal was overstated, relative to ACM. Subsequent negotiations increased the costs of GSL's proposal to the point where the application of the methodology employed by DIMIA ranked ACM ahead of GSL, at the time ACM's tender offer expired. That said, it is not possible to know, in different circumstances, how responses by the two final tenderers may have altered their proposals, or how the delegate may have weighed the various factors required in reaching his decision on which proposal represented the best value for money for the Australian Government. In response to inquiry by the ANAO, the delegate has advised that there were no factors or influences other than those identified in the tender evaluation plan which would have been taken into account in making the decision in this matter.

93. The CPGs issued by the Finance Minister are designed to ensure suppliers of services for Australian Government agencies are treated fairly and equitably, that agencies receive value for money for resources expended, and that the community has confidence in the procurement practices employed by agencies. In this case, the procurement practices employed by DIMIA to acquire detention services fell well short of the standard expected by the CPGs. The department put in place an appropriate plan to evaluate the costs and benefits of competing solutions from tenderers, but failed to follow through effectively in the implementation of its plan. Shortcomings identified by the audit include:

- ambiguity in DIMIA's management of the roles and responsibilities of key advisors and personnel;
- deficient recordkeeping, impacting DIMIA's ability to demonstrate accountability and transparency in this procurement;
- weaknesses in the conduct and documentation of contract negotiations; and

- deficiencies in the assessment of tender bids against the value for money criteria.

94. As indicated by the department's response (below), the department is implementing a wide range of measures to improve administration and has responded positively to the matters raised by the audit and the recommendations to enhance procurement practices in the department.

Agency Response

95. The ANAO's audit of the Detention Services Contract tender process has highlighted a number of areas in which procurement, tendering and recordkeeping processes could be improved.

96. In October 2005, a wide range of measures to improve administration within the Department were announced by the Minister as part of the Government's response to the Palmer¹⁴ and Comrie¹⁵ reports.

97. The measures included significant organisational changes, including the introduction of a centre of excellence for contract and procurement processes. A number of initiatives designed to strengthen the department's procurement assurance framework are underway, focussing on the early detection and better management of procurement risks.

98. In addition, the department will develop new recordkeeping guidelines specific to tendering and procurement processes. Improved records management processes will also be mandated through IT systems changes.

99. The Department considers that these measures will address the key concerns of the ANAO's recommendations, which the department has accepted.

100. DIMA's full response is attached at Appendix 2.

¹⁴ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Report, July 2005, <http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf> [last accessed 17 January 2006].

¹⁵ Commonwealth Ombudsman, Report No. 03/2005, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, September 2005, <http://www.comb.gov.au/publications_information/Special_Reports/2005/alvarez_report03.pdf?bcsi_scan_09886937D8E6245B=GifB7y59holzTP4VoNKv2wEAAABe/m0A&bcsi_scan_filename=alvarez_report03.pdf> [last accessed 17 January 2006]

Recommendations

Recommendation No. 1

Paragraph 3.57

The ANAO recommends that DIMA ensure that consultancy agreements developed for the provision of probity auditing and/or advising services in future tenders stipulate:

- that a comprehensive probity plan is finalised before the commencement of the tender process and monitored to ensure that any changes in probity requirements are managed; and
- that the scope of any probity auditor's services includes provision of a sign-off to the decision-maker that specifies the level of assurance provided by the audit engagement.

DIMA Response: Agree.

Recommendation No. 2

Paragraph 3.68

The ANAO recommends that for future procurements, the roles and responsibilities of key personnel should be clearly defined with particular attention given to the separation of people and functions to ensure that conflicts (actual or perceived) do not develop.

DIMA Response: Agree.

Recommendation No. 3

Paragraph 3.77

The ANAO recommends that, as part of DIMA's review of recordkeeping systems, procedures for the documentation of tender processes be developed, to facilitate accountability and transparency in outsourcing and to ensure compliance with the Commonwealth Procurement Guidelines.

DIMA Response: Agree.

**Recommendation
No. 4****Paragraph 4.28**

The ANAO recommends that, in future tenders, DIMA ensures that a brief confirming full compliance with the Commonwealth Procurement Guidelines is provided to the delegate in support of any recommendation to enter into a contract.

DIMA Response: Agree.

**Recommendation
No. 5****Paragraph 5.73**

The ANAO recommends that in future tenders, DIMA develop procedures for the conduct and documentation of the processes followed in negotiating contracts. Such procedures should be directed towards assisting those advising the delegate to manage and monitor the tender over the whole procurement cycle, particularly in regard to the transparent assessment of tenders against value for money evaluation criteria.

DIMA Response: Agree.

Audit Findings and Conclusions

1. Introduction

This chapter introduces the audit of the Management of the Tender Process for the Detention Services Contract. The audit objectives, scope and methodology are summarised.

Background

1.1 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) is responsible for administering immigration detention under the Migration Act. In February 1998 the provision of detention services was formally contracted to Australian Correctional Services Pty Ltd (ACS). At the time, it was envisioned that the contract would operate at a cost of \$14 million per year and serve approximately 700 detainees.

1.2 The 1998 general agreement between ACS and DIMIA was for a ten-year period. Under the umbrella of the general agreement, ACS entered into a detention services contract for the facilities at Port Hedland, Villawood, Maribyrnong and Perth. Supplementary agreements were established for Woomera, Curtin and Baxter. DIMIA and ACS also entered into an occupation licence agreement, authorising ACS to use immigration detention facilities.

1.3 ACS managed these contracts through a sub-contract to its operational company ACM. DIMIA's approach to the contracting out of detention and transport services under the general agreement was to enter into a 'strategic alliance' with ACS rather than a strictly contract driven relationship.

1.4 In 1999 and again in 2000 there was a surge in the number of unauthorised arrivals seeking asylum in Australia. The number of unauthorised arrivals (by boat) in this period represented a ten-fold increase in the numbers that arrived in the early 1990s, and this resulted in a large increase in the number of people in detention. There were over 3000 people in detention in the early part of 2001.

1.5 During 2000 there were a number of disturbances at the detention centres and subsequent reviews. At the request of the (then) Minister, Mr Philip Flood AO examined the processes in place for identifying, dealing with, reporting on and following up allegations where there was reasonable suspicion of child abuse in immigration detention centres.

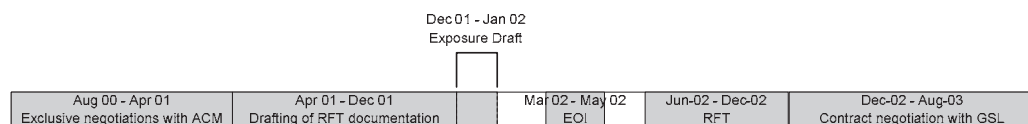
1.6 In February 2001, DIMIA also received a report from its consultants which reviewed the circumstances of several major incidents that occurred at

several of its detention facilities, including the mass break out at Woomera in June 2000. In March 2001, the Commonwealth Ombudsman released a report of an own motion investigation into the management and operation of immigration detention centres following complaints and a number of reported incidents, including escapes and allegations of assault on detainees.

1.7 In April 2001, DIMIA considered that it could not be certain that the agreements with ACM were continuing to provide ‘best value for money’, and decided to re-tender the contract for detention services. The tender, evaluation and contract negotiation process began in December 2001.

1.8 An extensive development process was undertaken to establish the contract. Figure 1.1 shows the key steps in the process, culminating in the announcement of GSL¹⁶ as the successful tenderer in December 2002.

Figure 1.1 – Timeline for Contract Renewal



Source: ANAO from DIMIA data

1.9 Contract negotiations took place with GSL from December 2002 until the Contract was signed on 27 August 2003. ACM continued to manage the centres throughout this period until the transition, which began in December 2003 and was completed on 29 February 2004.¹⁷

Previous ANAO performance audit reports

1.10 As part of a series of audits, the ANAO has undertaken two prior audits of the management of immigration detention within DIMIA:

- ANAO Report No.54¹⁸ of 2003–04 examined DIMIA’s management of its contract with ACM (now the GEO group),¹⁹ which ran for six years

¹⁶ The tender bid for the Detention Services Contract was submitted under the name of Group 4 Falck Global Solutions. Subsequent to the signing of the Contract, Group 4 Falck changed its name to GSL Australia Pty Ltd (GSL). For ease of understanding this report will refer to GSL.

¹⁷ More detail of the environment in which the detention centres operate can be found in Chapter 2 of ANAO Audit Report No. 54 2003–2004 *Management of the Detention Centre Contracts – Part A*. The ANAO’s examination of DIMIA’s management of its contract with GSL is provided in ANAO Report No.1 2005–06 *Management of the Detention Centre Contracts – Part B*.

¹⁸ Available at: <http://www.anao.gov.au/WebSite.nsf/Publications/BF1AE59CA8BED0CA256EB6006F8A65>

¹⁹ Previously known as ACM.

and completed on 29 February 2004. This audit was tabled on 18 June 2004.

- ANAO Report No.1²⁰ of 2005–06 examined DIMIA’s management of its current contract with GSL. This audit was tabled on 7 July 2005.

Audit objective and scope

1.11 The examination of DIMIA’s management of the tender process for the Detention Services Contract was to be included in the audit of DIMIA’s management of the Detention Centre Contracts (Report No. 1 of 2005–06). However, in November 2004, it became clear that in order to undertake a full review of the probity of the tender process, a separate audit would be needed.

1.12 The objective of this audit was, therefore, to assess DIMIA’s management of the tender, evaluation and contract negotiation processes for the Detention Services Contract.

1.13 Specifically, the audit considered the processes for:

- the evaluation of the Request for Tender, including the announcement of the preferred tenderer;
- negotiations with the successful and unsuccessful tenderers; and
- management of the liability, indemnity and insurance provisions of the tender.

1.14 The audit did not specifically consider the drafting of the contract and the Immigration Detention Standards (IDS), including the release of the exposure draft and the processes involved in evaluating the Expression of Interest stage of the procurement. However, to the extent that these aspects provide a greater understanding of the process, they have been included in the report.

²⁰ Available at:
<<http://www.anao.gov.au/WebSite.nsf/Publications/A4171082334E23A9CA2570350070FCE1>>

Audit methodology and approach

1.15 The methodology for the audit consisted of:

- a review of the available documentation against the *Financial Management and Accountability Act 1997* (FMA Act) and the Commonwealth Procurement Guidelines (CPG's);
- a review of the available documentation against the conditions of tender outlined in the RFT provided to the tenderers;
- an email search to supplement the documentation held on file in relation to the deliberations of the key evaluation and support committees;
- gathering evidence from DIMIA staff and the external consultants directly involved with the tender evaluation and negotiation, where necessary; and
- discussions with tenderers and other key stakeholders.

1.16 The audit was conducted in accordance with ANAO auditing standards at a cost of \$430 601.

Other reviews of detention

1.17 Since this audit commenced, two other significant independent reviews covering aspects of immigration detention have been published; the Palmer and Comrie reports. The outcome of these reviews has been substantial administrative reform in DIMIA, led by a new executive management team announced by the Secretary of the Department of Prime Minister and Cabinet on 14 July 2005. The delegate for this procurement and the chair of the steering committee which managed the tender process on behalf the delegate, are no longer serving with DIMIA. Other internal changes in personnel and organisational arrangements have been made to assist in implementing the necessary administrative reforms.

1.18 On 6 October 2005, in addressing the recommendations of the Palmer report, the current Secretary committed DIMIA to a substantial program of change and reform, including improvements in training and recordkeeping systems.

Assistance to the audit

1.19 The ANAO engaged the assistance of Minter Ellison to provide legal advice.

2. The Procurement Process

This chapter examines the selection of a procurement method for the detention services contract, the statement of objectives and conduct of the tender.

General Agreement with ACM

2.1 The previous outsourced arrangements for the provision of detention services consisted of multiple agreements. A General Agreement with ACM was signed on 27 February 1998 for a 10-year period. Under the umbrella of the General Agreement, individual Detention Services Contracts (DSC) were established for the operation of various facilities, generally for periods of three years. Although its provisions are currently dormant through the execution of the new contract, the General Agreement has not yet been extinguished. The General Agreement is due to expire on 26 February 2008.

2.2 The initial Detention Services Contract with ACM could be renewed for further three year terms of three years each for a total of 12 years, in accordance with the process set out in the General Agreement. The General Agreement allowed the Commonwealth to renew a service contract, but only if ACM:

- performed all the requirements of the service contract to a satisfactory level;
- demonstrated that the services it provided under the service contract represent industry best practice; and
- continued to provide the service at the best value for money (VFM) to the Commonwealth for subsequent service contract terms.

2.3 In brief, the process for renewal in the General Agreement was as follows:

- ACM submitted an offer to provide the services for a further term, specifying:
 - fees for the further term; and
 - an explanation for any difference between existing fees and the new fees.

2.4 The offer was irrevocable for two months and, during those two months, the Commonwealth was required to negotiate exclusively with ACM

regarding detention services for the further term. If there was no agreement within those two months, the Commonwealth could begin a competitive review process.

2.5 DIMIA sought legal advice from the Australian Government Solicitor regarding the renewal process for the then current Detention Services Contract with ACM. The Australian Government Solicitor advised that the renewal process assumed a focus on costing and that:

DIMIA will need to be careful that any failure to agree is based on issues arising from the costing rather than a failure to agree amendments to the contracts with [ACM].

2.6 Later advice from the Australian Government Solicitor included a discussion of options for DIMIA to improve the current contract with ACM and identified areas for improvement within future contracts. As well, the advice provided options to prepare for the conclusion of current contracts and non-renewal of ACM, should that be required. DIMIA also obtained legal advice on the meaning of 'value for money'.

2.7 In order to ascertain value for money, DIMIA compared current prices, and the existing fee structure with the proposed new structure proposed by ACM. In April 2001, DIMIA's Detention Services Contract Branch provided a final analysis of the Offer and recommended that the Secretary agree that there was significant doubt that the ACM offer represented 'best value for money' and decide not to accept the offer. The department's view was that it was difficult to state with certainty exactly what the prices in the ACM offer represented and the extent to which assumptions initially set out in the ACM offer still applied.

2.8 As it had been assessed that one of the requirements for renewal was not met under the General Agreement, the Commonwealth was unable to renew the Detention Services Contract for a further term. A letter was sent to ACM on 5 April 2001 advising that its offer was not accepted and a brief was provided to the then Minister for Immigration on 24 April 2001 informing him of the decision.

Deciding on a tender process

2.9 DIMIA sought advice from the Australian Government Solicitor on the options for the next Detention Services Contract. The Australian Government Solicitor advice to DIMIA outlined several options and specified the varying degrees of risk to achieving an acceptable service delivery outcome for DIMIA

and the potential for claims to be made against the Commonwealth by ACM or other tender process participants.

2.10 DIMIA's preferred option for the next Detention Services Contract was to conduct a tender process on amended terms and conditions. In April 2001, the Australian Government Solicitor advised that DIMIA would need to obtain ACM's consent to this approach, including extending an offer to submit a new bid against the new terms. DIMIA sought and obtained ACM's agreement to the new approach. DIMIA also sought ACM's agreement to extend all of the detention services contracts for a further six months to accommodate the tender process.

2.11 In an information brief to the Minister on 24 April 2001, DIMIA stated that the preferred option for the future provision of detention services was to conduct a competitive tender process on amended contract terms and conditions, providing the department with 'the most complete response to the desired outcomes while minimising associated risks'. The decision to go to tender was announced on 25 May 2001.

The approach

2.12 In August 2001, DIMIA's Detention Strategy Branch prepared a paper discussing options and making recommendations for the next detention services tender process. The paper identified for consideration, whether the Tender Process should:

- include a Request for Expressions of Interest (REOI);
- be based on a Request for Tender (RFT) or Request for Proposals (RFP);
- include an exposure draft of the RFP or RFT; and
- use a select tender or an open public tender.

2.13 The paper discussed the implications of each option and recommended that a Detention Services Tender steering committee be established, and the tender process should be based on an open RFT and include an exposure draft of the RFT for industry comment.

2.14 An exposure draft in four parts – General Conditions of Tender (CoT), Statement of Requirements (SoR), Conditions of Contract, and Immigration Detention Standards (IDS) – was released for industry comment on 5 December 2001 and was made available on the DIMIA website.

2.15 In an update brief to its Minister on 12 March 2002, DIMIA advised that rather than an open tender process, it would instead conduct an Expression of Interest (EOI) and select tender process. This was to ensure that only serious bidders took part in site visits, and the subsequent tender process.

2.16 The inclusion of an EOI was expected to add approximately six weeks to the tender process and it was expected that the final RFT would be released in May 2002 with respondents being notified of the EOI results on 17 May 2002. The slippages in timelines resulted in revised timing for the release of the RFT to 19 June 2002, and 10-24 July 2002 for site visits. The EOI was released in March 2002.

2.17 The outcome from the EOI process was that four companies were invited to tender;

- Australasian Correctional Management (ACM);
- Global Solutions Limited Australia Pty Ltd (GSL)²¹;
- Management and Training Corporation (MTC); and
- Australian Protective Services.²²

2.18 The Detention Services tender documentation was released in June 2002, in five parts:

- Part 1 – Conditions of Tender;
- Part 2 – Statement of Requirements;
- Part 3 – Conditions of Contract;
- Part 4 – Immigration Detention Standards and Performance Measures and Performance Linked Fee Matrix; and
- Part 5 – Tenderer Responses.

²¹ The tender bid for the Detention Services Contract was submitted under the name of Group 4 Falck Global Solutions. Subsequent to the signing of the Contract Group 4 Falck changed its name to Global Solutions Limited Australia Pty Ltd (GSL). For ease of understanding this report will refer to GSL.

²² Australian Protective Services subsequently withdrew its tender before tenders closed.

Objectives of the tender and DIMIA's administrative arrangements

Tender objectives

2.19 A potential change in provider represents a significant risk to the delivery of the program, especially where the contractor is providing essential human services. It was important, therefore, that the objectives, costs, benefits and outcomes of the tender process were adequately articulated as well as appropriately evaluated and reported to inform future projects in this area.

2.20 The objectives of the tender process were not specified as part of an overall project objective, but were specified in the RFT as:

to identify the tender that represents best value for money, that is, which has the greatest merit or benefit in proportion to its tendered costs.²³

2.21 Clause 3.3(a) of the General Agreement states that the Commonwealth will elect to use the Services Provider who will provide the best value for money. Advice from the Australian Government Solicitor also stated that:

[ACM] would also appear to derive a contractual right ... that the Commonwealth has in effect committed to selecting suppliers of Services on the basis of best value for money.²⁴

2.22 The General Agreement between the Commonwealth and ACM was signed for a ten-year period in February 1998, remains extant, and its provisions were relevant throughout the tender process. DIMIA received later advice from the Australian Government Solicitor that the tender process needed to be conducted in accordance with clause 3.3(a) of the General Agreement and subsequent advice from Counsel, engaged for the purpose by the Australian Government Solicitor, which advised that:

By clause 3.3(a), ACM acknowledges that the Commonwealth will elect to use ACM for any [detention] Service Contract where ACM will provide 'the best value for money' for the Commonwealth.

2.23 The ANAO was later advised by the members of DIMIA's steering committee that one of the (undocumented) objectives of the tender process 'was about getting the business right',²⁵ this included addressing what it saw

²³ RFT clause 5.1.1

²⁴ AGS Advice, 'Legal Obligations associated with development of IDCs in Brisbane and Darwin, 24 May 2000.

²⁵ Meeting Record: Meeting with steering committee 17 June 2005.

as major 'issues' with the previous contract provisions for the Immigration Detention Standards, assets, maintenance and insurance.

2.24 Other objectives of the tender process identified by DIMIA's steering committee included:

- DIMIA clearly specifying what was required from the Services Provider; and
- selecting a Services Provider who has the fundamental ability to do the job and was reasonably priced to ensure best value for money for the Commonwealth.

2.25 DIMIA's documentation of the tender evaluation does not clearly identify whether the provisions of the General Agreement and the other objectives of the steering committee were considered throughout the tender process, and if so, how. The ANAO considers that the decision making process in the tender would have benefited from an explicit statement of objectives and implementation of a performance monitoring framework in respect of the overall procurement. The addition of quantitative and qualitative performance measures to such a framework would have assisted in the assessment and reporting of the overall outcome from the tender process.

3. Governance Arrangements

This chapter examines the tender process including the procedures for the management of records and the administration of probity throughout the process.

Introduction

3.1 Procurement is a significant business function, particularly if major service delivery activities of the agency are being tested in the market. Agencies are required to ensure their procurement functions are appropriately managed to provide the best value. A comprehensive governance framework provides a sound basis for the successful management of procurement in accordance with legal requirements.

3.2 A key element of an effective governance framework for a major procurement is ensuring procedural integrity. A procurement process which conforms to the expected standards of integrity is one in which clear procedures, consistent with legislation, Government policies and guidelines and the legitimate interests of bidders, are established, understood and observed throughout the procurement process. All bidders should be treated consistently and equitably in accordance with these procedures. Decisions should be made in a transparent manner, which allows them to be understood and justified subsequently.

3.3 For these reasons, the ANAO:

- examined the legal requirements and other guidance to be followed by DIMIA;
- examined the evaluation framework established by DIMIA to guide the procurement; and
- assessed DIMIA's compliance with probity guidelines.

Legal requirements and other guidance

3.4 The *Financial Management and Accountability Act 1997* (FMA Act) and the *Financial Management and Accountability Regulations 1997* (FMA Regulations) govern the management of Commonwealth money and property. Section 44 of the FMA Act provides (among other things) that, agencies must promote the efficient, effective and ethical use of Commonwealth resources.

3.5 Under the FMA Regulations an official performing duties in relation to the procurement of property or services must have regard to the Commonwealth Procurement Guidelines (CPGs). Officials must make written records of any actions that are not consistent with the Guidelines and state their reasons for their actions. Agencies, or officials undertaking procurement, also have an obligation to be aware of relevant government policy and to reflect its requirements in the way they do business.

3.6 The CPGs provide specific guidance concerning value for money (VFM):

Value for money is the core principle underpinning Australian Government procurement. This core principle is underpinned by four supporting principles of: efficiency and effectiveness; accountability and transparency; ethics; and industry development. Officials buying goods and services need to be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle. Accepting the lowest price is not necessarily an indicator of best value for money.²⁶

3.7 Determining value for money needs to be supported by processes to assist with ensuring probity. The CPG's require that government procurement also be conducted in an ethical manner. Probity is defined as 'complete and confirmed integrity, uprightness and honesty'. It is a key consideration throughout the entire procurement process. Probity contributes to sound procurement processes that accord equal opportunities to all participants.

3.8 Effective probity management aims to:

- minimise conflict, problems and the potential for litigation;
- avoid the potential for corrupt practices to occur;
- produce better outcomes against stated objectives; and
- maintain public sector integrity.²⁷

DIMIA's evaluation framework

3.9 The tender process conducted by DIMIA involved complex, resource intensive activities. DIMIA utilised financial, legal and probity advisors to assist it to progress the project. While the tender project was not guided by an

²⁶ Department of Finance and Administration, Commonwealth Procurement Guidelines and Best Practice Guidance, September 2001.

²⁷ Department of Finance and Administration; Procurement Guidance – Ethics and Probity in Government Procurement, <http://www.finance.gov.au/ctc/ethics_probity-probity.html>.

overall project plan, a number of plans covering specific aspects of the procurement were prepared including;

- a risk analysis and a risk action plan;²⁸
- a tender evaluation plan, including a financial evaluation plan;
- a probity plan; and
- a communications strategy for the purposes of articulating the methods of communication between DIMIA and the tenderers and other interested parties, such as the Ombudsman and Human Rights Commissioner.

3.10 The ANAO found that individually these plans generally were sound. Overall, the plans, when they were developed, reflected the requirements of the FMA Act and the specific legal and other specialist advice that had been obtained by DIMIA. At the outset, these plans established the necessary framework for the tender process to promote open and effective competition between the tenderers. This also provided a basis for evaluation against clear and previously stated requirements and for the achievement of a value for money outcome for the Commonwealth.

3.11 In the management of a large and sensitive procurement with a value of \$400 million (over the anticipated four years of the contract), adequate DIMIA oversight was important to ensure accountability and the over-arching achievement of value for money. This required careful management and monitoring against the individual procurement plans throughout the process, including amendments were necessary. The establishment and maintenance of a high standard of documentation and recordkeeping would also be important. DIMIA's oversight and adherence to these plans is discussed in more detail in subsequent sections and chapters of this report.

Probity Guidelines and Principles

3.12 Procurement guidance issued by the Department of Finance and Administration (Finance) emphasises the importance of:

- utilising necessary expertise during the conduct of the procurement process;

²⁸ There were several iterations of the risk analysis and risk action plan, including post evaluation analysis of risks.

- clearly specifying roles and responsibilities of key personnel and ensuring the separation of duties and responsibilities;
- having a clear understanding and agreement on the level of assurance being provided by expert advisors;
- the fair and equitable treatment of all tenderers including identifying and managing actual or perceived conflicts of interests; and
- creating and maintaining appropriate documentation, particularly surrounding key decisions.

Utilising necessary expertise during the conduct of the procurement process

3.13 An appropriate blend of operational, corporate and procurement experience provides a sound basis for the management of a tender process. Guidance provided by Finance recommends that ‘agencies should try to ensure that they have a sufficient pool of trained officers who can manage the tender process.’²⁹ As well, external specialised expertise, such as legal or financial advice, can be used to complement the skills of agency staff in particular circumstances.

DIMIA’s evaluation teams

3.14 Given the size and importance of the tender process, on 9 August 2001, the Secretary approved the following decision-making framework:

- an evaluation panel would evaluate tenders and report to a steering committee;
- the steering committee would make major decisions concerning the tender process;
- the steering committee would also consider and guide the report of the evaluation panel; and
- the Secretary would be the final decision maker (the delegate).

Steering committee

3.15 In August 2001, it was intended that the steering committee would oversee the various stages of the tender process including:

- the timing of key steps in the process;

²⁹ Department of Finance; Procurement Guidance—Ethics and Probity in Government Procurement, <http://www.finance.gov.au/ctc/efficient_effective_ethical.html#Ethics>.

- guiding decision making on key policy and contract issues concerning development of the tender;
- guiding development of an over-arching evaluation methodology;
- clearance of the exposure draft and final RFT;
- consideration of reports from the evaluation panel on responses to the exposure draft and final RFT;
- endorsing a recommendation to the Secretary on the preferred tenderer;
- oversight of contract finalisation/negotiation; and
- oversight of implementation, including transition to a new contractor if necessary.

3.16 The steering committee approved by the delegate in August 2001 comprised four senior DIMIA staff; Deputy Secretary; First Assistant Secretary – Detention Taskforce Division; First Assistant Secretary – Border Control and Compliance Division; and First Assistant Secretary – Corporate Governance Division.

Evaluation panel

3.17 When established, the evaluation panel was to be involved in developing the evaluation methodology as well as evaluating and reporting to the steering committee on responses to the exposure draft and final RFT. The evaluation panel membership was to be decided by the steering committee and formed from individuals occupying the positions of:

- Assistant Secretary, Detention Strategy Branch;
- Chief Financial Officer (CFO);
- Director, Detention Operations; and
- State Manager, Investigations/Business, NSW.

Changes to the decision making framework

3.18 There was a meeting of the steering committee on 6 November 2001 to decide the membership of the evaluation panel. There are multiple versions of the meeting minutes and multiple versions of subsequent meeting minutes, from which it is not possible to determine what was discussed and agreed in relation to the roles and responsibilities of the evaluation teams. However, subsequent evidence indicates that the steering committee assumed the role of

the Evaluation Panel (which later became known as the Tender Evaluation Team). An additional team was created, the Tender Support Team that included members initially identified as the Evaluation Panel.

3.19 The records of the meeting and subsequent meetings do not disclose how this affected the separation between the steering and evaluation bodies as approved by the Secretary. The records also do not disclose whether this involved the steering committee assuming additional responsibilities, and whether or not these changes were approved by the Secretary.

Membership changes

3.20 In September 2002, the Secretary was advised that owing to the departure of the chair of the steering committee, and the elevation of First Assistant Secretary – Unauthorised Arrivals and Detention Division (FAS UADD) to the position of Deputy Secretary, the newly promoted officer should assume the role of chair of the steering committee. Through the elevation of one member and with no replacement identified, a position on the steering committee/tender evaluation team (TET) was effectively abolished and this altered the balance of available skills and experience.

3.21 There is also no evidence of discussion, and no advice to the delegate, of the decision taken by the steering committee to replace DIMIA's CFO on the TST with another officer at a lower level. The replacement was drawn from the detention division and not from the CFO's division which further altered the balance of skills and experience involved in the procurement.

3.22 Financial expertise is a core capability required to determine value for money, and DIMIA's evaluation of the tender bids against the value for money criteria is discussed in more detail in Chapter 4.

Financial and legal advisors

3.23 The involvement of legal³⁰ and financial³¹ advisors was seen as important for the development of DIMIA's evaluation plans, and for the provision of ongoing expertise to assist the steering committee. The cost to DIMIA of the involvement of the specialist advisors in the RFT was not separately recorded and monitored by DIMIA. The ANAO noted:

- the extended timeframe for the conduct of the tender; and

³⁰ Legal advice was provided by the Australian Government Solicitor.

³¹ Price Waterhouse Coopers (PWC) was appointed as financial advisors on 30 October 2001.

- DIMIA's use of legal and financial advisers occurred to a greater extent and for a longer timeframe than was envisaged at various points throughout the procurement.

3.24 The ANAO considers that, in future procurements, DIMIA should include the costs of legal and financial advisers in the overall costs of re-tendering.

Probity advisor and probity auditor

3.25 The CPG's require that officials consider seeking appropriate probity advice.³² A probity advisor and/or probity auditor needs to be external to, and independent of, the procurement process. This independence allows scrutiny of the procurement to ensure that prescribed processes are followed. Any uncertainties about a probity advisor's independence will diminish their value to the project.

3.26 Although probity advisors and probity auditors provide different services, it is equally important that they have independence from the process. A probity advisor provides advice on issues which may arise before and during the procurement. As a result they are likely to have a level of direct interest in the project and will generally be under the direction of the client. However, it is essential that a probity advisor remains independent of the project team and other advisors.³³

3.27 A probity auditor's role is to provide a review of the procurement process, or a review of key phases, after completion. The probity auditor should be largely self directing and, as a result, will have a higher degree of independence than the probity advisor.³⁴

3.28 External probity services can include the engagement of a probity advisor or a probity auditor, or both. DIMIA appointed PSI consulting as the probity advisor on 30 August 2001. Sparke Helmore was formally appointed as the probity auditor on 28 October 2002.

³² *Commonwealth Procurement Guidelines*, September 2001 – Part 1.3 Ethics.

³³ Independent Commission Against Corruption (ICAC), *Probity and probity advising – guidelines for managing public sector projects*, November 2005, pp. 15.

³⁴ Independent Commission Against Corruption (ICAC), *Probity and probity advising – guidelines for managing public sector projects*, November 2005, pp. 13.

Clearly specifying roles and responsibilities of key personnel and ensuring the separation of duties and responsibilities

3.29 It is important that those undertaking procurement have a clear understanding of their roles and responsibilities. Clearly specified roles ensure that efforts are directed towards the achievement of defined goals and that accountabilities are understood.

3.30 The specified roles and related governing arrangements should allow for the separation of evaluation teams and the independence of advisors.

Evaluation teams

3.31 The structure and composition of DIMIA's evaluation teams are discussed at paragraphs 3.14 - 3.22 above. In relation to the evaluation teams, the ANAO found that responsibilities and accountabilities were assigned to the positions within the teams in only general terms. Although the documentation and set up of the administrative arrangements clearly indicates that the need for senior oversight, with operational and financial expertise was well understood, responsibilities for management of specific aspects of the procurement, were not documented.

3.32 The ANAO also found that the relationships between the decision-making bodies are described differently in the probity and communication plans when compared to the Tender Evaluation Plan (TEP). For instance, the steering committee and its roles and functions are not described in the TEP or the Financial Evaluation Plan. The Evaluation Panel is referred to as the Tender Support Team (TST) in the TEP but its primary role was evaluation of the tender. The role of the Tender Evaluation Team (TET), which was also the steering committee, was described in the TEP as no more than 'evaluation'. Overall the ANAO found a lack of clarity around the roles and responsibilities of the various committees and individual members.

Probity advisor

3.33 DIMIA's Probity Plan identified the role of the probity advisor as 'to independently monitor procedural aspects of the procurement and advise DIMIA on and of probity issues.' A probity advisor would normally examine the RFT, the evaluation plan and associated documents to ensure their consistency, and to ensure that the documented processes comply with legal, policy and probity requirements.

3.34 In July 2001, DIMIA released a Request for Tender for the provision of probity advice in relation to the Tender Process for the Detention Services

Contract. The statement of requirements indicates that the Tenderer is required to provide comprehensive advice on the probity aspects of the conduct of the Tender process for the Detention Services Contract.

3.35 During the development of the RFT for the probity services contract, a review by the Australian Government Solicitor (AGS) identified a lack of detail provided in the schedule of services to be delivered. In June 2001, the AGS advised:

it would be appropriate for the Department to have at least a well developed understanding of its requirements.

3.36 The contract for the provision of probity advice subsequently translated the Statement of Requirements from the RFT into the description of services to be provided at the Schedule. The contract between the Commonwealth and selected probity advisor (PSI Consulting) for the tender for the Detention Services Contract was signed on 30 August 2001.

3.37 The description of the service requirements indicates there was uncertainty regarding the role of the probity advisor. The RFT was for general probity advice. However, the description of services indicates an intention to appoint a single consultant to provide both probity advice and probity audit services.³⁵

Evaluation Assistance

3.38 Lack of clarity regarding the role of the probity advisor in the tender process was compounded when the probity advisor was engaged to deliver additional services. On 14 November 2001, following an undocumented request from DIMIA, a proposal was sent to DIMIA for services available 'in support of the evaluation of the responses to the Detention Services Request for Tender.'³⁶ The proposal indicated that in addition to the provision of probity advice, the following services could also be provided by PSI consulting:

- development of an Evaluation Breakdown Structure based on the Statement of Requirements and including additional evaluation criteria;
- development of a Tender Evaluation Plan;

³⁵ This view is supported by Section 4.5 the Conditions of Tender, released in June 2002, which advise tenderers that the Commonwealth has appointed an independent probity auditor and the *Probity Report – Detention Services Expression of Interest* prepared by the probity advisor, which states that it had been 'appointed by the Department of Immigration and Multicultural and Indigenous Affairs (the Department) as Probity Auditor/Advisor'.

³⁶ Letter from probity advisor to DIMIA dated 14 November 2001.

- briefing the TET on the evaluation methodology and its application to the evaluation of the tender responses;
- data entry of tender evaluation scores and comments into (the consultant's) proprietary software;
- incorporation of the financial analysis results into database to produce a value for money comparator;
- a sensitivity analysis on the evaluation results if required;
- the development of the tenderer debriefing notes, based upon each tenderer's strengths and weaknesses; and
- general consultancy advice and guidance throughout the tender evaluation process.

3.39 DIMIA was unable to provide documentation identifying the requirement for evaluation assistance, setting out the consideration of the options available for the selection and engagement of such advice, or documentation recording the acceptance of the evaluation proposal of 14 November 2001. However, the evaluation plans for both the Expression of Interest and the RFT names PSI consulting as both the probity advisor and the evaluation advisor.

3.40 The ANAO found that the probity advisor also had primary responsibility for the development of much of DIMIA's tender documentation including the risk plans and the tender evaluation plan (see paragraph 3.9). While it is acceptable practice that the probity advisor would review this documentation, it is not normally the role of a probity advisor to prepare the tender evaluation plan.

3.41 The DIMIA steering committee advised the ANAO that the decision to accept the evaluation proposal was taken following discussions in the presence of its advisors, including both PSI and legal advisors. The steering committee also advised the ANAO that the probity advisor had indicated that there was no conflict with holding the dual roles of both evaluation advisor and probity advisor. DIMIA's legal advisors did raise some concern regarding a potential conflict of interest but the ANAO was advised that these were resolved following discussions with the steering committee. The ANAO notes that this discussion is not documented and was not brought to the attention of the delegate.

3.42 A probity advisor's role should be strictly confined to probity issues and not be expanded into other fields of advice, even if the adviser has expertise in these areas.³⁷ The ANAO found that by engaging the probity advisor to undertake additional responsibilities, DIMIA compromised the independence of this role.

3.43 As well, a probity advisor (and his or her organisation) should preferably have no other current or prospective business relationship with the client agency on other projects.³⁸ The ANAO notes that PSI consulting had a long relationship with DIMIA, including providing advice as a consultant on detention and other matters.

Having a clear understanding and agreement on the level of assurance to be provided by expert advisors

3.44 Before a procurement process commences, all parties should have a clear understanding as to the level of assurance that an agency will be seeking from each specialist advisor. Agencies should specify whether sign-off is required for the entire process or whether sign-offs should occur at the end of specified stages of the process or particular milestones. Agencies should also clearly specify the required level of assurance the sign-offs are to provide.³⁹

3.45 While sign-off by expert advisors cannot replace a managers' own obligations and accountability for the proper conduct of procurement exercises, decision-makers rely on information provided to them in assessing the outcome of a tender. In this context, expert advisors should be required to provide sign-offs to demonstrate their involvement, the extent of their involvement and any conclusions reached.

3.46 The ANAO found that although DIMIA engaged a number of contractors for independent advice, including financial advice, these contractors were not required, as part of the terms of their engagement, to provide a statement of the level of assurance being provided. Ultimately, the probity auditor recommended that assurance from the contractors be provided. However, DIMIA did not seek to formalise this assurance until after a recommendation from the probity auditor on 20 August 2003. As well, the

³⁷ Independent Commission Against Corruption (ICAC), *Probity and probity advising – guidelines for managing public sector projects*, November 2005, pp. 24.

³⁸ Independent Commission Against Corruption (ICAC), *Probity and probity advising – guidelines for managing public sector projects*, November 2005, pp. 25.

³⁹ Department of Finance and Administration, *Procurement Guidance – Ethics and Probity in Government Procurement*, <http://www.finance.gov.au/ctc/ethics_probity-probity_exper.html>.

level of assurance provided by the probity audits was not clearly specified. This is discussed in the section below.

Engagement of the probity auditor

3.47 A probity auditor's role is to review a procurement process after it has been completed. Having regard to the evidence available, the probity auditor independently reviews the conduct of the process and comments on the probity of those processes. A probity auditor is normally responsible for producing a full report advising whether or not the process has been conducted in accordance with the probity principles.

3.48 At the steering committee meeting of 20 August 2002, the minutes reflect that DIMIA's legal advisor:

raised an issue in relation to independent probity audit.

3.49 The steering committee subsequently agreed to appoint a probity auditor. There is no other documentation supporting this decision apart from an email forwarded to DIMIA from the AGS in September 2002, which states:

to ensure that the tender process has been run in accordance with Commonwealth probity policy and principles and also to enable the Department to readily to show that this is the case.⁴⁰

3.50 On 17 September 2002, following consideration of two proposals, the steering committee informally appointed Sparke Helmore as probity auditor on 4 October 2002. The contract with the probity auditor was signed on 28 October 2002.

3.51 The contract for the provision of probity audit services identified the services to be provided as:

... assurance in relation to the integrity and robustness of the Detention Services Tender process through the provision of strategic audit review of the detention services tender process. In addition, further 'real time' probity audit review of the evaluation stage and subsequent negotiation and debriefing is required.

The provision of the probity audit service is intended to complement the activities of the Probity Advisor, in order to establish that the conduct of the process can be signed-off as having met or exceeded all appropriate probity principles and standards.

⁴⁰ Email from AGS to Project Director 13 September 02.

3.52 The contract goes on to specify that the probity auditor will:

- conduct initial discussions with key personnel and review background documentation;
- undertake a **desktop review** of the preliminary work and Exposure Draft and EOI documents;
- undertake a further **desktop review** on the documents that have both driven and reported on the RFT process; and
- provide an ongoing audit review role at a strategic level.

3.53 The contract lists the documents to be reviewed by the probity auditor. The ANAO found that the records of the steering committee meetings and documented probity advice are not listed in the contract to be reviewed by the probity auditor. In this sense, the engagement of the probity auditor has the characteristics of an 'agreed upon procedure'. Agreed upon procedures are described in the Australian Auditing Standards as:

An agreed-upon procedures engagement does not enable the auditor to express assurance. The auditor is engaged to carry out procedures of an audit nature in order to meet the information needs of those parties that have agreed to the procedures to be performed. However, because the auditor does not determine the nature, timing and extent of the procedures performed, no assurance is expressed.⁴¹

3.54 Generally, in a large procurement such as this, the engagement of a probity auditor to complement the activities of the probity advisor represents sound administrative practice because it enhances the ability, and level of confidence in being able to demonstrate the basis for tender assessments and selection. However, in this case, the probity auditor did not determine the nature, timing and extent of the procedures to be performed, and the probity plan did not clearly articulate a coordinated and clear understanding of the respective roles of both the probity advisor and probity auditor.

3.55 The probity advisor was appointed by DIMIA at the commencement of the tender, and was to continue for the term of the procurement. As an initial step in a probity engagement, a probity advisor would normally develop a probity plan and this was completed for this procurement. As suggested above, this represents good administrative practice because it provides an objective model for the proper conduct of the tender process, against which its

⁴¹ Australian Auditing Standard AUS 106.18 Explanatory Framework on Audit and Audit Related Services.

actual conduct may be assessed from a probity perspective. In this case, where both a probity advisor and probity auditor were appointed, the probity plan needed to detail the audit work to be undertaken by and the roles and responsibilities of the individual probity reviewers.

3.56 The ANAO found:

- the probity plan was not revised following the appointment of the probity auditor; and
- the probity auditor and probity advisor did not discuss their individual responsibilities with each other, both instead reporting to the same DIMIA project director.

Recommendation No.1

3.57 The ANAO recommends that DIMA ensure that consultancy agreements developed for the provision of probity auditing and/or advising services in future tenders stipulate:

- that a comprehensive probity plan is finalised before the commencement of the tender process and monitored to ensure that any changes in probity requirements are managed; and
- that the scope of any probity auditor's services includes provision of a sign-off to the decision-maker that specifies the level of assurance provided by the audit engagement.

The fair and equitable treatment of all tenderers including identifying and managing actual or perceived conflict of interest

Fairness to all tenderers

3.58 Agency practices should ensure that all tender processes are properly structured and managed effectively to provide fairness for all tenderers.⁴² DIMIA's probity plan indicated that:

DIMIA must monitor and evaluate application of these principles through all the stages of tendering process if DIMIA is to ensure the fair and equitable treatment of all parties. The essential principles of probity in contracting are:

- fairness and impartiality;
- use of a competitive process;

⁴² Department of Finance and Administration, Procurement Guidance – Ethics and Probity in Government Procurement, <http://www.finance.gov.au/ctc/ethics_probity-probity.html>.

- consistency and transparency of process;
- security and confidentiality;
- identification and resolution of conflicts of interest; and
- compliance with legislative obligations and government policy (as they apply to tendering).

3.59 The ANAO considers these principles to be sound, and that adherence to probity principles also means meeting the requirements of the Commonwealth Procurement Guidelines⁴³ which state:

Procurement must be conducted ethically to enable buyers and suppliers to:

- deal with each other on a basis of mutual trust and respect; and
- conduct business fairly, reasonably and with integrity.

Potential for conflict of interest

3.60 In significant procurements, members of an evaluation committee should disclose and manage appropriately any actual, perceived or potential conflicts of interest. At its meeting on 20 August 2002, the steering committee decided that there would be benefit in obtaining a formal referee report from within DIMIA, concerning the performance of ACM. The basis for this decision was that a formal written reference would provide transparency regarding DIMIA's views about ACM's service delivery performance. Two issues arose from this; the first involved a question of whether it would be appropriate for DIMIA to provide a reference where ACM⁴⁴ had not nominated DIMIA as a referee. The second involved the determination of the person best placed within DIMIA to provide the reference.

3.61 In relation to the first issue, the steering committee concluded that it was appropriate for DIMIA, as ACM's major customer in Australia for the provision of detention services, to provide a reference. This was in accordance with the provisions of the RFT which reserved the right of the Commonwealth 'to take account of any other information which it considered relevant to the tender evaluation.'

3.62 The ANAO acknowledges that the steering committee was entitled to be made aware, through formal means, of the performance of a tenderer as an incumbent supplier as part of the tender evaluation. DIMIA was also entitled

⁴³ Issued in September 2001.

⁴⁴ This is discussed in more detail at paragraph 4.31 below.

to ensure that the most qualified and appropriate people were placed on the steering committee in order to properly assess and make a recommendation as to the most appropriate tenderer.

3.63 However, in relation to the second issue, a complication arose because the steering committee nominated the chair of the steering committee, who was also the (then) contract administrator, to provide a referee report. Probity advice was sought and the probity advisor advised against the chair of the steering committee providing the referee's report, on the basis there was a risk of a perceived conflict between the obligation of the chair of the steering committee, to consider the evaluation of each tenderer impartially, having accumulated knowledge and experiences in administering the contract with the incumbent service provider over the previous two years.

3.64 Notwithstanding this advice, the steering committee considered that the chair of the steering committee was the most appropriate person to provide the reference from DIMIA. The steering committee minutes from this meeting are brief and do not record whether or not alternatives were considered.

3.65 In March 2003, seven months after the reference was provided, the probity auditor report recommended that:

- a more detailed report of the steering committee's deliberations on this issue be prepared, signed off and filed;
- in future, a member of the steering (or other tender process) committee should be disqualified from the deliberations of that committee in relation to any issue in which the member has an actual, potential or perceived conflict of interest until such time as the remaining members of the committee have considered and resolved on an appropriate course of action in relation to that issue; and
- in future tenders, DIMIA should consider (prior to the issue of an RFT) a suitable separation of people who might be performing functions that have inherent tensions, real or perceived.

3.66 The ANAO notes that in relation to the above recommendation:

- a more detailed report of the steering committee's considerations was prepared, agreed and filed. This occurred some eight months after the initial decision was taken and four months after the preferred tenderer had been announced;
- the steering committee did not agree the second part of the recommendation; and

- the steering committee referred the third part of the recommendation to DIMIA's internal audit committee.

3.67 There is no record of the delegate being informed of the probity auditor's recommendation and the resolution of the steering committee to disagree with the second part of the recommendation.

Recommendation No.2

3.68 The ANAO recommends that for future procurements, the roles and responsibilities of key personnel should be clearly defined with particular attention given to the separation of people and functions to ensure that conflicts (actual or perceived) do not develop.

Creating and maintaining appropriate documentation, particularly surrounding key decisions

Legal requirements and other guidance

3.69 The CPG's state that 'officials, departments and agencies are answerable and accountable for any plans, actions and outcomes that involve spending public monies.' As well, 'Chief Executive Officers are responsible for ensuring that adequate systems for recording decisions and reasons for making them are maintained.'⁴⁵

3.70 During the tender process, DIMIA's Data and Records Management Unit provided specific recordkeeping advice to DIMIA officers with responsibilities for this procurement. As well, more general records management policies and responsibilities are also detailed in DIMIA's Records Management Guide. The Records Management Guide describes the principles and practices of records management used by DIMIA and assists and guides staff in their recordkeeping obligations.

Standard of recordkeeping

3.71 The level and standard of documentation considered necessary to support an administrative process is always a matter of judgement for management in setting an organisation's control environment. However, a minimum standard of documentation is important for an agency to meet its legal and accountability obligations. The level and standard of documentation needs to be appropriate for the circumstances. Accordingly, it would be expected that both the level and standard of documentation would increase as

⁴⁵ Commonwealth Procurement Guidelines and Best Practice Guidance, September 2001.

the consequences of decisions and actions increases. At a minimum, records should provide sufficient information to enable an audit or independent review function to be carried out.

3.72 In the context of record keeping for this procurement, the ANAO found that:

- there was no version control for any of the project documents used by DIMIA. This shortcoming was highlighted in this case, as there were multiple versions of documents circulated to committee members and advisors for comments throughout the process;
- there are multiple versions of meeting records (unmarked to show their status as draft or final) with inconsistencies between what was recorded as being discussed or decided at the meetings (the implications of this are discussed in more detail in Chapter 4);
- important discussions were held where both the agenda for, and outcomes from, the meeting only record ‘oral presentation’ or discussion;
- several requests made of the department’s advisors were not documented, for example, sensitivity analyses (discussed in more detail in Chapter 4);⁴⁶
- meeting agendas and meeting records for the steering committee are extremely brief and practically non-existent for the tender support team; and
- there are no records for meetings held between 15 May and 21 August 2003. A range of important issues was managed through this period including settlement of the insurance, liability and indemnity regime (discussed in Chapter 6) and a change in the health services sub-contractor. The ANAO was advised that informal meetings were held during this period, but the matters arising, and outcomes decided have not been recorded.

3.73 At various stages during the conduct of this audit, the ANAO experienced difficulty in locating sufficient evidence to form an opinion about aspects of the procurement. In response to these difficulties, the ANAO

⁴⁶ Guidance from the Department of Finance states that ‘it is sound practice to document any requests for advice from any other parties consulted, including a probity expert or a legal adviser, in addition to documenting all advice provided for file and future use.’

requested access to DIMIA's email records of the members of the steering committee. However, the email records were also incomplete and provided only minimal amounts of additional evidence.

3.74 The ANAO was advised by the steering committee that it had delegated responsibility for the management of records to the tender support team. The steering committee advised that it did not 'micro-manage' this process. Instead there was an assumption that all documentation that was presented to the committee was being filed appropriately. The steering committee also advised that, in some instances, it specifically requested that documents be put on file in order to protect DIMIA's interests. An example is correspondence from Finance regarding insurance.

3.75 The ANAO acknowledges that delegating responsibility for record keeping is a reasonable administrative approach. However, the ANAO notes that the steering committee was directly involved in the preparation and review of many important records, such as the minutes of the steering committee meetings.

3.76 The ANAO notes the commitment given by the current Secretary of DIMA to improve recordkeeping systems in DIMA. In responding to the recommendations of the Palmer report, he has foreshadowed expenditure of \$10 million over five years to fund the necessary improvements. The following ANAO recommendation is made in that context.

Recommendation No.3

3.77 The ANAO recommends that, as part of DIMA's review of recordkeeping systems, procedures for the documentation of tender processes be developed, to facilitate accountability and transparency in outsourcing and to ensure compliance with the Commonwealth Procurement Guidelines.

4. Evaluation of the Tender Bids

The request for tender for the detention services contract, the evaluation of those tenders and the advice provided to DIMIA's (then) Secretary is examined in this chapter.

The Request for Tender (RFT) and Tender Evaluation Plan

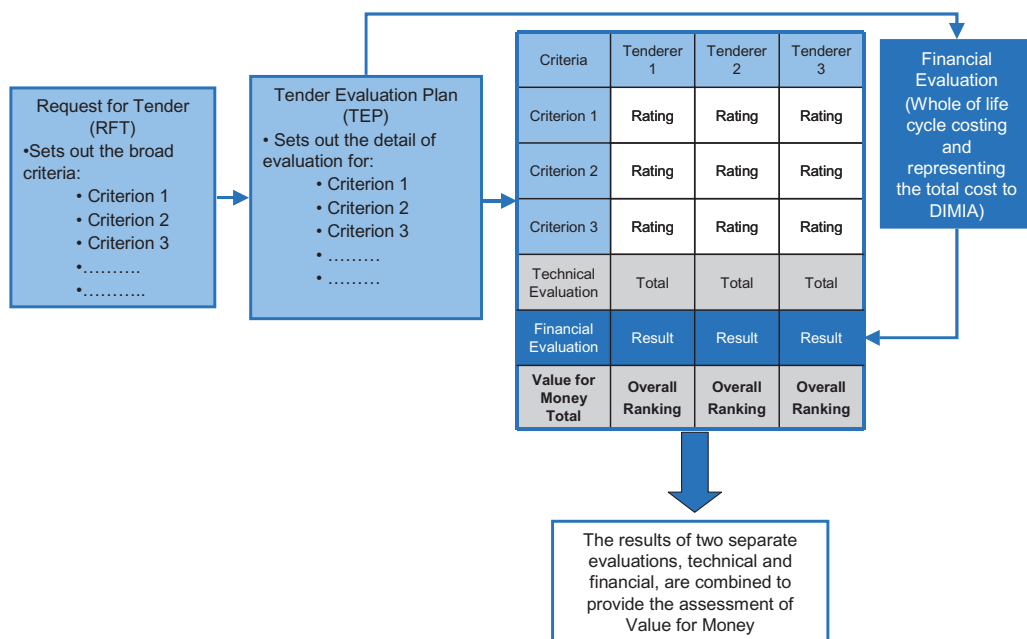
4.1 The general conditions of tender for the Detention Services Contract (DSC) indicated that:

The evaluation of those tenders admitted to consideration will be guided by any relevant policy documents, e.g. Commonwealth Procurement Guidelines, and any publicly available DIMIA commercial policy documents. Tenders will be evaluated to identify the tender that represents best value for money, that is, which has the greatest merit or benefit in proportion to its tendered costs.

4.2 DIMIA's Tender Evaluation Plan (TEP) provided a detailed breakdown of how the broad criteria set out in the RFT would be assessed as part of the evaluation. The decision-making framework set out in the TEP and other documents, is examined in Chapter 3 of this audit. The TEP also set out the evaluation methodology. Part of this was a separate financial evaluation plan, prepared by DIMIA's financial advisor. The evaluation methodology involved the consideration of both technical and financial aspects of the tender bids, in order to arrive at a determination of value for money. Figure 4.1 shows the operation of the broad concepts.

Figure 4.1

Combining technical and financial evaluations to establish value for money



Source: ANAO from DIMIA's Tender Evaluation Plan and the Financial Evaluation Plan.

Tender Evaluation

Financial evaluation

4.3 Tenders closed on 22 August 2002, and the evaluation of tenders using the process described at Figure 4.1 commenced at that time. Three tenderers⁴⁷ were assessed:

- Australasian Correctional Management (ACM);
- Global Solutions Limited Australia Pty Ltd (GSL);⁴⁸ and
- Management and Training Corporation (MTC).

⁴⁷ A fourth tenderer, Australian Protective Services withdrew its tender before tenders closed.

⁴⁸ The tender bid for the Detention Services Contract was submitted under the name of Group 4 Falck Global Solutions. Subsequent to the signing of the Contract Group 4 Falck changed its name to Global Solutions Limited Australia Pty Ltd (GSL).

Scenario used in value for money calculations

4.4 Sensitivity analysis was performed by DIMIA across a range of scenarios to assess the impact on pricing of different detainee population levels and the number of detention facilities in operation. One of the scenarios, (E) was developed as the 'benchmark' scenario reflecting DIMIA's best estimate of the detainee population levels in the future. Scenario E was used in the financial evaluation to calculate the Net Present Value for each of the three tenderers, and used for subsequent value for money calculations, until it was modified during contract negotiations.⁴⁹

The financial evaluation report

4.5 DIMIA's steering committee met on 28 October 2002, to 'confirm the technical evaluation' and distribute the financial evaluation. The record of the meeting shows an overview of the financial analysis was provided.

4.6 The financial evaluation report contained the following recommendation:

Both [GSL] and MTC propose significantly lower salary rates than ACM at remote and island locations, ranging from 30% to 50% less....from these results it appears as though ACM and MTC have included costs such as remote area allowances, bonuses, housing costs, etc in their staff costs....[GSL] do not appear to have provided for such expenses.

Therefore we recommend that clarification be sought from all tenderers regarding their staff recruitment, retention and remuneration strategies, particularly for remote and island locations.

4.7 The steering committee (which, as discussed in Chapter 3 was also the Tender Evaluation Team (TET)), agreed that the TET would consider the financial evaluation, for discussion next meeting. The probity advisor was to integrate the technical scoring and the tenderer financials to develop a draft value for money report.

4.8 On 29 October 2002, the probity advisor prepared a paper containing the draft value for money assessments and cost factors underpinning unit rates. The draft value for money analysis is shown at Table 4.1.⁵⁰

⁴⁹ The modification to scenario E is discussed in more detail at paragraph 5.29.

⁵⁰ For scenario 'E' which was a projection based on the (then) current level of detainee population. See paragraph 4.4.

Table 4.1**Draft Value for Money analysis at 29 October 2002**

Tenderer Name	Tenderer Cost	Technical Worth	Value for Money Calculation	VFM Index %	Difference
Global Solutions Limited Australia (GSL)	\$286,790,254	69.02%	4,155,196.8	100%	0.00%
Australasian Correctional Management (ACM)	\$334,344,405	76.91%	4,347,253.04	95.58%	4.42%
Management and Training Corporation (MTC)	\$364,517,711	67.56%	5,395,485.22	77.01%	22.99%

Source: ANAO from DIMIA records

4.9 The paper covering this analysis also advised:

..as a result, differences between value for money in the plus or minus 5% range are probably not statistically significant. Thus it is critical; where results are apparently too close to call, that a thorough assessment of the residual risks be conducted through the risk analysis.

4.10 It was important that, as the evaluation process went forward, the significance of the residual risks arising were identified, so that necessary treatments could be developed and monitored through the later stages of the procurement. In this case, where residual risks were identified by DIMIA, the documentation set out the nature and likelihood of the residual risk. However, the assessment did not clarify how each risk was to be measured and monitored in the on-going administration of the tender. The ANAO considers that effective risk pricing mechanisms should have been employed to form an input to the value for money analysis.⁵¹

4.11 The ANAO notes that the steering committee chose not to request a ‘best and final offer’ from GSL and ACM to separate these tenderers. Such a step was provided for in the TEP.

4.12 On 5 November 2002, the steering committee met to consider, (among other things), the outcome of the financial evaluation and the draft value for money analysis. The record of the meeting shows that the steering committee simply ‘agreed’ the financial evaluation, and ‘noted’ that the draft value for

⁵¹ Refer Department of Finance Circular 2003/02 ‘the price of risk being borne by the Commonwealth has been factored into the value for money consideration of the proposal.’

money analysis would be finalised following the residual risk analysis and the visits to the tenderer sites. The department was unable to provide documentation that clarified whether the steering committee's agreement to the financial evaluation report meant that it agreed with the recommendation in that report to seek price clarification from all tenderers. If so, the draft value for money analysis was not completed with the benefit of price clarifications from all tenderers, introducing additional risk into the process.

Post evaluation risk assessment

4.13 On 6 November 2002, prior to the site visits,⁵² the probity advisor prepared a post-evaluation risk assessment. This risk assessment was an iteration of an earlier risk plan, and it set out individual risks attached to each tenderer's submission. The ANAO found there were differences between the risk treatments proposed for the financial aspects of ACM and GSL bids. This is illustrated in Table 4.2 below.

Table 4.2

Extract from post evaluation risk analysis

Tenderer	Risk Identified	Risk Treatment Proposed	ANAO Comment
ACM	Christmas Island: ACM has a very high fixed cost component for this centre and are 100% to 130% more expensive than the other tenderers.	Assess likelihood and extent of use of Christmas Island. Document alternatives and assess their cost.	DIMIA rated this as a 'high' risk, although it deals with the cost of services, which had been factored into ACM's tender bid.
GSL	Staffing: staffing levels very low in some centres and may be insufficient high detainee to staff ratio, particularly for Baxter low salaries in remote locations, may not have provided for remote area allowances	Seek further clarification of staff recruitment, retention and remuneration strategies, particularly for remote locations. Negotiate minimum levels of staffing in contract.	This is rated as a 'moderate' risk, although it deals with the provision of contractor staffing levels.

Source: ANAO from DIMIA documents.

4.14 The ANAO notes that risks around ACM's pricing of Christmas Island (a remote location) were to be managed by reviewing the way Christmas Island was utilised. Risks around GSL's apparent underbid in remote locations were to be managed by seeking further clarification from GSL of the financial

⁵² The steering committee conducted site visits to tenderer sites from 11 to 13 November 2002. This is discussed in more detail at paragraph 4.15.

aspects of its bid, while not affording ACM the same opportunity for its apparent overbid at Christmas Island. This course of action is not consistent with the recommendation from the financial evaluation report detailed at paragraph 4.6 above.

GSL's request for a pricing change

4.15 The steering committee conducted site visits to tenderer sites from 11 to 13 November 2002. On 13 November 2002, DIMIA received a request from GSL for a pricing change for the Baxter facility. The delegate was later advised that the request for a pricing change 'appears to have been triggered by TET questioning'. On 14 November 2002, this request was forwarded to financial, legal and probity advisors for consideration and comment. The following comments were received:

- on 14 November, the probity advisor recommended that the correction be accepted, noting that this would be GSL's negotiating position in any event;
- on 15 November, the financial advisor informed DIMIA that it was impossible to determine whether the correction claimed by GSL was a 'transformation error'; but nevertheless prepared a revised spreadsheet for GSL's pricing change for Baxter which showed the effect of accepting the price change would increase the four year NPV of GSL's bid by approximately \$11 million; and
- on 18 November, legal advice was received recommending that DIMIA seek further information from GSL to support its claim of a clerical error in its tender submission.

4.16 On 19 November 2002, DIMIA wrote to GSL seeking more information to justify the request for pricing changes. The purpose of the letter was to:

verify [that this was] a translation mistake and confirm that the changes in prices at Baxter directly flow from this change and do not represent a post lodgement alteration of your original tender.

4.17 On 20 November 2002, the steering committee met with the probity advisor. There are three versions of the record of this meeting. One is clearly a draft (although it is not marked as such) and from the other two it is not possible to know which was intended to be the final version. However, the apparent draft version reveals that the risk of GSL low detainee/staff ratio at Baxter would be ameliorated if a pricing change were accepted. This condition was deleted from the final versions of the meeting record. Noting that the

request for additional information from GSL had not yet been considered by the steering committee, this presented a risk that required careful management. Failure to manage this risk materialised in the final report to the delegate, discussed at paragraph 4.37 below.

4.18 On 26 November 2002, the steering committee met to consider GSL's request for a pricing correction submitted for the Baxter IRPC. There are two versions of the record of this meeting. However, both versions of the record show that the steering committee agreed to GSL's pricing correction at Baxter – with the following justification noted:

the amendment requested was considered to be broadly consistent with the costs related to the correction of that error.

4.19 At this meeting the steering committee also determined that there was a narrow margin in favour of GSL which represented better value for money overall. The steering committee also noted that consideration of the residual risk factors did not change the value for money margin in favour of GSL. The ANAO notes that it is not possible to determine from either record of the meeting, the steering committee's consideration of the effect on value for money arising from the decision to accept the pricing change from GSL.

The elimination of MTC and selection of preferred tenderer

4.20 The steering committee also agreed that Management and Training Corporation (MTC) was 'clearly the least favoured tenderer on the basis of Value for Money and the level of unmitigated risk'. However, the Committee also considered that MTC would be able to provide the detention services satisfactorily if required to do so. Although not explicitly stated in the Minutes of the meeting, this is the point at which MTC was eliminated from further considerations.

Advice to the delegate

4.21 The final report of the evaluation stated that;

Therefore, taking into account the technical and financial assessment to generate the VFM index, and factoring the outcome of the risk analysis, the final assessment of best value for money for the Commonwealth establishes Group 4 (GSL) as representing best value for money for the Commonwealth, albeit by a relatively small margin.

4.22 Following this recommendation, a meeting was held between the delegate and the steering committee on 11 December 2002. The meeting is not

documented, but the delegate asked a number of questions that were answered in separate correspondence to him on 18 December. The delegate agreed to the steering committee's recommendation that GSL be selected as the preferred tenderer and in view of the closeness of the two final tenderers, it was decided that ACM should be invited to keep its tender offer open until contract negotiations were finalised.

4.23 The ANAO found a number of errors and omissions in this report. These are discussed under the relevant sub-headings below.

Common ownership links and Industry Development Criteria

4.24 The CPGs also require that in major procurements of \$5 million or more, (except Information and Communication Technology procurement), agencies and where appropriate, outsourced service providers, must clearly identify in tender documentation:

- any industry development criteria and associated evaluation methodology; and
- where appropriate, opportunities for small and medium enterprise participation.

4.25 As early as March 2002, the risk of common ownership links between ACM and GSL were apparent. The delegate was not informed that, as a result of a recommendation from the probity auditor, the steering committee had resolved at the meeting of 26 November to write to ACM and GSL to ask them to:

- confirm what, if any, interaction there had been between Group 4 (now GSL) and ACM or the management structures of those companies in relation to their Australian operations; and
- if there had been any interaction, to confirm that this had not in any way impacted upon the company's participation in the tender process, including development of the tender responses.

4.26 DIMIA advised the ANAO that it made a deliberate decision to not include the Industry Development Criteria in the weightings. The ANAO found that the reasons for that decision are not documented. The ANAO considers that the request above, and the tenderers response to it was important, in the context of placing all relevant information about the tender, before the delegate was asked to make the final decision.

4.27 The Industry Development Criteria was a requirement of the CPGs and tenderers were required to prepare, as part of their tender submissions, responses to the criteria in order to provide a compliant tender. When the deliberate decision was taken to exclude industry development from the evaluation procedure, the decision should have been documented and the delegate informed. The ANAO considers that the risk of common ownership links is likely to have been identified earlier with a systematic approach to the Industry Development Criteria.

Recommendation No.4

4.28 The ANAO recommends that, in future tenders, DIMA ensures that a brief confirming full compliance with the Commonwealth Procurement Guidelines is provided to the delegate in support of any recommendation to enter into a contract.

Technical worth summary ranking

4.29 The report advised that the technical ranking of the tenderers was as follows.

Table 4.3

Technical worth ranking summary

Tenderer Name	Technical Worth	Ranking
Australasian Correctional Management	76.91%	1
Global Solutions Limited	69.02%	2
Management and Training Corporation	67.56%	3

Source: ANAO from DIMIA documents.

4.30 The delegate was also advised that this assessment was based on the information provided in response to the tenderer data requests and response for improved bids, information provided by tenderers during the clarification interviews and discussions with nominated referees.⁵³

4.31 In the context of ‘nominated referees’ the ANAO notes that the delegate was not advised that the RFT asked tenderers to nominate their preferred referees. ACM did not nominate DIMIA as one of its referees, but the then chair of the steering committee acted as a referee for ACM. The RFT also allowed the Commonwealth to check information with any other person or body it saw fit.

⁵³ The probity auditor report of 7 March 2003 indicates that the technical worth scores were not influenced by referee reports.

4.32 This was an important interpretation of the TEP which provided for:

- considerations that may be readily and objectively determined by contact with:
 - reference sites; and/or
 - third parties, able to provide objective and verifiable first hand information.

4.33 The determination of the chair of the steering committee as a ‘third party’ was the subject of probity advice, indicating that this was not ideal and was later to be commented upon by the probity auditor. This is discussed in more detail at paragraph 4.46 below.

Net present value (NPV)

4.34 The evaluation report showed the results of the NPV analysis applied to each tenderer’s prices over the four-year period of the contract, for a projected base population. Subsequent to the financial evaluation report, the steering committee allowed a correction from GSL on pricing for the Baxter IRPC. The initial and revised figures are shown in Table 4.4 below.

Table 4.4

Initial and revised NPV analysis – final evaluation report

Tenderer Name	Initial 4 Year NPV	Revised 4 year NPV	Difference
Global Solutions Limited (GSL)	\$286,790,254	\$298,358,006	\$11,567,752
Australasian Correctional Management (ACM)	\$334,344,405	\$334,344,405	0
Management and Training Corporation (MTC)	\$364,517,711	\$364,517,711	0

Source: ANAO from DIMIA documents.

Value for Money Index

4.35 The evaluation methodology determined value for money through a process outlined at Figure 4.1, to arrive at a value for money index. The value for money index was calculated by dividing the NPV for each tenderer by the technical worth figure for that tenderer, thus arriving at a ‘dollar per point of technical worth’ index. In the report provided to the delegate, the value for money index was ‘normalised’ as a percentage, where 100 per cent represented

the first placed tenderer, so that the difference between that index and the others could be seen easily. The normalised value for money index summary provided to the delegate is shown at Table 4.5 below.

Table 4.5

VFM index ranking summary provided to the delegate

Tenderer Name	Tenderer Cost	Technical Worth	Value for Money Calculation	VFM Index %	Difference
Global Solutions Limited (GSL)	\$298,358,006	69.02%	4,322,776.09	100.00%	0.00%
Australasian Correctional Management (ACM)	\$334,344,405	76.91%	4,347,216.29	95.58%	4.42%
Management and Training Corporation (MTC)	\$364,517,711	67.56%	5,395,466.42	77.01%	22.99%

Source: ANAO from DIMIA final evaluation report.

4.36 The delegate was advised that:

it can be seen that [GSL] has the best value for money, while ACM is a close second, only 4.42% behind. It should be noted that a difference of this order does not constitute a significant advantage or disadvantage for either of the two tenderers.

4.37 The ANAO found that the value for money index calculation provided to the delegate (shown above) was incorrect. Although the table displays the correct figure for the tenderer cost for GSL, the index calculation is based on the original rather than the revised prices submitted by GSL (see Table 4.4) and this affects the index margins. The correct calculations are shown in Table 4.6 below.

Table 4.6

VFM index ranking summary with ANAO corrections⁵⁴

Tenderer Name	Tenderer Cost	Technical Worth	Value for Money Calculation	VFM Index %	Difference
Global Solutions Limited (GSL)	\$298,358,006	69.02%	4,322,776.09	100.00%	0.00%
Australasian Correctional Management (ACM)	\$334,344,405	76.91%	4,347,216.29	99.44%	0.56%
Management and Training Corporation (MTC)	\$364,517,711	67.56%	5,395,466.42	80.12%	19.88%

Source: ANAO from DIMIA final evaluation report

4.38 Although the corrections do not alter the overall position of the tenderers, the margin between them, and the top two in particular, was closer than the delegate was advised. It is relevant to point out for subsequent sections of this audit that this error remained undetected by DIMIA through the contract negotiation phase of this procurement. The delegate was ultimately informed of this error in February 2005, after it was brought to the attention of DIMIA officials by the ANAO in November 2004.

Residual risk analysis

4.39 As provided in the tender evaluation plan, an assessment of the level of risk and confidence of one tenderer over another was undertaken. The delegate was advised that:

Consideration of the risk issues did not provide a clear differentiation between the tenderers or change the narrow margin in favour of Group 4 (now GSL) under the VFM index.

4.40 Notwithstanding this advice, the report outlined several risks. These are summarised, with ANAO comments against them, at Table 4.7 below.

⁵⁴ Corrections are shown in reverse font. Corrections were required to the value for money index in respect of ACM and MTC. This was necessary because DIMIA’s method ranked the tenderer with the best value for money first, and measured the other two from that reference. This means that where there are changes in the calculations for the first ranked tenderer, consequential changes flow through to the ranking of the other tenderers.

Table 4.7

Risk analysis following evaluation process

Risk Advice to the Delegate	ANAO Comment
<p>While the value for money index represents the conclusion of the quantitative analysis, it is still necessary, as foreshadowed in the Tender Evaluation Plan, to assess the level of any residual risk associated with the proposed solutions.</p>	<p>The TEP calls for an assessment of the level of risk and confidence of one tenderer over another. However, the method of assessment of residual risks and how these are to be used are not contained in the TEP. Effective risk pricing is an essential part of establishing and demonstrating a value for money outcome.⁵⁵ There is no evidence that DIMIA made an attempt to price residual risks. In any event, the delegate had been advised that consideration of risk did not change the narrow value for money margin.</p>
<p>Where the differences in value for money index between competing tenderers are small, it is important to take into account the residual risks for each of the tenderers.</p>	<p>This advice is deficient. The delegate had already been advised that:</p> <ul style="list-style-type: none"> - in value for money terms, ‘a difference of this order does not constitute a significant advantage or disadvantage for either of the two tenderers’; and - consideration of the residual risks did not provide a clear differentiation between the two tenderers. <p>The delegate was not advised of the discretion open to him under;</p> <ul style="list-style-type: none"> - paragraph 3.4.1(c) of the terms and conditions of the RFT which provides Commonwealth discretion to enter negotiations with more than one tenderer, including a request for ‘best and final offers’ from all or some of the tenderers; - the steering committee agreement on 5 December 2001, that the final conditions of tender be modified to allow for the possibility of conducting parallel negotiations; and - step (z) of the TEP which also provided for negotiation with more than one tenderer.

Source: ANAO from DIMIA Evaluation Report.

Probity audit report 7 March 2003

4.41 In Chapter 3, the ANAO noted that a probity auditor was appointed late in the procurement process. The contract for probity audit services was

⁵⁵ Further guidance is provided in Department of Finance Circular 2003/02: ‘In summary, to minimise the Commonwealth’s exposure to risk, any arrangement involving the provision of an indemnity, guarantee, warranty or letter of comfort by the Australian Government should not be entered unless; ... The price of the risk being borne by the Commonwealth has been factored into the value for money consideration of the proposal.’

signed on 28 October 2002, and although the EOI for the detention services contract had been issued in December 2001, the probity auditor was expected to audit the EOI process, the development of the RFT and provide 'real-time' probity audit review of the evaluation and negotiation process.

4.42 The ANAO found that the probity audits were limited in scope and, accordingly, appropriately qualified. As discussed in Chapter 3, the probity auditor had limited access to documents and decision makers. These qualifications are set out in short form in the Executive Summary of the probity auditors report;

We have conducted this stage of the Audit in accordance with our retainer, subject to the restriction on our retainer to conduct our audit at a strategic level, based on:

- (a) our discussions with the Project Director;
- (b) a selective desktop review of files maintained by DIMIA in relation to the Evaluation Phase stage; and
- (c) a review of the Tender Evaluation Report, the recommendations contained in it and the decision outcomes flowing from it.

4.43 A probity audit report was provided to the steering committee members on 7 March 2003. DIMIA had been provided with two previous audit reports in relation to this procurement. The first followed the conclusion of the EOI Stage and the second report covered the RFT Stage to Tender Closing Date.

4.44 The report of 7 March dealt with the evaluation phase of the project, commencing on the RFT closing date of 22 August 2002 and culminating in the tender evaluation report submitted to the Secretary of DIMIA on 29 November 2002 and the decision of the Secretary on 18 December 2002 concerning the selection of a 'Preferred Tenderer'.

4.45 The ANAO considers that notwithstanding the (above) limitations placed on the work of the probity auditor by DIMIA, the probity audit reports contained appropriate summaries and recommendations. However, a selective desktop review provides a relatively low level of assurance over the probity of the process since it does not provide complete coverage of the available material. The ANAO found examples of duplicate records of minutes of meetings. In some cases this was simply poor administration. In other cases there were potential probity implications. An example is provided in Table 4.8 below, where the observation of the probity auditor is incorrect because he was

not provided with both versions of the record of the meeting of the steering committee.

Table 4.8

Illustration of level of assurance provided in a probity audit with limited scope

Extract from steering committee Minutes of 17 September 2002 (Version 1)	Extract from steering committee Minutes of 17 September 2002 (Version 2)	Extract From Probity Audit Report of 7 March 2003	ANAO Comment
<p>The steering committee noted a number of issues relating to tenderers submissions.</p> <p>Subject to review once the value for money assessment has been conducted:</p> <p>— ACM's detailed....received subsequent to the closure of tenders was accepted as a genuine correction.</p> <p>— ACM's revised allocation of corporate costs ...was not accepted as a genuine correction.</p> <p>— Noted that further information has been sought in relation to Group 4 Falck's ...to allow ...corrected ...prices received subsequent to the closure of tenders.</p>	<p>The steering committee noted a number of issues relating to tenderers submissions.</p> <p>Subject to review once the value for money assessment has been conducted:</p> <p>— A tenderer's detailed....received subsequent to the closure of tenders was accepted as a genuine correction.</p> <p>— A tenderer's revised allocation of corporate costs ...was not accepted as a genuine correction.</p> <p>— Noted that further information has been sought in relation to a particular tenderer's ..to allow ...corrected ...prices received subsequent to the closure of tenders.</p>	<p>On each occasion, the material was considered by the TST which prepared a detailed report and made a recommendation to the steering committee, although the identity of the relevant tenderer providing the additional material was not made available at that time to the steering committee. This was done in order to enhance probity by avoiding any issue arising of irrelevant considerations influencing the deliberations of the steering committee on the material before it.</p>	<p>Contrary to the probity auditor's report, the identity of the tenderers was made available to the steering committee.</p> <p>The ANAO found that limiting the terms of the probity auditor to the conduct of a 'selective desktop review' meant that this provided a low level of assurance over the probity of the process.</p>

Source: ANAO from DIMIA documents

The probity audit report and the potential for conflict of interest

4.46 As discussed in Chapter 3, the probity audit report also made recommendations concerning documentation, conflict of interest and separation of people and functions. This involved the chair of the steering committee acting as a referee for ACM. The probity auditor subsequently found that the ranking of the tenderers were not altered as a consequence of the consideration of the referees' reports. However, in the final report of the evaluation, the delegate had been advised that:

It is emphasised that this assessment [of the technical worth scores] was based on the information provided in response to the tenderer data requests and response for improved bids, information provided by tenderers during the clarification interviews *and discussions with nominated referees*.⁵⁶

4.47 As well, the ANAO found that ‘sensitivity analysis’ was conducted on technical worth scores following undocumented requests from the steering committee. On 27 October 2002, DIMIA received an email from the probity advisor which reads in part;

Analysis 1 simply halves ACM’s scores for the requirements specified by the TET.⁵⁷

I then tried – in Analysis 2, to simply take away the advantage that their attempts at innovation may have given them...but only where ACM had an advantage. Leaves them at the top of the heap but with a reduced margin.

We can play around with other options as the TET sees fit, but bear in mind that the sensitivity analysis is an input to the risk analysis and not a replacement for the technical worth scores.

4.48 As suggested in the email extract above, the sensitivity analysis involved the potential modification of ACM’s technical worth scores. The ANAO notes that ‘the requirements specified by the TET’ were not recorded, and the ANAO was advised by DIMIA that these were passed to the probity advisor in a telephone conversation. In view of this, the ANAO was unable to determine what prompted the sensitivity analysis request from the steering committee, why it was focused only on ACM’s scores, and how it was intended to be used.

4.49 In February 2003, a further ‘sensitivity analysis’ was conducted. This request from the steering committee was also not documented. However, the outcome of the analysis indicates that modification of the technical scores was again being considered. The email from the probity advisor reads;

The result was to raise G4’s (now GSL) technical score from 69.02% to 70.64%.

4.50 Although the scores were not modified as a result of this analysis, the risks of a conflict, both actual and perceived, through undocumented requests from the steering committee were real. On the one hand, the steering committee had advised the delegate that the scores were partly based on the referee reports. At the same time, the probity auditor was advised that scores

⁵⁶ Emphasis markings added by the ANAO.

⁵⁷ The Tender Evaluation Team (TET) and the steering committee had common membership.

were not modified as a result of the referee reports. These two pieces of evidence are not consistent and the number of undocumented requests from the steering committee showing potential alterations of the technical scores does not provide assurance that the risks of a conflict of interest were adequately identified, considered and managed.

4.51 The scope of the engagement and the restrictions on the retainer provided to the probity auditor, as described earlier, meant that the audits were mostly retrospective, heavily dependent upon the quality of the working papers kept by DIMIA and as a result, provided a low level of assurance. As discussed in Chapter 3, the ANAO considers, the engagement of the probity auditor was an 'agreed upon procedure'. Agreed upon procedures under the Australian Auditing Standards⁵⁸ do not express assurance, because the auditor does not determine the nature, timing and extent of the procedures performed.

⁵⁸ Australian Auditing Standard AUS 106.18 Explanatory Framework on Audit and Audit Related Services.

5. Negotiation with the Successful and Unsuccessful Tenderers

DIMIA's processes for negotiating with the successful and unsuccessful tenderers are examined in this chapter.

Introduction

The Commonwealth Procurement Guidelines (CPG's)

5.1 The obligation set out in the CPG's that 'officials need to be satisfied that the best possible outcome has been achieved, taking into account all relevant costs and benefits over the whole of the procurement cycle'. In this context, there are risks in accepting a preferred tenderer too early. Chief among these risks is that non-preferred tenderers cease to have any involvement in the process, but negotiations with the preferred tenderer that are required to finalise the contract may raise issues of significance. For example, the preferred tenderer may seek, during negotiations, to increase its effective price, or modify the risk allocation between itself and the Commonwealth.

5.2 The 'narrow' margin between the top two tenderers, GSL and ACM, meant that DIMIA needed to ensure that there was a substantive basis for reviewing the value for money index as contract negotiations with GSL went forward.

Option of parallel negotiations – November 2002

5.3 The steering committee considered entering into parallel negotiations with GSL and ACM at its meeting of 26 November 2002 and subsequently recommended against this option. On 29 November, the covering minute to the final report of the evaluation, advised the delegate that:

Negotiation with a single preferred tenderer is recommended because parallel negotiations would add a significant layer of complexity for DIMIA and could have the effect of endangering a successful transition to [GSL]. This is in part because any discussions by them with the staff of the current services provider would be difficult.

5.4 Although the margin between the GSL and ACM tenders was smaller than DIMIA realised, having informed the delegate that the recommendation to select a single preferred tenderer was made on the basis of value for money, and the residual risk analysis could not differentiate between them, any

changes to the value for money inputs needed to be carefully monitored and managed, and compared to the other tenderer's offer, before the contract was executed.

5.5 From the evidence available, the ANAO was unable to determine the nature or extent of the 'significant layer of complexity' that would have been added through parallel negotiations. In subsequent discussions with the steering committee, the ANAO was advised that another factor was that in the previous tender process, DIMIA had noticed the rigidity in ACM's approach to contract negotiations. Notwithstanding this, the methodology employed had already demonstrated the capacity to standardise the various tenders to within fine tolerances in assessing value for money. The existing process required ongoing and careful management. Consideration of service provider difficulty in managing discussions with its staff would seem a lower order risk from the Commonwealth's perspective.

5.6 The ANAO has previously noted (at Table 4.7 of Chapter 4) that the steering committee had earlier decided that the conditions of tender be modified to permit parallel negotiations. As well, the steering committee's own advice had been that the differences between the two final tenderers were not significant. In a competitive process, where the two final tenderers could not be separated through any 'significant' measure or indicator, the ANAO considers that negotiations could have continued in parallel until one tender was identified as clearly presenting a superior outcome in terms of value for money. As indicated in Chapter 4, the ANAO notes that the risk analysis advice was deficient and did not provide the delegate with a complete representation of the options open to him to enter into parallel negotiations.

Option of parallel negotiations – February 2003

5.7 Contract negotiation commenced with GSL in January 2003. By February 2003, GSL had requested a number changes to the draft contract. The material changes requested involved:

- changes to workers compensation insurance payments; and
- the re-distribution of Woomera's corporate costs across operational centres,⁵⁹ and amortisation of startup costs.

⁵⁹ A number of additional scenarios (over and above those developed for the evaluation, were considered by DIMIA for the reallocation of start up and corporate costs. For example, during the course of the tender, it was announced that Woomera would close and this impacted tender bids. The details of the additional scenarios are not well documented.

5.8 The requested changes were sufficient to cause DIMIA to seek advice from its legal, financial and probity advisors. On 17 February, DIMIA's financial advisor prepared a financial analysis that showed the impact of accepting GSL's changes would be:

- an increase to GSL's bid of \$2.09 million⁶⁰ for workers compensation insurance (discussed in more detail at paragraph 5.20 below);
- an increase to GSL's bid of \$12.2 million⁶¹ for the consequential changes that would be necessary following the announced closure of Woomera (discussed in more detail at paragraph 5.27 below); and
- an increase to GSL's bid of \$5.344 million⁶² for the re-amortisation of start up costs (discussed in more detail at paragraph 5.35 below).

5.9 This advice and the financial analysis were collated by the probity advisor on 17 February 2003. Extracts from his advice were:

The first projection shows an overall decrease in value for money for [GSL] of an average 6% when compared to the original value for money when the evaluation closed. This has the effect of putting ACM ahead of [GSL] for scenarios A, B, C, and E by a narrow margin.

The second projection decreases the value for money for [GSL] even further, by an average of 8% compared to the original. This scenario puts ACM ahead of [GSL] in all scenarios from A to F by a small margin.

5.10 The concluding sections of the probity advisor's paper were:

Since ACM's prices are also likely to change during negotiation, the most effective course of action would be to **enter parallel negotiations**⁶³ with both tenderers. There is no probity issue in this case as the methodology was published to both tenderers at the end of the evaluation period. The following process is suggested:

- identify [GSL]'s proposed start-up, Workcover, and other cost increases and conduct a review of the relative value-for-money as compared to the ACM tender;

⁶⁰ NPV amount over 4 years.

⁶¹ NPV amount over 4 years.

⁶² NPV amount over 4 years.

⁶³ Emphasis markings added by the ANAO.

- assess [GSL]'s degree of compliance with the requirements and the draft contract to ensure that the negotiations in these areas are complete and that risk attribution is effective;
- assess whether the negotiated combination of price, technical capability and risk represents the best possible value for money outcome and if agreed by the delegate, finalise contract negotiations and complete contracts;
- if the assessment is that there is a high probability of a better outcome being available, subject to negotiations, from ACM, open negotiations with ACM;
- after the completion of all negotiations, select the service provider offering the best combination of price, technical capability and risk.

5.11 In the discussion above, DIMIA's advisors identified, analysed and evaluated significant risks to achieving a value for money outcome, and proposed a sound administrative solution to manage that risk. After entering GSL's increased bids into DIMIA's evaluation methodology, DIMIA's advisors were signalling changes in the order of 6 to 8 per cent to the value for money calculation. The ANAO notes earlier advice from the steering committee to the delegate that differences of less than 5 per cent were 'probably not' significant in the context of value for money. Neither the RFT nor the TEP indicate whether or not changes of more than 5 per cent were significant in the value for money index calculation. In this situation, where ACM was shown to be ahead of GSL, DIMIA had a responsibility to manage the risk and to closely monitor and manage the margin between the two final tenderers.

5.12 Members of the steering committee and the probity advisor have subsequently advised the ANAO that the advice above was intended to be managed as a step-by-step process. ANAO analysis of DIMIA's management of the relevant steps in this process is examined in subsequent sections. The overall outcome is described at paragraph 5.52.

5.13 Notwithstanding, the steering committee met on 18 February 2003, and among other things, 'noted' the advice above from its specialist advisors. The minutes of the meeting records the following outcome:

...since the tender evaluation is complete, the definition of value for money used in the evaluation, while it remains the defensible centre of the process, is no longer the sole guide to whether negotiations have been successfully concluded. In considering issues raised by [GSL], DIMIA should be seeking an appropriate balance of capability, pricing and risk while ensuring a sound relationship with the Services Provider. The steering committee subsequently

agreed that all significant contract negotiation issues are to be referred to the committee.

5.14 The ANAO found that the recorded outcomes of the steering committee's consideration of the probity advice did not address the recommendation of the specialist advisors, following their assessment of the pricing changes. In particular, the steering committee's decision that 'the definition of value for money was no longer the sole guide as to whether negotiations have been successfully concluded' was a significant departure from the advice of the specialist advisors and the requirements of the CPG's that stipulate that value-for-money is the essential test against which agencies must justify any procurement outcome. The steering committee's decision to favour 'ensuring a sound relationship with the Services Provider' was not canvassed in the specialist advice it received and it introduced an additional and subjective element into an evaluation methodology designed to be a systematic assessment of value for money.

5.15 The ANAO considers that the recorded outcome of the steering committee carried additional risks in this procurement. In suggesting that 'value for money was no longer the sole guide to whether contract negotiations have been successfully concluded', it also failed to acknowledge the terms of the general agreement.⁶⁴ This agreement is extant and remains in force until 27 February 2008. DIMIA had decided not to renew the previous arrangements on the basis of value for money, and had received advice from the Australian Government Solicitor that the tender process needed to be conducted in accordance with clause 3.3(a) of the General Agreement. Subsequent advice from Counsel, engaged for the purpose by the AGS, stated that:

By clause 3.3(a), ACM acknowledges that the Commonwealth will elect to use ACM for any [detention] Service Contract where ACM will provide 'the best value for money' for the Commonwealth.

5.16 This means that all other considerations were subordinate to the overarching requirement of the General Agreement, to select the tender that represented best value for money.

Monitoring Value for Money

5.17 When negotiating with a preferred tenderer, it is important to have a clear understanding of whether any potential change represents a repricing, or

⁶⁴ The General Agreement is a ten-year agreement between the Commonwealth and ACM for the provision of detention services. Details of the agreement are discussed in ANAO Report No. 54 of 2003–04. *Management of the Detention Centre Contracts – Part A*.

a change in scope that may or may not apply equally to all tenderers. Significant re-pricing or changes in scope should be monitored carefully before acceptance, as these changes can, either individually or cumulatively be of a size that a re-bidding process may become necessary.

Changes in scope

5.18 During the course of a tender, each tenderer has made commitments to be undertaken if awarded the contract, based on the requirements of the RFT. During contract negotiations, changes can occur in the level of services the Commonwealth requires, and in the commitments of the preferred tenderer. It is important to appreciate the probity implications arising from changes made to the requirements tenderers were asked to tender against. Probity and legal implications can arise if the original RFT requirements or the method of evaluation are amended to such an extent that a re-bidding process becomes necessary.

The need for accuracy

5.19 As well, any pricing calculations undertaken need to be accurate and clearly recorded. Because DIMIA did not allocate clear responsibility for monitoring value for money and keep appropriate records, the ANAO's examination of the management of the probity and financial aspects of changes in scope and of GSL's pricing changes in the negotiation process was limited. DIMIA was only able to provide 'stand alone' spreadsheets to support important elements of the sequence of events. These spreadsheets were not related to other documents that explained the context and content for their creation and subsequent action. The ANAO notes that the probity advisor provided the value for money index calculations; although the tender evaluation plan shows that the probity advisor's responsibilities did not extend beyond monitoring the technical worth rankings.

Workers compensation insurance changes – value for money

5.20 On 28 February, the probity advisor prepared an updated value for money calculation, showing the impact of the workers compensation insurance increases on GSL's bid. The probity advisor and a member of the steering committee have advised the ANAO that this spreadsheet indicates that value for money was being monitored. However, there is no formal record of steering committee consideration of this analysis. Notwithstanding, the value for money indices for DIMIA's preferred scenario are shown in Table 5.1 below;

Table 5.1**Extract from value for money analysis of 28 February 2003**

Code	Tenderer Cost	Technical Worth	Value for Money	Rank ⁶⁵	VFM%	Difference
ACM	\$334,344,405	76.91%	4,347,216.29	2	95.58%	4.42%
GSL Tender	\$286,790,254	69.02%	4,155,176.09		100%	0.00%
GSL Revised	\$300,645,275 ⁶⁶	69.02%	4,355,915.31	1	95.39%	4.61%

Source: ANAO from DIMIA data.

5.21 The ANAO found that this analysis did not detect the original error in the value for money calculation advised to the delegate (see paragraph 4.37 above), and it contained an additional error – the rankings (in column 5) were transposed. DIMIA’s value for money percentage clearly shows ACM representing better value for money than GSL following these pricing changes. Using ANAO corrected figures in this analysis, ACM was further ahead of GSL in the value for money index.⁶⁷ The 28 February analysis is re-presented below in Table 5.2, with ANAO corrections highlighted.

Table 5.2**Extract from value for money analysis of 28 February 2003 – with ANAO corrections**

Code	Tenderer Cost	Technical Worth	Value for Money	Rank	VFM%	Difference
ACM	\$334,344,405	76.91%	4,347,216.29	1	99.44%	0.56%
GSL Tender	\$298,358,006	69.02%	4,322,776.09		100%	0.00%
GSL Revised	\$300,645,275	69.02%	4,355,915.31	2	99.24%	0.76%

Source: ANAO from DIMIA data.

⁶⁵ The rankings in this table are incorrect. See paragraph 5.19.

⁶⁶ This figure was taken from a PWC analysis which included the first pricing change from GSL discussed at paragraph 4.19 above. It also includes \$193,513 of Woomera costs. Woomera costs are discussed in more detail in the next section.

⁶⁷ DIMIA chose to measure the pricing change from GSL’s accepted tender price, hence it has no ranked position, but ACM’s unchanged prices and GSL’s new price were given a rank to show relative movement.

5.22 On 3 March, the financial advisor informed DIMIA that;

...it is not possible to precisely calculate these (workers compensation insurance) amounts due to anomalies in GSL's detailed tendered spreadsheets. ...This indicates that other staff related costs have been included in 'salaries and wages' that are not subject to workers compensation premiums.

5.23 The advice of 3 March indicated that two corrections to GSL's workers compensation tendered amount would be needed; one to correct the tendered amount to 'a more reasonable estimate' (using figures from an actuary as a benchmark), and the second change arose due to assessed risks (i.e. because GSL would be inheriting ACM's claims history). The anticipated additional costs from both parts of the correction added \$2.093 million to GSL's bid over 4 years.

5.24 The ANAO notes that this analysis did not trigger any further discussion or consideration of whether or not DIMIA should proceed to parallel negotiations.

5.25 Subsequent to this, in August 2003, in the attachment to the Minute seeking approval to enter into the contract, the delegate was advised these changes were 'due to a scope change and a similar adjustment would be required for all tenders' and as a result, these changes 'did not have any implications for the value for money assessment'. There is no record of the steering committee's decision to classify workers compensation insurance payments as a 'change in scope'. The ANAO considers that the changes to the workers compensation tendered amounts from GSL did not involve the Commonwealth adding or subtracting services to the tender and, therefore, considers that its classification as a change in scope of the tender was doubtful. The assertion that a similar adjustment would be required for all tenders was also not subject to further analysis or testing by DIMIA.

5.26 The value for money margin between ACM and GSL as reported to the delegate in the December 2002 evaluation report, was small given the size of the tender. In Table 5.1 above, DIMIA's own calculations in February 2003, reveal that relatively small changes in workers compensation insurance payments had placed ACM ahead of GSL in value for money terms.

The closure of Woomera and Christmas Island

5.27 Following the announcement of the preferred tenderer, it was decided that the Woomera detention centre would be 'mothballed'.⁶⁸ As a result, GSL requested a change to the pricing of its tender to reflect the overhead costs that had been applied to Woomera and were to have been recovered through Woomera detention services fees. The request involved increasing the fixed costs allocated to facilities with ongoing operations,⁶⁹ while reducing the fixed costs at the centres to be mothballed.

5.28 Analysis by DIMIA's financial advisor had shown that GSL's initial pricing allocated a disproportionately high amount of overhead costs to Woomera. Subtracting these costs from the Woomera (and later Christmas Island) centres, meant that large adjustments were required to GSL's tendered prices for the remaining centres. Increases to GSL's fixed costs at the operational centres were greater than the amounts subtracted from the mothballed centres. The financial advisor identified this in the final report to the delegate which stated that:

We are unable to directly match the figures used in the adjustment to the originally tendered detailed price schedules....a direct match is not possible because the 'overheads' line on the detailed price schedules are a consolidation of a number of items, not just the start-up and overheads that are the focus of this adjustment. Additionally, in some cases the start-up and overheads are partly allocated to items other than the 'overheads' line.

5.29 The financial model used by DIMIA required the tenderers to quote fixed and variable prices per centre, according to capacity 'bands' in the centres. The closure of Woomera and Christmas Island meant that the benchmark scenario (E) developed for the evaluation needed to be modified to take into account GSL's reallocation of overhead costs and the redistribution of anticipated detainee numbers to the other centres. DIMIA was unable to provide documentation that explained the basis on which DIMIA re-distributed the detainee numbers from Woomera and Christmas Island to the other centres. As well, these changes were a departure from the stated evaluation criteria (scenario E) used to select the preferred tenderer. There is no evidence DIMIA considered GSL's request against the probity and legal

⁶⁸ Later it was announced that the facility on Christmas Island would also close, although it would subsequently re-open.

⁶⁹ These centres were Port Hedland, Villawood, Maribyrnong, Perth and Baxter.

implications of a change to the evaluation criteria and original RFT requirements.

5.30 GSL's request did contain reductions to the fixed costs that would apply to fees received from future operations in Woomera and Christmas Island, but these would not be realised unless these centres were re-opened.

5.31 In considering GSL's request, DIMIA decided that the closure of Woomera (and later Christmas Island) was an 'unforeseeable' modification to the scope of services being offered for tender. DIMIA also decided that this change would affect all tenderers equally and would not affect the value for money assessment, although no comparison with other tender bids was undertaken to support this decision. As a result, the price change was accepted and advice from DIMIA's financial advisor showed that it increased GSL's bid by \$15.5 million (NPV) over the planned four years of the contract.

5.32 The ANAO notes that ACM had earlier⁷⁰ submitted a request to re-allocate the rate at which its corporate costs would be recovered from the fees it would receive in operating the detention centres.⁷¹ The steering committee rejected ACM's request, although there was no change in the overall cost of ACM's bid. This request⁷² made it clear that ACM had allocated no corporate costs to the Port Hedland, Woomera or Christmas Island centres and, therefore, it was unlikely that the closure of Woomera and Christmas Island would have affected all tenderers equally. On this basis the ANAO considers that GSL's request for a re-pricing following the announced closure of Woomera (and later for the same reasons Christmas Island) to the other centres should have been brought to account in the value for money calculation.

5.33 The ANAO notes that in the final advice to the delegate, recommending that the Commonwealth enter into the contract with GSL, the effect of this change on GSL's bid was not quantified and was listed in the attachments as 'TBA'.⁷³

5.34 The final advice to the delegate also indicated that the pricing changes that had been allowed to GSL's bid were based on scenario E. However, the manner in which DIMIA had modified the criteria used to calculate scenario E

⁷⁰ On 28 August 2002.

⁷¹ The request from ACM involved a re-distribution of its corporate costs between Maribyrnong, Perth and Villawood IDC's and Baxter IRPC.

⁷² Discussed in more detail at table 4.8.

⁷³ The ANAO assumes this to mean 'to be advised'.

meant that key factors relating to the operation of the Woomera and Christmas Island facilities, (that had been used in the evaluation process up to this point), were inconsistently applied to this request. It also meant that comparisons with ACM's bid could no longer be undertaken on a 'like with like' basis, as the modified criteria were not applied to ACM's tendered prices. In those circumstances, it could be expected that the steering committee responsible for the evaluation would formally address in its documented advice and recommendations to the delegate, whether, in its view, the departure from its preferred scenario meant that the value for money basis on which the preferred tenderer had been selected was still valid, and if so, how. That was not the case in this tender process. The final report of the evaluation indicated to the delegate that the comparisons for all price changes accepted were undertaken against the 4 year NPV price for scenario E 'as per the tender evaluation'.

Amortisation of start-up costs

5.35 GSL had, in its original tender bid, assumed that it would hold the contract for the initial four years on offer through the tender, plus the extension period in the contract of three years. Therefore, it had amortised its start-up costs over a period of seven years. This assumption had the effect, throughout the tender and evaluation process, of making the tendered cost of four-year service provision more attractive than its competitors (ACM's bid was based on a four year amortisation of start up costs). In March 2003, GSL sought to modify its pricing in the event that the Commonwealth exercised the discretion open to it to not extend the term beyond the initial period of four years.

5.36 This request had been considered earlier by DIMIA's specialist advisors and was covered in the advice to the steering committee of 17 February that recommended that DIMIA proceed to parallel negotiations. This advice was considered and rejected by the steering committee, in favour of continued negotiations with GSL. These negotiations culminated in a letter from GSL to DIMIA on 17 March 2003 which stated that:

...a significant portion of this [profit] margin is at risk through the operation of the performance fee regime, through the potential financial exposures that arise through our inability to achieve full capping or insurance covers for particular types of loss, especially related to property damage, or through oversights that are to be expected when embarking upon a new contract.

[GSL] is comfortable that it will be able to take these risks within the margin that it is claiming and that it will achieve benefit from the contract over the longer term. However, the possibility of a change in government policy or a significant reduction in the number of illegal immigrants arriving in Australia in future years and the possible consequential expiry of the contract after four years, imposes a substantial risk on our anticipated margins over the full length of the contract.

5.37 DIMIA referred this request to its probity advisor and, on 18 March 2003, the probity advisor stated:

The four-year amortisation also allows a more accurate price comparison between [GSL] and ACM, since ACM's bid assumed a four-year amortisation of start-up costs.....Since this is not a re-pricing, but rather a restructure of existing prices for risk management purposes as part of the negotiation process, we do not consider that a probity issue arises.

5.38 The steering committee accepted this advice, and provided GSL with the opportunity to increase the price of its bid. The value for money implications of this are discussed in more detail at paragraph 5.45 below.

Amortisation of start up costs and the advice provided by DIMIA's specialist advisors

5.39 Based upon the advice above, DIMIA appears to have determined, in the first instance, that GSL's request was not a re-pricing and that a probity issue did not arise. However, the ANAO notes that a preliminary probity question surrounding GSL's request was whether or not it was eligible to be considered in accordance with the terms and conditions of the RFT.

5.40 The terms and conditions applicable for tenderers requesting changes to their bids was set out in Clause 2.4.1 of the RFT which provided that:

If a Tenderer becomes aware of any clerical or administrative error or omission in its tender ...the Tenderer may lodge ...a written correction to its tender. The Commonwealth, at its discretion, may elect to accept any such correction.

5.41 The ANAO notes that GSL did not argue that it had made an administrative error or omission in its tender; it argued that its profit margin was at risk if it did not hold the contract for seven years. Whether or not this request complied with the terms and conditions of the RFT were not addressed as part of the probity advisor's advice.

5.42 The steering committee also did not reconcile differing views between its probity advice and advice from its other experts as to whether or not GSL's

request should be accepted. In relation to this request, DIMIA's legal advisor had stated that:

GSL were not given any indication that an extension would be forthcoming. Likewise, there was no indication or guarantees regarding detainee numbers or particular centres being operational. In fact, the uncertainty was highlighted.

Therefore, GSL were not prudent in their pricing if it was based on a contract exceeding 4 years. This was an unreasonable assumption, and DIMIA should not be asked to compensate them for it.

5.43 DIMIA's financial advisor maintained, in advice provided to DIMIA up to and including the day the contract was signed, that:

...it should be brought to account as a change to value for money. The evaluation was conducted on a 4 year term and this change increases costs during that time.

5.44 The ANAO also considers that this change should have been brought to account in the value for money index calculation. Although the advisor's views were clearly stated, DIMIA was unable to provide any record of the steering committee recording DIMIA's view as to whether or not this pricing change should be accepted. The impact of this is discussed in more detail in the next section.

Amortisation of start up costs and the effect on value for money

5.45 The probity advisor's advice to the steering committee of 18 March 2003 concerning GSL's amortisation of startup costs stated that:

In comparing value for money between ACM and [GSL] over the four year period, the relevant rankings remain unchanged, although the solutions are closer together.⁷⁴

5.46 This advice demonstrates that, at the time, the steering committee was aware that changes in the amortisation of start up costs were considered to have an impact on the value for money assessment. However, DIMIA was not able to supply the analysis supporting this statement. There is also no evidence that the steering committee requested, or was provided with an updated value for money index calculation. From figures that were available at the time, ANAO analysis shows that the acceptance of this pricing change added \$4.1 million to GSL's tendered amount. This amount was subsequently revised

⁷⁴ DIMIA was unable to provide the financial analysis that shows that the rankings were unchanged when it received this advice.

downwards through negotiations over the Woomera and Christmas Island repricing discussed earlier (paragraph 5.27), and settled at \$2.943 million. The ANAO notes that in the final advice to the delegate, recommending that the Commonwealth enter into the contract with GSL, the effect of this change on GSL's bid was also listed in the attachments as 'TBA'.⁷⁵

Other changes affecting value for money during negotiations

5.47 On 1 April 2003, the steering committee agreed to accept a further pricing change from GSL as the correction of a genuine error, and noted that it would not affect the relative value for money position of the tenderers. Advice provided to the committee at the time showed an increase in the NPV of GSL's bid of \$675 981, which was later revised downwards, through negotiations to \$497,952.

5.48 For the same reasons previously described (at paragraph 5.21 above), this advice and supporting analysis provided to the steering committee was also based on incorrect figures. The compounding error on this occasion was that the analysis provided to the steering committee, did not include the impact of the re-amortisation of start up costs from GSL that had been allowed two weeks earlier, nor did it include analysis or discussion of the additional workers compensation insurance costs. The analysis provided to the steering committee at this time was, therefore, of no value in monitoring value for money.

5.49 Later, GSL identified that it had left an insurance cost estimate in its fixed/variable prices (contrary to the instructions in the RFT). Nevertheless, DIMIA decided that if not adjusted, the additional cost in GSL's bid would lead to the over recovery of insurance costs of \$1.2 million per year (\$4.4 million in NPV terms). The pricing change was allowed and, although it was not brought to account in the value for money index calculation, it did form part of the NPV calculation (i.e. one component of the value for money index).

Overall reconciliation of changes in relative value for money

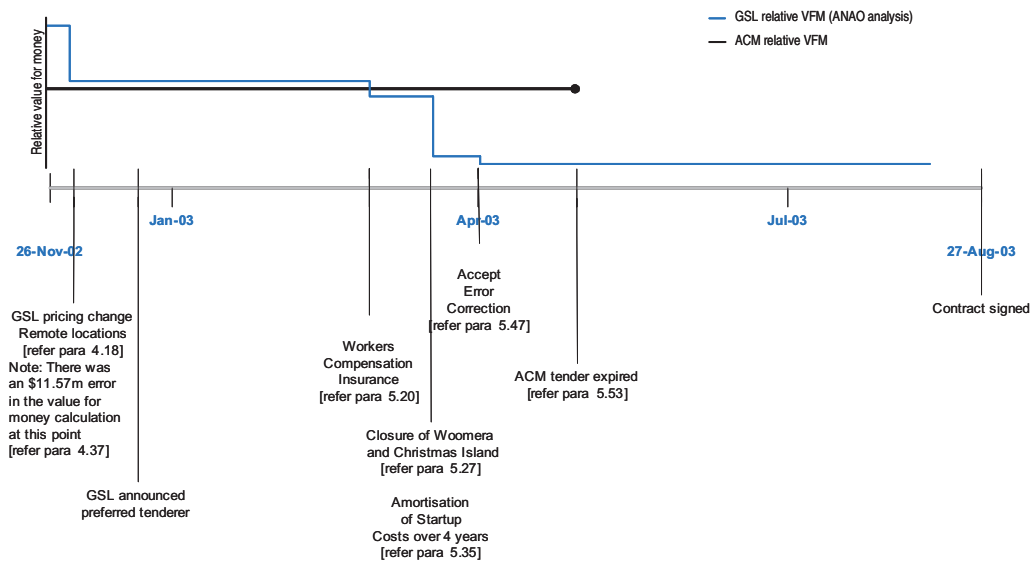
5.50 Contract negotiations were protracted (the reasons for this are discussed in more detail in Chapter 6) and many of the adjustments made to GSL's tendered prices were not finalised until very late in the negotiation phase. However, at the time the changes were accepted, the available figures and DIMIA's own analysis showed that the relative position of the tenderers in DIMIA's value for money index had changed. In some instances there is not a

⁷⁵ The ANAO assumes this to mean 'to be advised'.

clear record of the steering committee formally agreeing to the financial commitment it was accepting on behalf of the Commonwealth, following each pricing change. However, the actual changes were substantial and the ANAO's analysis of movements in relative value for money are shown in Figure 5.1.

Figure 5.1

Overall reconciliation of changes in value for money



Source: ANAO from DIMIA data.

5.51 The pricing changes described above affected the relative position of the tenderers in DIMIA's value for money index. In subsequent statements to the ANAO, members of the steering committee advised that 'specific value for money issues cannot be examined in isolation from one another.' However, the ANAO notes other advice from the steering committee and the probity advisor that it considered earlier advice about parallel negotiations to be describing a 'step-by-step' process (discussed at paragraph 5.12 above). That process foreshadowed a reconciliation of GSL's workers compensation, amortisation of start up and other price increases and the conduct of a review of the relative value for money against ACM's tender, 'to ensure the best possible value for money outcome'. The ANAO found no evidence that this review was undertaken.

5.52 Overall, the ANAO found that there was a lack of transparency in the decision making process in the acceptance of increased prices in the preferred tenderer's bid, particularly in the later stages of the tender. The steering

committee did not bring to a conclusion the 'step-by-step' process it set for itself at the meeting of 18 February 2003 and did not reconcile legal and financial advice that differed from probity advice into an overall DIMIA position. This meant there was no systematic basis for reviewing the value for money index system as envisaged by the steering committee. ANAO analysis shows that the cumulative effect of the pricing changes accepted between 26 November 2002 and 2 May 2003 (the point where ACM's tender bid expired) had added \$32.6 million to the price of GSL's bid.

The elimination of ACM from the tender process

5.53 In December 2002, the delegate agreed to the steering committee's recommendation that GSL be selected as the preferred tenderer and in view of the closeness of the two final tenderers, it was decided that ACM should be invited to keep its tender offer open *until contract negotiations were finalised*.⁷⁶ ACM's original tender bid remained valid until 22 February 2003, when it expired through the operation of the terms of the RFT. On 4 March 2003, the steering committee noted advice that a letter had been sent to ACM seeking agreement to extend its tender validity period to 4 April 2003 and that ACM had agreed to the extension.

5.54 On 1 April 2003 the steering committee decided that a letter should be sent to ACM urgently seeking its agreement to extend the validity of its tender for a further period *pending completion of contract negotiations*. ACM subsequently agreed to keep its tender offer open until 2 May 2003.

5.55 On 30 April 2003, DIMIA again wrote to ACM to 'propose' that the tender validity period be extended by another month to 30 May 2003. ACM responded that it would be prepared to extend the validity period of its tender subject to several conditions. DIMIA did not respond to ACM's counter proposal and, therefore, ACM's tender offer lapsed on 2 May 2003. A member of the steering committee has subsequently advised the ANAO⁷⁷ that there was a deliberate decision taken not to respond to ACM because it was felt that negotiations with GSL were far enough advanced, that the ACM bid was no longer necessary. The ANAO notes that this was contrary to the explicit instructions of the delegate. The ANAO considers that it would have been sound administrative practice to at least respond to ACM's conditions,

⁷⁶ Emphasis markings added by the ANAO.

⁷⁷ At a meeting held at DIMIA on 12 January 2006.

whether or not DIMIA decided to accept them, and advise the delegate accordingly.

5.56 There was also an obligation on the steering committee to advise the delegate that ACM had requested certain conditions to keeping its tender offer open. There is no evidence that this was brought to the attention of the delegate and it was not discussed in the steering committee meetings. As previously noted, there were no steering committee meetings held between 15 May 2003, and 21 August 2003. The delegate was ultimately informed of the intention to advise ACM that its tender bid had been unsuccessful on 22 August 2003.

5.57 In preparing its advices to the Ministers, DIMIA needed to satisfy itself that the tender evaluation process had identified, or was in the process of identifying, the best offer for the Commonwealth. Under the conditions of tender, ACM's offer had expired but the ANAO found that there was no formal decision taken by the steering committee to eliminate ACM from the tender process. This was at odds with the initial decision of the delegate to keep ACM's tender offer open until completion of contract negotiations. It also meant that there were no alternative tenderers remaining and the negotiating position of the Commonwealth had altered considerably as a result.

Completion payments to ACM

5.58 On 25 March 2003, the delegate and Minister were informed that discussions were continuing with ACM on transition arrangements, including ACM's costs associated with transition. The advice stated:

While ACM has promised to cooperate in the delivery of a smooth transition process to [GSL], they have shown a reluctance to provide some information sought by [GSL] on staffing and operational matters that ACM considers commercially sensitive.

In order to manage this tension, we have determined that the best strategy is to postpone substantive action on transition until contract signature. It will then be clear to ACM that they are no longer in the running for this tender process and they will have to live up to their promise of facilitating a smooth transition.

We are also proposing to encourage ACM's successful transition out by offering a 'completion payment' contingent on, among other things, a satisfactory level of assistance being provided to [GSL] and agreement to extend the current contract on existing terms, conditions and prices to cover the full transition period.

5.59 In a pen script note to this advice, the delegate advised the Minister that authorisation for the completion payment would be arranged through an exchange of letters.

5.60 The ANAO notes that the general agreement makes no provision for completion payments, except where the contract is terminated for convenience, which DIMIA elected not to do.⁷⁸ The general agreement is also silent on ACM's responsibility for transitioning out. The documentation provided by DIMIA does not weigh up the risks and benefits of encouraging ACM's successful transition, while at the same time inviting ACM to keep its tender offer open.

5.61 The overarching principle DIMIA needed to consider in deciding to offer a completion payment arises out of section 44 of the *Financial Management and Accountability Act 1997* (FMA Act). Section 44 requires that agency Chief Executives and their delegates manage the affairs of the agency in a way that promotes proper use of the Commonwealth's resources. The need for, purpose, and quantum of the three individual elements were negotiated over time by DIMIA with ACM.

5.62 The contract completion payments encompassed three elements;

- transition team costs (\$1 100 300);
- a bonus payment (\$1.1 million); and
- a lump sum completion payment (\$3.5 million).

5.63 The ANAO found that the determination as to the final amount of the completion payments required a conclusion to be drawn based upon assessments against each element. Apart from a commitment to meet a transition timetable, DIMIA was not able to provide evidence of the criteria it used to make assessments for these payments. The exchange of letters brought the payments into the (then) existing contract with ACM under the 'out of scope' provisions. This meant that no separate authorisation of the payments was then required under Section 44 of the FMA Act. The ANAO notes that the 'out of scope' provisions of the previous contractual arrangements were intended to cover contingencies associated with the provision of detention

⁷⁸ Transition is discussed at clause 5.2.2(c) of the General Agreement which states; If the Commonwealth elects to accept a tender from a person other than the Contractor, the Contractor and the Commonwealth, with effect from the expiration of the then current Service Contract Term, must, and must procure others within their respective control to, do all things reasonably necessary, including the execution of any variation to the General Agreement or a Service Contract, to implement the Commonwealth's acceptance of the tender and the resulting transition requirements.

services, not payments designed to encourage a successful transition to a new service provider. In the circumstances, it is not clear as to whether these payments promoted the most effective, efficient and ethical use of Commonwealth resources.

5.64 The ANAO found that effective administrative actions were not taken to identify and specifically quantify the financial risks of the \$5.7 million (elements listed above) of contract completion payments for ACM. DIMIA was unable to provide substantive evidence that any action was taken by the steering committee to consider and/or evaluate the potential impact of this transaction on achieving a value for money outcome for the Commonwealth. The ANAO also found that including these payments as part of the 'out of scope' provisions of the previous arrangements was not within the intent or the spirit of the contract for the provision of detention services.

5.65 The offer of discretionary contract completion payments, not required as part of the existing contractual arrangements, represented a decision on the part of DIMIA. The need for the payments and risks to the tender process arising from them is not discussed in the department's tender evaluation plan, or in any of the risk plans completed by DIMIA in respect of this procurement.

Decision to enter into a contract with GSL

5.66 The final probity audit report was produced on 20 August 2003, and on 22 August 2003, the delegate was provided with a covering Minute seeking approval to enter into a contract with GSL for the provision of detention services. A supplementary report was required to address outstanding recommendations from the report of 20 August. The supplement was provided on 27 August 2003, the day the contract was signed. As well as the obvious pressures of a demanding time schedule, both of these reports carry additional scope limitations (over and above those described in Chapter 3) in that discussions were held with only two members of the Tender Support Team (TST) for the former report, and one member of the TST for the latter. The TST were administrative staff and had limited decision-making responsibilities for this procurement.

5.67 The covering minute of 22 August confirmed for the delegate that, in the steering committee's view, [GSL]'s bid was superior and recommended that the Commonwealth enter into a contract for the provision of detention services. The complexity of the negotiations coupled with the scale of the technical and financial analysis used to form the final judgements required the

steering committee to be in a position to ensure that the ultimate decision maker could rely on the information about the processes in the Minute, the tables and reports that supported it and the supplementary reports that followed.

Final probity audit reports

5.68 The engagement of the probity auditor was intended to complement the probity advisor and provide a higher level of assurance over the probity of the procurement. However, the level of assurance that could be derived from the work of the probity auditor was low. As well, the probity auditor and probity advisor did not contact each other⁷⁹ throughout the process to crosscheck any potential probity concerns. The ANAO found that following the appointment of the probity auditor, the probity advisor was not requested and did not provide to DIMIA reports of the probity aspects of this procurement that fell within the purview of the probity advisor.

5.69 Poor documentation overall and undocumented requests from the steering committee meant that the advice of individual advisors tended to be quarantined from the advice of other advisors and from the probity auditor. The sign-offs obtained from the advisors were also appropriately qualified to reflect the level of involvement. The ANAO found that specialist advice was provided through the steering committee to the delegate where the advisors views were summarised or amended.

5.70 ANAO comments on the probity audit reports do not indicate that the auditor's reports were inappropriate. ANAO findings in this context serve to highlight the importance of providing auditors independent and unfettered access to records and people, and the risks involved where there are limitations⁸⁰ on the scope of such work. For substantial and sensitive procurements it is advisable that a probity auditor report to, and have direct access to, the head of an agency, should matters worthy of comment arise.

5.71 On 22 August 2003 the steering committee advised the delegate that:

[the probity auditor] have undertaken a probity audit of the entire tender process and their most recent report deals with the contract negotiation stage of the process.

⁷⁹ As discussed at paragraph 3.55 it would be advantageous in future procurements if the roles and responsibilities for probity auditors and probity advisors be clearly defined in advance of the tender process.

⁸⁰ Discussed in Chapter 3.

5.72 At paragraph 3.67 above, the ANAO has already noted that important probity audit report findings were not communicated to the delegate in a timely way. The advice to the delegate (above) did not rectify this and the ANAO notes that, in effect, the steering committee stood in a reporting line between the delegate and the probity auditor. However, the delegate was not informed in the above advice of the findings and recommendation of the earlier probity audit of the potential for a conflict of interest from the chair of the steering committee.

Recommendation No.5

5.73 The ANAO recommends that in future tenders, DIMA develop procedures for the conduct and documentation of the processes followed in negotiating contracts. Such procedures should be directed towards assisting those advising the delegate to manage and monitor the tender over the whole procurement cycle, particularly in regard to the transparent assessment of tenders against value for money evaluation criteria.

6. Management of Liability, Indemnity and Insurance

This chapter examines DIMIA's management of liability, indemnity and insurance risks associated with the development and signing of the detention services contract with GSL.

Introduction

6.1 In ANAO Report No.1 of 2005–06, *Management of the Detention Centre Contracts – Part B*, the audit identified several risks in the insurance, liability and indemnity regime of the detention services contract. Although the actual operation of the liability, indemnity and insurance regime in the contract has not been tested, the audit found there was a significant risk that;

- clause 9.5.5 of the contract will come into effect for any damages claim, including claims not arising from detainee damage;
- as a result, GSL's liability will be capped at \$0.5 million per event or \$2.5 million per year for all damages claims; and
- the Commonwealth will be deprived of the benefit of \$20 million in public liability insurance, purchased by GSL, and designed to cover claims where detainees did not cause the damage.

6.2 In this audit, the ANAO examined DIMIA's negotiation in arriving at this arrangement.

Commonwealth requirements and guidance on indemnities

6.3 Each indemnity issued by the Commonwealth obligates it to protect another party against the consequences of the risks specified in the indemnity. In effect, the recipient of the indemnity is exempted from the possibility of incurring particular losses or liabilities which, if they ever arise, are assumed by the Commonwealth.

6.4 In April 1997, the Department of Finance provided guidance to all agencies for the issuing of indemnities. Indemnities are forms of contingent liabilities which can facilitate the operations of Government. The advice from Finance contained comprehensive advice for the management of indemnities:

When preparing a guarantee, indemnity or...the rationale for issuing the instrument must be that the Commonwealth's interests are advanced sufficiently to outweigh the level and cost of the risk which the Commonwealth would be assuming. The specific rationale behind issuing particular instruments should be adequately documented to ensure:

- transparency in the decision making process;
- the instruments are issued for sound reasons; and
- original justification for the issue of the instrument will be available for review and evaluation.

Role of Comcover

6.5 Comcover, the Australian Government's self-managed fund for insurable risks, commenced operations on 1 July 1998, replacing the previous Australian Government policy of non-insurance for public sector entities.

6.6 Comcover is responsible for providing general government sector agencies with access to risk management services to develop the knowledge and skills that will ensure the successful implementation and integration of risk management in the Commonwealth. However, it is important to recognise that the ultimate responsibility for risk management resides with agency chief executives.

Minimising the Commonwealth's exposure

6.7 To minimise the Commonwealth's exposure to risk, any arrangement involving the provision of an indemnity by the Australian Government should not be entered into unless:

- there is an explicitly identified risk;
- alternative options for managing these risks have been fully explored; and
- the price of the risk being borne by the Commonwealth has been factored into the value for money consideration of the proposal.

ANAO examination

6.8 In DIMIA's response to an earlier ANAO recommendation that the insurance, liability and indemnity provisions of the detention services contract

with GSL should be reviewed,⁸¹ the department indicated that it would further consider that recommendation in light of the findings of this audit.

6.9 Consequently, the ANAO examination in this audit focuses on the major weaknesses previously identified, to assist DIMIA in its review of the relevant clauses. To do this, the ANAO examined DIMIA's management of:

- the indemnities provided by the Commonwealth in the RFT and whether or not these were appropriately costed;
- DIMIA's analysis of the tender compliance statements; and
- DIMIA's interpretation and assessment of responses, particularly in the context of 'detainee damage'.

Determining liability for damage

6.10 Determining liability for damage is a very important concept in risk management and insurance. Liability can arise through common law or through the terms of the contract, or by breach of duty. In developing the terms of the contract for determination of liability, DIMIA focused only on damages to Facilities and Equipment. There was no consideration of, and therefore no mechanism developed, for the determination of liability for any other public liability events, such as personal injury claims.

6.11 As indicated in paragraph 6.1 above, there are significant risks in the clauses of the contract that deal with the determination of liability, whether or not the damage was 'detainee damage' and the indemnities that limit the services provider's liability.

Key events in the development of the insurance, liability and indemnity regime

6.12 Table 6.1 sets out the key events in the development of the insurance, liability and indemnity regime in the detention service contract with GSL, and incorporates ANAO comments.

⁸¹ Contained in ANAO Report No.1 of 2005–06 *Management of the Detention Centre Contracts – Part B* p.66.

Table 6.1

Summary of key events

Date and Event	ANAO Comment
22 June 2002 <ul style="list-style-type: none"> Initial insurance, liability and indemnity regime established as part of the request for tender (RFT). 	No risk analysis undertaken by DIMIA. No consideration of the need for the Finance Minister to approve the offered indemnities under Regulation 10 of the FMA.
10 September 2002 <ul style="list-style-type: none"> Revised insurance, liability and indemnity regime issued to all tenderers. The revised conditions clearly state that the revised minimum standard would be the lowest acceptable; otherwise, responses would be regarded as 'non-compliant'. 	As above. See also discussion at paragraph 6.17 below, concerning tender compliance.
30 September 2002 <ul style="list-style-type: none"> The steering committee conducts assessment of revised insurance responses. 	The steering committee incorrectly concluded that all tenderers were unable to obtain binding quotes for the insurance requirements. The ANAO found two tender responses (ACM and MTC) were binding and 1 (GSL) provided estimates. There was no assessment conducted of the costs and benefits of individual responses, which brought together the insurance, liability and indemnity arrangements that DIMIA was seeking. The revised insurance terms and conditions of the RFT explicitly advised tenderers that they would not be required to insure for detainee damage. The steering committee accepted that the Commonwealth would be uninsured for damage to Commonwealth assets (including damage caused by detainees) for amounts less than \$250 000.

Source: ANAO from DIMIA documents.

Detainee Damage

6.13 On 29 November 2002, the steering committee made its recommendation to the delegate that GSL be selected as preferred tenderer. This advice stated that;

....ACM would only accept **liability for detainee damage**⁸² if found to be negligent or in default under the contract.

⁸² Emphasis markings added by the ANAO.

6.14 This advice was incorrect. ANAO analysis (in Table 6.2) shows that in the RFT, there were two avenues through which the services provider could have been held liable for detainee damage. One was for ‘Urgent and Minor Repairs’,⁸³ the other related to liability for damage as a result of a major incident.⁸⁴ Both ACM and GSL indicated that they would accept liability for detainee damage as follows.

Table 6.2

Analysis of ACM and GSL conditions on being held liable for detainee damage

Section(s) of the RFT relating to detainee damage	DIMIA’s Record of ACM Tender Response ⁸⁵	DIMIA’s Record of GSL Tender Response	ANAO Comment
First section of the RFT where Urgent and Minor Repairs (UMR) are required as a result of detainee damage.	Partially Complies	Complies	ACM’s partial compliance related to its request only to meet the costs of UMR, where it was found to be negligent or in default.
Second section of the RFT where liability for detainee damage must be determined following a major incident or the exercise of emergency powers.	Complies	Complies, <i>subject to insurance availability and an agreed cap.</i>	As indicated ⁸⁶ this strand of the RFT contemplates the imposition of significant liabilities on the service provider. GSL’s response indicated that it would accept liability, if insurance was available, and on the proviso that the Commonwealth would provide a cap for any amounts that GSL’s insurance would not cover.

Source: ANAO from DIMIA tender documents.

⁸³ For example, broken windows or other minor repairs of an urgent nature if there was a disturbance.

⁸⁴ This strand of the RFT had the potential to impose substantial liabilities on the service provider. As indicated in paragraph 4.7 of ANAO Report No. 1 of 2005–06 – *Management of the Detention Centre Contracts – Part B*, \$13.6 million in damages was settled following major disturbances at the centres in 2002.

⁸⁵ In relation to this section of the tender, ACM also indicated that the appointment of the independent advisor (see ANAO report No. 1 of 2005–06 for more detailed explanation of the role of the independent advisor) should be by mutual agreement of the Services Provider and the Contract administrator.

⁸⁶ The determination of liability is discussed in more detail in ANAO Report No. 1 of 2005–06 – *Management of the Detention Centre Contracts – Part B*.

6.15 The ANAO found that, as a starting point for negotiations, the conditions being requested by GSL represented a potential arrangement that carried more risks than that offered by ACM. This is because GSL's conditions on being held liable for detainee damage related to *major* incidents leading to significant damage to Commonwealth property or assets.⁸⁷

6.16 DIMIA was not able to provide evidence to show how the tender responses were evaluated against the requirements of the RFT. ANAO analysis above (in Tables 6.1 and 6.2) shows there was limited understanding within the steering committee about the indemnities being offered, the mechanism for determining liability for detainee damage, and the strengths and weaknesses of the tender bids and proposals provided.

Advice to the delegate – tender compliance with the insurance, liability and indemnity provisions

6.17 Also of importance was the question of whether or not tenderers were compliant with DIMIA's insurance, liability and indemnity provisions. In the final report of the evaluation, the delegate was advised that;

All respondents were compliant with documentation requirements, and there were no major compliance issues noted.

6.18 Notwithstanding DIMIA's advice through the tender that it had a 'strong preference' for binding insurance quotes, GSL's insurance arrangements were not based on binding quotes. The ANAO found that conditions specified in a letter from GSL of 2 October 2002 concerning medical malpractice insurance, made its tender response non compliant with the terms of the RFT. In this letter, GSL advised that its deductible for medical malpractice would be \$250 000, rather than the \$100 000 specified in the (modified) RFT terms and conditions for insurance and indemnities.⁸⁸

6.19 GSL did leave open the option of negotiating the lower deductible specified in the RFT, but there is no evidence that this was pursued.⁸⁹ Failure to manage the non-compliance of its preferred tenderer with the insurance provisions of the RFT was to cause protracted difficulties for DIMIA and other government agencies as contract negotiations went forward.

⁸⁷ Further detail is provided at Appendix 1.

⁸⁸ The other tenderers met the minimum \$100 000 deductible requirement for medical malpractice insurance.

⁸⁹ GSL's letter has a pen script note on it saying that a response was forwarded by email, but it was not located in the search of DIMIA's email system requested by the ANAO.

6.20 DIMIA was also unable to provide documentation of any consideration given to the fact that ACM's insurance cover was already in place.

6.21 The ANAO also found that there is no record of DIMIA attempting to clarify GSL's proposal to cap liability relating to detainee damage to the level of insurance cover. Contract negotiations were to proceed on this basis. Failure to ensure that GSL had finalised its insurance arrangements before the announcement of preferred tenderer was a risk to DIMIA that was to materialise later in contract negotiations.

Indemnities offered by DIMIA

Public Liability

6.22 As discussed at paragraph 6.3 above, Finance has published guidance and better practice principles regarding indemnities. Considered against this guidance, the ANAO was unable to find evidence of the risks, benefits and/or costs that DIMIA attributed to:

- any increase in the premium payable as a result of the indemnity for Broad Form Public Liability provided to GSL in contract negotiations;
- the extent to which any additional or reduced costs from the new insurance regime were absorbed into or increased DIMIA's overall insurance costs; and
- a cost benefit analysis of ACM's tender response that offered cover up to \$150 million and required no indemnity for public liability.

6.23 The ANAO considers that it would have been a straightforward matter to aggregate the maximum exposure represented by the insurance and indemnity arrangements, and similarly straightforward to make the same calculation where a cap on the maximum liability was being considered for acceptance under the draft contract.

GSL Request to amend liability cap on detainee damage

6.24 As discussed at paragraph 6.15 above, the GSL tender bid was conditional upon liability caps on detainee damage being provided by DIMIA that matched the level of insurance that GSL was able to purchase. The insurance had not been arranged by GSL, and the liability caps were not settled prior to the selection of GSL as the preferred tenderer. The potential impact of these conditions, and the resultant uncertainties, were not addressed by DIMIA prior to contract negotiations.

6.25 During contract negotiations, GSL requested changes to the insurance, liability and indemnity clauses of the draft contract. These are summarised in Table 6.3 below.

Table 6.3

Key points of the negotiation of the insurance and indemnity clauses

Date and Event	ANAO Comment
February/March 2003 <ul style="list-style-type: none"> Negotiations commence between DIMIA and GSL to settle the insurance, liability and indemnity regime. 	GSL advises that its liability for detainee damage in the contract is too broad and requests higher levels of Commonwealth indemnity. DIMIA asks GSL for a realistic proposal for liability caps. GSL suggests modifications to the contract clauses will be needed and provides the draft of clause 9.5.5 for insertion into the contract. (Clause 9.5.5 placed a cap on GSL liability in circumstances where damage to facilities and equipment was caused by detainees).
April 2003 <ul style="list-style-type: none"> Negotiations now involve DIMIA, GSL, Comcover and Immigration Ministers and Finance Minister. 	Comcover advised DIMIA that it did not accept the indemnities for detainee damage for GSL, particularly since it would require the Commonwealth to provide the indemnity in the event of a negligent, wilful or reckless act or omission by GSL, or its employees. The then Minister for Immigration is asked by DIMIA to sign a letter to the Minister for Finance requesting approval for the indemnities – before the indemnity, insurance and liability conditions had been agreed with GSL.
May 2003 <ul style="list-style-type: none"> Negotiations between DIMIA, GSL and Comcover continue. 	GSL advises that it is unwilling to enter into the contract unless the indemnities requested above are provided. DIMIA offers higher liability caps: \$500,000 per event, \$2.5m per annum (for detainee damage) and all public liability over \$20m.
June 2003 <ul style="list-style-type: none"> Negotiations now involve DIMIA, GSL, and the Government. 	On 2 June 2003, DIMIA prepares correspondence for Ministers seeking support for the higher liability caps proposed above, and seeking further support that if required, the uninsured risk would be met by the (Commonwealth) budget. On 10 June 2003, GSL advises agreement with DIMIA position (above).
July 2003 <ul style="list-style-type: none"> Indemnities approved. 	Finance Minister approved the requested indemnities, but provided no assurance that liability for uninsured risk will be met by the budget.

Source: ANAO from DIMIA documents.⁹⁰

6.26 In a large procurement such as this, there is an obligation on officials to initiate a process of consultation with relevant agencies, and between Ministers as appropriate, to ensure that new or revised undertakings will operate effectively and efficiently with existing policies. As indicated in Table 6.3 above, the evidence shows that DIMIA had not agreed the overall indemnity, liability and insurance position with Comcover until after the preferred tenderer had been announced. By this time, significant indemnities had already been provided by DIMIA and GSL was seeking to increase these further to match its available insurance cover.

⁹⁰ Note 1: See ANAO Report No.1 of 2005–06, p.55 for detailed discussion of the operation of Clause 9.5.5.

6.27 In managing the negotiation outlined above, the ANAO found that DIMIA did not seek to place the Commonwealth in a more advantageous position through reconsideration of the costs and benefits of the individual insurance tender responses of both ACM and GSL.

6.28 Nevertheless, on this basis DIMIA advised the delegate and the Government that the proposed indemnities represented the best financial outcome for the Commonwealth. The quality and accuracy of the department's advice is examined in the next section.

DIMIA's advice to the Government

6.29 There were potentially significant implications arising from the finalisation of the insurance, liability and indemnity regime in the contract, and these became more complex as contract negotiations went forward. As indicated in Table 6.3, in May 2003, (after the expiry of ACM's tender offer), GSL wrote to DIMIA and indicated that it was unwilling to enter into the contract unless it was provided with the requested indemnities. DIMIA's approach involved exchanges of letters between the then Minister and the Finance Minister and the Prime Minister.

6.30 These letters sought agreement to the Government providing the indemnities being requested, and also that if needed; any uninsured risk would be met by the budget. The letters prepared by DIMIA advised that:

If we do not conclude a contract with [GSL], the only alternative tenderer for the delivery of detention services under the current model has stated unequivocally in its tender response that it would not take responsibility **for any detainee damage**.⁹¹ It is unlikely that, should we test the market again, any potential provider will be able to insure against detainee damage.⁹²

6.31 In preparing advice of this type for the delegate and the Minister, the onus was on DIMIA to ensure its advice was appropriate for the circumstances, clearly expressed and based on a full understanding of all relevant issues and options. The ANAO found there was a lack of appreciation by DIMIA's steering committee of the evidence required to underpin adequate advice to the Government on whether or not to grant the indemnities, or whether or not the option to negotiate with ACM was still open at this time.

⁹¹ Emphasis markings added by the ANAO.

⁹² The ANAO was unable to determine the basis for this sentence. The RFT clearly stated that no tenderers were required to carry or obtain insurance for detainee damage.

6.32 The analysis at paragraph 6.14 above shows there were significant shortcomings with DIMIA's understanding of the strengths and weaknesses of both ACM and GSL's tender proposals, in particular the advantages and disadvantages of each in accepting liability for detainee damage.

6.33 Overall the ANAO found that DIMIA's advice to its then Minister was inadequate, since it was based on:

- DIMIA's failure to identify its insurance risks and exposures early; and
- an accumulation of errors in the analysis, assessment and evaluation of tenderer responses to the insurance, liability and indemnity requirements of the RFT.

6.34 DIMIA was also unable to provide evidence of financial data and costings that would support the assertion made to its then Minister that the proposed indemnities represented the best financial outcome for the Government.

Conclusion

6.35 In the planning for an insurance, liability and indemnity regime for a contract of this complexity, it was important that DIMIA identify, analyse and evaluate all risks to ensure that the Commonwealth's commercial position was adequately protected. As a general principle, responsibility for the effective management of risk should be allocated to those parties that have the necessary expertise to identify and manage the risk. DIMIA could not provide evidence of a risk assessment completed after granting the initial indemnities, and there was no evidence of analysis which showed the relative costs of the indemnities and the impact on the insurances being purchased. In this context, there were additional risks involved in DIMIA approaching its preferred tenderer to assist it in developing 'a realistic proposal for a cap on liability' before consulting with the Commonwealth's insurer about the optimum balance of risks to be carried by the service provider and the Commonwealth.

6.36 The ANAO considers that sound administrative practice required the committee to engage with relevant agencies and Ministers as appropriate, and to adequately and accurately identify Commonwealth insurance risks and exposures before the selection of a preferred tenderer. When this was not done, and the difficulties with the insurance, liability and indemnity regime began to compound, the responsibility rested with DIMIA to provide advice to the Government that was based on a full appreciation of all relevant factors and considerations.



Ian McPhee
Auditor-General

Canberra ACT
2 March 2006

Appendices

Appendix 1: Detainee damage and the insurance, liability and indemnity regime of the RFT

1. In the following section, the ANAO sets out the tenderers responses to the sections of the Request for Tender (RFT) and proposed contract dealing with acceptance of liability for damage caused by detainees. Liability for ‘detainee damage’ was inserted into two distinct sections of the contract, and treated differently in both sections. One section of the RFT set out procedures for determining liability for Urgent and Minor Repairs (UMR). The other section of the RFT set out the procedures for determining liability for damage as a result of a major incident and/or the exercise of emergency powers. Differences between the two sections of the RFT, and the tenderer responses, are shown in Table A.1 and Table A.2 below.

Table A.1

Illustration of liability, insurance and indemnity requirements in RFT for detainee damage (maintenance)

RFT Section	Tenderer Responses	Insurance Requirement (from RFT)	Indemnity Provided
Liability for Urgent and Minor Repairs Clause 4.5.4 (d)	GSL Complies	No	N/A
The Services Provider will be liable for the cost of Urgent and Minor Repairs ⁹³ where the requirement to perform the repairs resulted from any act or omission of a Detainee ...	ACM Partially complies and provides the following comment: The provisions of this subclause should require ACM only to meet the costs where it has been found to be negligent or in default	No	N/A
<p>ANAO Comment:</p> <p>ACM responses referred to situations where, for example, a window may have been broken. If ACM were found not to have supervised detainees properly, ACM would meet the costs. If the window was broken because detainees were upset over visa decisions without any prior knowledge given to ACM to enable them to provide additional supervision, it expected DIMIA to meet the cost.</p>			

Source: ANAO from DIMIA data.

⁹³ Urgent and Minor Repairs are defined in Schedule 2 of the contract; ‘to rectify defects including emergency and urgent works, breakdowns of plant and equipment (including vehicles) and engineering services, and works of a minor nature required for the immediate and continued functioning of the facilities.’

Table A.2

Illustration of liability, insurance and indemnity requirements in RFT for detainee damage (Damage as a result of major incident)

RFT Section	Tenderer Responses	Insurance Required	Indemnity Provided
<p>Liability for damage as a result of major incident or the exercise of emergency powers</p> <p>Following a review conducted in accordance with Clause 9.4.1, an opinion will be made from the independent advisor regarding:</p> <p>9.4.2 (c) the extent to which the Services Provider should therefore be responsible for the costs associated with the repair of such defects or damage and the reinstatement of the Detention Facilities</p>	<p>GSL</p> <p>States that it partially complies with 9.4.2 with the conditions – subject to insurance availability and an agreed cap.</p>	<p>Insurance requirements of RFT set out in clause 16.2 (see table below)</p>	<p>Request for cap for liability determination in 9.4.2</p>
	<p>ACM</p> <p>Complies and provided the following comment:</p> <p>The appointment of the 'independent advisor' should be by mutual agreement of the Services Provider and the Contract Administrator.</p> <p>Need a mechanism for the services provider to rebut or appeal the findings or opinions of the 'independent advisor'.</p>	<p>Insurance requirements set out in clause 16.2 (see table below)</p>	<p>N/A</p>
<p>ANAO Comment:</p> <p>A major incident is defined as.....These sections therefore contemplate the imposition of significant liabilities on the tenderers. The ANAO considers that the conditions proposed by GSL represented a real risk to the achievement of a value for money outcome. In the event of widespread damage by detainees, GSL was stating that if the independent advisor found it to be responsible, it would accept liability only if it could arrange insurance, and also on the proviso that the Commonwealth would provide a cap for any amounts that GSL's insurance would not cover. The ANAO considers that this made its tender response marginally compliant.</p>			

Source: ANAO from DIMIA data.

2. These compliance statements did not change, notwithstanding the ongoing negotiations surrounding the insurance requirements.

3. The analysis in Table A.1 and Table A.2 demonstrates that the advice provided to the delegate about the tender responses to acceptance of liability for detainee damage was confused and potentially misleading as a result. By focusing on ACM's comment which was made in relation to relatively minor matters of urgent and minor repairs, it overlooked the more serious risk of GSL's conditions on its acceptance of liability for major damage.

4. ANAO analysis of the tenderer responses to the revised insurance conditions of the RFT, confirm that there was a misunderstanding within DIMIA about the interrelated concepts of liability, indemnity, insurance and detainee damage.⁹⁴ The ANAO found:

- contrary to internal DIMIA advice provided to the steering committee, one tenderer was able to provide binding insurance quotes;
- all tenderers complied with the insurance requirements of the RFT, and this did not require the tenderers to insure for 'detainee damage';
- under the revised insurance terms⁹⁵ of the RFT, Service Provider exposures were limited to the first \$250 000 of 'detainee damage' to Commonwealth assets;
- the terms of the revised insurance requirements specified that the successful tenderer would be indemnified by the Commonwealth for 'detainee damage' to Commonwealth and Service Provider assets for claims over \$250 000; and
- the performance security bond was increased from \$2.5 to \$5 million to assist in mitigation of the risk, and all tenderers agreed to this increase.

5. Accordingly, advice to the delegate that ACM would only accept liability for detainee damage if it were found to be negligent is irrelevant in the context of insurance, and the statement of ACM's position was incorrect. In situations where liability for detainee damage was to be apportioned, whether or not the damage involved UMR or major damage, both ACM and G4 would have been required to meet the first \$250 000, with a Commonwealth indemnity applying above this amount.

⁹⁴ This was extensively reported on in Audit Report No.1 of 2005–06 – Management of the Detention Centre Contracts – Part B.

⁹⁵ Minimum option of Industrial Special Risks, agreed by the steering committee on 9 September, and advised to all tenderers on 10 September 2002.

Appendix 2: DIMA Response

1. The Detention Services Contract Tender Process was undertaken between August 2001 and August 2003. The ANAO's audit of this process has highlighted a number of areas in which procurement, tendering and recordkeeping processes could be improved.

2. In October 2005, a wide range of measures to improve administration within the Department were announced by the Minister as part of the Government's response to the Palmer⁹⁶ and Comrie⁹⁷ reports.

3. The measures included significant organisational changes, including the introduction of a centre of excellence for contract and procurement processes within the newly established Legal Division. This Division provides additional resources to manage legal and contracting process risks throughout DIMA.

4. A number of initiatives designed to strengthen the department's procurement assurance framework are underway. They focus on early detection and better management of procurement risks. The initiatives include:

- the development of a consolidated procurement assurance review process based on best practice approaches in comparable Commonwealth agencies;
- the centralised monitoring of all planned procurement through the annual procurement planning process to enable proactive deployment of support; and
- the revision of departmental instructions (including Chief Executive Instructions and procurement instructions) to incorporate an assurance process for strategic procurement, and to define respective roles and responsibilities of delegates and steering committees.

5. More broadly, high priority is also being given to reviewing the Department's Risk Management Strategy to address the application and

⁹⁶ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Report, July 2005, <http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf> [last accessed 17 January 2006]

⁹⁷ Commonwealth Ombudsman, Report No. 03/2005, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, September 2005, <http://www.comb.gov.au/publications_information/Special_Reports/2005/alvarez_report03.pdf?bcsi_scan_09886937D8E6245B=GifB7y59holzTP4VoNKv2wEAAABe/m0A&bcsi_scan_filename=alvarez_report03.pdf> [last accessed 17 January 2006]

effectiveness of the risk management framework, particularly as it relates to complex procurements.

6. In addition to these recent initiatives, DIMA's current arrangements for its panel of business and probity advisors, which have been in place since November 2003, clearly differentiate the scope of services that can be provided by respective advisors. They also provide for contract negotiation expertise.

7. The reforms announced in October 2005 also included a review of DIMA records management processes to be undertaken by the National Archives of Australia (NAA). NAA has now analysed the current state of recordkeeping in the department and made recommendations for improvement. In this context, and consistent with the ANAO's recommendations, the department will develop new guidelines specific to tendering and procurement processes. New standardised recordkeeping procedures for procurement and tendering will ensure consistency with the Commonwealth Procurement Guidelines and focus on the importance of appropriate recording of decisions, evidence to support decisions and version control.

8. One of the outcomes of the NAA review will be the mandating of improved records management practices through IT systems changes.

9. The Department considers that these measures will address the key concerns of the ANAO's recommendations, which the department has accepted.

10. DIMA agrees with the ANAO conclusion that it is not possible to know, in different circumstances, how negotiations with the two final tenderers may have altered their proposals. At the completion of the process, GSL was selected as the preferred tenderer. The department is now committed to improving its procurement, tendering and recordkeeping processes for the future.

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