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Performance Audit

Procurement of the International Centre for Complex Project Management to Assist on the OneSKY Australia Program

[Airservices Australia](#)

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Canberra ACT

31 August 2016

Dear President and Speaker

The Australian National Audit Office has undertaken an independent performance audit in Airservices Australia titled *Procurement of the International Centre for Complex Project Management to Assist on the OneSKY Australia Program*. The audit was conducted in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website—<http://www.anao.gov.au>.

Yours sincerely



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

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Summary and recommendations

Background

1. The civil air traffic management system operated by Airservices Australia (Airservices) and the separate system operated by the Department of Defence for military air traffic are both due to reach the end of their economic lives in the latter part of the current decade. The December 2009 National Aviation White Paper identified expected benefits from synchronising civil and military air traffic management through the procurement of a single solution to replace the separate systems. Under the OneSKY Australia program, Airservices is the lead agency for the joint procurement of a Civil Military Air Traffic Management System (CMATS). A Request for Tender (RFT) for the joint procurement was released on 28 June 2013. The RFT closed on 30 October 2013, with six tenders being received (including from the incumbent providers of both the Airservices and Defence air traffic management platforms).
2. On 27 February 2015, it was announced that Airservices, in partnership with Defence, would be entering into an Advanced Work contracting arrangement with the successful tenderer, Thales Australia, as a next step for the delivery of the OneSKY initiative. As at April 2016, negotiations for the finalisation of acquisition and support contracts for the provision of the combined civil-military system were ongoing.
3. At a public hearing held on 18 August 2015 as part of its ongoing inquiry in the performance of Airservices, the Senate Rural and Regional Affairs and Transport Legislation Committee (Senate Committee) raised a number of concerns regarding conflict of interest matters in respect to Airservices' procurement of services via the International Centre for Complex Project Management (ICCPM) to assist in the OneSKY Australia program. This audit was undertaken following requests subsequently received from the Minister for Infrastructure and Regional Development and the Senate Committee that the ANAO examine Airservices' oversight and implementation of the OneSKY program.¹
4. This audit is the first in a two-stage approach to those requests. Its objective was to examine whether Airservices has effective procurement arrangements in place, with a particular emphasis on whether consultancy contracts entered into with ICCPM in association with the OneSKY Australia program were effectively administered.
5. The second performance audit will examine the conduct of the OneSKY Australia tender process from initiation to finalisation of the selection and contracting process, with a focus on the achievement of value with public resources in accordance with appropriate probity protocols. The consideration of any probity impacts on the tender process will be examined within the scope of the second audit.

¹ This audit is the first in a two-stage approach to those requests. The second performance audit will examine the conduct of the OneSKY Australia tender process.

Conclusion

6. A key shortcoming in Airservices' procurement policies and procedures is that they do not give appropriate emphasis to the use of competitive processes. In addition, Airservices routinely failed to adhere to its policies and procedures in procuring services from ICCPM. As a result, Airservices' procurement of services from ICCPM, on an exclusively sole-sourced basis, did not deliver value for money.

7. Airservices demonstrated a lack of organisational commitment to the effective implementation of probity principles in respect to the ICCPM arrangements. It was reasonably foreseeable that Airservices' contracting of ICCPM to assist with the OneSKY Australia project would give rise to perceptions of conflicts of interest and, potentially, actual conflicts of interest. But the ICCPM engagements were not effectively managed so as to ensure the OneSKY tender process was free of any concerns over conflict of interest that could impact on public confidence in the outcome.

Supporting findings

Airservices' engagement of ICCPM

8. Over the period examined by the ANAO (2012 to the end of 2015), Airservices had in place a procurement governance framework that sought to achieve value for money from procurement processes. Two key shortcomings were that the procurement governance framework did not:

- address Airservices entering into strategic partnerships and alliances; or
- adequately contemplate, or regulate, non-competitive approaches being adopted for procurements with a value of \$50 000 or more.

9. In May 2013, Airservices and ICCPM agreed to enter into a strategic partnership for the duration of the OneSKY program. There was no business case prepared. In addition, no performance indicators were established to enable monitoring and evaluation of whether the partnership was delivering the expected benefits. It was quite common for Airservices to use the relationship with ICCPM to engage individuals to undertake particular roles akin to an employee for extended periods, rather than build the organisation's own capability.

10. The strategic relationship did not represent a procurement in itself. Each subsequent decision to engage specified personnel, or to acquire other services, via ICCPM represented discrete procurement decisions.

11. Airservices has made extensive use of ICCPM to assist with the delivery of the OneSKY Australia program. Since 2012, there have been 42 engagements of ICCPM employees and sub-contractors through 18 procurement processes. The engagements were given effect through six contracts, 10 contract variations and four uses of an on-call services schedule under one of the contracts. Under the various contractual arrangements, Airservices agreed to pay ICCPM total fees of more than \$9 million.²

2 All figures in this ANAO report are GST exclusive.

12. Departures from Airservices' documented procurement policies and procedures were common in the approval processes for the various ICCPM procurements. Internal controls intended to promote compliance were regularly bypassed. Where they were applied, the controls were often ineffective. In addition, the records made by Airservices of each procurement decision were often perfunctory. This approach to recording decisions to spend money, together with internal controls being bypassed, contributed to a lack of transparency over the decisions to procure services from, or through, ICCPM.

13. Airservices sole-sourced each of the ICCPM procurements. It also largely operated as a price-taker. Quotes from ICCPM were accepted by Airservices without seeking to benchmark the proposed rates to similar services obtained by other Commonwealth entities³, or actively seeking to negotiate reduced rates particularly in circumstances where initial short-term engagements became extended into long-term engagements.

14. The daily rates agreed to be paid by Airservices for the services of individual contractors ranged from \$1 500 per day up to \$5 000 per day (for an eight hour day). The rates paid for initial, short-term high level strategic engagements were similar to, or the same as, those paid for the same individuals to deliver on long-term assignments that involved full-time, or close to full-time, work.

15. Overall, Airservices' approach to contracting ICCPM to assist with the delivery of OneSKY Australia was ineffective in providing value for money outcomes.

Airservices' probity management framework

16. Airservices' documented procurement framework requires that probity be a key consideration in undertaking procurement processes. This includes requirements to effectively identify and manage potential, actual or perceived conflicts of interest.

17. Two internal audits of governance within Airservices' Future Service Delivery (FSD) group (which incorporates the OneSKY program) have been undertaken, reporting in April 2014 and August 2015. Whilst the scope of the first report included some consideration of the probity records management associated with the Probity Plan for the CMATS tender, neither involved an examination of the conduct of the tender evaluation or contract negotiation processes from a probity perspective.

18. The Probity Plan and Protocols established for the CMATS joint procurement process, together with the engagement of an external Probity Advisor as well as an external Probity Auditor, provided a reasonable basis for managing the probity aspects of the tender process. But Airservices did not commission independent probity audits of any phase of the tender process subsequent to the release of the RFT.

3 For example, the daily rate paid by Airservices for lead negotiation services through ICCPM was 30 per cent higher than the rate paid by Defence for similar services provided by the same individual during overlapping periods of time. Over the term of the Airservices engagements, this meant that Airservices agreed to pay consultancy fees \$560 361 higher than had it contracted at the same rate Defence had agreed with ICCPM.

Probity management in engaging ICCPM and its subcontractors

19. Neither the decision to enter into a strategic relationship with ICCPM for the duration of the OneSKY program, nor any of the 18 sole-sourced procurements that occurred both prior, and subsequent, to that relationship being established, addressed probity matters. In particular, on no occasion was there documented consideration as to whether the engagement would give rise to potential actual or perceived conflicts of interest that should either be avoided (by not proceeding with the procurement) or for which a specific management strategy should be established.

20. ICCPM sub-contractors with links to tenderers (including through past employment and as a result of the membership of the ICCPM board) became involved in the evaluation of competing tenders. They subsequently undertook contract negotiations with the successful tenderer. But Airservices did not identify or actively manage the attendant probity risks.

21. Overall, Airservices approach to administering declared conflicts and monitoring ICCPM subcontractors' compliance with the Probity Plan and Protocols was inconsistent and largely passive. This was reflected in a number of missed opportunities to avoid or effectively manage potential conflict of interest concerns associated with engaging key subcontractors via ICCPM. There were also foregone opportunities to accept offers from ICCPM to establish assurance mechanisms at the corporate level, and to obtain and implement advice from the external Probity Advisor.

22. That those opportunities were not taken up by Airservices, together with other shortcomings identified by the ANAO in the management of probity, is indicative of an inadequate appreciation within Airservices of probity principles and their effective implementation.

Recommendations

Recommendation No.1
Paragraph 2.35 The ANAO recommends that Airservices Australia address systemic failures in the adherence to the organisation’s procurement policies and procedures and the cultural underpinnings of those failures.

Airservices Australia response: *Agreed.*

Recommendation No.2
Paragraph 2.54 The ANAO recommends that Airservices Australia improve the value for money it obtains from major and strategic procurement activities by:

- (a) requiring that, except in genuinely rare circumstances, competitive procurement processes are to be employed; and
- (b) on those rare occasions when competitive procurement processes have not been able to be employed:
 - documenting the reasons why a competitive approach was not employed;
 - benchmarking the quoted rates/fee and making records of the basis on which it was decided that the contracted rate/fee represented value for money; and
 - reporting any such instances to the Airservices Australia Board.

Airservices Australia response: *Agreed.*

Recommendation No.3
Paragraph 3.19 The ANAO recommends that Airservices Australia improve its procurement framework by including enhanced guidance in relation to:

- (a) the different roles performed by probity advisors and probity auditors;
- (b) determining the circumstances in which the engagement of an independent probity auditor would be appropriate; and
- (c) the manner in which such decisions are to be documented.

Airservices Australia response: *Agreed.*

Recommendation No.4
Paragraph 4.96 The ANAO recommends that Airservices Australia proactively manage probity in procurement activities by:

- (a) ensuring conflict of interest declarations are updated regularly or their ongoing currency confirmed;
- (b) reviewing existing declarations when the role being performed by an individual changes; and
- (c) regular review of program participants’ reporting of contact with industry respondents in order to monitor compliance with reporting obligations.

Airservices Australia response: *Agreed.*

**Recommendation
No.5
Paragraph 4.100**

The ANAO recommends that Airservices Australia’s governance arrangements address:

- (a) whether individuals proposed to be employed in key probity management roles possess the understanding and capabilities required to undertake the role effectively; and
- (b) the appropriate separation of duties between key probity management roles associated with a procurement activity.

Airservices Australia response: *Agreed.*

**Recommendation
No.6
Paragraph 4.154**

The ANAO recommends that Airservices Australia enhance its procedures for managing probity in procurement processes to require documented consideration of the potential for actual or perceived conflicts of interest to arise when engaging external contractors to participate in tender evaluations and contract negotiations and, where relevant, the management strategies that are to be applied.

Airservices Australia response: *Agreed.*

Entity response

23. Airservices Australia provided formal comments on the proposed audit report, which are included at Appendix 1. Its summary response is set out below. Formal comments were also provided by four other recipients of the proposed report (ICCPM, Ashurt Australia, Mr Harry Bradford and Mr Andrew Pyke). They are also included in appendices.

Airservices’ summary response

Airservices acknowledges that improvements can be made to its procurement framework and accepts the recommendations made by the ANAO in the proposed audit report. Airservices has initiated action to address each of the recommendations.

However, Airservices holds significant concerns about commentary in the report regarding the management of probity as it relates to the overall OneSKY tender process, which could lead the reader to draw conclusions in relation to the integrity of the tender process that are not supported by evidence.*

Airservices maintains that the tender evaluation arrangements in place were robust, and strongly refutes any suggestion that perceived conflicts at any stage created, or had the potential to create, an actual conflict of interest that could adversely impact the integrity of the OneSKY tender process.

ANAO comments on Airservices’ summary response

* The analysis and findings that support the audit conclusions are set out in detail in the chapters of the audit report. Based on the audit work undertaken to date, the ANAO has not made a conclusion as to whether actual conflicts of interest arose and impacted on the actual tender process (a matter that will be examined in the second performance audit—see paragraph 1.12).

Audit Findings

1. Background

The OneSKY Australia program

1.1 Airservices Australia (Airservices) is responsible for managing Australia's airspace in accordance with the Chicago Convention on International Civil Aviation.⁴ Airservices is principally funded by revenue from industry, involving charges for enroute, terminal navigation and aviation rescue and firefighting services. The level of charges is based on five year forecasts Airservices prepares of activity levels (including traffic volumes), operating costs and capital expenditure.

1.2 Airservices provides civilian airspace management via The Australian Advanced Air Traffic Management System (TAAATS).⁵ The existing air traffic management (ATM) platform is operated under contract by Thales Australia (Thales), utilising hardware originally installed in 1996. There has been a continual program of incremental software upgrades to meet new requirements and technologies. The platform's life and associated contract with Thales were due to expire in 2015. A further hardware upgrade and associated deed of variation to the existing support contract with Thales extended the operational capacity of the existing system, but Airservices identified limits to the capacity to extend the economic life of type beyond 2018. The program initiated by Airservices for consideration of future ATM options was the Air Traffic Management Future Systems program (AFS program).

1.3 The Department of Defence (Defence) is responsible for military aviation operations and air traffic control (including at airports with a shared civil and military use). At approximately the same time as the TAAATS platform was commissioned, Defence commissioned a separate ATM platform for military aircraft, known as the Australian Defence Air Traffic System (ADATS). ADATS is supplied under contract by Raytheon Australia Pty Ltd (Raytheon). ADATS is similarly due to reach the end of its useful life in the latter part of this decade. Following the cessation of initial consideration of systems harmonisation, Defence initiated phase three of Project AIR5431 to replace ADATS.

1.4 The December 2009 National Aviation White Paper identified expected benefits from synchronising civil and military air traffic management. The activities identified in the White Paper for the implementation of a comprehensive, collaborative approach to nation-wide air traffic management included the procurement of a single solution to replace the separate systems.

1.5 Delivery of the joint initiative commenced in 2010, with a Request for Information being issued to industry. The Airservices AFS program and Defence AIR5431 Phase 3 project are now represented jointly as OneSKY Australia. Within the overall OneSKY Australia program, Airservices is the lead agency for the joint procurement of a Civil Military Air Traffic Management System

4 Airservices was established in 1995 when the then Civil Aviation Authority (CAA) was separated into two separate bodies: Airservices and the Civil Aviation Safety Authority.

5 The tender for awarding the TAAATS contract was conducted by CAA prior to its separation. The unsuccessful tenderer (Hughes Aircraft Systems International) commenced proceedings against the CAA in December 1994. In 1997, the Federal Court found CAA breached the Request for Tender (RFT) in awarding the TAAATS contract (Hughes sought the award of costs and damages). The successful tenderer in that RFT process was renamed Thales in December 2000. An earlier tender process for the same project had been found 'in significant respects unsound and unfair', which led to the RFT being re-issued in 1993.

(CMATS). CMATS is intended to be delivered through contracts between Airservices and the successful tenderer, with a separate agreement being established between Airservices and Defence for the on-supply of services and goods/supplies. A Request for Tender (RFT) for the joint procurement was released on 28 June 2013. The RFT closed on 30 October 2013, with six tenders being received (including from the incumbent providers of both the Airservices and Defence ATM platforms).

1.6 On 27 February 2015, it was announced that Airservices, in partnership with Defence, would be entering into an Advanced Work contracting arrangement with the successful tenderer, Thales, as a next step for the delivery of the OneSKY initiative. As at April 2016, negotiations for the finalisation of acquisition and support contracts for the provision of the combined civil-military system were ongoing.

Matters raised by Senate Inquiry

1.7 At a public hearing held on 18 August 2015 as part of its ongoing inquiry in the performance of Airservices, the Senate Rural and Regional Affairs and Transport Legislation Committee (Senate Committee) raised a number of concerns regarding conflict of interest matters in respect to Airservices' procurement of services via the International Centre for Complex Project Management (ICCPM) to assist in the OneSKY Australia program. In particular:

- the engagement of a member of the ICCPM Board to undertake the Lead Negotiator role involving contract negotiations with the successful tenderer Thales, whose Managing Director was also (then) Chair of the ICCPM Board; and
- the role of an Airservices employee (and former ICCPM employee and subcontractor to Airservices) in recommending approval of a substantial extension to a contracting arrangement with ICCPM, given his spouse's role as ICCPM Managing Director and CEO.

1.8 The Committee sought assurances from Airservices as to how the apparent actual and/or perceived conflicts of interest had been managed. The Committee expressed dissatisfaction with the advice provided by Airservices, including in relation to whether the Airservices Board had been made aware of relevant matters relating to the ICCPM arrangements.

Allens probity review

1.9 Following the Committee hearing, the Airservices Board commissioned an external review of the probity arrangements in relation to the OneSKY program, focussed on the matters raised by the Senate Committee. The review was conducted by legal firm, Allens Linklaters (Allens). A draft report was provided to the Airservices Board on 9 September 2015 and the final report on 27 October 2015. The Board agreed to implement all recommendations arising from the report of the Allens review by 30 November 2015 and, in May 2016, Airservices advised the ANAO that this occurred.

1.10 Not all relevant information relating to Airservices' relationship with ICCPM was provided to Allens. In particular, Airservices did not provide Allens with advice or documentation associated with a May 2013 decision (see paragraph 2.13) to establish a 'strategic partnership' with ICCPM for the duration of the OneSKY program. Airservices also did not provide Allens with all documentation concerning the role played by ICCPM sub-contractors in the evaluation and

contract negotiation processes.⁶ Nor did Allens engage with ICCPM in conducting its review. Further, the Allens review did not address the question of advice provided to the Airservices Board of any conflict of interest matters caused by ICCPM's involvement in the OneSKY project.⁷

Audit approach

1.11 This audit was undertaken following requests received in August 2015 from the Minister for Infrastructure and Regional Development and the Senate Committee that the ANAO examine Airservices' oversight and implementation of the OneSKY program. The requests were made as a result of issues raised in the context of the Senate Committee's inquiry.

1.12 This audit is the first in a two-stage approach to those requests.⁸ Its objective was to examine whether Airservices has effective procurement arrangements in place, with a particular emphasis on whether consultancy contracts entered into with ICCPM in association with the OneSKY Australia program were effectively administered. To form a conclusion against the audit objective, the following high level criteria were adopted:

- Does Airservices have appropriate procurement policies and procedures in place?
- Was the engagement of ICCPM in association with each phase of the OneSKY project based on transparent and effective procurement and contract management procedures?
- Were the ICCPM engagements effectively managed so as to ensure the CMATS joint procurement tender process was free of perceived, potential or actual conflicts of interest that may impact on public confidence in the outcome or, where conflicts arose, they were appropriately managed?

1.13 The audit methodology involved examining relevant Airservices records, including emails, relating to: procurement policies and procedures; selection, engagement and tasking of ICCPM in association with OneSKY; the involvement of ICCPM personnel in each phase of the CMATS tender process and related communications of tender information; the establishment and administration of probity protocols, particularly conflict of interest and information disclosure provisions; and the conduct, consideration and outcomes of the Allens review. In addition, evidence (including sworn

6 Airservices also did not provide Allens with a copy of a January 2015 minute to the CMATS Review Board signed by a sub-contractor engaged through ICCPM that recommended exclusion of the second placed tenderer from further consideration following the initial stage of the contract negotiation phase. See further at paragraphs 4.14 and 4.136.

7 The terms of the reference for the Allens review were agreed by the Airservices Board on 24 August 2015, subject to two additional questions being added including: 'Whether the Board of Airservices was reasonably and appropriately informed of any conflicts of interest (actual, perceived or potential) caused by ICCPM's involvement in the Project?'

8 The second performance audit will examine the conduct of the OneSKY Australia tender process from initiation to finalisation of the selection and contracting process, with a focus on the achievement of value with public resources in accordance with appropriate probity protocols. In July 2015, there was an unauthorised disclosure to the second placed tenderer of commercial-in-confidence material relating to the tender evaluation. This was followed by an unauthorised public disclosure, including material referring to key ICCPM subcontractors. The latter matter is currently the subject of an Australian Federal Police investigation. The consideration of any probity impacts on the continuation of the tender process will be examined within the scope of the second audit.

testimony from a number of persons and documentation from ICCPM and Allens) was obtained using the powers provided by section 32 of the *Auditor-General Act 1997*.

1.14 The audit was conducted in accordance with ANAO auditing standards at a cost to the ANAO of approximately \$420 000.

2. Airservices' engagement of ICCPM

Areas examined

The ANAO examined whether Airservices has appropriate procurement policies and procedures in place, as well as whether the various engagements of ICCPM were based on transparent and effective procurement processes.

Conclusion

Airservices' procurement policies and procedures seek to achieve value for money from procurement processes. But a key shortcoming is that they do not give appropriate emphasis to the use of competitive processes.

In May 2013, Airservices and ICCPM agreed to enter into a strategic partnership for the duration of the OneSKY program. There was no business case prepared and no performance indicators were established to enable monitoring and evaluation of whether the partnership was delivering the expected benefits. The strategic relationship did not represent a procurement in itself. Each subsequent decision to engage specified personnel, or to acquire other services, via ICCPM represented discrete procurement decisions.

Airservices has made extensive use of ICCPM to assist with the delivery of the OneSKY Australia program. Since 2012, there have been 42 engagements of ICCPM employees and sub-contractors through 18 procurement processes, via six contracts. Under the various contractual arrangements, Airservices agreed to pay ICCPM total fees of more than \$9 million.^a

Airservices sole-sourced each of the ICCPM procurements. It was common for the key elements of the processes employed to be inconsistent with the organisation's procurement policies and procedures. In addition, the records made by Airservices of each procurement decision were often perfunctory. This approach to recording decisions to spend money, together with required internal controls over the approval processes being bypassed on a number of important occasions, contributed to a lack of transparency over the decisions to procure services from, or through, ICCPM.

In addition to applying no competitive pressure, there were few occasions where Airservices attempted to benchmark the quoted rates, or to negotiate on those rates. The daily rates agreed to be paid by Airservices for the services of individual contractors ranged from \$1 500 per day up to \$5 000 per day (for an eight hour day). The rates paid for initial, short-term high level strategic engagements were often similar to, or the same as, those paid for the same individuals to deliver on long-term assignments that involved full-time, or close to full-time, work. Overall, Airservices' approach to contracting ICCPM to assist with the delivery of OneSKY Australia was ineffective in providing value for money outcomes.

Areas for improvement

The ANAO has made two recommendations. The first emphasises the importance of adhering to the organisation's procurement policies and procedures. The second is focused on value for money being obtained when Airservices procures consultancy services, with a particular focus on greater use of competitive selection processes.

Note a: All figures in this ANAO report are GST exclusive.

Does Airservices Australia have appropriate procurement policies and procedures in place?

Airservices' procurement policies and procedures are, in most respects, appropriate. However, a key shortcoming is that they do not give appropriate emphasis to the use of competitive processes.

2.1 Under the Commonwealth's financial framework, Airservices is not required to comply with the Commonwealth Procurement Rules (CPRs), which are issued by the Finance Minister and apply to all non-corporate Commonwealth entities. Rather, as is the case with most corporate Commonwealth entities⁹, Airservices develops and implements its own procurement policies and procedures. Those policies and procedures are required to meet general obligations on the organisation that it promote proper use of resources and employ effective internal controls.

2.2 Over the period examined by the ANAO (2012 to the end of 2015), Airservices had in place a procurement governance framework that included:

- a Finance Policy issued by its Board;
- various versions of a procurement management instruction;
- documented procurement workflows, updated from time to time and tailored according to the estimated whole of life value of the goods and/or services being procured;
- a documented contract variations workflow, which was updated from time to time; and
- a delegations structure to govern the exercise of financial powers and functions.

2.3 The Finance Policy is sound. It refers to the importance of making efficient, effective, ethical and economical use of resources. It also seeks to promote the achievement of value for money from procurement processes.

2.4 In many respects, the procurement management instructions and workflows were also sound. For example, the documented processes sought to promote open and effective competition for procurement opportunities; there are requirements to retain appropriate documentation of procurement processes; and the procedural documents advocate the importance of probity and ethical behaviour (including in relation to identifying and managing conflicts of interest).

2.5 In addition, the contract variation workflow clearly sets out processes for identifying: the reason for any variation; the development of a variation strategy; the development, approval and signing of variation documentation; and management of the variation. Consistent with better practice procurement processes¹⁰, the contract variation workflow specifies that:

9 Immediately prior to the commencement of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), 16 Commonwealth authorities were subject to the CPRs. This included, for example, the Export Finance and Insurance Corporation and the Reserve Bank of Australia. Upon commencement of the PGPA Act, four more corporate Commonwealth entities were added to those required to adhere to the CPRs. This did not include Airservices Australia.

10 For example, Airservices' approach is consistent with the ANAO's 2012 Better Practice Guide *Developing and Managing Contracts* (p. 100).

If the variation is for additional scope and term, a determination will be made by the Procurement Manager as to whether the additional requirement is significant or not significant. If the variation is significant, this will be treated as a new procurement.

2.6 Two key shortcomings are that the procurement governance framework does not:

- address Airservices entering into strategic partnerships and alliances. This is notwithstanding that the organisation had agreed, in response to a 2009 internal audit, to develop a considered approach to managing strategic partnerships¹¹; or
- adequately contemplate, or regulate, non-competitive approaches being adopted for procurements with a value of \$50 000 or more. Specifically:
 - a minimum of three quotes are required to be obtained for procurements valued between \$50 000 and \$300 000 (identified as 'major' procurements in the Airservices framework). The documented workflow provides that the 'Manager, Organisational Procurement' can approve an exemption where Airservices is 'unable to seek three quotes'. But:
 - no version of the documented framework outlined the criteria that would be applied when deciding whether to grant any such exemptions, or set out any recordkeeping or accountability requirements¹²; and
 - the method to be used when seeking approval for an exemption (specified in an earlier version of the workflow) is no longer specified; and
 - adopting an open approach to the market is not explicitly specified as the required or preferred approach to procurements of \$300 000 or more (identified as 'strategic' procurements). Rather, the requirements include developing:
 - an acquisition strategy that, among other things, addresses market research, project timings and resources, the procurement methodology and an evaluation plan; and
 - a suite of tender documents including conditions of tender, the scope of work, draft conditions of contract and tender response schedules.

2.7 In May 2016, Airservices advised the ANAO that a Management Instruction in relation to strategic alliances had been issued with effect from 4 April 2016.

11 A draft management instruction was approved on 1 July 2010 by the then Acting Chief Executive Officer but was not issued. Airservices advised the ANAO in November 2015 that it was unable to locate any documentation that would explain why the management instruction was not issued.

12 In contrast, the CPRs set out the limited circumstances in which direct source procurement can be undertaken, and require an appropriate record to be made of the circumstances and conditions that justified direct sourcing, as well as how it was concluded that the procurement provided value for money.

What is the International Centre for Complex Project Management (ICCPM)?

ICCPM is an unlisted non-profit public company limited by guarantee under the *Corporations Act 2001*. It was originally established with the assistance of the then Defence Material Organisation (DMO) in 2007 as the College of Complex Project Managers Limited to support and encourage research and learning in the field of complex project management. It changed its name to ICCPM in October 2008. In 2011, ICCPM commenced an income diversification strategy to generate alternate revenue from sources other than fees from its partner organisations. Airservices has been the largest financial contributor to the revenue that ICCPM has generated from consulting work. For example, the \$4.8 million in consultancy fees and expenses paid by Airservices between 2012–13 and 2014–15 equated to 75 per cent of the revenue reported by ICCPM over that period from consulting work. A further \$1.0 million had been paid to December 2015 (when ANAO audit fieldwork was undertaken).

No performance indicators were established to enable monitoring and evaluation of whether the strategic partnership between Airservices and ICCPM was delivering the expected benefits (including, the extent to which Airservices' internal capability was being built). It was quite common for Airservices to use the relationship with ICCPM to engage individuals to undertake particular roles akin to an employee for extended periods, rather than build the organisation's own capability.

2.8 ICCPM is an unlisted non-profit public company limited by guarantee under the *Corporations Act 2001*. The entity was originally established with the assistance of the then Defence Material Organisation (DMO) in 2007 as the College of Complex Project Managers Limited. It changed its name to ICCPM in October 2008. The company constitution outlines that:

The ICCPM is established as a public benevolent institution to support and encourage research and learning in the field of complex project management around the world and will pursue these purposes and activities for the public benefit.

The predominant object for which the ICCPM is established is to facilitate the management and delivery of complex projects around the world.

The ICCPM may also do such other things as are incidental or ancillary to the attainment of the predominant object of the ICCPM including (without limitation);

- (a) act as a peak body for complex project management;
- (b) advance complex project management knowledge and practice; and
- (c) educate persons in complex project management.

2.9 In its initial years of operation, ICCPM was primarily reliant upon the annual fees paid by entities that had agreed to become funding partners. This included DMO and certain aeronautical and defence industry participants, including Thales Group (incorporating Thales Australia), Boeing (incorporating Boeing Defence Australia), Lockheed Martin and BAE Systems Australia (each of

which was a respondent to the CMATS RFT).¹³ Given the likely complexity of the OneSKY Australia program and its lack of recent experience with a project of that magnitude, Airservices became an ICCPM corporate partner in September 2010 so as to be eligible for representation in advisory groups, focus groups and communities of practice.

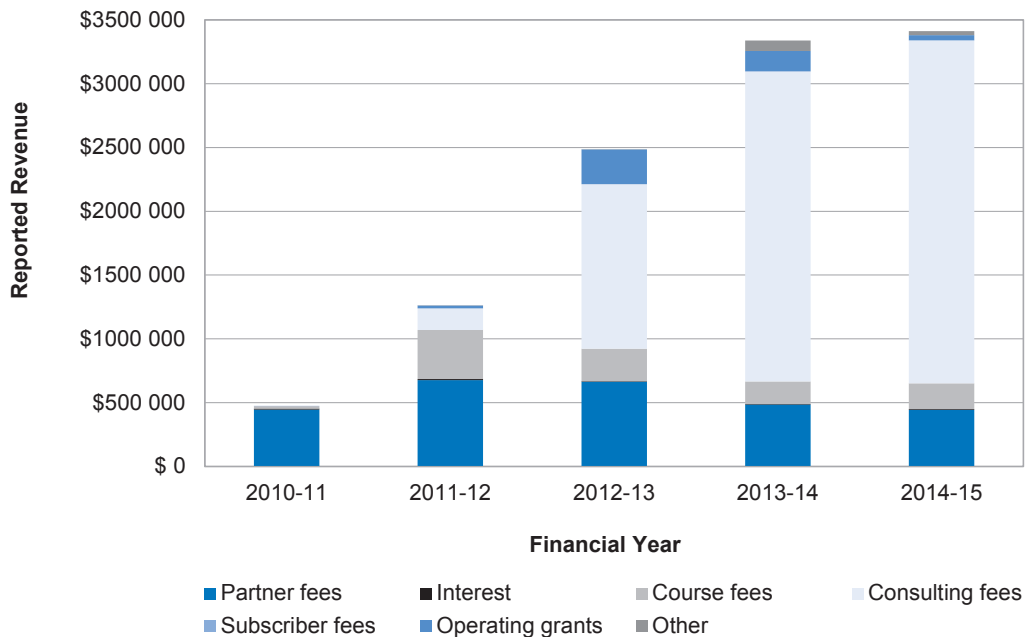
2.10 In March 2011, the ICCPM Board agreed to the introduction of a revised Partner Charter that included the introduction of an Associate Partner level. This led to the establishment of the ICCPM's Associate Partner Network. This Network consists of a range of individuals, companies and education providers with expertise in various fields related to complex project management. Each Associate Partner is contracted directly to ICCPM. Their services are provided to organisations via a subcontracting arrangement through ICCPM. The organisation's *Strategic Overview 2014–2019* outlined that the establishment of this 'professional solutions' stream was an alternate revenue generation strategy for ICCPM.

2.11 Between 2011–12 and 2014–15, ICCPM's reported revenue from partner fees reduced by more than one-third from \$676 643 to \$443 207. As illustrated by Figure 2.1, over the same period revenue from consulting fees increased 15-fold from \$170 775 to nearly \$2.7 million.

2.12 Between 2012–13 (when Airservices started obtaining consulting services through ICCPM) and December 2015, Airservices paid ICCPM a total of \$5.8 million in consultancy fees and expenses. Between 2012–13 and 2014–15, the payments from Airservices equated to 75 per cent of the revenue reported by ICCPM as deriving from consulting work. This indicates that Airservices has been the single largest contributor to the substantial growth reported by ICCPM from its 'professional solutions' revenue generating strategy.

13 In this respect, ICCPM's 2011–12 financial statements outlined that the company was dependent on DMO, BAE Systems Australia, Lockheed Martin and Thales for the majority of its revenue used to operate the business. Similarly, the 2013–14 financial statements outlined that ICCPM was economically dependent on the DMO, Thales, Lockheed Martin, Airservices and Boeing Defence Australia. The 2014–15 financial statements outlined that ICCPM was economically dependent on the Capability Acquisition and Sustainment Group of Defence (which now incorporates the prior DMO), Thales and Airservices.

Figure 2.1: ICCPM Revenue: 2010–11 to 2014–15



Source: ANAO analysis of financial statements lodged with the Australian Securities and Investments Commission.

Strategic partnership between ICCPM and Airservices

2.13 In May 2013, Airservices wrote to ICCPM accepting a proposal from ICCPM in relation to the AFS program (renamed on 1 July 2013 as OneSKY Australia).¹⁴ Specifically, the correspondence signed by Airservices:¹⁵

- agreed that the relationship would be in the nature of a strategic partnership for the duration of the OneSKY program (with that arrangement being in addition to, and separate from, the existing corporate partnership agreement under which Airservices pays an annual membership fee of \$50 000 to ICCPM);
- stated that the building of capability within Airservices ‘must be a focus of ICCPM at all times’;
- outlined an intention to use an existing contract between Airservices and ICCPM as the engagement mechanism, with ICCPM to prepare schedules to that contract so that assistance with strategic planning and tender evaluation planning/implementation could commence in May 2013; and

¹⁴ That proposal had been discussed and developed between November 2012 and May 2013.

¹⁵ Records examined by the ANAO as part of this audit, together with sworn evidence obtained by ANAO using the powers provided by the *Auditor-General Act 1997*, indicated that an ICCPM employee (Ms Hein) working under contract at Airservices played a role in drafting the May 2013 letter from Airservices accepting ICCPM’s proposal that it provide support across all stages/phases of planning and delivery of the AFS program.

- stated that each contractor engaged through ICCPM would be required under the probity plan established for the CMATS tender to have a probity briefing and execute a conflict of interest declaration prior to commencing work.

2.14 The approach taken to developing and formalising this strategic partnership did not involve any approach to the market that would have identified any other possible strategic partners, what they could offer the organisation and the related costs and benefits. As it eventuated, the cost of the partnership has been significant.

2.15 It was also inconsistent with key elements of the strategic alliance management instruction that had been approved in July 2010, but not published. For example, there was no business case prepared by Airservices and no performance indicators were established to enable monitoring and evaluation of whether the partnership was delivering the expected benefits (including, the extent to which Airservices' internal capability was being built). In this latter respect, the ANAO's analysis was that it was quite common for Airservices to use the relationship with ICCPM to engage individuals to undertake particular roles akin to an employee for extended periods, rather than build the organisation's own capability.¹⁶

How extensively has Airservices contracted with ICCPM in relation to the OneSKY Australia program?

Airservices has contracted extensively with ICCPM in relation to the OneSKY Australia program. The contracted services have been very broad, with 42 engagements made in areas such as training and project management education, provision of strategic advice, delivery of technical services, general managerial support, assistance with the evaluation of tenders and the negotiation of contracts, including with the successful tenderer. The 42 engagements have been transacted under six contracts, involving total payable fees of more than \$9 million. One of the contracts was varied on two occasions and another on eight occasions. In addition, an on-call services schedule under one of the contracts was exercised on four occasions.

2.16 Between April 2012 and August 2015, Airservices procured consultancy services from ICCPM on 18 occasions. For these 18 procurements, Airservices entered into six consultancy contracts with ICCPM. One of those contracts was varied and extended on two occasions. Another was varied and extended on eight separate occasions. One of those variations established an on-call services schedule under the contract, which Airservices made use of on four occasions (see further at paragraphs 2.22 to 2.25).

2.17 Figure 2.2 provides an overview of the various procurements. It illustrates that, while some contract variations extended the timeframe over which already contracted services would be delivered, it was more common for Airservices to use contract variations to obtain further services from ICCPM instead of, or in addition to, extending the delivery timeframes for already

16 As noted at paragraph 2.13, the 16 May 2013 letter from Airservices' CEO had emphasised that the building of Airservices' internal project management capability was to be a principle focus of the services that were then to be delivered through the ICCPM strategic relationship. In that respect, an August 2015 OneSKY program health check, undertaken by an ICCPM sub-contractor, recommended that Airservices prepare a plan to mitigate the risk of a general lack of project management capability in Airservices.

services, and of relatively low value. After the exchange of letters agreeing to a strategic partnership, Airservices began contracting more extensively with ICCPM for strategic advice, as well as for high level reviews of the OneSKY program. This was followed by contracts to provide project management assistance to senior managers of the OneSKY project so as to progress the preparation and release of the CMATS RFT. It also extended to ICCPM providing more general staff support to senior managers, in the nature of chief of staff services, executive support services and assistance with strategic planning.

2.21 The more long-term, and expensive, contracts were entered into after the CMATS RFT had been issued on 28 June 2013. ICCPM sub-contractors played important roles in the tender evaluation process, in terms of the overall approach/strategy, providing subject matter/technical expertise and contributing to key decisions. In addition, ICCPM sub-contractors were engaged by Airservices for contract negotiation assistance, both at a technical level and to fill the Lead Negotiator and Deputy Lead Negotiator positions.¹⁷

Establishment of the on-call services arrangement

2.22 The third variation to Contract 2013/7595 established an on-call services schedule. This schedule provided Airservices with flexibility to engage services from ICCPM in seven 'activity areas'. These were: Tender Evaluation Working Group evaluation member of subject matter expert; collaboration cell; secretariat services; day courses; organisational change; project management; and team selection and composition.

2.23 In effect, the on-call services schedule established a panel consulting arrangement, albeit with only one provider on the panel. As indicated by Figure 2.2, Airservices used the on-call services schedule on four occasions, as follows:

- at the time the schedule was established in December 2013, Airservices accepted a quote for 11 engagements to the value of \$1.36 million (two of the quoted engagements did not have a cost quoted, with Airservices clarifying in January 2015 that the value of those two engagements was \$347 500);
- in May 2014, Airservices agreed to a quote for obtaining the services of both a Lead Negotiator and Deputy Lead Negotiator via ICCPM for six months from 1 April 2014 to 30 September 2014. Airservices operated on the basis those engagements were able to be accessed via the on-call services schedule despite contract negotiation services not being reflected in any of the listed 'activity areas';
- in October 2014, the Lead Negotiator and Deputy Lead Negotiator's engagements were extended for a further eight months (to 31 May 2015); and
- in June 2015, the Lead Negotiator and Deputy Lead Negotiator's engagements were extended for a further twelve months (to 31 May 2016), and three other engagements made. The total value of the engagements executed through the June 2015 process was \$2.03 million.

¹⁷ Contract negotiation involves work on a suite of contracts including, for example, the On-Supply Agreement between Airservices and Defence.

2.24 The total contract value of the four occasions the on-call services schedule was used across 15 engagements was \$6.17 million.

2.25 The contract variation to include the on-call services schedule was undertaken without the endorsement of Airservices' Office of Legal Counsel (OLC). In June 2015, in light of concerns raised by OLC, the contract was varied to revise the process for preparing and authorising an order for on-call services, and to expand the definition of on-call services to include contract negotiation support.

Payments made

2.26 To deliver the contracted services to Airservices, ICCPM sub-contracted to seven member companies of its Associate Partner Network as well as to a professional services firm. Two ICCPM employees were also involved in providing various contracted services. In total, 12 individuals (including the two ICCPM employees) were involved in delivering the contracted services to Airservices across 42 engagements.

2.27 The total fee value associated with the various contracts between Airservices and ICCPM (including variations) was \$9.01 million.¹⁸ The majority (\$6.47 million or 72 per cent) of this was to be on-paid by ICCPM to the relevant sub-contractor. ICCPM was entitled to retain \$1.56 million of the fees Airservices had agreed to pay for ICCPM sub-contractors. In addition, two ICCPM employees were engaged by Airservices to provide support to senior executives, with fees of \$971 551 contracted to be paid to ICCPM.¹⁹

2.28 As at January 2016, the total amount paid to ICCPM in relation to the various OneSKY consultancy contracts was \$5.78 million (see Table 2.1). The difference between the contracted amount and the amount paid largely reflects:

- that it was common for Airservices to enter into a new contract, or vary an existing contract, before the original contract had been fully drawn down; and
- the Lead Negotiator contracted through ICCPM resigned in November 2015, with the Deputy Lead Negotiator taking on the role of Lead Negotiator and an Airservices employee then being appointed to the Deputy role. Consistent with a recommendation from the Allens review, the new Lead Negotiator contract was signed directly between Airservices and the contracted personnel's company (Keyholder Pty Ltd) rather than via an ICCPM sub-contracting arrangement.

18 Airservices also contracted to reimburse travel expenses, although it was uncommon for an estimate to be made of those expenses when entering into the contract, or for a cap on them to be specified.

19 Over a combined total time period of 44 months (two years for one ICCPM employee, and 20 months for the other).

Table 2.1: Payments made by Airservices to ICCPM in relation to OneSKY Australia contracts: July 2011 to January 2016

	Fees paid for		ICCPM sub-contractor payments					Total \$'000
	ICCPM employees \$'000	HC Bradford & Associates P/L \$'000	Keyholder P/L \$'000	Other sub-contractors \$'000	Fees retained by ICCPM \$'000	Expenses reimbursed \$'000		
Strategic advice, reviews and education	27	121	27	75	52	14	315	
Support to Airservices executives	612	72	10	118	61	4	878	
Request for Tender preparation and issue, and program delivery	Nil	126	362	Nil	118	10	615	
Tender evaluation and contract negotiation, and establish commercial arrangements with Defence	Nil	1 265	1 218	499	678	308	3 968	
Total	639	1 584	1 616	692	909	336	5 777	

Note: Numbers may not add due to rounding.

Source: ANAO analysis of Airservices and ICCPM records.

Was the approval of the various ICCPM procurements in accordance with Airservices' procurement framework?

Departures from Airservices' documented procurement policies and procedures were common in the approval processes for the various ICCPM procurements. Internal controls intended to promote compliance were regularly bypassed. Where they were applied, the controls were often ineffective. In addition, the records made by Airservices of each procurement decision were often perfunctory.

2.29 For 15 of the 18 procurements, the decision to engage ICCPM was recorded by way of one or more approval memos. Memos were prepared and signed in relation to each of the larger value procurements, but not the lower value procurements, as follows:

- there were no approval memos prepared for the first and second contracts for ICCPM to assist with OneSKY Australia (signed in April/May 2012 and June 2012), with values of \$25 000 and \$20 000 respectively;
- an approval memo was prepared on 18 July 2012 in respect to the \$117 600 third contract (2012/6665), and memos were also prepared for the September 2012 and November 2012 variations to that contract that had aggregate values of \$412 000;
- a memo was prepared in April 2013 to enter into Contract 2013/7595 with a value of \$589 100. Approval memos were also prepared for the eight variations to that contract between July 2013 and May 2015 (one of which was to revise the process for preparing and authorising an order for on-call services, and expand the definition of on-call services to include contract negotiation support) and the four occasions on which Airservices accessed the on-call services scheduled under that contract. The variations to that contract and the accessing of the on-call services schedule had a combined total value of \$7.72 million;
- there was no approval memo for a \$27 000 contract signed in October 2013 for a review of tender evaluation readiness; and
- approval memos were prepared in June and August 2015 for a \$100 000 engagement for a progress and status review of the OneSKY program.

2.30 For those 15 procurements where approval memos were prepared, they set out the need/reason for the procurement, some relevant background and the purpose of each engagement covered by the procurement. The memos also evidenced involvement by senior Airservices executives in the procurement processes.²⁰

2.31 Airservices' procurement processes and workflows require approval memos and the underlying document to be endorsed by OLC and the Manager, Organisational Procurement prior to a contract being executed. Only eight of the 15 procurements where a memo was prepared

20 In total, 13 of the procurements were submitted for approval by an Executive General Manager (or someone acting in that role), with 14 of the procurements being approved at Chief Executive Officer (or acting Chief Executive Officer) level.

were endorsed by both OLC and the Manager, Organisational Procurement. Of the remaining seven procurements:

- four were not endorsed by either OLC or the Manager, Organisational Procurement;²¹
- two were endorsed by the Manager, Organisational Procurement but not by OLC; and
- one was endorsed by OLC but not by the Manager, Organisational Procurement.

2.32 In two instances, a memo was endorsed by a procurement or legal officer within Future Service Delivery (FSD), being the division within Airservices responsible for the OneSKY program. However, reliance on staff from within the business division undertaking the procurement runs counter to the intention of the procurement procedures (of ensuring compliance across all business groups).

2.33 In any event, the ANAO's analysis was that obtaining the required endorsements was ineffective as a control for ensuring compliance with Airservices' procurement policies and procedures. Specifically, despite most of the approval memos carrying one or both of the endorsements required from the OLC and the Manager, Organisational Procurement, the ANAO's analysis of the various memos was that key elements of Airservices' procurement policies and procedures had not been adhered to. Of particular significance was that:

- memos for only two of the 15 procurements with a memo explicitly outlined that ICCPM was being sole sourced. Memos for four procurements noted that contracting was necessary as Airservices lacked the required capability. That alternative external sources for the contracting task had been considered was raised in only one instance. Overall, the approach was inadequate in providing a rationale for, and accountability over, the decision to sole source more than \$8.9 million in consultancy contracts;
- value for money was not discussed in the approval memos supporting eight of the 15 procurements. Of the seven that mentioned value for money, in one case (being the memo for the engagement of a configuration manager) there was a specific section on the subject of value for money. This section falsely claimed that the rates 'were market tested and found to be competitive against comparable service offerings from other service providers'.²² Memos supporting another procurement stated that costs would be monitored to ensure value for money was obtained, but there was no documentary

21 Included in these four was the approval memo that was examined by the Senate Committee in the course of its inquiry where concerns were raised about a perceived conflict of interest given the memo was signed by an Airservices employee who was the spouse of the Chief Executive of ICCPM.

22 This resource was provided by Airservices contracting with ICCPM who, in turn, sub-contracted to Keyholder with three contracts signed to a total value of \$412 500 for the period 15 September 2014 through to 30 September 2015. Neither Airservices' records nor the testimony from Airservices employees involved with preparing and signing this memo identified which other service providers had been used for comparison purposes. For example, Mr Harfield signed the memo seeking approval of this procurement and his testimony to the ANAO was 'There was a need, a requirement, for a configuration manager. In looking at that, also the fact that we needed it sort of immediately to sort of sort things out, and we made some inquires internally plus also and it was easier to access it through ICCPM for a period of time, and I had the mechanism to be able to do that.' Further in respect to this engagement, Keyholder's comments to the ANAO on the proposed report included that the configuration manager: 'was supplied via ICCPM until a less costly resource could be obtained from a competitive source, in 2015'.

evidence that this was actually done. Approval memos for three other procurements suggested that Airservices had attempted to negotiate on the consultancy rates;

- there was no consistency in Airservices' approach to including or excluding GST from the estimated cost of a proposed engagement; quantifying the possible cost of any extension options; and providing an estimate for reimbursable travel and other expenses; and
- the approach to including quotations to support the approval memo also varied markedly. Quotes were attached to the memos for eight of the procurements, but not for the other seven. In one instance, the quote was incomplete—the November 2013 quote was for \$1.36 million, and this was the amount the then Chief Executive Officer (CEO) was asked to approve (and did approve). However, the quote did not include expected outlays for two of the line items (for two separate 'Strategic Advisers'). In January 2014, Airservices wrote to ICCPM advising that the quote of \$1.36 million had been approved by the CEO and clarifying that the amount for the two Strategic Advisers was capped at \$347 500 for the 2014 calendar year (based on total number of days work). This means that, as a consequence of Airservices not having defined the work effort expected to be required of the two Strategic Advisers, the quoted amount, and the amount submitted for approval, had been understated by 26 per cent.

2.34 On two occasions, the procurement memo identified that the cost of the proposed ICCPM engagement was not provided for within the existing project budget. In both cases, approval was nevertheless recommended notwithstanding that the memo did not include any proposal for funding the procurement. On two occasions, the memo advised the approver that the relevant positions would be funded 'within the OneSKY Australia program'. The remaining memos were silent on whether funds to meet the estimated cost of engaging ICCPM were available within the project budget. In this context, Airservices has identified an increase in OneSKY program costs as one of a number of factors contributing to the organisation's overall costs being greater than had been projected when the current Long Term Pricing Arrangement was finalised.

Recommendation No.1

2.35 The ANAO recommends that Airservices Australia address systemic failures in the adherence to the organisation's procurement policies and procedures and the cultural underpinnings of those failures.

Airservices Australia response: *Agreed.*

Did Airservices' procurement processes achieve value for money?

Airservices did not achieve value for money through its procurement of ICCPM. It applied no competitive pressure in the engagement processes and the records of the engagements made little or no reference to how the entity was satisfied that value for money was being obtained. Airservices also largely operated as a price-taker; obtaining quotes from ICCPM without seeking to benchmark the proposed rates to similar services obtained by other Commonwealth entities, or actively seeking to negotiate reduced rates particularly in circumstances where initial short-term engagements became extended into long-term engagements.

2.36 Applying open and effective competition in procurement processes assists entities to obtain value for money. This approach also provides suppliers with fair and equitable access to government supply opportunities.

2.37 Not one of the ICCPM contracts resulted from a competitive procurement process. Rather, on each occasion, Airservices sole sourced directly from ICCPM. Significantly, although Airservices documented the approval of each procurement valued at more than \$50 000, the relevant approval memos did not state that the sole sourcing approach was at odds with a key element of its procurement framework, as follows:

- there were eight procurements between \$50 000 and \$300 000. Airservices' documented procedures requires three quotes for procurements in this value range but in each instance Airservices only obtained a quote from ICCPM; and
- procurements valued at greater than \$300 000 are required to have an acquisition strategy in place that addresses market research; a suite of tender documents (conditions of tender, scope of work, draft conditions of contract and tender response schedules) is to be prepared; and, as part of the 'Approaching the Market' stage, an evaluation plan is to be prepared before the tender documents are released to potential providers. None of these activities were undertaken for the seven ICCPM procurements valued above \$300 000.²³

2.38 More broadly, Airservices' records of engaging ICCPM also made little mention of value for money considerations. Although it was common for the approval memos to set out both the expected cost of the engagement(s) covered by the particular procurement, and the total amount of estimated expenditure to date awarded to ICCPM, they did not address the basis on which it had been concluded that the cost of the procurement for the scope of work and timeframe could be considered to provide value for money. Two key aspects in that respect that should have been addressed were:

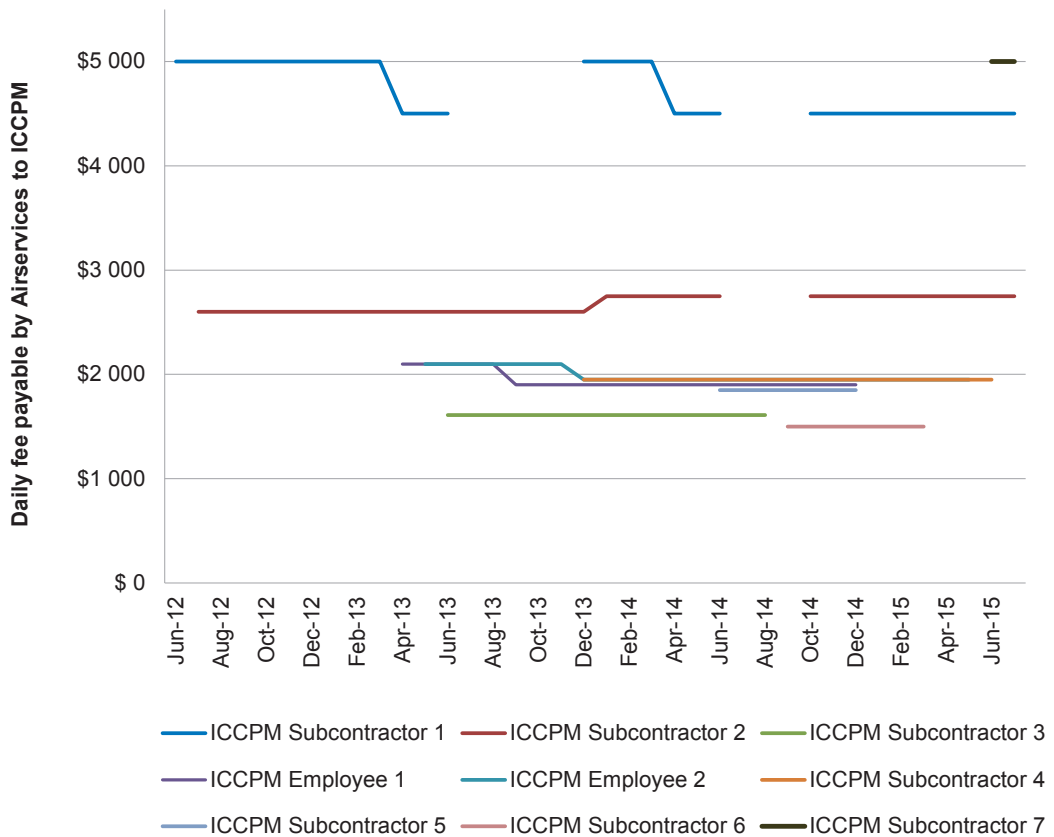
- the daily fee rates being agreed to by Airservices; and
- the terms of the sub-contracting arrangements between ICCPM and the various members of its Associate Partner Network that were to provide services to Airservices.

23 This was the case notwithstanding that the approval memo for the first variation to Contract 2013/7595 had acknowledged that a separate acquisition strategy would be required to establish the on-call services schedule (which was established by the third variation to that contract, but without an acquisition strategy being developed).

Fee rates

2.39 Apart from those engagements that involved the delivery of training or workshops where fixed fees to the total value of \$75 090 applied, Airservices engaged ICCPM employees and subcontractors on daily rates. The daily rates agreed to be paid by Airservices for the services of individual contractors ranged from \$1 500 per day up to \$5 000 per day (for an eight hour day), as illustrated by Figure 2.3. These rates did not result from competitive procurement processes. In addition, rates were the same or similar for an individual engaged to provide strategic advice for a limited number of days each week for a relatively short period of time as were paid for the same individual to be engaged on a full-time, or close to full-time, basis for many months as part of tender evaluation and/or contract negotiation activities.

Figure 2.3: Daily consultancy fee rates paid by Airservices to ICCPM



Source: ANAO analysis of Airservices and ICCPM data.

Note: Some ICCPM engagements did not involve daily fees but fixed fees (for example, for delivery of a particular training course).

2.40 Five of the approval memos made reference to the negotiation of consultancy rates. But there were few records supporting that any such negotiations had been undertaken. In the absence of such records, key Airservices personnel involved in the engagements that were

interviewed by the ANAO were unable to describe any steps they had taken in this respect. Rather, having decided to sole source from ICCPM, Airservices typically operated as a price-taker with only four instances across the 42 engagements where rates were reduced. This comprised:

- a \$500 reduction proposed by a sub-contractor in March 2013 as a volume discount (from a rate of \$5 000 per day that had been paid by Airservices up to that point) for a 25 to 35 day engagement undertaking a review of the RFT prior to it being issued. The rate returned to \$5 000 per day for the next engagement (which was approved in December 2013) for up to 20 days strategic advisory services on an 'as required' basis up until 31 December 2014;
- the \$5 000 per day for this sub-contractor for review services was usurped in May 2014 when Airservices approved the engagement of HC Bradford and Associates, via ICCPM, to undertake the Lead Negotiator role for an 'initial' six month term of up to 104 days, with this lower rate being continued throughout the contract negotiation role. The daily rate to be charged returned to the \$4 500 rate previously agreed as a volume discount for a 25 to 35 day engagement;²⁴
- a \$200 reduction in the daily rate for an ICCPM employee contracted for executive services, from \$2 100 to \$1 900; and
- a \$150 reduction in the daily rate for an ICCPM employee contracted initially for executive services at a daily rate of \$2 100 and later for a Chief of Staff role at a rate of \$1 950 per day.

2.41 In one instance, the daily rate of an ICCPM subcontractor was increased from \$2 600 for strategic advisory services to \$2 750 for work described in similar terms as well as a later (long-term) contract negotiation role. The approval memoranda for these procurements did not note the increase in the rate or mention any negotiations with regards to this increased rate.

2.42 With one exception²⁵, Airservices also did not seek to benchmark the rates to those paid for similar services by other Commonwealth entities so as to be assured that it was obtaining value for money.

2.43 For example, Airservices was aware that the previous negotiation role undertaken for the Commonwealth by HC Bradford and Associates through ICCPM was for Defence. That was under a contract signed in July 2013 for the Helicopter Aircrew Training System (HATS) for Army and Navy. While Airservices saw the HATS engagement as relevant in making the decision that HC Bradford

24 The change in daily rate was not mentioned in the approval memoranda supporting the procurements nor did any of these memoranda mention rates being negotiated.

25 The exception related to a \$59 200 June 2014 contract for a systems engineer. In the absence of any available internal resources, Airservices approached Defence to help identify a suitable resource. As Airservices and Defence were to share the cost of the system engineering work, and Defence were aware of the rates it had been paying for this resource, Airservices benchmarked the rate to the relevant panel from which Defence engages systems engineering services. This was also acknowledged in the quote provided by ICCPM (Airservices used the existing contract with ICCPM to enable it to engage the systems engineer through a sub-contracting arrangement within a short timeframe). This was the only sub-contract for which ICCPM did not receive any proportion of the fees being charged to Airservices.

and Associates would be capable of undertaking the OneSKY Lead Negotiator role, it did not obtain reliable information from Defence as to the rate paid by Defence.²⁶

2.44 Information obtained by the ANAO from Defence was that the lead negotiator contract for the HATS project was capped at \$400 000 for fees and expenses for up to 100 days of consultancy services over a term of up to fourteen and a half months (from mid July 2013 to 30 September 2014). The daily rate contracted and paid by Defence to ICCPM for negotiation services from HC Bradford and Associates was \$3 454.55.

2.45 Through three consecutive engagements²⁷ Airservices engaged HC Bradford and Associates via ICCPM for up to 536 days of lead negotiation services over a 26 month term commencing on 1 April 2014 with a total contract value of \$2.41 million. The arrangements for reimbursement of travel and other expenses under the Airservices and Defence contracts were similar (reimbursement of expenses at SES rates, and time spent travelling reimbursable at 50 per cent of the daily consulting rate), although Defence capped the total contract cost whereas Airservices did not.²⁸

2.46 The daily rate paid by Airservices for lead negotiation services was \$4 500. This was 30 per cent higher than the rate paid by Defence for similar services. Over the term of the Airservices engagements, this meant that Airservices agreed to pay consultancy fees \$560 361 higher than had it contracted at the same rate Defence had agreed with ICCPM for lead negotiation services from HC Bradford and Associates (during overlapping periods of time).

2.47 The daily rate of \$4 500 had been proposed to Airservices by the sub-contractor in March 2013 as a volume discount (from a rate of \$5 000 per day that had been paid by Airservices up to that point) for a 25 to 35 day engagement undertaking a review of the RFT prior to it being issued. It returned to \$5 000 per day for the next engagement (which was approved in December 2013) for up to 20 days strategic advisory services on an 'as required' basis up until 31 December 2014. This was usurped in May 2014 when Airservices approved the engagement of HC Bradford and Associates, via ICCPM, to undertake the Lead Negotiator role for an 'initial' six month term of up to 104 days. The daily rate to be charged returned to the \$4 500 rate previously agreed as a volume discount for a 25 to 35 day engagement. There was no attempt by Airservices to negotiate any further reduction for the 'initial' Lead Negotiator engagement, or in respect to the subsequent engagements of 172 days over eight months or 260 days over twelve months. In February 2016, the sub-contractor advised the ANAO that:

26 In response to being asked if inquiries had been made of Defence as to the rate it paid, Mr Harfield's testimony to the ANAO was 'they said it was \$5 000 per day. So there was sort of an assumption that that was there, and \$5 000 was the roundabout number so I accepted it and moved on.'

27 This comprised: 104 days (an average of 4 days per week) over an initial six month term from 1 April 2014 to 30 September 2014 approved in May 2014; 172 days (5 days per week) over eight months from 1 October 2014 to 31 May 2015 approved in October 2014; and 260 days (5 days per week) over twelve months from 1 June 2015 to 31 May 2016 approved in June 2015.

28 For the first two engagements, Airservices did not estimate the likely amount of reimbursable expenses when making the decision to engage the Lead Negotiator. The amount actually reimbursed for those two engagements was \$154 090. For the third engagement, Airservices estimated reimbursable travel costs to be \$177 714.

I set the rates for which I am prepared to work, and as a general rule I do not negotiate these rates. My clients either accept my costs or not—it is up to them. For the most part, my rates are not a critical determinant of my engagement.

2.48 As discussed (see paragraphs 2.23 to 2.25), Airservices operated on the basis that the Lead Negotiator services were being accessed via the on-call services schedule to its existing contract with ICCPM. Airservices did not seek to establish any framework of specified deliverables against which the Lead Negotiator's performance would be assessed. Nor did the contractual arrangements establish any financial incentives in respect to the successful conclusion of negotiations within specified timeframes.

2.49 When the Lead Negotiator ceased providing those services in November 2015, Airservices engaged the Deputy Lead Negotiator (directly from Keyholder Pty Ltd, who had until that time been engaged on a sub-contractor basis through ICCPM to perform the Deputy Lead Negotiator role) to take on that role. That arrangement coincided with implementation by Airservices of a recommendation from the Allens review that, to avoid conflict of interest perceptions, the Lead and Deputy Lead Negotiators be contracted directly, rather than via ICCPM.²⁹ The fee now payable under the direct contract with Keyholder Pty Ltd for the Lead Negotiator services was \$3 500 per day. This was the rate put forward by the contractor without any negotiation by Airservices. Further, while Airservices obtained information from Defence on rates for various types of consultants on the Capability Acquisition and Sustainment Support Services panel³⁰, this data was not referenced in the approval record for the engagement of a new Lead Negotiator. Rather, Airservices limited itself to comparing the rate it was agreeing to pay for Keyholder to provide the Lead Negotiator services with the rate it had agreed to pay ICCPM for a sub-contractor (HC Bradford and Associates) to provide those services.

2.50 The \$3 500 per day rate contracted to be paid direct to Keyholder was a significant reduction on the rate that had previously been paid by Airservices to ICCPM for a sub-contractor to provide those services. But, on a like-for-like basis, this rate was not substantially different to the underlying commercial arrangements that had previously applied between ICCPM and HC Bradford and Associates. Specifically HC Bradford and Associates had been sub-contracted to Airservices through ICCPM, with ICCPM retaining \$900 (20 per cent) of the daily fee and passing the remaining \$3 600 per day onto the sub-contractor.

Fees retained by ICCPM

2.51 As outlined at paragraph 2.10, in 2011 ICCPM established a 'professional solutions' stream as an alternate revenue generation strategy. For its Associate Partner Network, this involves ICCPM retaining a proportion of the consulting fees paid by a client. For each of the 18 procurements, in addition to not negotiating on the daily fee rate that was payable, Airservices did not seek to inform itself as to the proportion of the fee that was to be retained by ICCPM; seek to negotiate with ICCPM on that proportion (including in circumstances where the engagements

²⁹ See further at paragraphs 4.33 to 4.37.

³⁰ Renamed in July 2015 from the Defence Materiel Organisation Support Services panel (see <https://www.tenders.gov.au/?event=public.son.view&SONUUIID=7A2BDCD5-E790-51C2-9CC41310EC9323D2>).

were to be long-term of six months or more); or consider whether the same services could be obtained by contracting directly with particular sub-contractor.

2.52 In this respect, the Allens review:

- opined that ICCPM performs ‘a bare administrative role’; and
- as noted, recommended that Airservices contract directly rather than through ICCPM.

2.53 There were three engagements with a total contract value of \$79 200 where ICCPM did not retain a proportion of the fee paid by Airservices. For the remaining procurements, ICCPM retained between 13 per cent and 26 per cent of the fee where the services were sub-contracted rather than being delivered by an ICCPM employee. This amounted to total potential fee revenue of \$1.56 million to be retained by ICCPM, or 19.7 per cent of the total fees contracted to be paid by Airservices. In his testimony to the ANAO, Mr Bradford stated that his approach involved:

Directing, where the opportunity presented itself, work to my company through ICCPM because that was beneficial to ICCPM. It’s not a cash rich organisation and any work I could bring into ICCPM was helpful for their financial position.

Recommendation No.2

2.54 The ANAO recommends that Airservices Australia improve the value for money it obtains from major and strategic procurement activities by:

- (a) requiring that, except in genuinely rare circumstances, competitive procurement processes are to be employed; and
- (b) on those rare occasions when competitive procurement processes have not been able to be employed:
 - documenting the reasons why a competitive approach was not employed;
 - benchmarking the quoted rates/fee and making records of the basis on which it was decided that the contracted rate/fee represented value for money; and
 - reporting any such instances to the Airservices Australia Board.

Airservices Australia response: *Agreed.*

3. Airservices' probity management framework

Areas examined

ANAO examined whether Airservices has appropriate policies and procedures in place for the management of probity, including conflicts of interest, in undertaking procurements generally and for the CMATS joint procurement in particular.

Conclusion

Airservices' documented procurement framework requires that probity be a key consideration in undertaking procurement processes. This includes requirements to effectively identify and manage potential, actual or perceived conflicts of interest.

The Probity Plan and Protocols established for the CMATS joint procurement process, together with the engagement of an external Probity Advisor as well as an external Probity Auditor, provided a reasonable basis for managing the probity aspects of the tender process. But Airservices did not commission independent probity audits of any phase of the tender process subsequent to the release of the RFT.

Area for improvement

The ANAO made one recommendation that Airservices' procurement framework better address the use of probity auditors and probity advisors.

Has Airservices established appropriate procedures for managing probity in procurement decisions?

Airservices' documented procurement framework requires that probity be a key consideration in undertaking procurement processes, including the need to effectively identify and manage conflicts of interest, whether potential, actual or perceived.

3.1 Airservices' suite of policies and procedures emphasise that probity³¹ and ethics are key to undertaking procurement activities, and integral to achieving value-for-money outcomes. Probity is identified as including the management of conflicts of interest, whether actual or perceived. Procurement governance is similarly identified as important, including for ensuring that each activity is undertaken with high standards of transparency, probity and integrity.

3.2 Airservices has also promulgated a Code of Conduct and associated Management Instruction, which set out the standard of conduct required of all Airservices employees, contractors and consultants. The Code includes a requirement that individuals must immediately disclose in writing (and preferably avoid) any actual, potential or perceived conflict of interest as soon as it arises in connection with their engagement with Airservices. Under the Management Instruction, each Business Group or Division is required to maintain a conflict of interest register

31 In the procurement context, probity is used in a general sense to mean a defensible process that is conducted, and is seen to have been conducted, with integrity, uprightness, honesty and fairness. Probity management is concerned with ensuring that appropriate processes and systems are in place so that the integrity of the eventual procurement decision can withstand internal and external scrutiny and the risk of legal challenge or complaint is minimised.

and gifts and benefits register. Following an internal risk review, the requirement for conflict registers to be maintained was reinforced to Airservices managers in September 2015.

Was an appropriate probity management framework established for the CMATS joint procurement?

Two internal audits of governance within Airservices' Future Service Delivery (FSD) group (which incorporates the OneSKY program) have been undertaken, reporting in April 2014 and August 2015. Whilst the scope of the first report included some consideration of the probity records management associated with the Probity Plan for the CMATS tender, neither involved an examination of the conduct of the tender evaluation or contract negotiation processes from a probity perspective.

In conjunction with the engagement of an external Probity Advisor, the Probity Plan and Protocols established for the CMATS joint procurement process provided a reasonable basis for managing the probity aspects of the tender process. An area for improvement related to the approach taken to identifying the role of a probity auditor, and documenting the rationale for not commissioning independent probity audits of any phase of the tender process subsequent to the release of the RFT.

Probity Plan and Protocols and external Probity Advisor

3.3 The legal firm Ashurst Australia³² (Ashurst) was first engaged by Airservices to act as external Probity Advisor to the process for procuring a future air traffic management system in February 2010. Ashurst was selected from a legal services provider panel established by Airservices.³³ A Probity Plan and Probity Protocols for the (then) AFS program, prepared in conjunction with Ashurst, were endorsed in April 2010. That plan applied to Airservices participants only during the process of developing, with Defence, a joint Request for Information (RFI) for a future civil-military ATM platform. The RFI was released to industry in May 2010, with the responses received being used as a basis for developing a business case and options for progressing the ATM replacement processes for Airservices and Defence.

3.4 Following confirmation that the subsequent approach to market would be based upon the provision of a harmonised civil and military ATM solution, a Joint Probity Plan and associated Protocols were promulgated in December 2011. Under that Plan, Ashurst became the Probity Advisor to both Airservices and Defence. Program Directors in Airservices and Defence were jointly responsible for administering compliance with the Probity Plan and Protocols.

3.5 The Probity Plan and Protocols were updated in April 2013, including to reflect the agreement that Airservices would be the lead agency for the joint procurement. The position of Manager Acquisition within Airservices became solely responsible for overall management of the

32 At the time of this original engagement, the firm was known as Blake Dawson.

33 From 1 June 2013, Ashurst has been engaged via the Legal Services Multi-Use List established by the Attorney-General's Department for purchasing, accessing or utilising legal services

Probity Plan and Protocols.³⁴ Minor further updates were made in a further version of the Plan promulgated in September 2013.³⁵

3.6 The stated objectives of the Probity Plan, and attached Protocols are to:

- identify probity issues relevant to the program;
- determine the most appropriate controls to deal with the identified probity issues;
- publish, and make Program Participants aware of, the potential probity issues and their responsibilities; and
- ensure that Airservices and Defence adopt and implement a process which will sustain any internal or external scrutiny of the program.

3.7 The role of the Probity Advisor, as set out in the Probity Plan, is to independently monitor procedural aspects to ensure compliance with program documentation and governance documents and to advise Airservices and Defence in relation to such matters. Ashurst has provided signoffs in relation to each phase of the tender evaluation completed to date.

3.8 The Manager Acquisition is responsible for taking reasonable steps to ensure that the program is at all times conducted in a manner that is consistent with the Probity Plan and Protocols and any other approved program plans. The Manager Acquisition is responsible for nominating as Program Participants those persons who either require access to commercial-in-confidence information, or need to deal with a person who could affect the probity of the program.

3.9 The Probity Plan and Protocols set out a range of obligations on Program Participants relating to maintaining confidentiality. There are also obligations for the on-going declaration of existing or potential conflicts of interest, whether actual or perceived, including proposals for managing each conflict. Upon being nominated as a Program Participant, individuals are required to receive a probity briefing to assist them in understanding their obligations. The Protocols apply until a Program Participant is informed by the Manager Acquisition that they no longer apply. The Protocols also stipulate that the specified confidentiality obligations apply indefinitely, unless advised by the Manager Acquisition that the information is no longer confidential.³⁶

Tender Evaluation Plan and Contract Negotiation Strategy

3.10 The Tender Evaluation Plan (TEP) established for the joint procurement articulated the probity obligations applying to members of the Tender Evaluation Organisation (TEO), which consisted of the various governance structures and teams responsible for evaluating tenders and making procurement decisions. Those obligations reiterated the requirement to observe the

34 This coincided with the transfer of probity management responsibility from the AFS Program Management Office to the procurement stream.

35 At the completion of ANAO fieldwork for this performance audit, a further revised version incorporating minor amendments primarily to reflect organisational and legislative changes was in draft form. In March 2016, Airservices advised the ANAO that its Probity Adviser 'has further amendments they wish to propose to the document, which will then be approved by Airservices and Defence.'

36 Upon becoming a Non-Active Participant, an individual is required to sign a Non-Active Program Participant Declaration, including acknowledgement of continuing confidentiality obligations.

Probity Plan and Protocols, as well as articulating specific procedures for the disclosure and management of conflicts of interest that arose during the tender evaluation process.

3.11 The TEO structure included a Procurement Governance Advisor. That position was responsible for monitoring procedural aspects of the evaluation process to ensure compliance with the published documentation (including the TEP and Probity Plan and Protocols) and to advise relevant TEO members in relation to such matters. The TEP provided that the Probity Advisor may be consulted by the TEO, through the Procurement Governance Advisor, if there were any probity issues or as otherwise required in relation to the evaluation or the TEP.

3.12 Similarly, the Contract Negotiation Strategy (CNS) established to regulate the conduct of contract negotiations with the successful tenderer reiterated the requirement for members of the Tender Negotiation Organisation (TNO) to continue to comply with the Probity Plan and Protocols. The Procurement Governance Advisor continued to be responsible for ensuring that all aspects of the negotiation were conducted in an ethical, efficient and fully defensible manner, and for managing any contact with the Probity Advisor.

Conditions of tender and obligations of tenderers

3.13 The Conditions of Tender set out in the RFT released to industry on 28 June 2013 included a provision stipulating conflict of interest obligations applying to all tenderers. Specifically, clause 3.7 of the Conditions of Tender stipulated that:

3.7.1 A tenderer must not, and must ensure that its officers, employees, agents and advisors do not, place themselves in a position that may or does give rise to an actual, or potential or perceived conflict of interest between the interests of AirServices Australia or Defence and the tenderer's interest during the RFT process.

3.7.2 If during the RFT process a conflict of interest arises, or appears likely to arise, the tenderer must notify the Contact officer immediately in writing and take such steps as AirServices Australia requires to resolve or otherwise deal with the conflict. If the tenderer fails to notify the Contact Officer or is unable or unwilling to resolve or deal with the conflict as required, the tender may be excluded from further consideration.

Probity auditor

3.14 There is a distinct difference between the role performed by a probity advisor and that of a probity auditor. A probity adviser works closely with the client from the beginning of the procurement process, providing advice on probity/process issues which may arise and strategies to overcome potential problems. Consequently, a probity adviser cannot be regarded as an 'independent' party.³⁷ In contrast, a probity auditor's role is more generally an 'after the fact' role, auditing the process and associated documentation after it has been completed, or at key stages during the process. Any issues identified are addressed in a probity audit report. A probity auditor must be completely independent, and therefore cannot be the legal adviser or otherwise involved in the project.

37 Australian Government Solicitor, Commercial Notes No.15, 14 March 2005.

3.15 At the initiation of the Airservices Board Audit and Risk Committee (BARC), a probity auditor was engaged in March 2012 to report to the Committee, through Airservices' chief internal auditor. This was intended to provide an independent assessment of AFS probity matters to the Board. The engagement process envisaged the probity auditor undertaking an initial baseline audit, followed by a series of audits upon completion of key project activities and/or milestones. The probity auditor undertook two probity audits, reporting in July 2012 and June 2013, prior to the finalisation and release of the RFT in June 2013. Both reports identified areas for improvement in the AFS program's probity processes and controls.

3.16 The July 2012 probity audit report also noted that the then extant version of the Joint Probity Plan was silent on probity auditing requirements. The revised Plan endorsed in April 2013 incorporated specific provision for probity audits to be conducted by either Airservices or Defence. The provision specified that the Manager Acquisition or Defence Program Director would appoint the probity auditor and define the scope of any audit. No probity audits have been commissioned by Airservices in relation to the tender receipt and evaluation and down-selection processes or the conduct of contract negotiations with the successful tenderer.³⁸

3.17 The internal audit plan 2014 to 2016 approved by the Airservices Board in June 2013 proposed a commitment of resources over the three years to reviewing risk management within the Future Service Delivery (FSD) group (incorporating the OneSKY program). The preliminary objective of the proposed work effort was to review the program's effectiveness in managing risks in order to maximise its chances of delivering its objectives. Identified risk areas could include 'Probity requirements governing the program have been adhered to such as activities relating to interaction with the market, RFT release, tender evaluation, and contract development.' Two internal audits of governance within the FSD group were subsequently undertaken, reporting in April 2014 and August 2015. Whilst the scope of the first report included some consideration of the probity records management associated with the Probity Plan for the CMATS tender³⁹, neither involved an examination of the conduct of the CMATS tender evaluation or contract negotiation processes from a probity perspective.

3.18 In that context, since June 2014, Airservices' procurement policy guidance has advised that, in practice, probity requires (inter alia) 'engaging a probity auditor(s) where the complexity of the procurement warrants independent process oversight'. The policy documentation has not provided any guidance as to the different roles played by probity advisors and probity auditors. The inclusion of such guidance would assist in avoiding mistaken reliance on a probity advisor (or internal audits) as having fulfilled the role of an independent probity auditor.

38 The Probity Advisor (Ashurst) was engaged by Airservices to undertake an assurance review during Phase 3 of the tender evaluation process. Ashurst has stated that: 'The purpose of the review was to identify areas where process improvements could be made prior to completion of Phase 3 evaluation. This included attendance at some meetings of the Tender Evaluation Working Groups.' As noted, given a probity adviser works closely with the client from the beginning of the procurement process, they cannot be regarded as an 'independent' party.

39 See further at paragraphs 4.18 to 4.26.

Recommendation No.3

3.19 The ANAO recommends that Airservices Australia improve its procurement framework by including enhanced guidance in relation to:

- (a) the different roles performed by probity advisors and probity auditors;
- (b) determining the circumstances in which the engagement of an independent probity auditor would be appropriate; and
- (c) the manner in which such decisions are to be documented.

Airservices Australia response: *Agreed.*

4. Probity management in engaging ICCPM and its subcontractors

Areas examined

The ANAO examined whether the ICCPM engagements were effectively managed so as to ensure the CMATS joint procurement tender process was free of perceived, potential or actual conflicts of interest that may impact on public confidence in the outcome or, where conflicts arose, they were appropriately managed.

Conclusion

Given the links between ICCPM subcontractors and tenderers, it was reasonably foreseeable that Airservices' contracting of ICCPM to assist with the OneSKY Australia project would give rise to perceptions of conflicts of interest and, potentially, actual conflicts of interest.

Airservices did not identify or actively manage the attendant probity risks. Airservices' approach to administering declared conflicts and monitoring ICCPM subcontractors' compliance with the Probity Plan and Protocols was inconsistent and largely passive. This was reflected in a number of missed opportunities to avoid or effectively manage conflict of interest concerns associated with engaging key subcontractors via ICCPM.

There was an inadequate appreciation within Airservices of probity principles and their effective implementation. Overall, the ICCPM engagements were not effectively managed so as to ensure the CMATS joint procurement tender process was free of any concerns over conflict of interest that could impact on public confidence in the outcome.

Areas for improvement

The ANAO made three recommendations aimed at Airservices:

- proactively managing probity in procurement activities;
- better resourcing key probity management roles through appropriate segregation of duties and applying greater attention to appointing suitable persons to such roles; and
- explicitly considering the potential for actual or perceived conflicts of interest to arise when engaging external contractors to participate in tender evaluations and contract negotiations, and how any such conflicts can be effectively managed.

Why did the engagement of contractors through ICCPM give rise to potential conflict of interest matters?

The potential for actual and/or perceived conflicts of interest arose due to the Board of ICCPM including employees from companies that were expected to participate, and did participate, in the CMATS tender process. One subcontractor was also a Director of ICCPM, and was engaged via ICCPM to undertake the Lead Negotiator role (which included being involved with tender evaluation activities). The Managing Director of the successful tenderer with whom contract negotiations were occurring was also Chair of the ICCPM Board.

Potential conflict of interest matters also arose due to the two key subcontractors engaged via ICCPM, including one ICCPM Board member, having had substantial recent employment histories with companies involved in tenders submitted to the CMATS tender process.

4.1 Conflict of interest matters arise where a member of, or adviser to, a procurement team has an affiliation, relationship or interest which prejudices, or might be seen by a reasonable bystander as potentially prejudicing, their impartiality or result in an incompatibility with the duties owed to the entity undertaking the procurement. In the case of the engagement of contractors through ICCPM to assist with the OneSKY program, there were a number of pre-existing relationships that gave rise to the potential for such actual or perceived conflicts of interest.

4.2 ICCPM's partner organisations have included many of the key participants in the defence and aerospace industries. As discussed, Defence (through DMO) has also been a key partner since the company's inception. Partners are entitled to appoint a representative as a member of ICCPM. The company members have custody of the ICCPM constitution and elect Directors to serve on the ICCPM Board.

4.3 ICCPM's Board included employees from companies that were expected to (and did) participate in the CMATS tender. In addition, key personnel subcontracted to Airservices via ICCPM had extensive employment histories with likely (and then actual) industry respondents. This included Mr Harry Bradford (engaged as a specified person under an Associate Partner Agreement between ICCPM and his company HC Bradford and Associates Pty Ltd) and Mr Andrew Pyke (engaged as a specified person under an Associate Partner Agreement between ICCPM and his company Keyholder Pty Ltd). Mr Bradford, who was also a Director of ICCPM⁴⁰, was engaged via ICCPM to undertake the Lead Negotiator role (which included being involved with tender evaluation activities) on behalf of Airservices and Defence. The Managing Director of the successful tenderer (Thales) with whom contract negotiations were occurring was also Chair of the ICCPM Board. In addition, the Vice President and Managing Director of the principal subcontracting partner to the CMATS tender submitted by Thales was a member of the ICCPM Board until his resignation from the subcontracting partner in August 2015.

4.4 Details of these industry associations are set out in Appendix 4.

40 Until March 2012, Mr Bradford was a member of the ICCPM Board in his capacity as an employee of BAE Systems Australia.

4.5 Airservices became a fee-paying partner of ICCPM in September 2010. In July 2011, ICCPM invited the then Airservices CEO to take up a member position. In light of the ICCPM Board and membership consisting of a number of the major organisations that may play a future role in the AFS program, Airservices sought advice from the Probity Advisor. The Probity Advisor based its August 2011 advice on its understanding of ICCPM's functions, as set out on its website, as a not-for-profit company with the objective of undertaking or promoting innovation to advance the knowledge and practice of complex project management. Ashurst advised that it did not, in principal, have any probity concerns with the then CEO accepting the position on the basis that it was not, in its view, distinguishable from participation by him or other Airservices personnel in any other forum in which industry representatives are also represented. However, the Probity Advisor stated that it would important that the AFS Program's probity controls be maintained. In the event, the then CEO did not take up the invitation. The reasons for that were not documented by Airservices.

Was the potential for perceived or actual conflicts of interest considered in the ICCPM procurement processes?

Neither the decision to enter into a strategic relationship with ICCPM for the duration of the OneSKY program, nor any of the 18 sole-sourced procurements that occurred both prior, and subsequent, to that relationship being established, addressed probity matters. In particular, before procuring resources through ICCPM on no occasion was there documented consideration as to whether the engagement would give rise to potential actual or perceived conflicts of interest that should either be avoided (by not proceeding with the procurement) or for which a specific management strategy should be established.

Consideration of potential conflicts of interest in entering into a strategic relationship with ICCPM

4.6 The discussions leading to the May 2013 exchange of correspondence agreeing to a strategic relationship with ICCPM for the duration of the AFS (OneSKY) program commenced with a meeting between Mr Bradford (who had been providing strategic advisory services periodically since June 2012) and the then Airservices CEO in October 2012. That meeting resulted in ICCPM submitting an 'intervention' proposal in November 2012 to support a transformational change program incorporating the CMATS joint procurement.

4.7 Following further discussions, a revised proposal submitted on 10 May 2013 formed the basis for the agreed strategic relationship. In that proposal, ICCPM advised that it would '... commit to supporting Airservices for the duration of the AFS Program across all stages/phases of planning and delivery at the discretion of Airservices.' The proposal included services related to ongoing strategic advice and planning; tender evaluation planning, processes and management; tactical project management and integrated project team support; and FSD organisational design, change and transformation.

4.8 The then Airservices CEO's 16 May 2013 response advised that: 'I agree that the nature of the relationship between ICCPM and Airservices will be that of a strategic partner and will be required for the duration of the AFS program.' There is no evidence of any consideration having

been given to the potential for conflict of interest matters to arise. Nor is there any evidence of internal or external probity advice having been sought either prior, or subsequent, to the then CEO agreeing to the strategic relationship.

Consideration of potential conflicts of interest in procuring services via ICCPM

4.9 The strategic relationship agreed by the then Airservices CEO in May 2013 did not represent a procurement in itself. Each subsequent decision to engage specified personnel, or to acquire other services, via ICCPM represented discrete procurement decisions. Similarly, the prior engagement of two subcontractors (Mr Bradford and Mr Pyke) via ICCPM in 2012 and 2013 had represented procurements that were required to be undertaken in accordance with Airservices' procurement framework.

4.10 Airservices' procurement instructions include a requirement to identify and manage conflicts of interest. For the procurement process to be effective, such consideration must necessarily be applied at the point of determining:

- whether identified potential, actual or perceived conflicts of interest are of a nature that the proposed procurement should not proceed; and
- if it is determined that the procurement can proceed, the approach that is to be applied in order to manage those conflict of interest matters.

4.11 The importance of applying appropriate consideration to potential conflicts of interest in contracting services was highlighted in July 2012 advice set out by Airservices' OLC in relation to one of the early ICCPM engagements, which advised that:

Agencies are expected, in the first instance, to seek to eliminate actual, potential and perceived conflicts of interest. When this is not possible (such as where it would exclude needed expertise or the conflict is so widespread as to be impossible to avoid completely), effective management strategies should be implemented.

4.12 However, none of the approval memos prepared over the period July 2012 to August 2015 in respect to engaging subcontractors via ICCPM made any reference to whether there was any potential for conflicts of interest to arise (either in respect to ICCPM or the individual subcontractors' employment and business connections).⁴¹ Nor is there documented consideration of such matters occurring in any other form prior to each procurement being approved. This was the case notwithstanding Airservices' earlier recognition (in a different context) of potential conflict of interest matters arising from the construct of the ICCPM Board and partners (as discussed at paragraph 4.5).

4.13 Relevant Airservices officials testified to the ANAO that the approach taken in the initial procurement of services reflected an expectation that the engagements would be of short duration and related to strategic and organisational planning advisory services only. As a consequence, a conflict of interest in relation to those services being procured via ICCPM was not

41 In the case of one subcontractor, Mr Pyke, specific consideration was applied by Airservices to the management of conflicts of interest arising from Mr Pyke's former employment with Raytheon. However, that consideration occurred subsequent to the approval memo for the procurement being signed, and as a result of OLC raising the risks associated with the conflicts declared in Mr Pyke's conflict of interest declaration.

considered to be in prospect. The officer responsible for preparing the July 2012 memo recommending approval of the procurement of additional strategic advisory services from Mr Bradford (10 days over six months) and the initial engagement of Mr Pyke to provide complex project management support (26 days over three months) testified that:

There was no possibility of them being involved in, as I said, the development of the RFT or the release of RFT or there was no intention for them to be involved in the evaluation or contract negotiation or any of that at the time they were engaged.

4.14 Subsequent to those initial advisory engagements, key ICCPM subcontractors became increasingly involved in those processes, including:

- chairing a review of the RFT prior its release in June 2013;
- conducting a review just prior to the RFT closing in October 2013 of the program’s readiness to conduct tender evaluations;
- being appointed in March 2014 as part of the tender evaluation organisation and participating in tender evaluation discussions as advisors to the Tender Evaluation Committee (TEC), and then being formally appointed as full members of the TEC in June 2014;
- from September 2014, performing the roles of Lead and Deputy Lead Negotiator on behalf of Airservices and Defence in contract negotiations with the successful tenderer; and
- making recommendations for the exclusion of the second placed tenderer from further consideration following the initial stage of the contract negotiation phase in January 2015.⁴²

4.15 However, despite the extent and nature of the services procured via ICCPM changing significantly over time, the approach adopted in relation to addressing potential conflict of interest matters did not alter in any subsequent procurement process. That approach contributed to a failure by Airservices to adequately appreciate, and therefore manage:

- the elevated risk of perceived or actual conflicts of interest to arise as the contracted services became more integral to the CMATS tender selection process; or
- any broader conflict of interest perception issue associated with the ICCPM arrangements, including a potential perception in relation to the extent of ICCPM-provided contracted involvement in the conduct of the OneSKY program.

4.16 In that respect, the then Executive General Manager Future Service Delivery (now Airservices CEO⁴³) was responsible for overseeing the ICCPM relationship and associated procurement of services from shortly after the then CEO had agreed to the establishment of the strategic relationship in May 2013. This included signing nine memos over the period July 2013 to May 2015 recommending approval of the procurement of a range of services via the contractual

⁴² See further at paragraph 4.136.

⁴³ Mr Jason Harfield was EGM FSD from establishment of the FSD group on 1 July 2013. On 10 August 2015, Mr Harfield took on the role of acting Airservices CEO following the departure of the previous CEO. In March 2016, it was announced the Mr Harfield had been appointed as Airservices CEO.

arrangements with ICCPM, including those of the Lead Negotiator. As noted, none of those memos addressed potential conflict of interest matters.⁴⁴ In interview, the ANAO advised the then acting CEO that the ANAO had not seen any evidence of a probity or risk management plan having been prepared specifically in regard to contracting through ICCPM (noting that the services procured via the sole-sourcing arrangement encompassed broader organisational services not directly related to the CMATS tender process). In relation to whether he was aware of any such plan, the then acting CEO testified to the ANAO in February 2016 that:

I've been working on the assumption that the probity side was all addressed, because I wouldn't have thought we would have been able to execute the actual agreement in the first place. However I haven't sighted or seen them, so it would have been a working assumption that there had been.

... In other words, I had a reliance on the fact that because these things were in place at the time of assuming, inheriting, etcetera, that the organisation's protocols and our focus around probity and the mere level of—that was put around probity, that those things were already assessed and taken into account.

4.17 In the absence of a discrete strategy for managing conflict of interest risks associated with the procurement of services via ICCPM, reliance was placed on the individual application of the Probity Plan and Protocols established for the CMATS tender process to each ICCPM subcontractor after they had been engaged. In that respect, the Probity Plan stipulates that the plan and associated protocols do not replace, but are in addition to, any other obligations applying to Program Participants including Airservices' procurement policy and management instructions.

Internal audit of Future Service Delivery Group governance highlighted ICCPM conflict issue

4.18 The April 2014 report of an internal audit of governance within the FSD group concluded that a key area for improvement was the adoption of a process for documenting conflicts of interest and mitigation strategies for organisations and suppliers FSD has significant engagement with. The internal audit drew particular attention to the ICCPM arrangement, reporting:

Conflicts of Interest—The International Centre for Complex Project Management (ICCPM) is engaged by FSD to assist with strategic direction and probity activities. ICCPM is a not for profit organisation supported by government and global corporate partners who are also respondents to the OneSKY tender. This conflict of interest has not been documented. The Probity Advisor (Ashurst) will be consulted by 30 April 2014 to determine the correct process.⁴⁵

4.19 A draft of the internal audit report provided to FSD on 10 February 2014 had included the same finding. Probity Advisor records indicate that the matter was discussed with the then Manager Acquisition during a scheduled telephone conversation on 25 February 2014. On 4 March 2014, the Probity Advisor emailed the Manager Acquisition advising:

44 The consideration of potential conflict of interest matters in the decision to involve ICCPM subcontractors in the tender evaluation and contract negotiation processes is discussed further at paragraphs 4.101 to 4.153.

45 The audit also found inadequacies in the recording in Airservices' OneSKY probity register of declared conflicts of interest and associated mitigation measures, and identified a number of remedial actions to be taken.

A recent governance audit has queried whether ICCPM should sign probity undertakings at an organisational level given the links between ICCPM and RFT respondents. As the existing probity undertakings are signed by individuals, this would require some modifications to the template.

4.20 Ashurst further advised that it had reviewed its previous correspondence with Airservices in relation to ICCPM⁴⁶, and confirmed that it had not been asked to provide any advice on probity issues arising from the engagement of ICCPM personnel in the AFS program. Under the heading 'organisational declaration', Ashurst asked the Manager Acquisition to let it know if Airservices wished it to provide advice in relation to ICCPM. No request for further advice was made and no response was provided to Ashurst.

4.21 In his testimony, the then Manager Acquisition advised the ANAO that he recalled having a conversation in which the Probity Advisor had given more direct advice to the effect that, as the Probity Plan and Protocols applied to individuals, Airservices would not require ICCPM as an organisation to sign a probity undertaking. No file note was made of the conversation the Manager Acquisition recalled having occurred.

4.22 The specific action item included in the internal audit report, as agreed between FSD and internal audit, was that 'The Probity Advisor, Ashurst will be consulted to determine if the potential conflict of interest with ICCPM needs to be documented.' The due date for the action to be completed was 30 April 2014. On 7 May 2014, the then EGM FSD was advised of outstanding action items within Airservices' risk management program (CIRRIS), including the item relating to ICCPM, which he forwarded to relevant personnel instructing they be actioned immediately. The same day, the Manager Acquisition advised the EGM FSD that all actions assigned to him had been updated within CIRRIS and were from his perspective closed. The comments entered by the Manager Acquisition requesting that internal audit close the action item were as follows:

Discussions have been held with Ashurst and determination reached that no further action needs to be taken. All members of ICCPM engaged by Airservices have been probity briefed and are aware of their obligations in respect of the program and any potential conflicts of interest.

The Manager Acquisition is comfortable that actions taken to date and notice provided by ICCPM in relation to individual COI are appropriate and does not require any additional controls.

4.23 In response to a request from internal audit for the completion action to be reflected in the probity register, the same comments were included against the personal conflict declaration entry for each ICCPM contractor.

4.24 The potential for the completion comment entry to be read as representing that the Probity Advisor had provided positive advice that no further action needed to be taken (which is not supported by the documentary evidence) is reflected in the action verification comments entered in CIRRIS by internal audit in agreeing to close the action item:

Agree with action taken. Confirmed that determination from Ashurst (refer Action Completion) has been added to the Probity Register, specifically, to Personal Conflict Declarations.

46 The then Manager Acquisition stated in testimony to the ANAO that he had requested that Ashurst review its records in order 'to ensure I had a full picture of what advice had been sought prior to me arriving on the program, to see if obviously something previously had been provided that I should close off the audit action as drafted.'

4.25 As a consequence of the approach adopted, in which the Manager Acquisition confirmed to the ANAO that the primary consideration was the applicability of the Probity Plan and Protocols to individuals rather than organisations, Airservices did not establish any mitigation strategy specifically associated with its procurement arrangements with ICCPM. This was an illogical consideration given the Probity Plan and Protocols for the joint procurement were established in December 2011, some 17 months prior to Airservices entering into the strategic relationship with ICCPM.

4.26 The Manager Acquisition testified to the ANAO that his comfort that 'actions taken to date by Airservices and notice provided by ICCPM in relation to individual conflicts of interest were appropriate and did not require any further controls' had been based on a review of entries in the probity register spreadsheet. No consideration was given to otherwise reviewing the existing arrangements as they applied to individual subcontractors to ensure potential actual or perceived conflicts of interest relating to ICCPM had been consistently identified, declared and managed (including by way of examining the signed declarations and other contact reports provided).

ICCPM offers to provide corporate probity undertakings to Airservices

4.27 Airservices' decision that it was not appropriate to seek any form of corporate probity undertaking from ICCPM was formed despite ICCPM having repeatedly indicated a willingness to provide such undertakings if it would assist Airservices in demonstrating that potential conflict of interest matters had been appropriately managed. Specifically:

- in June 2013, Ms Hein as the then Deputy CEO of ICCPM⁴⁷ (who was also a subcontractor to Airservices) provided the then incumbent Manager Acquisition with copies of the corporate conflict of interest and corporate compliance declarations that ICCPM had signed in relation to a Defence program on which ICCPM had been engaged. Airservices was advised that ICCPM would be happy to sign similar undertakings in respect to the CMATS procurement 'should it be deemed necessary to support transparency and probity considerations for our involvement in the program'. There is no record of any written response having been provided by Airservices. In her testimony, Ms Hein advised the ANAO that she had been verbally advised by the then Manager Acquisition that Airservices did not do corporate undertakings; and
- in January 2014, ICCPM reiterated its offer to sign corporate probity undertakings after becoming aware of the issue having been raised in the context of the internal audit of FSD governance. The renewed offer was provided to the Manager Acquisition and available to him during the period in which the determination was reached that no further action was required in relation to the internal audit report action item. There is no record of any response being provided to ICCPM and Ms Hein testified to the ANAO that no verbal response was provided.

47 Ms Hein became acting ICCPM CEO in June 2014 and then permanently from August 2014.

Corporate undertaking obtained in December 2015

4.28 Regardless of whether a corporate probity undertaking was obtained from ICCPM in the context of the 'program participant' concept on which the Probity Protocols were based, it was always open to Airservices to seek any additional information or take any steps it considered necessary in order appropriately manage any potential conflict of interest concerns.

4.29 The capacity to obtain undertakings from, or on behalf of, ICCPM was illustrated by the fact that an undertaking was obtained in December 2015. The Allens review recommended that Airservices seek assurances as to certain matters from ICCPM and its Board. No amendment to the Probity Plan was required in order to obtain that undertaking. Rather, it was a straightforward matter for Airservices to obtain a suitable undertaking template from Ashurst and provide it to ICCPM for signature.

4.30 In that respect, in completing the undertaking, the ICCPM CEO made certain amendments to remove proposed wording that she had 'made reasonable enquiries' in order to declare certain matters in relation to the conduct of ICCPM Directors. The signed declaration stated that the CEO 'asserted' that the conduct had not occurred to her knowledge. The CEO advised Airservices that the amendment had been made because, otherwise, the declaration would not be able to be completed until the next full sitting of the ICCPM Board, due in February 2016. The Probity Advisor was not advised of the amendments made by ICCPM to the undertaking template Ashurst had proposed and was also not asked to provide any advice regarding the changes. In May 2016, Airservices advised the ANAO that 'the proposed change by ICCPM was reviewed by Airservices' General Counsel, who considered them acceptable and did not consider it necessary to seek further advice from the probity advisor'.

4.31 To strengthen the probity oversight arrangements in future Airservices procurements of a similar size and complexity, the Allens review also recommended that:

- provision be made for corporate entities to sign probity undertakings; and
- that this should be a mandatory requirement where the involvement of a corporate entity is of particular relevance to managing probity risk.

4.32 Airservices has accepted the recommendation.

Direct contracting as a means of avoiding conflict of interest perceptions

4.33 The conflict of interest declaration provided by Mr Pyke in July 2012 in association with his first engagement with Airservices had identified that his involvement would be as a subcontractor of ICCPM through his company Keyholder Pty Ltd and that:

... Because of the composition of its Board and organisational membership, ICCPM may have some potential organisational conflicts of interest to be managed.

I submit that these organisational conflicts of interest do not directly involve me and that they be addressed between ICCPM and Airservices Australia. In the event that they are unable to be resolved, subject to agreement with ICCPM, Airservices Australia and my employer, Keyholder Pty Ltd, would have an option to eliminate the conflict of interest, by contracting directly.

4.34 Under the Probity Plan, the responsible officer within Airservices was obliged to consider the conflict management proposals put forward by Program Participants. However, there is no

evidence of Mr Pyke’s proposal having received any consideration, in terms of either seeking to resolve potential conflicts of interest with ICCPM at a corporate level or whether Airservices should consider the option of seeking to contract directly with specified personnel as a means of avoiding conflict of interest perceptions.

4.35 In that latter respect, in initiating its procurement of services via ICCPM in early 2012, Airservices accepted from ICCPM its standard Corporate Services Agreement rather than requiring that the services be contracted via the standard Airservices terms and conditions. That continued to be the case, with minor amendments only, for the two contracts executed in July 2012 and April 2013 that applied to all subsequent engagements via ICCPM until August 2015. Included within the standard ICCPM terms and conditions was a clause stipulating that where ICCPM has provided services utilising a nominated subcontractor, the client (Airservices) agreed that it shall not engage that subcontractor independently of ICCPM to provide the services or like services at some other time in a manner inconsistent with the ICCPM's rights.⁴⁸

4.36 There is no evidence of Airservices having given explicit consideration to the acceptability or otherwise of that clause in agreeing to the terms and conditions of the engagement, by way of executing the relevant agreements.

4.37 As discussed at paragraph 2.49, the direct contracting of the Lead and Deputy Lead Negotiators through their respective companies, rather than via ICCPM, was recommended by the October 2015 report of the Allens review.⁴⁹ By the time Airservices was seeking to implement that recommendation, Mr Bradford had advised he would not be continuing in the Lead Negotiator role, and Airservices had decided to contract Mr Pyke to deliver those services. In order to implement the Allens review recommendation, it was necessary for Airservices to terminate the existing contract with ICCPM and for Mr Pyke to seek, and obtain, ICCPM’s agreement to his company, Keyholder Pty Ltd, contracting directly with Airservices.

Did the Probity Advisor consider and sign-off on the ICCPM arrangements?

Airservices did not seek advice from the Probity Advisor in relation to whether any potential conflict of interest matters arose in relation to engaging contractors via ICCPM to assist with the OneSKY Australia program, or how any such conflicts should be managed.

4.38 The role of the Probity Advisor is described in broad terms within the Probity Plan. The July 2012 probity audit report proposed that a review of the Probity Plan take into account whether a refined scope of work was required. But that recommendation did not result in any scope of work being developed. Rather, the Probity Advisor’s role continued to be described through the broad terms of the Probity Plan.

4.39 The original December 2011 version of the Probity Plan for the joint procurement stipulated that where a Program Participant declared a conflict of interest, consideration of the

48 The Associate Partner Agreements signed between ICCPM and its subcontractors included a similar restriction on the ability of Associate Partners to contract directly with an ICCPM client without ICCPM’s agreement.

49 See paragraph 1.9 in respect to Airservices’ acceptance of the Allens review recommendations.

declaration and decisions regarding its appropriate management would be done in consultation with the Probity Advisor. The Probity Advisor was also jointly responsible for ensuring that a record was kept of all declared conflicts, including any mitigation actions taken.

4.40 The July 2012 probity audit report further noted that the procedure for obtaining probity advice had changed in the first half of 2012 whereby issues were now being assessed in house and progressed internally with the Airservices Office of Legal Counsel, and then assessed as to whether the issue needed to be referred to the external Probity Advisor. Under those revised procedures, the management of conflict of interest declarations provided by Program Participants and associated probity register became the responsibility of Airservices. The probity audit noted that the internal probity advisor function had not been formally documented in the Probity Plan and Protocols and recommended that a review of the Probity Plan also consider that matter. The Probity Plan has not been amended to reflect any internal probity advisory role.

4.41 The Probity Plan and Protocols were not amended to reflect the practices adopted from mid-2012 until the version endorsed in April 2013. At that time, the Probity Plan was amended to remove the requirement for the Manager Acquisition to obtain Probity Advisor advice in determining how conflict of interest matters were to be managed. Rather, the Plan provides that the Manager Acquisition may, at his or her discretion, seek such advice.

4.42 Accordingly, individual conflict of interest declarations or other probity management matters relating to ICCPM subcontractors have been referred to the Probity Advisor for advice on an 'as required' basis, based on initial Airservices consideration.

4.43 On one occasion, Airservices sought advice from the Probity Advisor in relation to a declaration from the then ICCPM Deputy CEO (who was also sub-contracted to Airservices) regarding attendance at an upcoming ICCPM Board meeting and at ICCPM-related meetings at which she would have contact with industry representatives. In order to advise, Ashurst sought a copy of that individual's existing conflict of interest declaration. In the course of advising on the probity arrangements that should apply to the individual's attendance at those meetings, Ashurst also recommended that an updated conflict of interest declaration be obtained (which it was).

4.44 But at no stage did Airservices seek advice from the Probity Advisor as to whether:

- any probity concerns arose in relation to the arrangements for engaging subcontractors via ICCPM; or
- if so, how that might best be managed in order to mitigate against any potential conflicts of interest that could damage the perceived integrity of the program.

4.45 This was despite the Probity Advisor having drawn to Airservices' attention on multiple occasions that no such advice had been given and, in some cases, asking Airservices to advise if it would like Ashurst to provide such advice. As discussed at paragraph 4.20, the most recent of those instances occurred in March 2014 in the context of the Manager Acquisition's consideration of the ICCPM finding and action item set out in the internal audit of FSD governance. At that time, in asking whether Airservices wished it to provide advice on the ICCPM arrangements Ashurst had advised that, in order to provide such advice, Ashurst would need:

- confirmation from Airservices that other ICCPM personnel engaged by Airservices had signed the relevant probity deeds; and

- a copy of the relevant provisions of Airservices' contract with ICCPM.

4.46 In not responding to that email, the Manager Acquisition also did not provide the Probity Advisor with any contractual documentation or copies of the conflict of interest declarations provided by other ICCPM subcontractors.

4.47 The Allens review commissioned by the Airservices Board highlighted that advice had not been sought from the Probity Advisor in relation to the ICCPM arrangements, with the October 2015 report stating that:

The Probity Advisor has said that, despite flagging the issue to the Agency, its advice on the issue of retaining ICCPM was not sought or given.

4.48 The then acting Airservices CEO testified to the ANAO that it had been his assumption that, as the Probity Advisor had provided sign-offs in respect to various stages of the procurement, the ICCPM aspect had also been covered off through those sign-offs. That understanding was also reflected in evidence initially provided to the Senate Committee's August 2015 hearing.⁵⁰

4.49 In that respect, the Probity Plan does not specify deliverables or sign-offs that are to be provided by the Probity Advisor, or the purpose of such sign-offs. The sign-offs provided by the Probity Advisor have set out the involvement Ashurst had with the relevant phase of the tender, and any limitations or exclusions that applied. The sign-off for phases 1 and 2 of the tender evaluation process noted that certain matters were the responsibility of the Procurement Governance Advisor or Manager Acquisition within Airservices, including the management of conflicts of interest. The Ashurst letters did not identify the purpose of each sign-off provided.

4.50 That situation highlights the need for clarity in respect to the role of the Probity Advisor and the particular nature of the assurance that is intended to be provided through the provision of 'sign-offs' in relation to stages of the tender process. It is apparent that there was not a mutual understanding in that respect between Airservices and the Probity Advisor.

Allens review recommendation for an enhanced probity advisor role

4.51 The October 2015 report of the Allens review observed that:

the probity framework may have operated more effectively if the Probity Advisor's engagement allowed it to undertake a more proactive role in assisting the Agency to manage its probity risk, including for example by allowing it to inquire and make recommendations in relation to the involvement of ICCPM (rather than simply being reactive and awaiting requests for advice in circumstances where the Agency may not always be alive to the need to seek such advice).

4.52 Airservices has accepted the review's recommendations that, for future procurements of a similar size and complexity:

- the probity advisor have an inquisitorial function and be empowered to determine its terms of reference (rather than simply being reactive and awaiting requests for advice); and
- the probity advisor report to the Airservices Board Chairman and, if Defence is involved in the procurement, to a nominated senior representative of Defence.

50 Committee Hansard, Senate Rural and Regional Affairs and Transport Legislation Committee, *Performance of Airservices Australia*, 18 August 2015, pp. 4 and 6.

Did Airservices actively manage conflicts of interest associated with ICCPM subcontractors as OneSKY program participants?

Airservices adopted an inconsistent and largely passive approach to administering declared conflicts and monitoring compliance with the Probity Plan and Protocols. Of note was that Airservices was oblivious to evidence that a key ICCPM sub-contractor had adopted a very different perspective to that exhibited generally by program participants (including a number of other ICCPM contractors) as to:

- what constituted a potential actual or perceived conflict of interest that warranted disclosure and appropriate management; and
- the need to adhere to the contact reporting obligations set out in the Probity Protocols.

4.53 Program Participants and Airservices each have explicit conflict of interest management obligations under the Probity Plan and Protocols. Those obligations apply to: actual or perceived conflicts; and existing or potential conflicts.⁵¹

4.54 Program Participants within Airservices are required to:

- complete a conflict of interest declaration prior to undertaking duties, and at other times as requested by the Manager Acquisition;
- set out a proposal for managing each declared actual or potential conflict;
- inform the Manager Acquisition in writing of any actual or perceived conflict he or she may become aware of after signing a declaration; and
- provide written reports to the Manager Acquisition in respect to each occasion in which he or she comes into contact with an Industry Respondent⁵² in a range of specified scenarios including contact initiated by an industry respondent; employment offers or business relationships; conferences, seminars and training sessions; social functions; and offers of gifts, hospitality or other benefits.

4.55 The Manager Acquisition is responsible for:

- taking reasonable steps to ensure that the program is at all times conducted in a manner that is consistent with the Probity Plan and Protocols and other approved program plans;
- managing any conflicts of interest, including perceived conflicts, as soon as possible after becoming aware of them;
- considering each conflict declared by a Program Participant and making a decision regarding the Participant's on-going involvement in the program, including by restricting

51 The Probity Plan defines a Conflict of Interest as an incompatibility, or the possibility that there might be a reasonable perception of an incompatibility, between a Program Participant's public, professional or contractual duty in respect to the program, and a current or prospective material personal or financial interest that the program participant, his or her immediate family or any close associate has.

52 'Industry Respondents' are defined as a respondent (or a potential respondent) to an approach to the market conducted as part of the OneSKY Australia program. A list of potential industry respondents was developed in conjunction with the promulgation of the Joint Probity Plan in December 2011.

his or her involvement, imposing conditions or taking any other action as appropriate to manage the conflict. In addition, changes may be required to any of the proposals set out in a Participant's declaration to ensure that an actual or perceived conflict of interest does not arise. As noted, since April 2013, the Protocols have provided that consideration of a declared conflict may be done in consultation with the Probity Advisor 'if required';

- receiving and considering records of contact with industry respondents reported by Program Participants; and
- ensuring a record is kept of all declared conflicts and any mitigation actions taken. In that respect, a probity register is maintained to record all Program Participants; any declared conflicts and the mitigation measures proposed; the officer responsible for considering those mitigation measures; all contact and other disclosures reported by each Program Participant; and any other probity matters raised.

4.56 The Probity Plan stipulates that Participants are required to act strictly in accordance with the Protocols. To that end, they are required to sign a probity undertaking confirming they have read and understood their obligations and undertaking to act in accordance with the Probity Plan and Protocols.

4.57 The Protocols further advise Program Participants that:

In addition to acting in accordance with these Probity Protocols, you must also ensure your conduct does not give rise to a perception that would allow for the erosion of industry and community confidence in the way in which the program and its associated activities are implemented.

You must avoid any conduct which has a tendency to increase the risk of issues of integrity being raised as matter of public concern.

4.58 Collectively, the provisions of the Probity Plan and Protocols require Program Participants to fully disclose all potential, actual or perceived conflicts of interest on an ongoing basis and to avoid conduct which may increase the risk of issues of integrity being raised as matter of public concern; and that the Manager Acquisition actively manage all known existing or potential conflicts (whether actual or perceived).

Passive approach taken to managing conflicts of interest

4.59 Each of the ICCPM personnel involved in the Airservices engagements received a probity briefing and completed a probity undertaking, conflict of interest declaration and deed of

confidentiality.⁵³ However, Airservices adopted a ‘silo’ approach to managing conflict declarations and contact disclosures by individual ICCPM personnel. As a result, matters declared by each individual were considered individually. There was no attempt by Airservices to consider the ICCPM-related declarations collectively to assess consistency and more fully inform its consideration of the appropriate management approach. In addition, rather than taking a proactive approach, Airservices was also passive and reactive in its oversight of probity matters relating to ICCPM personnel.

4.60 Where an individual was active in providing ongoing conflict and contact declarations, Airservices was generally responsive in dealing with the matters raised on an individual basis. That was the case, for example, in respect to one of the key subcontractors, Mr Pyke. He was demonstrably diligent in providing Airservices with on-going and updated declarations of potential conflicts and contact with industry respondents including employees of his former employer, Raytheon. Mr Pyke’s approach provided Airservices with the capacity to consider the conflicts and contacts being disclosed and the acceptability or otherwise of the proposed management approaches.

4.61 In contrast, where an individual did not provide any such disclosures, there was no management response by Airservices. In particular, Airservices did not have processes in place for monitoring the reasonableness of the disclosures being received having regard to an individual’s role in the program, known associations and previously declared conflicts. This was most clearly illustrated by the approach taken to managing probity matters as they related to Mr Bradford.

4.62 Specifically, as a member of the ICCPM Board alongside persons employed by likely (and then actual) participants in the CMATS tender, it is arguable that Mr Bradford’s involvement in the OneSKY program represented the most notable risk in terms of the potential for perceived conflicts of interest to arise as a result of the ICCPM arrangements. This was particularly the case in relation to Mr Bradford’s engagement as Lead Negotiator. However, it was in respect to Mr Bradford that Airservices adopted the most passive approach to managing compliance with the probity management procedures.

4.63 Mr Bradford provided Airservices with a conflict of interest declaration on 29 May 2012, in association with his initial engagement to conduct a five day review of the AFS program. The declaration identified conflicts in relation to Mr Bradford’s prior employment with BAE Systems

53 In July 2012, the then CEO of ICCPM returned a draft, unsigned conflict of interest declaration to Airservices setting out proposals for avoiding any potential conflict of interest associated with the ICCPM engagement, particularly as it related to perceived conflicts arising from his contact with industry representatives as part of undertaking ICCPM business and with ICCPM Board members. The then CEO asked that Airservices discuss the proposals set out in the draft declaration for managing potential conflicts. The draft declaration was forwarded to the Airservices’ General Counsel with a request for advice (the General Counsel was, at that time, undertaking an informal internal probity advisor role under which conflict of interest declarations were reviewed internally and only referred to the external Probity Advisor for advice if it was considered to be warranted by the nature of the conflicts disclosed). No response was provided. The draft declaration was not signed by the then ICCPM CEO or registered by Airservices. In May 2013, following a probity audit that had identified discrepancies in probity management records, Airservices sought completed probity documents from the then CEO. The signed conflict of interest declaration returned by the then CEO simply recorded ‘No change to that previously advised’. Airservices recorded the declaration in its probity register as having declared no conflicts of interest. There is no evidence of Airservices having reconciled the May 2013 declaration to the draft setting out declared conflicts that had been provided for comment in July 2012.

(an identified industry respondent for the purposes of the CMATS tender) and other professional relationships.⁵⁴ In relation to ICCPM, the declaration stated:

I am a non-executive director of ICCPM and an Associate of the organisation. This is the organisation through which I am contracting to Air Services. I do not believe this creates any conflict of interests.

4.64 In effect, Mr Bradford declared that, in his view, no potential, actual or perceived conflict arose as a result of his ICCPM associations, including as a Board member. Accordingly, Mr Bradford did not set out any proposal for managing or mitigating any such conflicts. The declaration did not provide any advice in relation to the makeup of ICCPM Board. There is no record of Airservices making a determination at that time that it agreed with Mr Bradford's statement that no potential for an actual or perceived conflict existed, or seeking any further information to inform such a conclusion.

4.65 As discussed, Mr Bradford's involvement in the OneSKY program was extended and expanded considerably over the period subsequent to May 2012. This culminated in him accepting the Lead Negotiator role for the tender process in March 2014 (at which time tenders from three companies who had employees on the ICCPM Board were still under consideration). In September 2014, contract negotiations commenced with Thales, whose Managing Director was Chair of the ICCPM Board.

4.66 However, the May 2012 declaration stating that his ICCPM connections did not give rise to any existing or potential conflict of interest (actual or perceived⁵⁵) remains the only declaration provided to Airservices by Mr Bradford. At no stage did Airservices seek, or Mr Bradford offer, an amended or updated declaration. This was despite:

- conflict of interest declarations subsequently received from other ICCPM personnel specifically identifying the potential for conflict of interest issues to arise as a consequence of the inclusion of industry respondents in the ICCPM Board and fee-paying partners; and
- the significant change in the nature of Mr Bradford's role in relation to the OneSKY program, particularly when he was included in the tender evaluation and contract negotiation processes.

4.67 In addition, at no time did Airservices seek to establish any mitigation or management procedure in respect to Mr Bradford's attendance at ICCPM Board meetings or other ICCPM events whilst he was playing important roles in the tender evaluation and contract negotiation processes.

54 The declaration also stated: 'I am currently engaged by the Defence Materiel Organisation as a Gate Review Board Member. The relationship is a consultancy with clear obligations as to the Department of Defence to protect classified and sensitive data. I do not believe these obligations create any conflict of interests in relation to this program.' Airservices did not record any deliberations as to whether it agreed with Mr Bradford's view that there was no potential for actual or perceived conflicts to arise in association with his participation in Defence project Gate Reviews and, therefore, no management proposal was required.

55 Mr Bradford testified to the ANAO that he did understand the disclosure obligation within the conflict of interest declaration form to include both actual and perceived conflicts of interest.

4.68 Testimony to the ANAO from various Airservices employees agreed that revised declarations should have been sought from Mr Bradford as his involvement in OneSKY expanded. However, Mr Bradford testified to the ANAO that at no stage had he changed his view that there was no potential conflict relating to his ICCPM Board position that required disclosure to Airservices.

4.69 In contrast, ICCPM Board minutes record that at the 17 September 2014 Board meeting, Mr Bradford declared 'an ongoing conflict of interest with respect to the CMATS OneSKY contract'. In that respect, Thales had been formally invited to participate in the contract negotiation phase of the CMATS tender process on 4 September 2014. Noting that the Probity Protocols require Program Participants to immediately report any conflict or potential conflict that arises during the program, the ANAO sought Mr Bradford's advice as to whether the making of that declaration to the ICCPM Board had given him any reason to consider whether he should change his declaration to Airservices in respect to ICCPM. Mr Bradford testified that:

No. I considered that was a matter of interest for ICCPM but it didn't occur to me to make that declaration to Airservices.

4.70 In addition, on no occasion over the period May 2012 to November 2015 did Mr Bradford provide any written disclosure to the Manager Acquisition in relation to contact with industry respondents when attending ICCPM Board meetings (as required under the Probity Protocols). In his testimony, Mr Bradford advised the ANAO that:

... as a matter of course I didn't see the need to tell Airservices that I was having a Board meeting with ICCPM. I didn't think it was really any of their business. So, no, not as a matter of course.⁵⁶

4.71 Mr Bradford's approach in that regard was in contrast to the approach adopted by the two other ICCPM subcontractors that also attended ICCPM Board meetings. Written advice of attendance at those meetings was provided to the Manager Acquisition by both individuals. In one case, the then Deputy CEO of ICCPM provided advance notice of the meetings and, where requested, a post attendance follow-up email. In the other case, Mr Pyke advised Airservices of having been invited to attend an ICCPM Board meeting while attending the ICCPM annual conference overseas. Both individuals had also provided details of the relevant industry respondent attendees and assurances in relation to the matters discussed.

56 Mr Bradford testified that he believed he may have casually advised the then EGM FSD on occasion, including his recollection of mentioning his attendance at a February 2015 ICCPM Board strategy meeting and subsequent discussion with the Thales Managing Director regarding the CMATS contract negotiations (see paragraphs 4.150 to 4.152).

4.72 Coinciding with the June 2013 original offer to provide corporate probity undertakings, Ms Hein had also provided an updated individual conflict of interest declaration.⁵⁷ The updated declaration identified three employees of industry respondents as members of the ICCPM Board and set out advice on the Board's non-disclosure and conflict management processes. The declaration also offered to provide Airservices with a blank copy of the non-disclosure agreement signed by ICCPM Board members. In relation to whether Airservices responded to that offer, Ms Hein testified to the ANAO that:

No, nor did they take me up on copies of agendas or minutes or discussions of board meetings, which was also offered. Their view was that it wasn't necessary ... And I made it as an open offer, to say "If you ever feel uncomfortable and you want us to provide anything, we're happy to do so".

4.73 Had Airservices taken up the offer to receive copies of ICCPM Board minutes relevant to the ICCPM engagement with the OneSKY program, it would have been in a position to identify that:

- Mr Bradford had attended multiple ICCPM Board meetings that were also attended by industry representatives, while not having provided Airservices with any report of such contact having occurred;
- conflict of interest declarations relating to the OneSKY program had been provided to the ICCPM Board by Mr Bradford, while the only conflict declaration provided to Airservices continued to state that his position as an ICCPM Director while subcontracted to Airservices via ICCPM did not give rise to any actual or perceived conflict of interest; and
- there was a need to establish a specific conflict of interest mitigation strategy in respect to Mr Bradford's involvement in the OneSKY program.

Monitoring of compliance with obligation to disclose contact with industry representatives

4.74 Mr Bradford exhibited a similarly different interpretation to that of other key ICCPM subcontractors of the requirement under the Probity Protocols to provide records of contact with industry respondents that may arise in a variety of scenarios, including at conferences or seminars or at social functions. Specifically, there was no occasion over the period of his involvement with the OneSKY program (May 2012 to November 2015) that Mr Bradford reported any contact with

57 That declaration had been provided as a consequence of advice to Airservices from the Probity Advisor after Airservices had sought advice in relation to a particular contact report Ms Hein had provided. The original conflict of interest declaration provided by Ms Hein in April 2013 had identified three industry respondent companies as ICCPM Partners, with the management proposal being 'No disclosure or business as usual contact.' The contact report provided in June 2013 had advised that she would be attending an ICCPM Board meeting at which two persons employed by industry respondents would be present (Ms Hein had been company Secretary since 2012), and would also be representing the then CEO in other meetings with industry respondents on ICCPM business. Ms Hein provided assurances that the ICCPM engagement in Airservices or information regarding the RFT would not be discussed. The Probity Advisor advised Airservices that, in addition to abiding by the requirements of the Probity Protocols, Ms Hein be required to send a follow up email after the meeting confirming that no discussion of the AFS program took place; and that Ms Hein should provide an updated conflict declaration to reflect that she was now required to have business as usual contact with industry respondents and setting out the proposed management process for the conflicts declared.

industry representatives to Airservices. In contrast, the Airservices probity register records Mr Pyke as having provided 25 such declarations over a similar period of time.

4.75 The May 2012 declaration identified two conflicts relating to Mr Bradford's previous employment with BAE Systems until his retirement in March 2012. These included a number of ongoing social connections with BAE Systems employees and professional relationships with a number of other firms that were also included on the industry respondent list. In testimony to the ANAO, Mr Bradford stated that, subsequent to providing the May 2012 declaration, he had met with BAE Systems employees on 'plenty' of occasions in a social capacity. He further stated that he had also had professional or social contact with representatives of other industry respondents. Mr Bradford testified that he had not considered it necessary to report any of those contacts to Airservices on the basis that he did not consider anything improper to have been discussed as it related to the OneSKY program; and that if the program had been discussed, he would have declared that. Mr Bradford further testified that he had not been approached on any occasion by anyone within Airservices in relation to the absence of any reported contacts.

4.76 As discussed at paragraph 4.22, in determining that no further action was required in relation to the finding of the 2014 internal audit report regarding the ICCPM arrangements, the Manager Acquisition recorded that he was 'comfortable that actions taken to date and notice provided in relation to individual conflicts of interest were appropriate and did not require any further controls.' In his testimony to the ANAO, the individual who held the Manager Acquisition position during the period June 2013 to November 2015 stated that at the time of making that determination he had been aware that Mr Bradford had made no further declaration subsequent to the original May 2012 declaration, and agreed that:

Upon reflection maybe it would have been useful when his role changed within the program. We should have requested an updated declaration, but I didn't.

4.77 As to whether the absence of any reports from Mr Bradford of contact with industry representatives was of any concern to him, the Manager Acquisition testified that he 'won't disagree that it's unusual.' The Manager Acquisition also testified that he had only become aware of that situation as a result of the processes set in train following the Senate Committee's August 2015 hearing.

4.78 That situation had arisen as a consequence of the 'silo' approach taken to probity management. As a result, instances that presented opportunities to apply critical analysis to the reasonableness of individuals' patterns of behaviour in terms of observance of the probity protocols were overlooked. This was illustrated, for example, by the approach adopted in respect to a particular event on 14 May 2014 attended by a number of Airservices, ICCPM and industry representatives. The event was a networking evening co-sponsored by ICCPM at which three individuals spoke on their experiences with complex project management. The speakers included Mr Bradford and the then EGM FSD, Mr Jason Harfield. Among the approximately 50 attendees were the Thales Managing Director (and ICCPM Chair), Mr Jenkins; employed by Boeing Defence Australia as well as being a member of the ICCPM Board, Mr Gillis; the ICCPM Deputy CEO (and ICCPM subcontractor to Airservices), Ms Hein; Mr Andrew Pyke (ICCPM subcontractor to Airservices); and Mr Stephen Hein, an Airservices employee (and former ICCPM subcontractor to Airservices).

4.79 On 15 May 2014, Mr Harfield chaired a CMATS Tender Evaluation Committee (TEC) meeting. The minutes of the meeting record that the TEC Chair disclosed to the meeting that he had had contact with Mr Jenkins at a function the previous day at which Mr Jenkins had raised two items in relation to the CMATS tender—one advising that there was talk that a particular tender had been excluded from the evaluation process; and the other seeking advice as to when there would be an announcement on the outcome of the then current phases of the evaluation. The TEC Chair advised the TEC that he had not provided any information to Mr Jenkins. The TEC Chair further advised that Mr Bradford had been a witness to the conversation. In his capacity as Procurement Governance Advisor, the then Manager Acquisition also attended the TEC meeting. The TEC Chair’s declaration was recorded in the probity register.

4.80 On 4 June 2014, Ms Hein provided an email to Airservices reporting the contact with Mr Jenkins and Mr Gillis at the event, and confirming that at no time was OneSKY Australia discussed by her with either individual. Ms Hein forwarded the email to Mr Bradford, Mr Pyke and Mr Hein. On 5 June 2014, Mr Pyke provided Airservices with a contact disclosure in relation to the same event, confirming that at no time was OneSKY Australia discussed by him with either Mr Jenkins or Mr Gillis. Both of those declarations were also recorded in the probity register.

4.81 Neither Mr Bradford nor Mr Hein provided Airservices with any contact report in relation to the event. Despite the nature of the TEC Chair’s declaration, and the direct reference to Mr Bradford having been a witness to the relevant conversation with Mr Jenkins, the Manager Acquisition took no action to reconcile the absence of a contact report from Mr Bradford. In their testimony, both Mr Bradford and Mr Jenkins stated that they did not recall the conversation reported by the TEC Chair or that there had been any discussion of the CMATS tender with any attendee at the event.

4.82 The obligations set out in the Probity Plan and Protocols are designed to guard against not only actual conflicts of interest and/or improper disclosure of information, but also the potential that a reasonable onlooker might form a perception that a Program Participant may have disclosed information or not acted impartially. Those obligations accrue to individuals, and there will always be an element of personal judgement involved as to whether a matter warrants reporting as either a potential conflict, or as a contact with an industry respondent.

4.83 However, the Probity Plan also requires the Manager Acquisition to take reasonable steps to manage compliance with those obligations in the conduct of the program. In that context, the application of appropriate review processes to identify potential anomalies in the interpretation or application of the Probity Protocol obligations by Program Participants is necessary for effective management.

4.84 In that respect, the Probity Plan requires that the status of all Program Participants listed in the probity register be reviewed at least once every three months. However, that review only relates to confirming whether the individual’s status as a core or non-core participant remained valid.⁵⁸ Neither the Probity Plan nor any other procedural documentation requires any regular review of the probity register in order to:

58 The April 2014 report of the internal audit of FSD Governance found that that review had not been undertaken as required, including through inadequate implementation of the recommendations of the June 2013 probity audit report in relation to inadequacies in the maintenance of the probity register.

- confirm the currency of conflict of interest declarations, including in respect to the capacity in which the existing declaration had been provided; or
- examine participants' reporting of contact with industry respondents in order to monitor compliance with reporting obligations, including assessing whether the contact reporting provided (or not) aligned with reasonable expectations in light of declared conflicts.

Conflict of interest awareness in Airservices internal arrangements

4.85 One of the probity matters raised by the Senate Committee at its August 2015 hearing related to the role of an Airservices employee (and former ICCPM employee and subcontractor to Airservices) in signing a memo recommending approval of a substantial extension to a contracting arrangement with ICCPM, given his spouse's position as ICCPM CEO.

4.86 The employee involved was Mr Stephen Hein. Mr Hein commenced with Airservices as an ICCPM employee subcontracted to provide strategic planning services to the EGM FSD in May 2013. The conflict of interest declaration provided by Mr Hein at that time stated that he had nil conflicts. By January 2014, Mr Hein was no longer an ICCPM employee, but continued to be subcontracted to Airservices as an ICCPM Associate Partner. His role had changed to Acting Manager, Business Readiness and Transformation Branch within FSD. In January 2014, Mr Hein provided an amended declaration declaring a conflict in relation to the ICCPM Board including industry representatives closely related with the OneSKY program and proposing measures for managing that conflict.⁵⁹

4.87 The Manager position was advertised in March 2014, with Mr Hein being announced as the successful candidate in May 2014. In September and October 2014, the EGM FSD travelled overseas, including to attend the ICCPM Annual Research and Innovation Conference in Paris. Mr Hein was appointed Acting EGM FSD for the period 17 September to 10 October 2014. In that capacity, on 22 September 2014, Mr Hein signed a memo recommending that the then CEO approve the contracting via ICCPM of Mr Bradford and Mr Pyke as Lead and Deputy Lead Negotiator respectively for a further eight months at a total expected cost of \$1.247 million. The then CEO approved the memo on 6 October 2014.

4.88 Mr Hein's spouse had also been subcontracted to Airservices between April 2013 and August 2014, while also serving as ICCPM Deputy CEO. Ms Hein became acting CEO from June 2014 and subsequently was appointed to the position in August 2014 (at which time she ceased as an ICCPM subcontractor to Airservices).⁶⁰ Ms Hein was the ICCPM manager of the contractual relationship with Airservices throughout the period of Mr Hein's involvement with

59 The February 2014 draft report of the internal audit of FSD governance reported that 'an ICCPM staff member engaged by Airservices did not declare a conflict of interest when undertaking his probity briefings. An updated conflict of interest declaration was completed by this individual during the audit.' The updated declaration provided by Mr Hein did not identify the industry respondents involved. The EGM FSD's Chief of Staff subsequently handwrote the names of four companies and DMO onto Mr Hein's declaration. In testimony, the Chief of Staff advised the ANAO that the addition had arisen out of a discussion with Mr Hein regarding the declaration and that, while she could not recall specifically, she believed that the addition would have been made prior to Mr Hein signing the declaration.

60 Mr Hein did not submit a further amended conflict of interest declaration reflecting his spouse's appointment as acting and then permanent ICCPM CEO until February 2015.

Airservices. Ms Hein provided the quote for the extension to the Lead and Deputy Lead Negotiator engagements attached to the approval memo signed by Mr Hein.

4.89 Despite the management of ICCPM-related contracting being within the responsibilities and delegations of the EGM FSD, there is no evidence of the ICCPM-related conflict declared by Mr Hein or his known ICCPM associations having been considered in determining whether it was appropriate for Mr Hein to act in the position.

4.90 The memo considered by the Senate Committee had been copied to the FSD Chief of Staff/Group Coordinator. On 30 October 2014, the Airservices Office of Legal Counsel contacted the Chief of Staff to ask whether the apparent conflict of interest involved had been discussed in preparing and signing the memo. At the request of legal counsel, the Chief of Staff prepared a file note the same day regarding the preparation of the memo which stated that:

- she had developed the memo and undertaken all related processes involving contact with ICCPM;
- Mr Hein had not been involved in any liaison with ICCPM in relation to the matter; and
- Mr Hein 'was required to approve the memo prior to submission to the CEO as he held the necessary financial delegations' as acting EGM FSD'.

4.91 The file note stated:

Discussions between [*Mr Hein*] and myself did occur regarding the perception of his signing the memo approving the quotation, and potential conflict of interest given he is married to [*Ms Hein*] and used to work for ICCPM as a Consultant. We felt that there was no Conflict of Interest as I had undertaken all liaison with ICCPM and he was only signing in the capacity of A/g EGM Future Service Delivery holding the necessary financial delegations.

4.92 The Allens review concluded that

Mr Hein and [*the FSD Chief of Staff*] were aware of the perceived conflict. Notwithstanding that, Mr Hein proceeded to give the approvals.⁶¹

We do not think it was appropriate for Mr Hein to have done so. We think an appropriate course would have been to find another person who held the relevant delegated authority (if available) or to escalate the approvals directly to the CEO.

That being said, this issue does not appear to have any bearing on the procurement aspects of the Program or any decisions concerning the Tenderers. There is no suggestion that a different decision may have been reached had Mr Hein not been involved in the process.

4.93 The imprudence of Mr Hein's involvement is amplified by the fact that it is clearly evident the whole matter would have been avoided had Airservices applied any reasonable level of planning to the approaching conclusion of existing procurement arrangements for the key role of Lead Negotiator.

61 On 22 September 2014, Mr Hein also approved an invoice relating to the Lead Negotiator's expenses for July 2014. That invoice had been issued on 10 September 2014. In that respect, prior to departing overseas, on 16 September 2014 the EGM FSD had approved five invoices relating to the Lead Negotiator, each of which had been issued on 8 or 10 September 2014. On 17 September 2014 (his first day as acting EGM FSD), Mr Hein also approved an ICCPM invoice relating to the delivery of a training course. The due date for payment of that invoice was 16 October 2014, six days after Mr Hein's acting period was to conclude on 10 October 2014.

4.94 Specifically, the need to consider an extension to the existing contractual arrangements for Mr Bradford was readily foreseeable given the engagement had been originally agreed for a six month period of 1 April to 30 September 2014. In that circumstance, it is reasonable to expect that, if it was considered necessary for Mr Hein to act in the EGM FSD position, the approval process in relation to the continued procurement of Mr Bradford’s services as Lead Negotiator would have been completed prior to the EGM FSD’s departure on 17 September 2014. In that respect, the long-term forecasting of future effort requirements was not needed at that time given the Statement of Work for the Lead Negotiator position agreed between Mr Bradford and EGM FSD had provided that the initial six month engagement would be followed by rolling one-month extensions. In the event, that provision was ignored. Instead, the memo prepared by the Chief of Staff (in consultation with the OneSKY Joint Program Director) and signed by Mr Hein sought approval for an eight month extension.

4.95 Alternatively, arrangements could have been made for the matter to be attended to shortly after EGM FSD’s return.⁶² That particular circumstance is a further example of inadequate attention being paid to the transparent management of declared conflicts of interest.

Recommendation No.4

4.96 The ANAO recommends that Airservices Australia proactively manage probity in procurement activities by:

- (a) ensuring conflict of interest declarations are updated regularly or their ongoing currency confirmed;
- (b) reviewing existing declarations when the role being performed by an individual changes; and
- (c) regularly reviewing program participants’ reporting of contact with industry respondents in order to monitor compliance with reporting obligations.

Airservices Australia response: *Agreed.*

Separation of probity oversight duties

4.97 As noted, two internal audits of governance within Airservices’ Future Service Delivery (FSD) group (which incorporates the OneSKY program) have been undertaken, but neither involved an examination of the conduct of the tender evaluation or contract negotiation processes from a probity perspective. In addition, Airservices did not commission any independent probity audits of any phase of the tender process subsequent to the release of the RFT.

62 It was not unusual for Airservices to finalise procurement approvals and contractual arrangements after the relevant ICCPM individual had already commenced delivery of the services. For example, the initial term for which Airservices made payments in respect to Mr Bradford undertaking the Lead Negotiator position commenced on 1 April 2014. However, the memo seeking the then CEO’s approval of the procurement of his services for the position was not signed by EGM FSD until 15 April 2014 and not approved by the CEO until 23 May 2014.

4.98 From the time of the release of the RFT, the same individual was responsible for:

- as Manager Acquisition appointed under the Probity Plan, taking reasonable steps to ensure that the program was at all times conducted in a manner consistent with the Probity Plan and Protocols, and managing any conflicts of interest or perceived conflicts of interest as soon as possible after becoming aware of them;
- as Procurement Governance Advisor appointed under the TEP, monitoring procedural aspects of the evaluation process to ensure compliance with the published documentation, including the Probity Plan and Protocols and TEP and advising relevant TEO members in relation to such matters; and
- as Manager Acquisition, (from April 2013) appointing a probity auditor for Airservices and defining the scope of the probity auditor's audit. As noted at paragraphs 3.16 to 3.17, no independent probity audits have been commissioned by Airservices subsequent to the release of the RFT, with no rationale for that approach being documented.

4.99 There was no documented consideration by Airservices as to whether there would have been any benefit in those roles being separated. In particular, it would be beneficial for consideration to have been given to whether the position responsible for determining whether a probity audit should be commissioned (particularly in relation to the processes leading to the selection of the successful tender) should be separated from the position(s) responsible for overseeing and advising on probity compliance in the course of the selection process.

Recommendation No.5

4.100 The ANAO recommends that Airservices Australia’s governance arrangements address:

- (a) whether individuals proposed to be employed in key probity management roles possess the understanding and capabilities required to undertake the role effectively; and
- (b) the appropriate separation of duties between key probity management roles associated with a procurement activity.

Airservices Australia response: *Agreed.*

Were probity matters considered in the decision to involve ICCPM contractors in the tender evaluation and contract negotiation processes?

Airservices did not apply any consideration to potential actual or perceived conflict of interest matters in deciding to engage the Lead and Deputy Lead Negotiator via ICCPM. Actual or perceived conflicts of interest could have been effectively contemplated and managed had Airservices combined competitively tendering these two long-term, high cost roles with active consideration of any conflicts as part of the procurement process. Airservices also did not consider conflict of interest matters before the Lead and Deputy Lead Negotiator became involved in the evaluation of tenders ahead of the contract negotiation phase of the tender process. These were significant failings by Airservices.

4.101 The Tender Evaluation Plan (TEP) sets out the process of managing and evaluating the tenders received in response to the RFT in order to provide procurement recommendations to the respective decision-making authorities within Airservices and Defence. The TEP also set out the structure of the Tender Evaluation Organisation (TEO) formed in November 2013, comprising the:

- Tender Evaluation Board (TEB), chaired by the Airservices CEO;
- the TEC, chaired by EGM FSD within Airservices; and
- four Tender Evaluation Working Groups (TEWG).

4.102 The membership of each of those entities included representatives from both Airservices and Defence. The TEO also included: a number of teams involved in the initial receipt, screening and evaluation of tender responses; Specialist Advisors; the Legal Advisor; the Procurement Governance Advisor; and the Probity Advisor.

4.103 The TEP stipulated the individuals who were members of each board, committee or working group and the individuals that would perform the nominated advisor roles. Under the TEP, the TEB Chair had ‘absolute discretion’ in the appointment of further Airservices resources to the TEO.

4.104 The TEP set out a number of protocols directed at preserving the integrity of the evaluation process. This included requirements for regulating how information would be shared within the TEO, and prohibiting the unauthorised sharing of such information with individuals who

were not part of the TEO. The TEP also set out a number of obligations in relation to the management of conflicts of interest, including that:

Any member of the TEO must immediately notify the TEC Chair in the event that any conflict of interest arises before or during the evaluation process, including past or potential associations with the tenderers, which could be construed as having the potential to influence the independence of the evaluation deliberations. The TEC Chair shall deliberate on the circumstances of the potential conflict of interest, and seek advice as necessary (including from the Legal and/or Probity Advisor) and take the appropriate action to correct or mitigate the circumstances.

4.105 Similar to the Probity Plan and Protocols, the TEP required TEO members to report any contact with tenderers, as follows:

For the protection of the TEO and to facilitate audit or investigation, should it be required, the following records must be maintained under the control of the Procurement Governance Advisor:

a) Record of Contact. Any professional or casual contact with any person they know to be associated with a submitted tender in accordance with the process outlined in the Probity Plan and Protocols.

4.106 The protocols and expectations set out in the TEP were reflected in evidence provided to the Senate Committee's public hearing on 18 August 2015 by the acting Airservices CEO, as follows:

An individual with a potential for conflict of interest would not be allowed to be part of the tenderer-evaluation organisation, as a result the fact of whatever role they were carrying out. It all depends on what activities they are taking, what they are doing, depending on the conflict of interest, as to what mitigating factors we would need.⁶³

4.107 However, the documented process undertaken in respect the inclusion of two key ICCPM subcontractors within the Tender Negotiation Organisation (TNO) formulated for the contract negotiations with the successful tenderer did not reflect any explicit consideration of such matters by Airservices.

Initial addition of ICCPM subcontractor to the tender evaluation organisation

4.108 One ICCPM subcontractor was included in the TEO as it was initially established. That individual was an employee of a company with whom ICCPM formed a partnership in relation to the Airservices engagement. The individual, who had first been engaged via ICCPM in May 2013 to provide tender evaluation planning and implementation support, was appointed to the TEO in the capacity of providing secretariat support to the TEC.

4.109 Neither Mr Bradford nor Mr Pyke were included in the TEO as it was originally formulated.

4.110 During the latter part of 2013, Mr Pyke (as an ICCPM subcontractor) undertook the role of Integrated Project Team (IPT) Leader within the OneSKY program, pending the recruitment of an Airservices employee to fill that position. The role involved development of the On-Supply

63 Committee Hansard, Senate Rural and Regional Affairs and Transport Legislation Committee, *Performance of Airservices Australia*, 18 August 2015, p. 12.

Agreement between Airservices and Defence which provides for the joint management framework and how supplies and services are transferred to Defence from Airservices (the latter being the party that has entered into contracts for the advanced work orders and is also to enter into the acquisition and support contracts with the supplier). Agreement had been reached between ICCPM and the then Airservices CEO that, from the beginning of January 2014, Mr Pyke would move from the IPT Lead role into a more strategic advisory position involving a reduced level of involvement. A quote approved by the then Airservices CEO in December 2013 reflected that position.

4.111 A letter from the EGM FSD to ICCPM on 20 January 2014 advised that the allocation for Mr Pyke’s services in the strategic advisory role would be 90 days over the course of the 2014 calendar year. The letter stated that the services to be provided would include facilitating longer term business and contracting arrangements between Defence, Airservices and the ultimately successful CMATS supplier. Notwithstanding that advice, Mr Pyke was instead continued by Airservices in the IPT Lead role on a full-time basis.

4.112 Mr Bradford and Mr Pyke provided a briefing to the inaugural November 2013 meeting of the TEB with respect to the role, responsibilities and accountabilities of the Board and its members. The meeting minutes identified both individuals as attending in the role of ‘advisors’, with Mr Bradford’s position being identified as ICCPM consultant⁶⁴ and Mr Pyke as IPT Lead. The minutes don’t reflect any discussion of the tenders received in response to the RFT that had closed on 30 October 2013.

4.113 On 31 January 2014, the EGM FSD requested that the Procurement Governance Advisor (and Manager Acquisition) prepare a memo for his signature, in the capacity of TEC Chair, requesting approval from the TEB Chair to add specified individuals to the TEO. This included Mr Pyke and one other ICCPM subcontractor. In the case of Mr Pyke, the memo prepared by the Procurement Governance Advisor stated that :

[Mr Pyke] is the IPT lead for the Airservices and Defence agreements which has responsibility for the development and execution of the On Supply Agreement (OSA) between Airservices and Defence. To enable the OSA to accurately reflect the requirements and positions between Airservices and Defence it is required that [Mr Pyke] be aware of the current findings and outputs of the evaluation activities in respect of the joint acquisition for the CMATS.⁶⁵

4.114 Under that arrangement, it was not intended that Mr Pyke would participate in or attend the deliberations of the TEB, TEC or TEWGs. Nevertheless, the purpose of including him within the TEO was to authorise him to be privy to evaluation-sensitive information. However, there is no

64 During October 2013, Mr Bradford was engaged via ICCPM to review tender evaluation readiness.

65 The second ICCPM subcontractor had been engaged in the latter part of 2013 to provide contract negotiation support to the EGM FSD and had been working on the development of deliverables for the Phase 5 Parallel Negotiations and Scope Refinement process of the RFT. The memo advised that, to enable the delivery of the required outputs, including the Contract Negotiation Directive, it was required that he be aware of the current findings and outputs of the evaluation activities in respect of the joint acquisition for the CMATS. The conflict of interest declaration provided by that individual in November 2013 had identified that, up to June 2013, he had provided consulting services to an industry respondent (but not with respect to OneSKY). The proposal for managing the conflict was that he would not be engaged on any consulting tasks with that company during and immediately after providing advice to the OneSKY tender team.

evidence of the TEC Chair seeking any advice from the Procurement Governance Advisor in relation to Mr Pyke's previously declared conflicts in order to ascertain whether it was prudent for Mr Pyke to be included in the TEO.⁶⁶ There was no documented consideration as to whether the existing approach to managing any conflict perceptions that might arise would continue to be adequate in the event Mr Pyke became more closely connected with the evaluation process. The inclusion of Mr Pyke within the TEO on the basis of his role as IPT Lead was also inconsistent with the EGM FSD's 20 January 2014 letter to ICCPM regarding the nature of Mr Pyke's ongoing engagement with Airservices.

Selection of Lead and Deputy Lead Negotiator

4.115 The engagements through ICCPM for a Lead and Deputy Lead Negotiator were the longest and most costly of those entered into by Airservices with ICCPM. The maximum contracted fee cost of the Lead Negotiator engagement was \$2.41 million for up to 536 days of lead negotiation services over a 26 month term commencing on 1 April 2014. The maximum contracted fee value of the Deputy Lead Negotiator engagement was \$1.90 million for up to 692 days of deputy lead negotiator and IPT lead services over a 24 month term commencing on 28 May 2014.

4.116 Mr Bradford was being considered by Airservices for the position of Lead Negotiator from at least November 2013. There is no evidence of Airservices having actively considered any alternative candidate for the position. Airservices also did not record the basis on which Mr Bradford had been first identified as a candidate, or any inquiries that may have been subsequently undertaken to assess his suitability.

4.117 In testimony to the ANAO, Mr Bradford stated that 'Airservices at one point made an assumption that I would be the Lead Negotiator.' Mr Bradford further stated that he had initially advised Airservices that it should not make that assumption, and that his subsequent agreement to take on the role 'largely ... was because at the time they didn't have any other alternative. There was nobody else.'

4.118 In his testimony to the ANAO, the then acting Airservices CEO stated that Mr Bradford was suggested by a senior Defence representative involved in the CMATS joint procurement and that he was identified as a suitable candidate on the basis:

- he had recent experience undertaking the Lead Negotiator role in relation to a Defence procurement;
- there would be acceptance of his engagement within both Defence and Airservices, particularly by the then Airservices CEO; and
- Airservices had an existing contractual mechanism with ICCPM through which it was believed Mr Bradford could be easily engaged for that purpose.

66 Mr Pyke's conflict of interest declaration identified that his previous employment with one of the tenderers, Raytheon, had included various leadership roles between 2000 and 2005 in the Raytheon's ADATS system which was being replaced by Defence through the joint procurement, and advisory contributions to Raytheon's preparations for AIR5431 (the Defence project for replacing ADATS) which Mr Pyke described as sporadic and low level. As discussed, Airservices' original consideration of whether Mr Pyke's previous employment represented a potential probity risk was based upon an expectation that Mr Pyke would not be involved in the RFT or tender evaluation processes.

4.119 Email correspondence indicates that Mr Bradford accepted an offer from Airservices, via EGM FSD, to undertake the role of Lead Negotiator on 20 March 2014. At that time, the tender evaluation process was in Phase 3 (Detailed Evaluation). Two tenders (including the one from Exelis, which included Mr Bradford’s former employer, BAE Systems) had been excluded from consideration at the end of Phase 2. The remaining four tenders still under consideration included those from Thales (including Boeing Defence Australia) and Lockheed Martin—all three companies were represented on the ICCPM Board; Raytheon (Mr Pyke’s former employer until February 2012); and Indra Australia.

4.120 Mr Bradford advised Airservices of a number of conditions under which he would accept the Lead Negotiator position. These included that Mr Pyke be appointed to the Deputy Lead Negotiator role. In advising Mr Bradford in relation to his availability for the task, Mr Pyke identified a number of preconditions that he understood would need to be satisfied including ‘that my employment history doesn’t present an unacceptable protest risk.’ There is no documented consideration by Airservices of that matter in association with agreeing with Mr Bradford’s suggestion that Mr Pyke be appointed to the Deputy Lead Negotiator role.

4.121 There is also no evidence of Airservices applying any consideration to potential conflict of interest matters in deciding to engage the Lead and Deputy Lead Negotiator via ICCPM, or in respect to Mr Bradford’s position on the ICCPM Board. This was despite the deliberations undertaken by the Manager Acquisition in relation to the internal audit report finding regarding the ICCPM conflict occurring simultaneously to those engagement decisions. The individual who occupied both the Manager Acquisition and Procurement Governance Advisor positions at the time of the procurement testified to the ANAO that:

As I say, I wasn’t party to the discussions and the decision making process to appoint [Mr Bradford] as lead negotiator, nor was my advice sought prior to him being asked to become the lead negotiator ...

... To avoid confusing terminology, the procurement governance advisor was responsible for the evaluation process, not the procurement activities related to the OneSKY program.

4.122 The then acting Airservices CEO testified to the ANAO that, as EGM FSD, he had initiated the internal audit review of FSD governance. In that light, it is even more puzzling as to why greater attention wasn’t paid to the review’s findings in relation to the potential for actual or perceived conflicts of interest to arise as a result of contracting personnel via ICCPM. This is particularly the case given the then acting CEO’s further testimony that one of the factors in deciding to engage Mr Bradford as Lead Negotiator was that the existing ICCPM contract was seen as a convenient mechanism for progressing that engagement.

Inclusion of Lead and Deputy Lead Negotiator in tender evaluation process

4.123 As noted, Mr Bradford accepted the Lead Negotiator position on 20 March 2014. The EGM FSD signed a memo seeking the then CEO’s approval of the engagement of Mr Bradford as Lead Negotiator and Mr Pyke as Deputy Lead Negotiator (as well as continuing as IPT Lead) sometime later (on 15 April 2014). There was a further delay, with the CEO signing the memo as approved on 23 May 2014.

4.124 Despite the procurement approval process not yet having been undertaken and the tender not yet being at the stage of contract negotiations, on 24 March 2014 the EGM FSD, as TEC Chair, sought the TEB Chair's approval of Mr Bradford being included in the TEO 'to enable him to effectively discharge his responsibilities as Lead Negotiator'. The TEC Chair advised that:

[Mr Bradford] has recently accepted the position of Lead Negotiator for Phase 5 activities in relation to the OneSKY RFT Evaluation process. To enable [him] to be involved in the required inputs for Phase 5, it is required that he be aware of the current findings and outputs of the evaluation activities in respect of the joint acquisition for the CMATS.

4.125 The memo referred the TEB Chair to the provision within the TEP that: 'the TEB Chair has absolute discretion in the appointment of further Airservices resources to the TEO.' The memo made no reference to the provision also included within the relevant TEP clause that: 'Where required the TEB Chair may discuss such additional appointments with the Probity Advisor prior to appointment.' Nor was any advice sought from the Probity Advisor regarding Mr Bradford's inclusion in the TEO. The TEB Chair approved the memo on 27 March 2014.

4.126 As with Mr Pyke's earlier addition to the TEO, the memo did not seek approval for Mr Bradford's inclusion in the deliberations of the TEC or TEB. Rather, it was intended that both individuals would provide advice to the TEC. The 17 April 2014 meeting of the TEC was advised that Mr Bradford had been approved as a special advisor as per the provisions in the TEP.

4.127 From that time, Mr Bradford and Mr Pyke became more actively involved in the preparation of the evaluation reports for Phase 3 of the tender. In testimony to the ANAO, Mr Pyke stated that he was very reluctant to become involved in the evaluation due to potential conflict perceptions arising from his previous employment. Mr Pyke further testified that:

[Mr Bradford] wanted me in because the negotiation team needed to have continuity of the issues that we were evaluating, the tender evaluation committee, which made sense, because those issues subsequently became the negotiation agenda. And you don't flick a switch on that stuff, it takes quite a few months to sort of absorb it all. So that was the sort of reasoning at that time.

4.128 The only documented consideration of the need to avoid potential perceptions of a conflict of interest arising from the involvement of Mr Pyke in the evaluation process, in light of his prior employment history with one of the tenderers still in consideration, was by Mr Pyke himself. Specifically, on 26 April 2014 Mr Pyke responded to an email of 17 April 2014 in which Mr Bradford had sought comments from various members of the TEO in relation to options for progressing TEC consideration of evaluation outcomes from the various evaluation working groups. In his response, which was copied to the Airservices OneSKY Program Director, Mr Pyke advised that:

Note that my authorisation into the TEO (done [*in accordance with*] the TEP) was limited to accessing the information for planning and advice, and excluded involvement in the evaluation itself. This is for an abundance of caution in respect of my former employment by one of the shortlisted tenderers, including residual obligations (now completed). If my role in the Negotiation Team requires changes to this, we may need to re-staff the authorisation ([*in accordance with*] the TEP).

4.129 No action was taken in that regard.

4.130 On 26 May 2014, the TEC Chair sought the TEB Chair’s approval of a request that Mr Bradford and Mr Pyke be added as formal members of the TEC ‘to undertake all activities and provide required sign-offs as detailed in the TEP.’ The request was approved by the TEB Chair on 1 June 2014. In seeking approval, the TEC Chair advised the TEB Chair that:

Harry Bradford and Andrew Pyke are currently members of the TEO as a result of their nomination as Lead and Deputy Lead Negotiator respectively for Phase 5 of the evaluation. To ensure continuity between Phases 3 and 4 and the subsequent negotiation phase you have previously approved the inclusion of Harry Bradford as an SME within the TEO to assist in ensuring the appropriate delivery of outputs to the decision making bodies, facilitating cross TEWG discussions and workshops. Further to discussions with the Probity Advisor (Ashurst) it was agreed that to avoid any possible perceptions of undue influence being made within the TEC decision making process by non members of the TEC that it would be more appropriate to make both Harry and Andrew full members of the TEC and to undertake all activities and provide required sign-offs as detailed in the TEP.

4.131 The discussion with the Probity Advisor referred to in the memo took place on 15 May 2014 with the Procurement Governance Advisor (also Manager Acquisition).⁶⁷ In his testimony to the ANAO, the Procurement Governance Advisor stated that he had initiated the discussion because he was:

Not uncomfortable with [*Mr Bradford’s*] involvement in it, uncomfortable with doing it in the appropriate way in accordance with the process and procedures we actually established out to actually avoid—because obviously there are other issues afoot, but in terms of this one, to actually have someone—as you brought up, the TAAATS undue influence on the evaluation process—so partly having people external to the actual evaluation process providing advice into that process is what we were trying to avoid.

4.132 Further in that regard, in confirming that Airservices did not seek advice from the Probity Advisor in relation to the original decision to add Mr Bradford as a special advisor to the TEC, the Procurement Governance Advisor testified that:

... this concept of [*Mr Bradford*] providing advice to the TEC was unacceptable, which is why we moved to the position of if he actually wanted to provide advice to the TEC he should be part of the TEC, which is the advice we did seek from [*the Probity Advisor*].

4.133 The probity matters considered by Airservices in relation to the involvement of the Lead and Deputy Lead Negotiator in the tender evaluation process related to concern that there be compliance with the procedural requirements set out in the TEP. That is appropriate. However, there is no evidence of similar consideration having been given to potential conflict of interest perceptions and how they should (or could) be managed. In particular, the memo seeking the appointment of Mr Bradford and Mr Pyke to the TEC made no reference to any potential for perceived conflicts of interest arising from either:

- Mr Bradford’s position as a member of the ICCPM Board (which included employees from tenders still under active consideration). The Probity Advisor confirmed to

67 The advice obtained was verbal, with no request for follow-up written advice being made. In his testimony to the ANAO, the Procurement Governance Advisor stated that this approach had been taken because ‘we were taking steps to address the discussion we’d had’.

Airservices in September 2015 that the 15 May 2014 discussion with Airservices about whether Mr Bradford could attend meetings of the TEC without being a member ‘was not related to ICCPM’; or

- Mr Pyke’s past association with Raytheon, a tenderer also still under active consideration. Whilst it is evident that Airservices was aware of Mr Pyke’s employment history, it would have been prudent for there to have been explicit consideration of the matter in the context of the decisions to make him party to the tender evaluation process.

4.134 In that context, as with the Probity Plan and Protocols, Airservices was similarly passive in monitoring compliance with the obligations under the TEP (discussed at paragraphs 4.104 and 4.105) for the reporting by TEO members of professional or casual contact with any person they knew to be associated with a submitted tender. Mr Bradford made no such reports whilst a member of the TEO. This was despite attending, for example, the 25 June 2014 ICCPM Board meeting along with employees from Thales, Boeing Defence Australia and Lockheed Martin. At no stage did Airservices seek any advice from Mr Bradford in that regard.

Involvement in the tender selection process

4.135 As members of the TEC, Mr Bradford and Mr Pyke were signatories to:

- the July 2014 Phase 3 TEC report recommending to the TEB that the Raytheon tender be excluded from further consideration. The TEB agreed to that recommendation; and
- the August 2014 Phase 4 TEC report recommending to the TEB that the Thales tender proceed to Phase 5 Negotiations and Scope Refinement, but that the other remaining tender (Lockheed Martin) not proceed to Phase 5 and be set aside in accordance with the TEP (but not excluded at that stage). In the capacity of Lead Negotiator, Mr Bradford attended and presented to the subsequent TEB meeting which agreed to the TEC’s recommendations.

4.136 Contract negotiations with Thales commenced in September 2014. As Lead Negotiator, Mr Bradford signed a minute to the CMATS Review Board (CRB)⁶⁸ in January 2015 recommending that, based on the outcomes of the first two stages of negotiations with Thales, the Lockheed Martin tender be formally excluded from further consideration.⁶⁹

4.137 The involvement or otherwise of the two key ICCPM subcontractors in the process leading to the selection of Thales as successful tenderer was a matter of interest to the Senate Committee

68 The CRB was established to oversight the conduct of the contract negotiations phase (Phase 5) of the CMATS tender process.

69 The Contract Negotiation Strategy approved in September 2014 identified five stages of the Phase 5 negotiations, with the purpose of Phase 5A being to clarify, improve and refine Thales’ tendered offer, including through the submission of a Phase 5A offer. The purpose of Phase 5B was to achieve mutual disclosure and constructive testing, jointly by Thales, Airservices and Defence as to constraints, opportunities, assumptions, risks and dependencies as a basis for the critical negotiation of key scope and terms to be conducted during Phase 5C. On 12 January 2015, the Lead Negotiator sought CRB agreement to the exclusion of the second tenderer from further consideration with the Phase 5A offer received. The tenderer was advised of its exclusion on 30 January 2015.

at its public hearing of 18 August 2015. In that respect, the Airservices CEO's March 2016 advice to the ANAO was as follows:

In relation to the involvement of Mr Harry Bradford and Mr Andrew Pyke in the OneSKY Program procurement process, the intention of my evidence to the Senate Rural and Regional Affairs Legislation Committee (the Committee) on 18 August 2015 was to convey to the Committee that, although Mr Bradford and Mr Pyke were involved in the tender evaluation process by virtue of their roles as subject matter experts (complex program management) and their membership of the Tender Evaluation Committee, they did not make the decision to select Thales as the successful tenderer.

In my evidence to the Committee, I attempted to draw a distinction between the participants conducting the tender evaluation and the decision makers. I also attempted to convey that the Tender Evaluation Board, comprised of Airservices and Defence senior executives, made the recommendation to admit Thales to negotiations in Phase 5 and that the decision to accept that recommendation was made by the Airservices Board.

Procedures adopted for documenting engagements between an ICCPM contractor as Lead Negotiator and Thales executives

4.138 The conduct of contract negotiations with Thales⁷⁰ is required to be undertaken in accordance with:

- a Contract Negotiation Strategy (CNS) approved by the Joint Negotiation Authority (comprising the Program Sponsors in Airservices and Defence); and
- associated Contract Negotiation Directives (CND) approved in respect of each stage of the negotiations by the CRB (comprising senior Airservices and Defence personnel and chaired by EGM FSD).

4.139 The CNS approved in September 2014 stipulated measures for maintaining the integrity of the negotiations, including that all Tender Negotiation Organisation members must comply with the Probity Plan and associated protocols.

4.140 As discussed, in the case of the engagement (via the ICCPM contract) of a Non-Executive Director of ICCPM to undertake the Lead Negotiator role, the clear risk of a perceived conflict arose from the situation that the ICCPM Chair was also Managing Director of the tenderer with whom the negotiations would be taking place. Another member of the ICCPM Board was Managing Director of the principal subcontracting partner to the tenderer with whom the negotiations were taking place.

4.141 A key mechanism for mitigating or avoiding the risk of conflict of interest perceptions arising is to regulate contact between industry and an individual who may have a perceived conflict. Such protocols typically include requirements relating to:

- contact with the relevant party being witnessed by another member of the procurement team; and/or

70 As noted at paragraph 1.12, a second performance audit will examine the conduct of the OneSKY Australia tender process, including considering any probity impacts on the tender process.

- documenting all contact that does occur, particularly where there are no other procurement team representatives present, in order to establish a clear audit trail that can be relied upon should any questions subsequently arise.

4.142 No such requirements were established in relation to the Lead Negotiator. In that respect, the Lead Negotiator advised the Allens review that:

... I had sought and received explicit agreement from Airservices and Defence that I might engage directly with the tenderer's senior executive whenever I considered this necessary.

4.143 The occurrence of unaccompanied engagements between the Lead Negotiator and the tenderer was contrary to the provisions of the Statement of Work for the Lead Negotiator role that had been agreed between Mr Bradford, on behalf of ICCPM, and the EGM FSD in March 2014. Specifically, the Statement of Work stipulated that:

The Lead Negotiator is authorised to engage with short-listed tenderers to conduct without prejudice discussions as necessary to promote the mutual interests of Airservices and Defence. A senior permanent employee of Airservices shall be present at all such meetings, which will be conducted in accordance with appropriate advice from the Probity Adviser. [*emphasis added*]

4.144 There is no evidence of the Statement of Work having been considered by Airservices in agreeing to Mr Bradford's proposal that he be authorised to engage directly (and unaccompanied) with Thales executives. The Statement of Work was not amended to reflect the terms of the CND as subsequently approved.

4.145 The Lead Negotiator initiated the first draft of the CND for the initial stage of contract negotiations on 18 August 2014. On 3 September 2014, the Probity Advisor provided the Manager Acquisition with a suggested clause for inclusion in the CND setting out the conditions under which the Lead Negotiator would be authorised to communicate directly with Thales executives where he determined that to be necessary to achieve the negotiation principles. The proposed wording was to replace a clause originally drafted by the Lead Negotiator and Manager Acquisition as a means of giving effect to the Lead Negotiator's desire to have authority to engage directly. The clause proposed by the Probity Advisor included a requirement that, as one of three caveats, the authority to undertake such unaccompanied discussions be subject to 'ensuring that appropriate records are retained of these discussions'.

4.146 The Probity Advisor's proposal was forwarded to the Lead Negotiator by the Manager Acquisition without comment eleven minutes after being received, along with the draft CND in which the version number had been updated, but no change made to incorporate the Probity Advisor's proposal. The clause proposed by the Probity Advisor was incorporated into the amended version of the CND circulated by the Lead Negotiator some 20 minutes later. However, the requirement to maintain records of unaccompanied discussions with Thales executives was omitted.

4.147 The CND incorporating the amended version of the Probity Advisor's suggested clause was approved by the CRB members between 5 and 8 September 2014. There is no evidence of any individual other than the Manager Acquisition and the Lead Negotiator being made aware of the Probity Advisor's advice, or that it had been only partially taken up. Of particular significance was that the CRB was not informed of the Probity Advisor's recommendations.

4.148 Airservices did not seek the Probity Advisor’s sign-off on the CND either before or after it was issued by the CRB. There is no evidence of Airservices advising the Probity Advisor that its proposed clause had been amended in the final version of the CND. The same (amended) provision was included in the CNDs issued in respect of all subsequent stages of the negotiations.

4.149 In the absence of a documentary audit trail, reliance must be placed on individual recollections in order to establish whether such unaccompanied communication occurred and, if so, if the matters discussed were consistent with the CRB’s directives via the CND. As demonstrated below, the difficulties that situation poses in terms of effectively managing perceptions have been realised in this case.

4.150 Specifically, Mr Bradford testified to the ANAO that, to his recollection, he met with the Thales Managing Director alone to discuss the CMATS contract negotiations ‘in the ICCPM context’⁷¹ on one occasion.⁷² Mr Bradford stated that the meeting had occurred subsequent to an ICCPM Board strategy meeting held at the Thales Sydney offices on 20 February 2015. Mr Bradford further stated that he had initiated the discussion in order to raise dissatisfaction with aspects of the negotiations as they were then being approached by Thales. Mr Bradford confirmed that he had not made any record of the meeting. Mr Bradford further testified that he had provided verbal advice to the EGM FSD:

- prior to the meeting, that he was going to be attending the ICCPM Board strategy meeting and that he would be raising the state of negotiations with the Thales Manager Director; and
- following the meeting, confirming that the conversation had occurred and the nature of the discussion.

4.151 However, in his testimony to the ANAO, the Thales Managing Director was unable to recall whether the conversation with Mr Bradford had occurred and, if so, the matters discussed, stating:

I don’t recall. I honestly don’t recall whether I had a discussion with him at all. During that timeframe, 2014 – sorry, was that ’14 or ’15?

February ’15. Yeah, my apologies. During that timeframe from end ’14 through ’15, [*Mr Bradford*], Jason Harfield—you know, there were many, many communications going on around OneSKY, and I have to say, you know, any time we would meet there would be the likelihood of a conversation. Do I recall a specific conversation? No, I don’t I’m sorry. But is it possible? Yes, it is. But I don’t recall any conversation.

4.152 Similarly, in his testimony to the ANAO, the then acting Airservices CEO could not recall whether, as EGM FSD at the time, he had been aware of the conversation, stating:

71 Mr Bradford testified to the ANAO that: ‘Now in the ICCPM context, that’s the only time there has been any communication in which the OneSKY Program was discussed. There were many other occasions that were not conducted in the context of ICCPM where I had discussions with Chris Jenkins about the negotiation and under the Contract Negotiating Directive I had every right to have those discussions and I pursued them in the proper interests of achieving an appropriate negotiating outcome with Thales.’

72 Mr Bradford had similarly advised the Allens review.

I was aware that [Mr Bradford] went to the strategic thing—because we had at that stage a weekly telephone conference with [a Thales executive and Mr Jenkins] that myself and [Mr Bradford] attended to work through the particular issues, and I knew that that was coming up. I'm just wondering whether [Mr Bradford] came back and said to me that he'd talked to [Mr Jenkins] on the side or whether that may have come up in a subsequent weekly telephone conversation or not. So I can't remember specifically him mentioning it then, or whether it was the weekly either side if you know what I'm getting at.

4.153 Mr Bradford also testified to the ANAO that it was not his practice to make notes of telephone conversations he had with Thales executives, and that any advice to the Procurement Governance Advisor of such conversations would generally have been provided verbally.

Recommendation No.6

4.154 The ANAO recommends that Airservices Australia enhance its procedures for managing probity in procurement processes to require documented consideration of the potential for actual or perceived conflicts of interest to arise when engaging external contractors to participate in tender evaluations and contract negotiations and, where relevant, the management strategies that are to be applied.

Airservices Australia response: *Agreed.*

Was there evidence that ICCPM adhered to its own protocols for managing conflicts of interest?

Documentation provided to the ANAO by ICCPM evidenced compliance with most aspects of the documented ICCPM Board protocols for managing probity and conflicts of interest. A key shortcoming related to the ICCPM Chair (and Managing Director of the successful tenderer) not signing a non-disclosure agreement until December 2015.

4.155 The ANAO requested documentation and/or advice from ICCPM providing assurance that corporate protocols had been appropriately applied in respect to all aspects of ICCPM's involvement with the provision of services to Airservices relating to the OneSKY Australia program. The documentation provided to the ANAO by ICCPM included copies of:

- the agenda and minutes of Board meetings held between October 2010 and November 2015;
- Board governance documents, including the governance charter and conflict of interest policy; and
- the non-disclosure agreements or deeds of confidentiality signed by certain ICCPM Board members, staff and Associate Partners.

4.156 In that latter respect, the updated conflict of interest declaration provided to Airservices by Ms Hein in June 2013 had identified three individuals from industry respondents who were also ICCPM Board members: Mr Chris Jenkins (Thales), Mr Kim Gillis (Boeing Defence Australia) and Mr David Gordon (BAE Systems). In each case, the proposal for managing the identified conflict stated, in part, that prior to their appointment to the ICCPM Board, each individual 'was required

to sign a non-disclosure agreement and to abide by that agreement for the duration of his appointment.’ The non-disclosure or confidentiality documentation provided to the ANAO for the ICCPM Board members identified in Ms Hein’s declaration, and Mr Bradford’s, was as follows:

- in respect to Mr Bradford, the deed of confidentiality signed in March 2012 between the company and Mr Bradford as the nominated personnel of an Associate Partner company;
- in respect to Mr Jenkins, a non-disclosure agreement executed on 9 December 2015;
- in respect to Mr Gordon, a non-disclosure agreement executed in March 2013; and
- in respect to Mr Gillis, nothing.

4.157 The signed ICCPM Board minutes evidenced:

- a standing agenda item at the commencement of Board meetings for the disclosure of conflicts of interest in relation to any agenda item;
- Board members declaring conflicts in the course of discussing agenda items unrelated to the Airservices engagement;
- Board members having declared a conflict of interest specifically in relation to Airservices and/or the CMATS tender on three occasions between June 2012 and November 2015; and
- that no listed agenda item or other discussion recorded in the minutes involved substantive discussion of any matter related to the OneSKY program.

4.158 There was nothing in the documentation provided to the ANAO by ICCPM that indicated any departure from the documented ICCPM Board protocols for managing conflicts of interest. However, the documentation provided in relation to Board member non-disclosure agreements was incomplete and, particularly in the case of Mr Jenkins, post-dated the period of the ICCPM engagement with Airservices to assist with the OneSKY Australia program.

4.159 In testimony, Mr Jenkins, Mr Bradford and Ms Hein all confirmed to the ANAO that there had been no discussion at Board meetings of the detail of the Airservices engagement or of the CMATS tender process.⁷³

No declarations made under conditions of tender conflict of interest clause

4.160 Although both Mr Jenkins and Mr Gillis provided declarations of an interest in Airservices to the ICCPM Board, and were present when Mr Bradford declared to the ICCPM Board an ongoing conflict in respect to the CMATS tender process, neither provided a formal conflict declaration to Airservices for the purposes of the conditions of tender for the CMATS RFT.

4.161 In interview, the ANAO asked Mr Jenkins as to whether he had ever had reason to turn his mind to whether he needed to make a similar disclosure or conflict declaration to Airservices (having regard for the RFT conditions of tender). Mr Jenkins testified to the ANAO that:

73 As discussed at paragraphs 4.150 to 4.151, Mr Bradford recalled having discussed the CMATS contract negotiations with Mr Jenkins on one occasion following the conclusion of an ICCPM Board strategy meeting, but Mr Jenkins did not recall the discussion.

Well yeah, I'd advised [*the then Airservices CEO*] that I was the Chairman of the Board of ICCPM. Timeframe would have been well before the tender went in. You know, when the ICCPM organisation secured some kind of contract with Airservices, and in that timeframe we were bidding for the contract, I had had a discussion with [*the then Airservices CEO*]. I think I'd also mentioned it to Jason Harfield, but I definitely recall a conversation with [*the then Airservices CEO*], making sure she was aware. By the way, it's kind of hidden in plain sight. It's sort of on my bio and every time I speak publically it's kind of declared as one of the things that I do. So it's public declaration as well as to the CEO of the organisation.



Grant Hehir
Auditor-General

Canberra ACT
31 August 2016

Appendices

Appendix 1 Entity response



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Dear Grant

Performance audit of Airservices Australia's procurement of services from the International Centre for Complex Project Management to assist with the OneSKY Australia Program

I refer to Mr Brian Boyd's email of 6 June 2016, enclosing the ANAO's proposed audit report on the performance audit of Airservices Australia's procurement of services from the International Centre for Complex Project Management (ICCPM) to assist with the OneSKY Australia Program.

Airservices acknowledges that there are improvements that can be made to our procurement framework and accepts the recommendations made by the ANAO in the proposed audit report. Airservices has initiated action to address the recommendations and further detail is attached.

However, Airservices remains extremely concerned about commentary within the report regarding the management of probity as it relates to the overall OneSKY tender process.

The report covers in some detail matters associated with perceived conflicts of interest with the ICCPM procurements and draws broad unsubstantiated conclusions¹ in relation to their impact on the overall tender process. This commentary could lead the reader to draw conclusions in relation to the integrity of the tender process that are not supported by the evidence reviewed and analysis conducted by the ANAO in this phase of the audit.

Airservices strongly refutes any suggestion that the perceived conflicts of interest associated with the contracting arrangement with ICCPM at any stage created, or had the potential to create, an actual conflict of interest that could adversely impact the integrity of the OneSKY tender process.

As advised to the ANAO during the audit, the tender evaluation arrangements implemented by Airservices were sufficiently robust to ensure that at no time could any person or persons inappropriately influence the tender outcome. A detailed description of this process, including the roles of both Airservices and Defence and articulation of the significant control environment in place to prevent potential or actual conflicts of interest, is at **Attachment A.2**

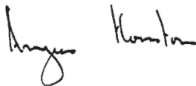
connecting australian aviation

As the ANAO is aware, OneSKY is a program of national significance which underpins the future safety and efficiency of air traffic management in Australia and represents the culmination of many years work by Airservices and Defence.

Airservices welcomes the independent oversight provided by the ANAO and is committed to addressing the areas for improvement identified by the ANAO. However, as stated above, Airservices considers that the report presents a potentially misleading perspective on the integrity of the OneSKY procurement that I considered it important to address in this response.

Thank you for the opportunity to provide this response. I would be more than willing to further discuss Airservices' concerns.

Yours sincerely



Air Chief Marshal Sir Angus Houston AK, AFC (Ret'd)
Chair
15 June 2016

Attachment A: OneSKY tender evaluation and negotiation governance

Attachment B: Airservices response to the ANAO recommendations

ANAO Comments:

1. The analysis and findings that support the audit conclusions are set out in detail in the chapters of the audit report. Based on the audit work undertaken to date, the ANAO has not made a conclusion as to whether actual conflicts of interest arose and impacted on the actual tender process (a matter that will be examined in the second performance audit – see paragraph 1.12). Rather, the ANAO concluded that:

- it was reasonably foreseeable that Airservices' contracting of ICCPM, whose Board included employees from companies that were expected to participate in the CMATS tender process, to assist with the OneSKY Australia project would give rise to perceptions of conflicts of interest and, potentially, actual conflicts of interest; but
- the ICCPM engagements were not effectively managed so as to ensure the OneSKY tender process was free of any concerns over conflict of interest that could impact on public confidence in the outcome.

2. This audit did not examine the conduct of the OneSKY Australia tender process, but was focused on Airservices' engagement of ICCPM. The consideration of any probity impacts on the OneSKY Australia tender process will be examined within the scope of the second performance audit. Chapter 3 of this audit report sets out that the documented probity framework, together

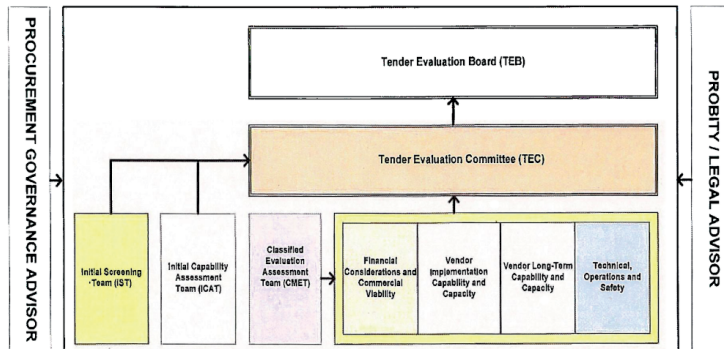
with the engagement of an external Probity Advisor as well as an external Probity Auditor, provided a reasonable basis for managing the probity aspects of the tender process. But it also outlines that Airservices did not commission independent probity audits of any phase of the tender process subsequent to the release of the Request for Tender. Chapter 4 of the audit report then outlines that Airservices' approach to administering declared conflicts and monitoring ICCPM subcontractors' compliance with the probity framework was inconsistent and largely passive. This was reflected in significant instances of non-adherence to the documented probity framework.

Attachment A

OneSKY tender evaluation and negotiation governance

1. Governance framework during tender evaluation

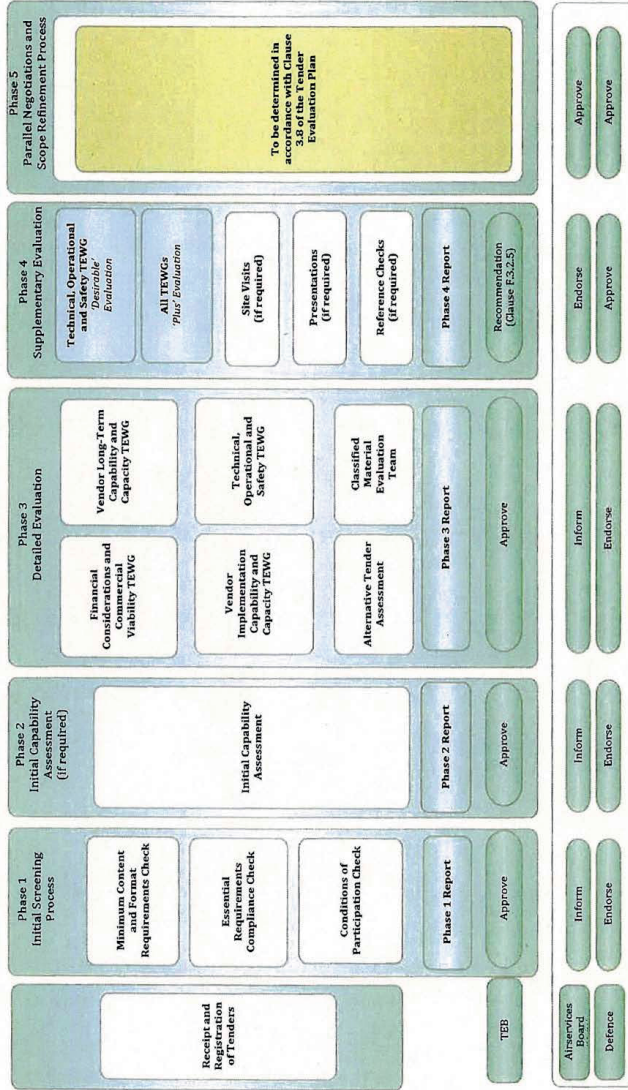
- 1.1 The OneSKY tender process was an open Request for Tender, with six tenders ultimately submitted from a range of multi-national companies.
- 1.2 The governance framework that existed within the tender evaluation and negotiation procedures was carefully constructed to ensure that it was extremely robust and neither Airservices nor Defence, nor any individual/s within the tender evaluation organisation, could drive an outcome unsupported by the evaluation findings.
- 1.3 These processes are well documented and were the result of months of discussions between Airservices and Defence, including comprehensive advice from the program's external probity advisor, Ashurst. The primary document setting out this process is the Tender Evaluation Plan.
- 1.4 The Tender Evaluation Plan, developed jointly by Airservices and Defence, established a tender evaluation organisation that is depicted below. The tender organisation included, in order of seniority:
 - i. the Tender Evaluation Board (TEB) – ultimately responsible for making a recommendation as to the preferred tenderer to Airservices and Defence delegates;
 - ii. the Tender Evaluation Committee (TEC) – responsible for making recommendations to the TEB based on the work of the Tender Evaluation Working Groups; and
 - iii. Tender Evaluation Working Groups (TEWGs) – whose role was to conduct detailed evaluation of the tenders and report to the TEC.



- 1.5 In accordance with this framework, the detailed tender evaluation was performed by four TEWGs. The TEWGs operated largely independently of each other and each TEWG focused on a different element of the tenders. The TEWGs comprised dozens of Airservices and Defence subject matter experts and each was chaired and deputy chaired by an Airservices or Defence manager. Neither Mr Bradford nor Mr Pyke (nor any other ICCPM contractor) were members of any TEWG.
- 1.6 Midway through the detailed evaluation in Phase 3 an assurance review was conducted by Ashurst to assess whether the evaluation was being conducted in accordance with the Tender Evaluation Plan and other relevant plans and processes.
- 1.7 At the conclusion of the detailed evaluation in Phase 3, each TEWG provided a report on its particular area of focus. Where appropriate, the TEWGs ranked the tenders and provided these rankings in its report.
- 1.8 The TEC then coalesced the findings of the four TEWGs into a recommendation as to which tenders to take through to Phase 4. It is important to note that the information used by the TEC in making this recommendation was directly traceable to the findings of the TEWGs.
- 1.9 There were initially nine members of the TEC, consisting primarily of the Airservices managers who were TEWG chairs and the program directors from both Airservices and Defence. Other people joined the TEC as the evaluation progressed, including Mr Bradford (Lead Negotiator) and Mr Pyke (Deputy Lead Negotiator).
- 1.10 In an independent probity review conducted in September 2015, Allens Linklater observed that the material it reviewed and the witnesses it interviewed "...have not disclosed any evidence of improper influence, favour, bias, or breach of confidence in respect of either Mr Bradford or Mr Pyke." Allens further went on to observe that all of the witnesses interviewed confirmed that there was no overt influence or partial behaviour by Mr Bradford or Mr Pyke and that "... neither Mr Bradford nor Mr Pyke had the opportunity to covertly influence the procurement process because:
 - (i) of the experience and seniority of other key decision-makers and the transparency of decision-making; and
 - (ii) key evaluation findings from the [TEWGs] supported the TEC's order of merit decision."
- 1.11 In fulfilling its role, the TEB was required, amongst other things, to:
 - ensure that the evaluation was conducted in accordance with the Tender Evaluation Plan;
 - consider recommendations made by the TEC; and
 - make a recommendation at the conclusion of Phase 4 as to which tenderer or tenderers should proceed to Phase 5 (Negotiations).
- 1.12 The TEB was the governance body with accountability for decisions at the conclusion of Phases 1 to 3 of the evaluation. The TEB comprised seven Airservices and Defence senior executives, including Airservices' Chief Executive Officer. No contractors or consultants, from ICCPM or any other organisation, were members of the TEB.
- 1.13 In Airservices' view the distinction between the roles played by the governance bodies is important. Although the TEC made recommendations at the end of Phases 3 and 4, the power to decide which tenderers would proceed to subsequent phases of the process remained at all times with Airservices and Defence executives. It is worth noting that all decisions of the TEB were made unanimously.

- 1.14 The decision made at the conclusion of Phase 4 deserves further attention still, as this was the decision that allowed Thales to proceed to negotiations under Phase 5. Given the significance of the outcome of Phase 4 the level of decision-making was elevated beyond that applied during Phases 1 to 3. At the conclusion of Phase 4 the TEB, rather than the TEC, was responsible for making a recommendation for approval by the Defence Financial Delegate and endorsement by the Airservices Board.
- 1.15 This evaluation and decision making process is outlined in the below diagram, extracted from the Tender Evaluation Plan.

OneSKY Tender Evaluation Process



Evaluation Process Phases

Output

Financial Delegates

2. Governance framework during negotiations

- 2.1 The program contract negotiations were subject to a very high level of governance and control.
- 2.2 Mr Harry Bradford was jointly appointed by Airservices and Defence as Lead Negotiator for negotiations, under Phase 5 of the tender process.
- 2.3 Mr Bradford was selected for this role due to his extensive programme leadership expertise in very large and complex projects. His unique experience, including acting as a consultant and lead negotiator on numerous previous Defence projects, ensured that he had the ability to successfully work across both Defence and Airservices with immediate effectiveness (including holding the requisite security clearance and familiarity with Defence governance processes).
- 2.4 As Lead Negotiator, Mr Bradford was required to act subject to the instruction and oversight of the CMATS Review Board. The CMATS Review Board was a governance body established under the Contract Negotiation Strategy to oversee negotiations in Phase 5. The CMATS Review Board comprises at least three Airservices senior executives and three Defence senior executives.
- 2.5 The Lead Negotiator was supported by a negotiation team, comprising dozens of subject matter experts from Airservices and Defence. Mr Bradford and the negotiating team were responsible for conducting negotiations in accordance with a written governance framework including a Contract Negotiation Strategy and Contract Negotiating Directives approved by Airservices and Defence senior executives.
- 2.6 As the negotiations with Thales progressed positively, Airservices and Defence formed the view that it would be inappropriate to continue to keep the second ranked tender in consideration, with the attendant requirement for that tenderer to keep its bid team available.
- 2.7 Accordingly, in January 2015, having obtained probity advice from Ashurst, a recommendation was made to exclude the second ranked tender from further consideration under the tender process. By this time the TEB had been disbanded as the Tender Evaluation Plan under which the TEB was established was only intended to operate until a Contract Negotiation Strategy was established for Phase 5. Accordingly this recommendation to exclude the second ranked tenderer was referred to the CMATS Review Board.
- 2.8 The decision to exclude the second ranked tenderer was subsequently made by the CMATS Review Board and approved by the Joint Negotiating Authority (Airservices CEO and General Manager, Joint System Air of the Defence Materiel Organisation).
- 2.9 The governance processes constructed under the Tender Evaluation Plan and the Contract Negotiation Strategy established a robust system of checks and balances on significant decisions relating to which tenderers would proceed or be excluded. The composition and roles of the different evaluation and decision-making bodies were specifically designed to provide a multi-layered control environment to mitigate the impact of an actual conflict of interest if one were to occur. There is no evidence, from either the ANAO's findings or the Allens Linklater review, to suggest that an actual conflict of interest occurred or that, if it did, it had any impact on the procurement process.

Attachment B

Responses to recommendations in the Proposed Audit Report

SUMMARY RESPONSE

Airservices acknowledges that improvements can be made to its procurement framework and accepts the recommendations made by the ANAO in the proposed audit report. Airservices has initiated action to address each of the recommendations.

However, Airservices holds significant concerns about commentary in the report regarding the management of probity as it relates to the overall OneSKY tender process, which could lead the reader to draw conclusions in relation to the integrity of the tender process that are not supported by evidence.

Airservices maintains that the tender evaluation arrangements in place were robust, and strongly refutes any suggestion that perceived conflicts at any stage created, or had the potential to create, an actual conflict of interest that could adversely impact the integrity of the OneSKY tender process.

RESPONSE TO RECOMMENDATIONS

Airservices agrees to the ANAO recommendations


Airservices is updating its procurement framework as part of its 'Accelerate' Program, which was initiated in late 2015 to improve the organisation's governance, efficiency and effectiveness. Airservices will ensure that the update to the procurement framework will address all of the recommendations made by the ANAO.

Over the last six months Airservices has identified and/or introduced a range of initiatives aimed at improving governance within the organisation including:

- as part of the Accelerate program, implementation of best-practice program management principles (P3M)
- improved monitoring and oversight by the Executive and Board in relation to project delivery and governance
- a range of contract management practice improvements as a result of several management requested internal audits
- a detailed procurement review, which led to identification of a small number of high value contracts for negotiation to improve value for money.

The organisation is also developing an education program aimed at improving organisational governance which will address the importance of adherence to the procurement governance framework.

Appendix 2 The International Centre for Complex Project Management's response



INTERNATIONAL
CENTRE FOR
COMPLEX PROJECT
MANAGEMENT

29 April 2016

Ms Rona Mellor
Deputy Auditor General
Australian National Audit Office

Dear Ms Mellor,

Thank you for the opportunity to review elements of your draft Audit Report on **Airservices Australia's Procurement of the International Centre for Complex Project Management to Assist on the OneSKY Australia Program**.

The Board of the International Centre for Complex Project Management (ICCPM) has considered the material you have provided and submits for consideration our view that the Audit Report:

1. makes considerable comment on the potential for perception of conflict of interests but makes no observation on any evidence of actual conflict of interests;
2. lacks context in relation to the appointment of the Lead Negotiator; and
3. contains some factual errors.

Real Conflict of Interest

We note your intent to address any actual conflict of interests in a later Audit and accept your advice that a final determination in this regard will require more work by ANAO. That said, we submit that in view of the Allen's Review, which concluded that there had been 'no actual conflict of interests', together with the fact that your investigations have revealed no evidence of actual conflict of interests, your Report could, in a constructive and balanced manner, note this fact.¹

Appointment of Lead Negotiator and Discussion about open tendering of services

The Draft Report does not accurately reflect the circumstances leading to the appointment of the Lead Negotiator. In the first instance, ICCPM recommended that ASA consider accessing the Defence Negotiation Panel. On being advised that this source would not be pursued ICCPM advised that the AGS may be able to provide a suitable person. ICCPM was approached by ASA to provide a suitable Lead Negotiator after it appeared ASA had declined to pursue other sources of supply for this service as recommended by ICCPM.

The ANAO Report compares lead negotiator engagement between two very different organisations without considering the specific engagement models, the nature and demands of disparate tasks, operating conditions, internal departmental processes and expectations used by the two Commonwealth entities and without taking these matters into account have assumed that rate comparisons can be made. ICCPM recommends that reference to specific Defence contracts for Lead Negotiator services be removed from the Report. Alternatively, some balance could be restored by noting that any financial comparison should be moderated by reference to the terms and conditions of engagement.²

Factual Errors

The report claims incorrectly that ICCPM was engaged on 42 occasions to provide services to assist with the delivery of the OneSKY program. The facts are that 15 of the 42 instances involved ICCPM engagement to provide services to Future Service Delivery not to the OneSKY program. This is a very

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important distinction to be made as on those 15 engagements ICCPM was not privy to any OneSKY information nor was any contribution made to the delivery of the program. The tasking of ICCPM to support FSD and OneSKY was not connected.³

In discharging their duties as ICCPM Directors these individuals do not, and are not permitted to act as parent company representatives as inferred on many occasions in the Report. These inferences should be removed from the Report.⁴

Paragraph 2.41 contains inconsistency between the number of reductions across the engagements in paragraph 2.41 (three) with the number indicated in Figure 2.3 graphical representation (four).⁵

Paragraph 4.134 refers to Mr Andrew Pyke's previous employment with Raytheon Australia as a potential perceived conflict of interest. The judgement made here by auditors is not consistent with public service or industry standards for post-employment restrictions imposed on employees.⁶ Industry practice in this regard is 12 months depending on the role the individual held, with some companies applying additional restrictions for specific purposes. In this instance the individual had been separated from Raytheon for around 3 years when appointed to the TEO making it unreasonable to assert that any potential conflict of interest exists. Further the individual was very clear in confirming that he had fulfilled all obligations place on him by the company as a result of his separation to ICCPM before placement in ASA.

What is ICCPM?

The Draft Report's representation of the ICCPM organisation is substantially incomplete. With ICCPM having such a substantial role in the Draft Report we believe the ANAO should describe the organisation in a balanced and accurate manner. Attachment 1 is provided as an aid to this end.

Yours sincerely



Mrs Deborah Hein
Managing Director/CEO



Mr Harry Bradford
Chairman ICCPM

Attachment 1: Description of ICCPM

ANAO comments:

1. The Allens report conclusion was not unqualified. Specifically, the Allens review stated:
 - "Our review of the material provided to us, and the information provided by the witnesses we have spoken to, indicates that there has been no actual conflict of interest which has had an adverse impact on the fairness of the Tender process". In those respects, (as noted at paragraph 1.10 of the ANAO audit report) not all relevant information relating to Airservices' relationship with ICCPM was provided to Allens. In addition, the Allens review specifically stated that it had not "undertaken a comprehensive review of all elements of the probity framework nor the implementation of that framework". Further, as set out at paragraph 3.16 of the audit report, Airservices did not commission any independent probity audits of any phase of the tender process subsequent to the release of the Request for Tender; and

- “However, in our view, different or additional steps could have been taken in order to better manage the perception of potential conflict.”

The Allens review also stated that it had not:

- reviewed all documentation created in relation to OneSKY Australia;
- interviewed all potentially relevant witnesses;
- tested the veracity of witnesses or the accuracy of documents; or
- undertaken a comprehensive review of all elements of the probity framework nor the implementation of that framework.

2. As outlined at paragraph 2.44 of the audit report, Airservices saw the Defence lead negotiator engagement as relevant in making the decision to appoint the same ICCPM sub-contractor (Mr Bradford) to the OneSKY Lead Negotiator role. In addition, the Statement of Work for the OneSKY role was based on that used for the Defence lead negotiator engagement.

3. Airservices’ governance documentation identifies the Future Service Delivery (FSD) group as responsible for planning, development and implementation of Airservices’ next generation services, including OneSKY. In addition, as outlined at paragraph 4.16 of the audit report, the then Executive General Manager of Future Service Delivery (now the Airservices CEO) was responsible for overseeing the ICCPM relationship and associated procurement of services from shortly after the strategic relationship with ICCPM was established in May 2013. Further, under the OneSKY probity arrangements, each of the ICCPM personnel involved in the Airservices engagements received a probity briefing and completed a probity undertaking, conflict of interest declaration and deed of confidentiality in relation to OneSKY. The report recognises (at paragraph 2.20) that, in addition to roles directly related to the delivery of OneSKY, ICCPM also provided more general staff support to Airservices senior managers, in the nature of chief of staff services, executive support services and assistance with strategic planning.

4. Describing ICCPM Board members as representatives of their employing organisation was addressed prior to the ANAO audit report being finalised.

5. This inconsistency was addressed prior to the ANAO audit report being finalised.

6. Post-employment restrictions are a matter concerning the individual and their prior employer. The management by a Commonwealth entity of perceived, potential and/or actual conflicts of interest relating to a sub-contractor’s former employment is a different matter. Airservices’ probity framework did not adopt a 12 month limitation on identifying perceived, potential or actual conflicts of interest.

Description of ICCPM

Establishment

The establishment of ICCPM in 2007 was led by the Australian Department of Defence (Defence Materiel Organisation) with support from the UK Ministry of Defence, US Department of Defense, Canadian National Defence and Defence industry as part of the Australian Department of Defence's Complex Project Management Initiative. The Complex Project Management Initiative was seen as an international response or reaction to the continual failure to deliver complex projects by governments. The initiative was recognised in both houses of the Australian Parliament via a Deed of Agreement between the Centre and the Defence Materiel Organisation when the then Minister Assisting the Minister for Defence and the Minister for Veterans Affairs, the Hon Bruce Billson, MP tabled the Notice Pursuant to Section 45 of the CAC Act (1997). The rationale for establishing ICCPM agreed by the Australian Government is to create an independent, international, not-for-profit organisation that would support both government and industry's ability to better deliver complex projects.

ICCPM provides this central and coordinating role, by bringing together leading thinkers and practitioners in the complex project sector from around the world. ICCPM's key objectives are to:

- Develop and sustain effective collaborations;
- Educate and develop leaders and organisations on issues of complexity and managing complex programs; and
- Develop and disseminate practical knowledge and solutions.

As a not-for-profit organisation ICCPM seeks to translate contemporary research on the effective management of complexity into practical solutions for organisations facing the responsibility of delivering complex projects internationally, and are applicable across all industry sectors, corporate, NGO and government initiatives throughout the world. In the Australian context a not-for-profit is an organisation that uses its surplus revenues to further achieve its purpose or mission, rather than distributing surpluses as profit or dividends to shareholders.

Professional Organisation and Network

As a professional organisation (network) ICCPM welcomes partners and members who have an interest in working toward better outcomes for society in the delivery of complex projects and programs. These outcomes can be linked to increased productivity, reduced failure (personally, professionally and organisationally), better budget outcomes, and most importantly increased levels of capability.

Similar to organisations such as the Australian Institute of Project Management (AIPM), the Australian Institute of Company Directors (AICD) or the Australian Strategic Policy Institute (ASPI), individuals and companies belong to ICCPM in order to access the latest education and academic advancements, to network across organisations to share lessons and knowledge, and to build a cohort that together can address some of the most complex projects in history. Currently our partner and member base is small in comparison to other professional bodies, however it is growing. Belonging to the ICCPM network requires individual members and to some degree corporations to engage in continuing professional development to increase their capability to manage complex projects. As custodians of the only Competency Standards for Complex Project Managers in the world ICCPM has a responsibility to develop and deliver education that addresses the standards, to develop a cohort of experienced and qualified practitioners and provide assurance that practitioners demonstrate the appropriate level of capability.

ICCPM delivers complex project thought leadership through the conduct of international roundtables designed to enable senior government and industry leaders to discuss emerging issues around complex project delivery. The release of three significant papers enable the organisation to ensure that education and knowledge sharing occurs relevant to the most contemporary issues facing complex project delivery agencies.

1. *The Conspiracy of Optimism – Why Mega Projects Fail* published in 2009
2. *Complex Project Management Global Perspectives and the Strategic Agenda to 2025* published in 2012
3. *Hitting a Moving Target – Complex Project and Programme Delivery in an Uncertain World* published in 2014

Board of Directors

ICCPM Board Directorships are volunteer “pro bono” positions that attract no stipend: that is Directors receive no financial benefit from their role as directors, they hold no equity nor receive any profit share. All Directors are appointed following due process in accordance with the ICCPM Constitution.

The ICCPM Board complies with the requirements established under the ICCPM Constitution and with best practice guidance for Not-for-Profit organisations. ICCPM Board meetings are conducted under a strictly enforced conflict of interest policy that is accurately documented and adhered to. All ICCPM Board Members are required to comply with the company’s conflict of interest policy on commencement. To further ensure conflicts of interest are minimized the Directors of the Board have no access to ICCPM management material, other than that included in Board Papers.

The Board of Directors have no role in the execution or supervision of deliverables under service orders issued by ICCPM Management to associate partners (contractors) nor in the processing of payments or assurance of quality. Standard contract terms and conditions are used in all ICCPM contracts pursuant to the requirements of clients.

Provision of Services

ICCPM offers a range of services including:

- Education delivery
- Strategic reviews
- Workshop Facilitation (Strategic Planning)
- Complex Project Management Advisory Services

ICCPM staff and all contractors/advisors are required to enter into a non-disclosure agreement prior to discussing any potential opportunities or commencing work on behalf of ICCPM. ICCPM complies with all client policies in relation to probity and conflict of interest.

It should also be noted that ICCPM does not provide project or program related services (such as a Lead or Deputy Negotiators, Project Directors etc) to any company other than the owner of the complex project or program thus restricting access to these services to predominantly government or government owned organisations. We do not provide services to firms bidding or capturing work as providers or suppliers of services to the owner. This is a very important distinction.

Appendix 3 Response from other entities

Response from Ashurst Australia

Our ref: PVT\GSM\06 3001 5682
Partner: Paul Vane-Tempest
Direct line: +61 2 6234 4036
Email: paul.vane-tempest@ashurst.com
Contact: Georgina Adams, Consultant
Direct line: +61 2 6234 4059
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5 May 2016

Senior Director
National Security Branch | Performance Audit
Australian National Audit Office



By email: [REDACTED]

Dear [REDACTED]

AFS Program - Probity - Purchase order 9000105398 (Proposed Report)

Thank you for the opportunity to comment on the extract of the Proposed Report which you provided to us on 7 April 2016.

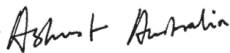
We offer the following comments on the extract of the Proposed Report provided to us:

- (a) Paragraphs 4.120, 4.136 and 4.137 includes the names of the Tenderers and the details of when Tenders were excluded. This information has not been made public by Airservices. There are also some other paragraphs of the report which refer to Tenderers whose names have not been made public by Airservices (paragraphs 4.134, 4.135, 4.136, 4.137).
- (b) We would appreciate knowing whether this information will remain in the final version of the Proposed Report so that we can advise Airservices to ensure that it notifies the relevant Tenderers that this information will be made public.

If there are any significant or material changes to the Proposed Report that contain commentary in relation to Ashurst, we would be grateful for the opportunity to review those changes.

Please do not hesitate to contact Paul Vane-Tempest on (02) 6234 4036 or Georgina Adams on (02) 6234 4059 if you have any queries.

Yours faithfully



Ashurst Australia

AUSTRALIA BELGIUM CHINA FRANCE GERMANY HONG KONG SAR INDONESIA (ASSOCIATED OFFICE) ITALY JAPAN PAPUA NEW GUINEA SAUDI ARABIA (ASSOCIATED OFFICE) SINGAPORE SPAIN SWEDEN UNITED ARAB EMIRATES UNITED KINGDOM UNITED STATES OF AMERICA

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. The Ashurst Group has an office in each of the places listed above.
240305002.01

Response from Harry Bradford

H.C. Bradford and Associates Pty Ltd

ACN: 155 938 168

ABN: 83 155 938 168

Ms Rona Mellor
Deputy Auditor General
Australian National Audit Office

Dear Ms Mellor,

Thank you for the opportunity to review elements of your draft Audit Report.

While your Audit is said to be directed to Airservices Australia's Procurement of ICCPM's assistance on the OneSKY Program the sections you have provided for my review mention my name on some 136 occasions with the principle implied criticism that I did not keep and lodge records of contact in the same manner as other contractors.

As it appears from the material you have supplied that the principal focus of your Audit was in fact the relationship between Airservices Australia and me, I submit that it would be appropriate for you to also comment on the absence of any evidence of actual conflict of interests or any inappropriate treatment of such conflict on my part. That is, I would greatly appreciate some commentary in your Report as to evidence of real conflict rather than treatment of perceptions. ¹

I also note that your Report compares the rates paid to me under separate contracts for quite different tasks with different entities and draws the conclusion, based upon rates alone, that Airservices did not receive value for money. I submit that without a much more thoughtful analysis of each task, including the nature and demands of each task, then such a conclusion is based upon insufficient data and is invalid. ²

Finally, I respectfully submit that all the directors and employees of ICCPM and fellow contractors and Airservices Australia employees working with me on the OneSKY negotiation behaved with impeccable ethics throughout.



Harry Bradford
Managing Director

5 May 2016

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ANAO comments:

1. The focus of this audit was Airservices' procurement of ICCPM in association with the OneSKY Australia program, with Mr Bradford being one of two key contracted personnel. Based on the audit work undertaken to date, the ANAO has not made a conclusion as to whether conflicts of interest impacted on the actual tender process (a matter that will be examined in the second performance audit – see paragraph 1.12).

2. This paragraph relates to ANAO's analysis of the rate paid by Defence for Mr Bradford to perform a lead negotiator role, and the rate paid by Airservices for Mr Bradford to perform the

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OneSKY lead negotiator role. As outlined at paragraph 2.44 of the audit report, Airservices saw the Defence lead negotiator engagement as relevant in making the decision to appoint Mr Bradford to the OneSKY role. In addition, the Statement of Work for the OneSKY lead negotiator role was based on that used for the Defence lead negotiator engagement.

Response from Andrew Pyke

Mr Andrew Pyke
C/- Airservices Australia
OneSKY Program
Alan Woods Building
25 Constitution Ave
Canberra ACT 2601

Rona Mellor
Deputy Auditor-General
GPO Box 707
Canberra ACT 2601

3 May 2016

Dear Sir/Madam,

Response to proposed performance audit report on Airservices Australia's procurement of the International Centre for Complex Project Management to assist with the OneSKY program.

I refer to the ANAO's proposed performance audit report on Airservices Australia's procurement of the International Centre for Complex Project Management (ICCPM) to assist with the OneSKY program, that includes commentary relating to myself and Keyholder Pty Ltd. An extract of the proposed report (Proposed Report) was provided to me on 8 April 2016, pursuant to section 19 of the *Auditor-General Act 1997* (the Act).

In accordance with Sub section 19(7) of the Act I wish to provide written comments to the Auditor-General for consideration before preparing the final report. I have been notified that the final date for providing any written comments is 5 May 2016.

Capacities in Which I Respond

I thank the ANAO for the opportunity to preview an extract of the proposed report and respond as a person with a special interest. I do not respond as a representative of Airservices Australia, Department of Defence, the International Centre for Complex Project Management, or any other party with a special interest.

As required by the ANAO, this response has been prepared in isolation, with the limited resources of a small business and without the support or collaboration of Airservices Australia, Department of Defence, or any other party.

Diligent and Proper Conduct

I thank the ANAO for particularly recognising that:

- I "was demonstrably diligent in providing Airservices with ongoing and updated declarations of potential conflicts and contact with industry respondents including employees of his former employer"¹.

Further, I am also pleased that the proposed report acknowledged the prior report into the matters by Allens Linklaters (Allens), and my cooperation in implementation of the Allens recommendations.²

The proposed report did not mention, but I wish to have clearly stated, the explicit finding of the Allens review, that:

- "The materials provided to us to date, and the content of our discussions with witnesses, have not disclosed any evidence of improper influence, favour, bias or breach of confidence in respect of either Mr Bradford or Mr Pyke".³
- "All of the witnesses we have interviewed that were involved in the tender evaluation have confirmed:

(a) that they have no probity concerns in relation to the procurement process, and consider that the recommendation to progress Thales to Phase 5 as preferred tenderer was properly based on the superiority of the Thales' tender;

(b) that neither Mr Bradford nor Mr Pyke (despite being held in high regard for their technical capability and industry experience) overtly influenced the procurement process or displayed partial behaviour"⁴

The report makes clear that all potential conflicts of interest held by me, and all contacts with employees of Industry Respondents, were diligently declared in accordance with the OneSKY Probity Plan. By reference to the Allens report, the report also makes clear that my conduct was at all times proper.

Expired Potential Conflict of Interest

The report refers to a potential conflict of interest declared by me, in relation to my prior employer - an industry respondent to OneSKY and an incumbent supplier to Defence for the Australian Defence Air Traffic System.⁵ For clarity, I elaborate that I was then subject to a

¹ Extract of Proposed Report under s.19 of the Auditor-General Act 1997, "Airservices Australia's Procurement of the International Centre for Complex Project Management to Assist on the OneSKY Australia Program", paragraph 4.60

² Op cit Extract of Proposed Report, p35, paragraph 4.37

³ Allens Linklaters Report, dated 27 October 2015, paragraph 4.5

⁴ Op cit Allens, Paragraph 4.6

⁵ Op cit Extract of Proposed Report, p57, paragraph 3.

declared post-employment restraint from the prior employer. This restraint had potential to conflict interests, had I been placed in a position of having to evaluate a tender from that respondent while the restraint was operative. In any event, that restraint ceased in November 2012, I was **not** engaged in any evaluation while it was operative and, as the report notes, the tasks I was engaged on were advisory tasks on organisational matters remote from RFT preparations.⁶

Nevertheless, the report perpetuates the issue, in relation to the Tender Evaluation, in April 2014⁷, over two years after I ceased employment with the industry respondent. In this respect, the report ventures into speculative *perceptions* of potential conflicts of interest.

In fact, there was **no** actual or potential conflict of interest operative. Moreover, under any public service or industry norm, recusory periods of up to 12 months are considered prudent, which were well exceeded in respect of this matter. This potential conflict of interest should not be treated as operating in perpetuity, and it would be inappropriate to restrain the trade of an individual or contractor in these circumstances.^a

The report's suggests that, in May 2014, "explicit consideration of the matter in the context of the decisions to make him party to the tender evaluation process" should have been made. Unless this was merely confirming that no potential or actual conflict is operative, it would have been excessive, unnecessary and unreasonable to exclude a program participant on this basis.

Origins of Concerns

This audit approach, which selectively examines^b some - but not all - suppliers and key persons, is stated as originating in referenced concerns discussed in the Senate Rural and Regional Affairs and Transport Legislation Committee⁸, apparently piqued by an alleged unauthorised disclosure.

I am not privy to the allegedly disclosed documents referred to by the Senate Committee, but I understand that they may be stolen, commercially-confidential, probity-controlled and tender-sensitive information, disclosed in the middle of a major tender evaluation of public interest, by a group or individuals who deliberately hid their identity.

I understand that this group or individual did not avail themselves of provided ethics, whistleblower, probity or other appropriate channels, but instead disclosed documents to unauthorised parties including competing tenderers, journalists, social media and industry activists. As such, this conduct appears to be malicious and ought to have given pause, that it may have in fact intended to further personal, factional or possibly commercial agenda.

I understand that the matter is subject to an ongoing Police investigation and may also be the subject of administrative and defamation actions. I also note that Airservices Australia

⁶ Op cit Extract of Proposed Report, pp30-31, paragraph 4.13 and p57 paragraph 3

⁷ Op cit Extract of Proposed Report, pp 49-55

⁸ Op cit Extract of Proposed Report, paragraphs 1.7-1.8

responded comprehensively to the Senate Committee's concerns, including accepting all the recommendations of the Allens report.

Major programs like OneSKY effect change in the public interest⁹. Like all major change, it will have its supporters, doubters and detractors. In our open society, detractors have their rights to criticise programs like OneSKY. However, it is disappointing that potentially malicious and illegal conduct, or personal, factional or commercially-motivated interference, is given such an airing in the middle of a major tender evaluation and negotiation.

In this context, I welcome the ANAO's noting of my own proper and diligent conduct, but regret that it even arose as a matter of interest for the audit.

Other Responses

To assist the objectives of the report, I offer further comments at Annex A to this letter, on errors, omissions and clarifications that have potential to affect the report findings.^c

I also offer comments at Annex B that have potential, if published, to prejudice the public interest. I defer to the ANAO as to whether they should be published or be retained as unpublished notes for the audit.^d

Yours faithfully,



Andrew Pyke

⁹ As outlined in the December 2009 National Aviation White Paper

ANAO comments:

- a. Post-employment restrictions are a matter concerning the individual and their prior employer. The management by a Commonwealth entity of conflicts of perceived, potential and/or actual conflicts of interest relating to a sub-contractor's former employment is a different matter. Airservices' probity framework did not adopt a 12 month limitation on identifying perceived, potential or actual conflicts of interest.
- b. The ANAO examined all Airservices procurements involving ICCPM. The ANAO did not examine procurements undertaken by Airservices in relation to the Future Service Delivery group, or OneSKY Australia specifically, of consultants or contractors that were not sourced through ICCPM.
- c. Mr Pyke's comments were taken into account in preparing this report for tabling.

d. The *Auditor-General Act 1997* requires that the Auditor-General not include particular information in a public report if the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest. The matters raised by Mr Pyke were taken into account in preparing this report for tabling.

Annex A

Other Comments

Unnecessary Naming

The report has a stated objective of examining "whether Airservices has effective procurement arrangements in place, with a particular emphasis on whether consultancy contracts entered into with ICCPM in association with the OneSKY Australia program were effectively administered."¹⁰ It is unfortunate that, in pursuing this objective, the report has selectively named some suppliers and some key persons, while appropriately avoiding the naming of others.^e

The naming of suppliers and individuals who have done nothing wrong and do not have access to the allegations¹¹ or documents considered, is unnecessary to the objective of the audit, deficient in natural justice and has potential to prejudice the commercial interests of the named parties. It is disappointing that the ANAO has adopted this practice and it would perhaps have been better practice to de-identify those parties.^f

Department of Defence

The report notes that a separate agreement was established between Airservices and Defence for the on-supply of services¹². However, the report omits important matters that have a direct bearing on the findings of the Report, including:

- A joint determination between Airservices and Defence in 2012, that Airservices should act as Lead Agency, on terms eventually agreed under the On Supply Agreement (OSA).^g The OSA involves significant rights on the part of Defence, in course selection, cost allocation and managerial control of the resources applied to OneSKY.
- That, as part of the Lead Agency determination, Airservices Australia undertook to significantly upgrade its Project Management capability, ready to manage OneSKY on behalf of both agencies. This was a major factor being considered by Airservices Australia delegates, in relation to the matters examined by the report.^h
- In regards to the negotiation itself, the OSA operates by reference to the negotiated contracts and, additionally, the OSA is accompanied by tripartite Deeds that are also part of the negotiation. These vital contractual dependencies draw-in regular oversight by Defence delegates in the process.

These factors, if considered, may provide better context to the matters considered by the report, and greater confidence in the decisions questioned by the report.

¹⁰ Op cit Extract of Proposed Report, paragraph 1.12

¹¹ As referenced by Senate Committee and the proposed report at pp 1.7-1.8

¹² Op cit Extract of Proposed Report, p7, paragraph 1.5

Discrete Contracts

The report tends to examine Tier 2 subcontracts as an amorphous matter¹³. I seek to clarify the following, in relation to contracts:

- Since 2012, I have been engaged Airservices Australia and the Department of Defence on OneSKY, in the following contracted scopes:
 - Some low-value initial advisory services in 2012 on structuring the OneSKY joint program team to, inter alia, implement a decision on the part of the agencies that Airservices Australia will assume the role of *Lead Agency*;
 - Acting as Joint Program Director (JPD), pending recruitment of a permanent JPD;
 - Acting as Lead of an Integrated Project Team (IPT) between Airservices Australia and the Department of Defence, developing an "On-Supply Agreement" to reflect the agencies' Memorandum of Cooperation;
 - Acting as Deputy Lead Negotiator with the Preferred Tenderer; and
 - Upon departure of the Lead Negotiator and cessation of ICCPM involvement, acting as Lead Negotiator, ongoing to 16 May 2016.
- Payments made were for separate contracts, over a 3 year duration. Aggregate amounts will be higher for some suppliers when compared to others, due to different periods of contracting.¹⁴
- In reference to events in late 2015 when the report examines my taking on the Lead Negotiator role¹⁵, I wish to clarify: As Deputy Lead Negotiator I accepted tasking to act as Lead Negotiator, under the ICCPM subcontract, without any changes in price or terms, until December 2015. It should be noted that from the outset, in such a long and uncertain negotiation, it was planned by all parties that the Deputy Lead would provide redundancy for the Lead, as well as an ability to cover multiple concurrent activities in multiple locations. In that sense, the change in October-November 2015 was merely executing the contingency plan for continuity.
- In November 2015, I as Acting Lead Negotiator was asked whether I would bridge the role through to a planned senior meeting in February 2016 (which was later rescheduled to March 2016) and was invited to negotiate a direct contract between Airservices and Keyholder Pty Ltd for the task. This was done, with a potential period to 30 June 2016, with some conditions specified by the contractor for continuity beyond the Summit. This should be understood in the context of that meeting being a moment of serious decision-making in the negotiation, my own commitment to the program outcomes, and continuity being a critical objective of Airservices Australia and the Department of Defence.

¹³ Op cit Extract of Proposed Report, p18, Table 2.1

¹⁴ Op cit Extract of Proposed Report, p18, Table 2.1

¹⁵ Op cit Extract of Proposed Report, p17, paragraph 2.28, bullet 3

Contracting vs Employees

I seek to clarify the following, in relation to contracting vs use of employees:

- The use of contractors was and is not unusual or anomalous on OneSKY. I was one of a fluctuating team of contractors (typically 20-25) engaged by both Airservices Australia and the Department of Defence from a number of suppliers, as part of a large Joint Program Team (JPT), managing the Request for Tender (RFT), Evaluation and Negotiation activities, as well as significant "Advanced Work Orders" and conduct of planning of customer obligations to the contracts under negotiation, all ongoing activities. The report selectively examines some suppliers and some key persons, but unfortunately omits to report the relatively small numbers of key persons provided via ICCPM, and the fact that alternative suppliers and internal resources were if fact used where they were assessed as better value-for money than ICCPM.¹⁶
- The contracts were discrete and separately contracted and were not "akin to an employee", as suggested by the report¹⁷. As is normal for contracted resources, the contracts were distinctly different from employment, which the proposed ANAO audit omits from its analysis of value-for-money, in that:
 - They are non-ongoing;
 - Work and hours are largely controlled by the contractor;
 - Deliverables were involved, to standard (albeit often orally determined);
 - Superannuation is not paid by Airservices;
 - Public Liability insurance is carried by the contractor;
 - Professional Indemnity insurance is carried by the contractor;
 - Worker's Compensation insurance is carried by the contractor;
 - The contractor utilises its own Information Technology;
 - Airservices does not withhold income tax;
 - The costs of Leave are held by the contractor;
 - Payment is invoiced monthly in arrears, with payment terms;
 - Continuing Professional Development is funded by the contractor;
 - Reprourement costs may be carried by the contractor;
 - Higher rates may be used to temporarily source specialist skills not internally available; and
 - Employee recruitment and termination costs are carried by the contractor.
- In respect of tasks that I am in a position to comment on, the report is incorrect in claiming that "It was quite common for Airservices to use the relationship with ICCPM to engage individuals to undertake particular roles akin to an employee for extended periods, rather than build the organisation's own capability."¹⁸ The report imputes that Airservices Australia, ICCPM and/or its subcontractors in some way did not deliver of the objective of building Airservices Australia's own capabilities. This is objectively incorrect, for reasons as follows:

¹⁶ The ANAO may not have obtained the example from testimony and documentation audited, but had I been asked, I would have cited the example of the Configuration Manager, which was supplied via ICCPM until a less costly resource could be obtained from a competitive source, in 2015.

¹⁷ As suggested at paragraph 2.15 of the proposed report

¹⁸ Op cit Extract of Proposed Report, shaded box in Section 2

- In the case of Joint Program Director services, the ICCPM task included supporting the recruitment and on-boarding of a permanent employee as the Joint Program Director, which following a lengthy global search including myself assisting in candidate shortlisting, was in fact done.
- In the case of the services provided to manage the Defence/Airservices Agreements Integrated Project Team (IPT), this was also transitioned to a permanent employee.
- In the case of Deputy Lead Negotiator services, regular planning occurred with Airservices and the then Lead Negotiator on similar planning to transition to employees, for Phase 5E of the negotiation, and in December the Deputy Lead Negotiator was in fact transitioned to a permanent employee.
- I witnessed and occasionally contributed to a number of capability plans being developed between Airservices and ICCPM, that would contradict the representation made on the report.
- The Report has not taken into account the successful action to recruit a Joint Program Director, a number of other reviews and reports, and the recent recruitment and appointment of a OneSKY Program Executive. These are all objective evidence that the capability building objectives were in fact actively worked-on and delivered.¹⁹

Membership of ICCPM and Professional Bodies

It is important to distinguish between normal and appropriate membership of professional bodies, from the matters raised in the report. Many program participants are, appropriately, members of professional bodies and Airservices Australia would be rightly criticised had it engaged professionals that did not hold recognised credentials and affiliations. For example, many PMs who are qualified for programs like OneSKY are quite properly members of ICCPM, as they may also be of the Australian Institute of Project Management, and just as Lawyers may be members of the Law Society, Accountants may be members of the Institute of Chartered Accountants of Australia, Professional Engineers may be members of Engineers Australia, etc.

These types of professional organisations are often run by volunteer office-holders and, from time-to-time, offices may be held by members who are employed by industry respondents to RFTs. Similarly, program participants may be members of many community-based organisations with offices held by industry respondents to RFTs. It is not even unusual for members and their employers to buy products and services from professional bodies.

This is a very normal, widespread and unavoidable, not at all unique to ICCPM. OneSKY's Probity Plan provides the controls and procedures to avoid or manage any potential or actual Conflicts of Interests that arise from these.

In respect of myself, I was a Member of ICCPM because it acts as a professional body for Project Managers (PMs) seeking Continuous Professional Development (CPD) in managing highly complex projects, of which OneSKY is a typical example. ICCPM provides laudable leadership in the industry, in advancing the body of knowledge in how to run highly complex

¹⁹ Op cit Extract of Proposed Report, paragraph 2.15 and footnote 9

programs. I was also a Key Person under subcontracts to ICCPM and at all times found ICCPM to be an ethical and earnest contributor to the success of OneSKY. I never received any improper direction from ICCPM, its officers or other subcontractors. Until disclosed by the report, the terms of the cited contracts between ICCPM and Airservices were confidential and I was not privy to them. I am not and have never been, an Employee, Officer or Director of ICCPM.

The report recognises that the recommendations of the Allens report have been implemented with respect to myself and, so far as I am concerned, that reduces the *perceived* (never potential or actual) conflicts of interest arising from subcontracting through ICCPM, to zero, and normalises the ICCPM relationship to the same as any other professional body.

Value for Money

The report undertakes many pages of analysis of pricing calling into question value-for-money. This analysis appears to be largely one-dimensional on pricing. It may not have been apparent to ANAO from the documents or testimony examined, but value-for-money judgements made by delegatesⁱ were much more multi-dimensional than indicated in the report and, as a supplier endeavouring to offer and deliver value for money, I would like to expand on this aspect:

In the case of the services in question, value-for-money quite reasonably took into account criteria such as:

- Skills and experience: For example, in my case including the fact that I was a Project Manager of the last Air Traffic Management System installed in Australia, namely the Australian Defence Air Traffic System (ADATS), executive experience in large-scale complex project management, commercial experience as a prime systems integrator and in international contracting, experience in relevant support contracts, and cyber-security experience.
- Security clearances to deal with the classified aspects of OneSKY.
- Availability to address urgent requirements and prevent costly delays to OneSKY.
- Acceptability to both funding parties under the OSA, namely Airservices Australia and the Department of Defence.
- Resource-balancing under the OSA.
- Understanding of the market: For example, the costs of a permanent staff member to take over the Joint Program Director (JPD) role in 2013, were well understood and market-tested by Airservices Australia, in that a global recruitment process was undertaken, that failed in final negotiations. Subsequently, the role was advertised again, which eventually led to the recruitment of the current JPD, that replaced myself. These understandings would have been foremost in the minds of delegates approving the relevant procurements - matters that are not addressed by the report.

- Contemporaneous independent reviews²⁰ that encouraged retention of some of the key persons examined in the report, in the interests of OneSKY.

In another example, the report implies that longer tasks should attract discounted daily rates²¹. This may not be so where:

- The market exhibits high demand and under-supply;
- Key Persons have to negotiate availability for OneSKY from other contracts;
- Opportunity costs in accepting longer-term commitments may be priced;
- Overheads may increase as a result of the contract;
- Where Key Persons are semi-retired or have personal limits to their availability, the incremental price of longer hours may be higher; and
- Reputational risk may be priced.

In respect of travel expenses, the report paints an exaggerated picture of uncontrolled and uncapped travel expenses, which is fallacious.^J It omits to mention²² that (in my case at least) travel was separately approved and booked by Airservices, that expenses were limited by clauses like "Any travel to be reimbursed at Commonwealth approved non-SES rates. All travel must be approved by [Airservices] prior to incurring the expense."²³ Airservices required the flexibility to direct travel in response to changing requirements in the negotiation. Travel is an essential part of negotiations with the preferred tenderer, and the travel involved is thrifty and necessary.

Were, in the alternative, Airservices to have incurred delays to OneSKY to conduct an alternative approach to market for gaps in its internal capabilities, selected Key Persons on price alone, accepted skills and experience less than required, failed to have sought-out the previous Project Managers of TAAATS and ADATS, and/or created discontinuities in work and negotiations, then it may be rightly criticised for being "penny-wise and pound foolish". Airservices Australia should be credited with not doing this.

²⁰ A number of independent assurance reports were commissioned by Airservices Australia and the Department of Defence, into the team capabilities relating to OneSKY, which inter alia, were on the minds of delegates as they made some of the procurement decisions addressed in the report.

²¹ Op cit Extract of Proposed Report, paragraphs 2.40 to 2.51

²² Op cit Extract of Proposed Report, p16, paragraph 2.27 and footnote 9

²³ ICCPM/Keyholder purchase orders, flowed-down from Airservices

ANAO comments:

e. Contracting organisations and key specified personnel providing the contracted services have been identified only where relevant and necessary to preparing the audit report. Mr Pyke, as one of two key contracted personnel, has already been publicly identified through the inquiry of the Senate Committee. Natural justice was afforded to Mr Pyke by providing him with relevant extracts of the proposed report, as well as by offering Mr Pyke the opportunity (when giving testimony to the ANAO under Section 32 of the Auditor-General Act) to make an opening and closing statement to the ANAO (in addition to answering questions from the ANAO).

- f. The naming of parties contracted to supply services to Commonwealth entities is not uncommon in ANAO performance audit reports.
- g. The audit report identifies, for example at paragraph 1.5, that Airservices is the lead agency in a joint procurement with Defence.
- h. The audit report examines (in chapter 2) the background to the establishment of the strategic partnership with ICCPM. The ANAO examined the documented factors being considered by Airservices when procuring services from or through ICCPM, as well as interviewing key Airservices employees involved in those procurements. A copy of the proposed report was also provided to the Chief Executive Officer of Airservices at the time the strategic partnership with ICCPM was entered into.
- i. The ANAO not only examined the documentation of the ICCPM procurements, including approval memos (where they were prepared) but also took testimony under oath from key Airservices employees involved in the procurements. Mr Pyke was not involved in those Airservices procurement approval processes.
- j. The audit report sets out that it was uncommon for Airservices to make an estimate of travel expenses when entering into the contract, or for a cap on them to be specified.

Annex B

Information that May be Contrary to the Public Interest

The Audit has been conducted during a major tender evaluation and negotiation of public interest.

I have been instructed not to consult with Airservices Australia and the Department of Defence on my response and, as a result, I am reluctant to comment in detail of matters that relate to the public interest. However, as current Lead Negotiator I feel obliged to provide some limited responses on what I regard as matters that have potential to prejudice the public interest.

I am concerned that the audit and responses have potential to prejudice the public interest, by:

- By reference, perpetuating and giving credence to the unauthorised disclosure and, as a result, weakening Airservices Australia's negotiating position²⁴;
- Aiding potential claimants against Airservices Australia and the Commonwealth²⁵;
- Compromising an ongoing police investigation;
- Elevating the preferred tenderer's concern about the risks of continuing in the process;
- Eroding confidence on the part of tenderers, that their commercially confidential information will be protected²⁶; and
- Inhibiting the preferred tenderer's openness in ongoing cost investigations.

I submit these concerns for the ANAO's consideration, in how it tables the Stage 1 report to the Senate Committee and how this springboards into Stage 2.

Concerns over Context and Staging of Audit

The sequencing of the particular matters covered by the Stage 1 of the Report are pre-emptive of Stage 2 and other wider related issues. One of the effects of this staging, is that the the Stage 1 report may have taken insufficient account of the context in which decisions were taken, which may not only disconfirm some of the report, but may reverse some of the conclusions.

For example, the following factors do not appear to have been fully considered in the report:

- The context of urgency in the RFT release to meet Defence's Second Pass commitments to Government.

²⁴ I understand that the unauthorised disclosure included, as read out in the Senate Committee, the pricing of competitors and the risk assessments done by the Tender Evaluation Committee. These facts have potential to embolden the preferred tenderer in negotiation.

²⁵ In the event of a protest or breakdown in negotiations.

²⁶ This is now an issue in the negotiations, that we do not want to worsen.

- Similarly, the context of the urgency to avoid significant public expense in relation to the Life-of-Type of TAAATS and ADATS.
- The context of joint decision-making with Defence.
- The "burn rate" of every day that OneSKY is delayed, which if considered may eclipse the concerns examined by the report.
- The context of classified requirements, requiring security-cleared Key Persons.
- There is little evidence that testimony was obtained from key decision-makers involved in this, for example the former CEO of Airservices Australia.

Were these addressed in the report, a different conclusion may be drawn in relation to speed of procurement, candidates for Key Persons and value-for-money. Moreover, if the report took account of these issues, it may have been rightly critical of Airservices Australia, had it failed to take timely action, to move with speed, to acquire the high levels of expertise and experience required, to mitigate the risks at the time.

These drivers of urgency may, if published, may encourage other parties in the negotiation to use "slow roll" tactics to put Airservices Australia and the Department of Defence under pressure to make concessions.

Appendix 4 ICCPM associations as sources of potential, perceived or actual conflicts of interest in relation to the OneSKY Australia program

1. Over the period May 2012 to November 2015, the ICCPM Board included:
 - Mr Chris Jenkins, appointed in September 2009 and elected Chair shortly thereafter. Mr Jenkins is Managing Director of Thales Australia (Thales), the incumbent ATM platform provider to Airservices. Thales was subsequently a prime tenderer to the CMATS RFT that closed on 30 October 2013 and, as noted, was selected as the successful tenderer. Contract negotiations with Thales commenced in September 2014 and are ongoing. Mr Jenkins remains an ICCPM Director following the expiration of his term as Chair in November 2015;
 - Mr Kim Gillis, appointed in August 2009. At that time, Mr Gillis was General Manager Systems in DMO. In June 2011, Mr Gillis was appointed Vice President and Managing Director of Boeing Defence Australia (BDA). BDA was a principal subcontracting partner to the CMATS tender submitted by Thales. Mr Gillis remained on the ICCPM Board until his resignation from BDA in August 2015 to take up the position of Deputy Secretary, Capability Acquisition and Sustainment Group within Defence;
 - Mr Tom Burbage, appointed as a founding Director in September 2007. Mr Burbage was Executive Vice President of Lockheed Martin. Lockheed Martin was also subsequently a prime tenderer to the CMATS RFT. Mr Burbage left the ICCPM Board in October 2013, with Ms Julie Dunlap from Lockheed Martin being appointed as Mr Burbage's successor on the Board. In September 2015, Ms Dunlap advised the ICCPM Board that she would be leaving Lockheed Martin. As at November 2015, Ms Dunlap remained a Director of ICCPM. In January 2016, the ICCPM CEO advised ANAO that Lockheed Martin had withdrawn as a fee-paying partner of ICCPM in October 2015; and
 - Mr David Gordon, appointed in June 2013 at which time he was an employee of BAE Systems. Prior to that, Mr Gordon had attended Board meetings in an observer capacity (when he was also a BAE Systems employee) in June 2012, December 2012 and March 2013.⁷⁴ Mr Gordon resigned from the Board in December 2013. BAE Systems was a principal subcontracting partner to the CMATS tender submitted by Exelis.
2. In addition, over the period May 2012 to December 2015 the ICCPM Board included three individuals who also provided subcontractor services to Airservices via ICCPM:
 - Mr Harry Bradford. At the time of his appointment to the ICCPM Board in December 2008, Mr Bradford was employed by BAE Systems Australia. Following a significant period with that company, Mr Bradford formed his own company (HC Bradford and Associates Pty Ltd) in February 2012 and retired from BAE Systems in March 2012. An Associate Partner Agreement between HC Bradford and Associates and ICCPM was executed with effect 23 May 2012. Under that Agreement, Mr Bradford was contracted by ICCPM to provide up

⁷⁴ Mr Gordon had also attended a number of Board meetings during 2010 and 2011 on behalf of Mr Harry Bradford, who at that time was employed by BAE Systems.

to five days consultancy services to Airservices in June 2012.⁷⁵ That was followed by a series of further engagements over the period of the CMATS RFT development and release and to review readiness for the tender evaluation phase in October 2013. Mr Bradford was re-engaged in December 2013 to provide further strategic advisory services over the course of 2014, but that was overtaken by his March 2014 acceptance of an offer to undertake the role of Lead Negotiator to the joint procurement (with Mr Bradford then participating in the tender evaluation process from March 2014). Mr Bradford withdrew from the role of Lead Negotiator on 13 November 2015. He was elected Chair of the ICCPM Board on 17 November 2015;

- Mr Stephen Hayes. Mr Hayes was a founding member of the ICCPM Board, and became ICCPM Chief Executive Officer (CEO) in November 2009. In March 2012, the Board agreed to the CEO's title being changed to Managing Director and CEO. In the capacity of CEO, Mr Hayes was significantly involved in the development of the strategic relationship with Airservices. In addition, Mr Hayes was engaged to provide certain services to Airservices, including providing a presentation on complex project management to the Airservices Board's June 2011 AFS Workshop and providing support to Airservices executives in relation to the Airservices Board's July 2012 AFS Workshop. Airservices was provided with Mr Hayes services as part of the benefits available to ICCPM fee-paying partners. Mr Hayes resigned from ICCPM in June 2014; and
- Ms Deborah Hein. Ms Hein has been an employee of ICCPM since July 2012. Ms Hein was subcontracted to Airservices between April 2013 and August 2014 for between three and four days a week to provide support and advisory services to Airservices executives. Ms Hein attended ICCPM Board meetings in the capacity of Company Secretary from October 2012. She subsequently also became ICCPM Deputy Chief Executive Officer, and was significantly involved in the development and management of the strategic relationship with Airservices. Following the resignation of the then ICCPM CEO and Managing Director, Ms Hein became Acting CEO in June 2014 and was permanently appointed to that role and to the ICCPM Board as Managing Director in August 2014. At that time, Ms Hein ceased providing services to Airservices, but remained the ICCPM manager of the strategic relationship with Airservices.

3. A further key subcontractor to Airservices, Mr Andrew Pyke, had retired from Raytheon after a long career in February 2012. Raytheon is the incumbent ATM platform provider to Defence, and during his tenure with the company Mr Pyke held roles associated with Raytheon's delivery of the ADATS platform and had some involvement in the company's preparations for Defence's AIR5431 project. Raytheon was subsequently a prime tenderer to the CMATS RFT. Mr Pyke formed his own company, Keyholder Pty Ltd (Keyholder) in May 2012. An Associate Partner Agreement between ICCPM and Keyholder was executed on 28 June 2012, which was the same day on which ICCPM had been requested by Airservices to submit a proposal for additional complex project management support to the AFS program, following on from the initial

75 The services included overseeing the conduct of a Critical Project Review of the AFS program. The relevant service agreement executed between Airservices and ICCPM on 4 May 2012 specified a different subcontractor. Mr Bradford was offered to Airservices by ICCPM as an alternative subcontractor after a delay in the relevant activity by Airservices had resulted in the original subcontractor no longer being available.

engagement of Mr Bradford in June 2012. A proposal for Mr Pyke's services to be provided to Airservices via ICCPM was submitted by ICCPM on 29 June 2012. The initial engagement finalised on 30 July 2012 was for two days a week over three months to assist with aspects of the CMATS project and program management structures and capabilities.

4. Over the entire period May 2012 to December 2015, the ICCPM Board also included an employee from DMO (and then Defence). As at May 2012, Airservices and Defence (including DMO) were still in the process of negotiating much of the governance and commercial arrangements that would be required to support the procurement and ongoing delivery of the joint platform. Those negotiations were ongoing throughout the RFT development and evaluation process, and are yet to be finalised pending completing of the contract negotiation phase of the procurement. From October 2013, the Defence employee who was a member of the ICCPM Board was Air Vice Marshall Chris Deeble. On 7 March 2016, it was announced that Mr Deeble had accepted an appointment as OneSKY Program Executive within Airservices. As at 22 March 2016, the ICCPM Board no longer included a Defence employee.

5. Ms Hein's spouse, Mr Stephen Hein, became an employee of ICCPM from 23 May 2013⁷⁶ and was subcontracted to Airservices commencing the same day to provide strategic planning services to the EGM FSD three days a week for 12 months.⁷⁷ Mr Hein resigned as an ICCPM employee in January 2014, but continued to provide services to Airservices via an Associate Partner Agreement executed between ICCPM and Mr Hein's company (Australian Centre for Strategy, Complexity and Leadership (ACSCL)) on 22 January 2014. Under a quote accepted by Airservices in December 2013, Mr Hein had been contracted to provide Chief of Staff services to the EGM FSD five days a week for 18 months. However, very soon after that quote had been approved by the then Airservices CEO in December 2013, Mr Hein was appointed Acting Manager of one of the newly established FSD branches, Business Readiness and Transformation.⁷⁸ The Manager position was advertised in March 2014, with Mr Hein being announced as the successful candidate in May 2014. In September and October 2014, the EGM FSD travelled overseas, including to attend the ICCPM Annual Research and Innovation Conference in London. Mr Hein was appointed Acting EGM FSD for the period 17 September to 10 October 2014. In that capacity, on 22 September 2014, Mr Hein signed a minute to the then Airservices CEO recommending that she approve the contracting of the Lead and Deputy Lead Negotiator via ICCPM for a further 8 months at a total expected cost of \$1.247 million.

76 Mr Hein was at that time an employee of DMO and had taken leave without pay in order to pursue other potential avenues. Mr Hein testified to ANAO that the DMO was aware of his employment with ICCPM.

77 Mr Hein was originally proposed to Airservices to undertake this role in November 2012.

78 Despite Mr Hein being engaged for an 18 month period under the contract between Airservices and ICCPM, the service order between ICCPM and ACSCL provided for a three month engagement to 18 April 2014. Neither the contract with Airservices nor the service order between ACSCL and ICCPM were varied to reflect the change in the nature of the services Mr Hein was providing to Airservices.