

Report 10 of 2020

Passenger transport
service contracts:
Bus and light rail



Report of the Auditor-General

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Passenger transport service
contracts: Bus and light rail

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Dear President and Speaker

**Report of the Auditor-General:
Report 10 of 2020 *Passenger transport service contracts: Bus and light rail***

Under section 39(3f) of the *Passenger Transport Act 1994* I am required to:

- report on the probity of the process leading to six service contracts being awarded from July 2020 for providing bus and light rail passenger transport services in metropolitan Adelaide
- examine the contracts.

I present to each of you my independent assurance report on the findings of the review.

Content of the Report

For probity of the process leading up to awarding the contracts we concluded that:

- we did not identify any specific probity matters that would suggest that the procurement process was compromised
- the Department of Planning, Transport and Infrastructure designed and established processes for conducting the procurement that were consistent with sound probity principles
- in carrying out the processes the Department of Planning, Transport and Infrastructure maintained sufficient documentation consistent with appropriate standards for most areas of the procurement other than for four specific areas of the procurement.

We also noted that there were some departures for specific practices and procedures. They were not systemic or pervasive but did warrant consideration to improve processes for future procurements.

For examining the contracts we concluded that the services contracts met the requirements of the *Passenger Transport Act 1994*.

Acknowledgements

The audit team for this Report was Salv Bianco, Philip Rossi, Jodie Fitzgerald, Stephen Gladigau, Simon Altus and Ryan Tran.

We appreciate the cooperation and assistance given by staff of the Department of Planning, Transport and Infrastructure during the review.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richardson', with a long horizontal flourish extending to the right.

Andrew Richardson
Auditor-General

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1 Executive summary

1.1 Introduction

The Department of Planning, Transport and Infrastructure (DPTI) plans, regulates and funds public transport services across South Australia in line with the *Passenger Transport Act 1994* (PTA).

Passenger transport services in metropolitan Adelaide are provided by contracted operators engaged by the Minister for Transport, Infrastructure and Local Government (the Minister). Bus services have been provided by contracted operators since 2000. From July 2020 contracted passenger transport services also includes light rail.

Following a competitive tender process run by DPTI, the Minister executed six contracts with four private operators¹ for passenger transport services. The contracts started on 10 March 2020 and are for eight years (through to 30 June 2028) with an option for the Minister to extend for a further two years. The contracted operators started providing the services from 5 July 2020.

The contracts were to be delivered in two stages. From July 2020 the contracted operators were to deliver the existing services under the existing public transport network. Operators were to then transition to new network services starting in most contract areas from late 2020. Under the contracts awarded the Minister retains the discretion to direct the contracted operators to change to a new service model at any time. On 29 June 2020 the SA Government announced it would not proceed with the new service model. This decision and the impact on our review is discussed in section 1.6.

As required by section 39(3f) of the PTA, we examined the contracts and:

- reviewed the probity of the procurement process leading up to the awarding of the contracts
- assessed whether the contracts comply with the requirements of the PTA.

To assess probity in this review we identified key probity principles that are necessary to demonstrate that the procurement process was fair, transparent and defensible. They are outlined in section 3.4.

This Report communicates the outcome of our review.

1.2 Conclusion

For probity of the process leading up to awarding the contracts we concluded that:

¹ The four operators are Torrens Transit Pty Ltd, Australian Transit Enterprises Pty Ltd, Busways South Australia Pty Ltd and Torrens Connect Pty Ltd, which is a joint venture between Torrens Transit Pty Ltd, John Holland Pty Ltd and UGL Rail Services Pty Ltd.

- we did not identify any specific probity matters that would suggest that the procurement process was compromised
- DPTI designed and established processes for conducting the procurement that were consistent with sound probity principles
- in carrying out the processes DPTI maintained sufficient documentation consistent with appropriate probity standards for most areas of the procurement other than for four specific areas of the procurement outlined below.

We also noted that there were some departures for specific practices and procedures. These matters did not compromise the probity of the process and were not systemic or pervasive but warrant consideration to improve processes for future procurements.

For compliance with the PTA we concluded that the service contracts met the requirements of the PTA and contained a broad range of contractual provisions that should help to protect the State's interests.

Probity of the process

DPTI established sound processes to manage the procurement and award the contracts including:

- establishing project structure and governance arrangements to provide structured decision-making and accountability
- establishing a comprehensive acquisition plan
- appointing a probity advisor and other specialists to assist with evaluating tenders
- the receipt and opening of tenders
- the security of tender documentation.

We also found that, in carrying out these processes for four specific areas, DPTI had not maintained sufficient records. Maintaining sufficient records is a fundamental principle in demonstrating probity. The areas were:

- managing probity risks for some communications with proponents
- recording contract negotiation discussions
- managing some probity advisor arrangements
- managing extensions of existing service contracts that occurred during the procurement process.

We also identified some areas where processes and practices should be improved for future procurements. These were not systemic or pervasive in nature and impact as they were departures, errors or omissions for specific practices and procedures.

Addressing the matters we identified for future procurements will help ensure that procurement processes are strengthened and probity risks are appropriately managed.

Section 1.3 summarises the matters we identified.

Compliance with the *Passenger Transport Act 1994*

The Minister materially complied with the requirements of the PTA. We did find one instance of non-compliance we considered minor and that did not impact the procurement process. Also, the service contracts addressed the mandatory requirements of the PTA.

It is essential that DPTI establishes a robust contract management framework and processes to effectively manage the contracts and any related operational and legal risks.

1.3 What we found

1.3.1 Sound processes established

DPTI established sound processes to manage the procurement and award the contracts that included the following:

- The project structure and governance arrangements were reasonably established and documented to provide structured decision-making and accountability.
- A comprehensive acquisition plan was prepared in line with sound procurement practices.
- Sound arrangements were established and implemented to manage receiving and opening invitation to supply responses.
- The evaluation of the invitation to supply responses followed the process established in the evaluation plans.
- A probity advisor was appointed to provide independent probity advice and a probity plan was developed that incorporated communication protocols.
- Sound processes were established to manage the security and confidentiality of procurement documents.
- The Minister materially complied with the requirements of the PTA leading up to and following the awarding of service contracts.

1.3.2 Areas where sufficient records were not maintained

We found DPTI did not maintain sufficient records in the following specific areas:

- Sufficient records of communications/interactions between senior SA Government representatives and potential proponents were not maintained for several meetings (section 11.3.1).
- File notes of negotiation meetings did not record details of the specific matters discussed and negotiated (section 8.3.2).
- DPTI had not clearly defined and agreed with the probity advisor the nature and extent of services to be provided, key deliverables and reporting requirements. Also, written records were not maintained for some probity advice received and matters discussed at probity briefings (sections 10.3.3 and 10.3.5).

- A register of probity matters reported and how they were dealt with was not maintained by the probity advisor as required by the acquisition plan (section 10.3.10).
- DPTI did not adequately identify and/or address possible risks to the probity of the procurement process while negotiating and finalising the extension agreements with the incumbent operators, who were likely proponents in the procurement process (section 12.3.1).
- DPTI did not maintain file notes or other records of meetings it held with the existing operators while negotiating the extension agreements during the negotiation process (section 12.3.2).

1.3.3 Areas requiring improvement

We identified processes and practices that should be improved for future procurements including:

- A negotiation plan was drafted but not approved and implemented (section 8.3.1).
- The response to the advice from the probity advisor for a proposed meeting with a proponent not to proceed was not documented. Further, the probity advisor was not informed of the response (section 11.3.2).
- DPTI did not document how it assessed that there were no perceived probity risks for the deviation to the approved acquisition plan to include light rail services in the procurement scope (section 5.3.1).
- Controls designed to confirm that evaluation criteria descriptions in the phase 1 evaluation plan were the same as those in the invitation to supply documents issued to proponents were not effectively implemented (section 5.3.2).
- The final evaluation plans for phase 1 and phase 2 of the procurement process were approved after the tenders were opened (section 5.3.3).
- Minutes were not maintained of key matters discussed with proponents at phase 1 clarification sessions (section 7.3.3).
- Some clarifications and requests for further information were not authorised before they were sent to proponents or reviewed by the probity advisor (section 7.3.4).
- Evaluation teams did not document their rationale for not implementing matters raised during the financial evaluation for both phases (section 7.3.5).
- The probity plan was not provided to all key officers involved in the procurement and some probity risks were not considered in the probity plan (sections 10.3.1 and 10.3.2).
- DPTI did not ensure the probity advisor prepared probity reports as detailed in the acquisition plan (section 10.3.7).
- A conflict of interest declaration from a consulting firm engaged to assist in evaluating phase 2 responses could not be provided (section 10.3.14).
- The probity plan requirements for considering conflict of interest disclosures was not always followed and the register of conflict of interest disclosures did not record details of all conflict of interest disclosures (sections 10.3.12 and 10.3.13).
- The Steering Committee overseeing the procurement did not maintain meeting minutes for the first 10 months of operation (section 4.3.3).

1.4 What we recommended

1.4.1 Summary of key recommendations

We made a number of recommendations to DPTI to address our findings.

To address areas where DPTI did not maintain sufficient records we recommended that DPTI:

- establish mechanisms to ensure that meetings between SA Government representatives and proponents are identified timely and probity risks are managed (section 11.3.1)
- maintain complete and accurate records to support negotiation activities (section 8.3.2)
- document and agree with the probity advisor the nature and extent of probity assurance services to be provided, key deliverables and reporting requirements (section 10.3.3)
- maintain a written record of probity advice received and matters discussed at probity briefings (section 10.3.5)
- maintain a register of all probity matters reported and actions taken and provide it to those responsible for the procurement process regularly throughout the process and before it is finalised (section 10.3.10)
- document risk analysis and management plans where there is potential for another business activity to impact on the probity of a procurement process (section 12.3.1)
- ensure that records are maintained for communications about extending existing contracts with actual or potential proponents who are current operators (section 12.3.2).

To address our findings for processes and practices that need improvement for future procurements we recommended that DPTI:

- develop and approve a negotiation plan before negotiations start (section 8.3.1)
- document the response to probity advice received including, where relevant, the basis for not following advice (section 11.3.2)
- document the evidence and rationale that demonstrates assessment of the potential probity impacts of deviations to acquisition plans (section 5.3.1)
- establish and implement a checking process before the evaluation starts to ensure evaluation criteria descriptions in the evaluation plan are the same as those included in market documents issued to proponents (section 5.3.2)
- ensure the final evaluation plan is endorsed by all evaluation team members and approved before opening tender responses (section 5.3.3)
- maintain records of key matters discussed with proponents at clarification sessions (section 7.3.3)

- ensure clarifications and requests for information from proponents are approved in line with evaluation plans and reviewed by probity advisors where they are used (section 7.3.4)
- ensure evaluation teams document their rationale to demonstrate how they considered and addressed matters raised but not actioned during the evaluation process (section 7.3.5)
- provide the probity plan to key officers involved in the procurement process and confirm they understand and will adhere to it (section 10.3.1)
- review its process to understand why a conflict of interest declaration was not obtained from a consulting firm it engaged and ensure any gaps identified are addressed for future procurements (section 10.3.14)
- consider all conflict of interest disclosures in line with the probity plan and ensure this is properly evidenced (sections 10.3.12 and 10.3.13)
- prepare meeting minutes for all Steering Committee meetings (section 4.3.3).

1.4.2 Important development requiring consideration in implementing our recommendations

The SA Government has stated that it supports repealing the *State Procurement Act 2004* and will replace the State Procurement Board (SPB) with a streamlined framework and enhanced central procurement branch within the Department of Treasury and Finance.² Under the new framework, agency chief executives will be accountable and responsible for establishing local procurement governance arrangements and processes suitable to their requirements.³ When considering our recommendations for implementation, DPTI should consider any future changes made to the SA Government's current procurement policy framework.

1.5 Response to our recommendations

The DPTI Chief Executive provided an overall response to our draft report to Parliament which is provided below.

The Auditor-General has affirmed that DPTI designed and established processes for the conduct of the procurement that were consistent with sound probity principles and in accordance with State Procurement Board guidelines. In conducting the procurement, DPTI maintained strong process controls throughout, supported by extensive documentation.

² The SA Government's response to the South Australian Productivity Commission inquiry into government procurement Stage 2, viewed 29 June 2020, <<https://www.dpc.sa.gov.au/resources-and-publications/government-procurement-inquiry>>.

³ *ibid.*

In accordance with section 39 of the PTA, DPTI has provided the Auditor-General a report which describes the process that applied with respect to the awarding of the contracts. We note that whilst the PTA requires the Auditor-General to examine the probity of the process as described in that report, the Auditor-General has gone beyond the requirements of the Act. In so doing, the Auditor-General has amplified the range of its recommendations as to aspects of DPTI's procurement processes that might be improved. We have addressed the individual recommendations in the body of the report.

In our assessment the Auditor-General has in part found a number of relatively minor departures from process, and some potential refinements to processes, which mostly we accept and will address in our process control framework for procurement and probity.

The Auditor-General also identified some administrative oversights in the completeness of records. Whilst regrettable, these arose from human errors, and in the context of keeping many thousands of pages of documents, they were not material. As the Auditor-General observes, these were not systematic or pervasive. We note these findings.

The Auditor-General has also formed an opinion as to the nature and extent of record keeping required based on its interpretation of the relevant standards and guidelines. We accept that in some cases there are opportunities for improved record-keeping. However we are mindful of the additional administrative and bureaucratic burden some may impose, and the impost of additional costs and time that could arise. In responding to such recommendations we have addressed them proportionately to the difference they might make to the probity and/or procurement outcomes.

Finally, we thank the Auditor-General for confirming that our efforts have delivered service contracts that meet the requirements of the PTA and contain a broad range of contractual provisions that will assist in protecting the State's interests.

The DPTI Chief Executive also responded to our detailed findings and recommendations. Responses to the specific findings are included in sections 4 to 13.

1.6 SA Government announcement not to proceed with proposed bus route changes

On 29 June 2020 the SA Government announced that it would not proceed with the proposed bus route changes in metropolitan Adelaide that were the subject of public consultation. The SA Government indicated that the existing network that public transport users know and understand is the network that will continue. The announcement was subsequent to the awarding of contracts.

Under the Australian auditing standards⁴ we are required to assess the effect of the 29 June 2020 announcement on the information in this Report and our conclusion.

This Report discusses contract values in section 2.2.2. The announcement will result in a change in the estimated cost over the term of the contracts, which was determined at \$3.008 billion (including GST) at the time the contracts were awarded based on the new service model. DPTI advised us that the estimated contract cost of running the existing network is greater than the estimated cost had the new network been rolled out as intended at the time of awarding the contracts.

This Report also highlights in section 2.2.4 that the contracts include a clause that provides the Minister with the discretion to transition from the original service model (existing network arrangements) to a new service model (changes to the current network and services intended to achieve better, more efficient services at a lower cost).

As discussed in section 2.4.2 the overall objective of the procurement was to engage the market to identify and drive network and service improvements that will deliver better, more efficient services that increase patronage. Proponents were required to provide service plans for both the original and new service models.

We concluded that the 29 June 2020 announcement not to proceed with the new service model does not affect our conclusion on the probity of the procurement process because:

- all proponents were evaluated on a consistent basis as described in this Report
- the decision not to proceed with the new service model was made after the contracts were awarded.

DPTI advised us that the contracts provide for continuity of the current networks. There are no plans to introduce major changes to the current networks.

⁴ Standard on Assurance Engagements ASAE 3000 *Assurance Engagements Other than Audits or Reviews of Historical Financial Information*, paragraph 61.

2 Background

2.1 The *Passenger Transport Act 1994*

Under the PTA the Minister is responsible for providing passenger transport services in South Australia.

The PTA allows the Minister to award service contracts for the operation of regular public transport services by tender or other such means as the Minister thinks fit.

2.2 Contracts awarded under this procurement process

2.2.1 Background

In 2019 the Minister invited tenders for the provision of bus services for metropolitan Adelaide in six discrete service or contract areas:

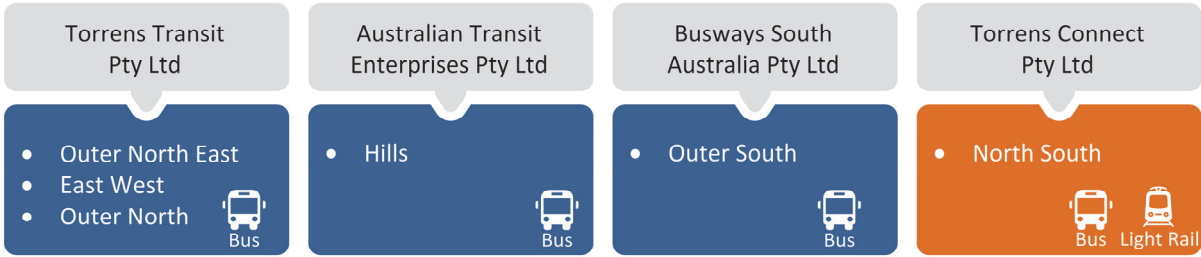
- East West
- Hills
- North South
- Outer North
- Outer North East
- Outer South.

There is a map of these contract areas in Appendix 1.

In May 2019, the SA Government approved that light rail services should be added to the bus services procurement. The operation and maintenance of light rail (tram) services was included in the North South contract area.

On 10 March 2020, the Minister awarded separate service contracts for each contract area as shown in figure 2.1.

Figure 2.1: Service contracts awarded



2.2.2 Overview of service contracts awarded

The primary objective of the service contracts is to ensure bus and light rail passenger transport services are delivered in ways that enhance the quality, efficiency and customer satisfaction in passenger transport services in South Australia, to increase patronage.

The service contracts have the following key elements:

- passenger transport service agreements that set out the terms and conditions on which each of the operators operate and provide the bus and light rail services
- vehicle lease agreements that set out the terms and conditions on which the operators can access the SA Government owned bus fleet and light rail vehicles for the purposes of providing the passenger transport services
- depot lease agreements, and in the case of light rail a licence agreement, that set out the terms and conditions on which the operators can access and use SA Government owned bus and light rail depots
- an employee transition deed that sets out the terms and conditions on which certain DPTI employees will transfer to the operator providing the light rail services
- an extension and variation agreement between the Minister and the Rail Commissioner, to enable the provision of light rail services to be subcontracted by the Rail Commissioner.

The SA Government has effectively outsourced the operation of its bus fleet and light rail, but has retained ownership of those assets. Under the contracts the SA Government also retains responsibility for setting and receiving fares and determining routes, timetables and service levels.

The start date for the service contracts is 10 March 2020, with the operators to start providing the passenger transport services from 5 July 2020. The initial term of the contracts is eight years (through to 30 June 2028), with an option for the Minister to extend for a further two years to 30 June 2030.

In the fifth year of the service contract the Minister has the discretion to review the operators' performance in the first four years of service. Where an operator has not met required performance standards the Minister has the right to terminate the service contract at that time.

The value of the service contracts was estimated to be \$3.008 billion (including GST) over the 10-year term.⁵

2.2.3 Summary of key commercial terms and arrangements

The key commercial elements of the service contracts are as follows:

- The service contracts are 'gross cost' contracts with an incentive payment for reducing the average cost per passenger and achievements in customer satisfaction and patronage growth.
- Most critical passenger transport assets used to deliver the services (depots, buses and light rail assets) are owned by the SA Government.

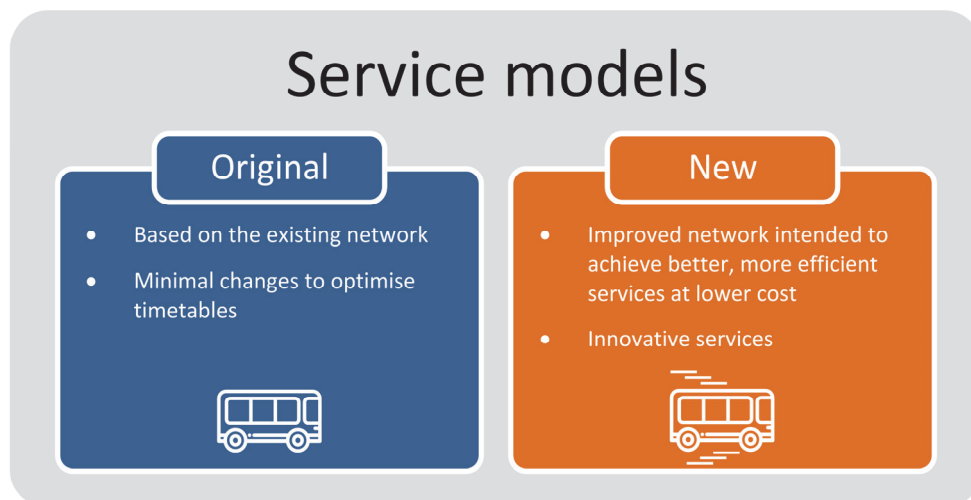
⁵ Knoll, Hon S MP (Minister for Transport, Infrastructure and Local Government) 2020, *Report to Parliament pursuant to section 39 of the Passenger Transport Act 1994: Adelaide Metropolitan Passenger Transport Service Contracts*, 23 March.

- The SA Government sets the:
 - pricing (the fares charged and retains the fare revenue collected)
 - service levels (the standard of service and the number of kilometres of service)
 - service location (the routes and locations, where each operator provides the services).
- The operator and the Minister agree to work together to identify, develop and implement an improvement and innovation strategy, to try to maximise patronage and customer satisfaction and efficiencies in delivering passenger transport services.
- The operator’s performance is guaranteed by:
 - an unconditional bank guarantee to be provided before the operator starts providing services
 - guarantees and indemnities provided by the operator and its parent entity guarantor.

2.2.4 Service models

The service contracts include two service models: the original service model and the new service model as shown in figure 2.2.

Figure 2.2: Service models in service contracts



The operators will start providing services in line with the original service model. It is up to the Minister to determine if, and when, the operators transition to the new service model.

2.2.5 Performance management arrangements

The service contracts include a performance management regime that includes regular and comprehensive reporting by the operator in performing the services. Further, the Minister has general audit and information gathering powers to review operator performance at any time.

In delivering the services the operator is required to meet a series of key performance indicator (KPI) benchmarks. The KPI benchmarks set the minimum acceptable service levels

in six key performance areas:

- service reliability and timeliness
- patronage
- reporting
- safety
- customer satisfaction
- service quality and asset presentation.

Performance against the KPIs feeds into payment calculations.

If an operator does not achieve a KPI benchmark it is deemed a KPI failure. A KPI failure may, depending on its severity and/or repetition, result in:

- abatements (reductions) to the operator's service payment
- incurring demerit points
- contract default, which if not remedied may result in the Minister exercising further rights such as step-in and/or termination.

Further, the Minister may require the operator to prepare and implement an approved cure plan that sets out how it intends to remedy the performance issues.

Should an operator incur too many demerit points the Minister may further reduce the operator's next monthly service fee.

2.2.6 Service payments

A service fee is payable to the operators monthly. The key elements of the service fee include:

- a primary amount that is subject to indexation and adjusted for agreed service changes
- bus fleet and depot costs
- other adjustments including any abatements for KPI failures.

In addition, variation to the monthly fee may be made for:

- additional services that the operator is requested to provide (beyond those specified in the contract)
- any changes to the applicable laws, standards and government policies that impact the operator's cost of providing the services
- the revenue share incentive scheme (see section 2.2.7)
- any other adjustments prescribed in the service contracts.

The Minister has broad set-off rights against the service fee payments for any amounts owing to it by the operator.

2.2.7 Revenue share incentive scheme

The service contracts include a revenue share incentive scheme to encourage strategies and investment to improve customer experience and patronage growth.

Under the scheme, the operator may be eligible to receive an incentive payment calculated as a percentage of MetroCard revenue⁶ for reductions in the average costs per passenger and/or increases in customer satisfaction and patronage. The revenue share incentive payment can be either positive or negative.

The revenue share incentive payment is calculated annually from the end of the second year of the contract (ie 30 June 2022).

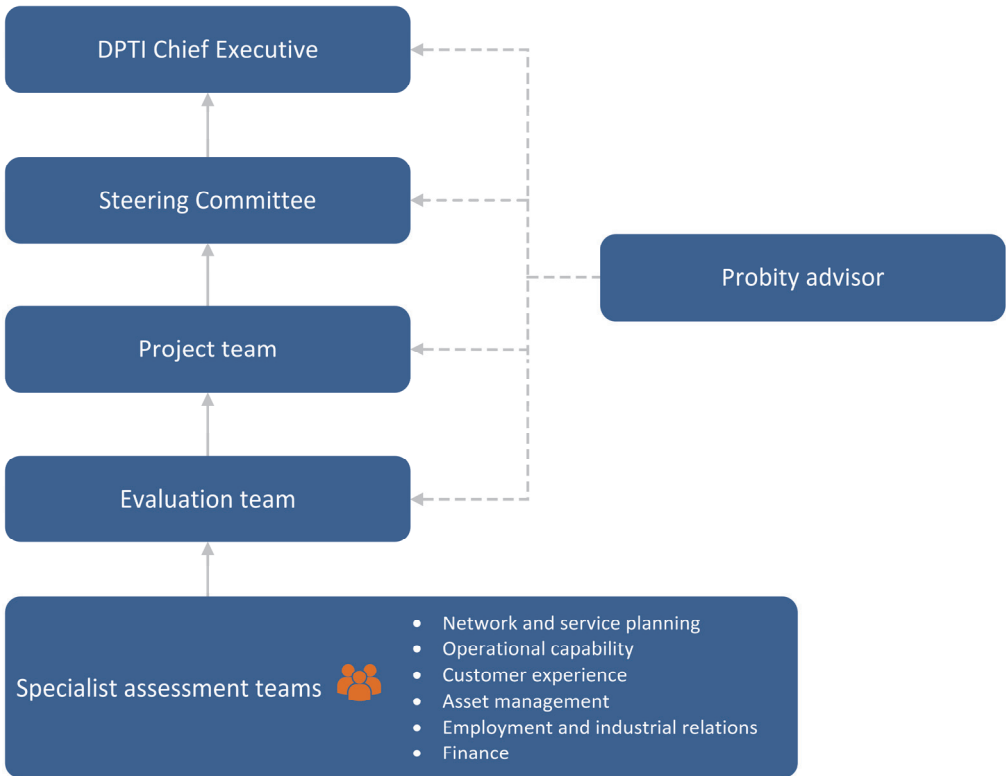
2.3 Project governance

The procurement process starts with acquisition planning, where needs and procurement objectives are identified, the procurement strategy is planned and an acquisition plan is prepared.⁷

DPTI allocated dedicated resources to plan and conduct the procurement by forming the Steering Committee, which started meeting in October 2017. The governance structure was reviewed and revised during the procurement process, which is further discussed in section 4.1.

Figure 2.3 shows the governance structure that was implemented in February 2019 and was in place during the supplier selection stage of the procurement.

Figure 2.3: Governance structure for passenger transport procurement



Source: Developed from the Steering Committee’s terms of reference.

⁶ MetroCard revenue is the fares paid by passengers using a MetroCard. These amounts are retained by the SA Government.
⁷ State Procurement Board, *Procurement Policy Framework*, version 4.1, issued September 2018, page 11.

The governance structure was established with reference to section 39(2a)(a) of the PTA, which requires the Minister to appoint a person or people to conduct the procurement process, including assessing responses.

To assist the DPTI Chief Executive, who was appointed under the PTA to conduct the procurement process on 13 March 2019, DPTI established:

- the Steering Committee
- a project team
- an evaluation team
- specialist assessment teams.

Section 4.1 outlines the roles and responsibilities of these groups.

DPTI also engaged an external probity advisor to provide advice as required throughout the procurement process and produce a final report on the probity of the procurement.

The governance arrangements for this procurement are set out in a range of DPTI documents, including:

- the terms of reference for the Steering Committee
- the acquisition plans for phase 1 and phase 2
- the evaluation plans for phase 1 and phase 2.

2.4 Procurement process

2.4.1 An overview of the stages of a procurement

A public sector procurement involves a range of activities conducted to buy goods or services that will deliver the best value in the expenditure of public money.

The SPB defines procurement as a three-stage process:⁸

- acquisition planning
- supplier selection
- contract management.

The activities undertaken for each stage of the procurement and the risks that may need to be managed will depend on the value and nature of the overall procurement. The procurement of passenger transport services for metropolitan Adelaide is for a service relied on by the public, is high value and results in contracts being established for a minimum of eight years.

Acquisition planning is the process undertaken when starting the procurement and includes identifying needs, planning the procurement strategy and preparing an acquisition plan. Robust planning supports efficient, effective, economical and ethical procurement and needs to commence early enough to identify opportunities and mitigate risks.⁹

⁸ State Procurement Board, *Procurement Policy Framework*, version 4.1, issued September 2018, page 7.

⁹ State Procurement Board, *Acquisition Planning Policy*, version 10.3, issued March 2018, page 5.

Supplier selection is the process undertaken to ensure appropriate suppliers are selected to provide required goods or services, while ensuring value is achieved.¹⁰ Under the SPB’s *Procurement Policy Framework* there are six broad stages for supplier selection which include developing bid documents and the evaluation plan, managing distribution and receipt of bids, selecting the preferred supplier(s) and developing contracts.

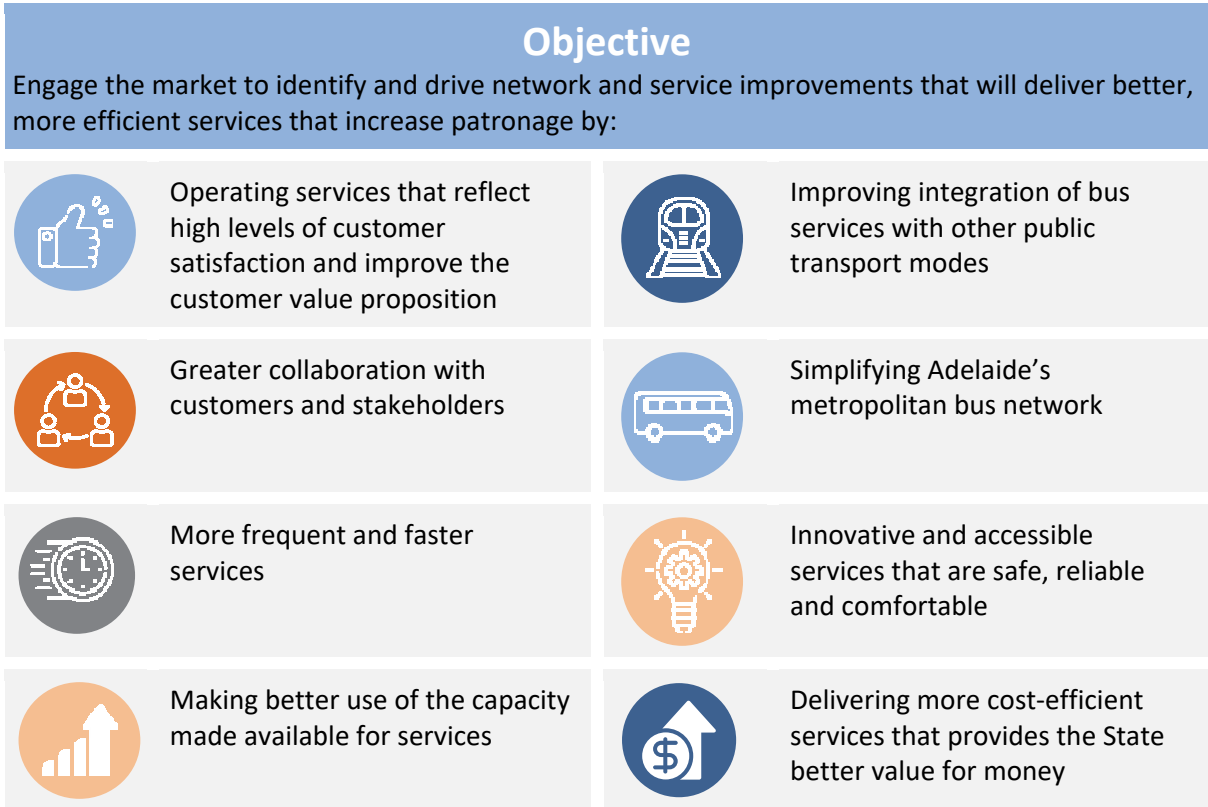
The contract management stage focusses on preparing and implementing a contract management strategy, implementing the contract, and monitoring and maintaining performance of the contract.

To review the probity of the procurement process leading up to the awarding of the contracts in line with the requirements of the PTA, we focussed on the acquisition planning and supplier selection stages of the procurement.

2.4.2 Procurement objective includes improved and more efficient services that increase patronage

Figure 2.4 shows the objective of the procurement and the specific elements that contribute to achieving it. These are included in the contractual arrangements.

Figure 2.4: Objective of the procurement to provide passenger transport services



Source: Developed from DPTI’s *Acquisition Plan for the Provision of Passenger Transport Services*.

¹⁰ State Procurement Board, *Supplier Selection Policy*, version 3.6, issued April 2020, page 4.

2.4.3 Market approach and tender evaluation process was split into two phases

DPTI conducted a competitive tender process for the procurement. It split the market approach and tender evaluation process into two phases. This approach was used as feedback from potential respondents during procurement planning indicated that additional time would be needed to develop network and service plans across the full network at the quality level likely to be sought.

Figure 2.5 shows the contract areas that were included in the two procurement phases.

Figure 2.5: Contract areas in each procurement phase



Sections 6 and 7 provide more information about the invitation to supply and evaluation processes for each phase.

2.4.4 Procurement timeline

Figure 2.6 provides a timeline of the key events during the procurement process from the Minister endorsing DPTI to proceed with a competitive tender process through to services starting under the new contractual arrangements.

Figure 2.6: Chronology of key events for the procurement process






A detailed chronology of events is in Appendix 2.

2.5 Extension of existing bus contracts

On 3 September 2018 the SA Government approved extending contracts with the existing operators to provide DPTI sufficient time to implement a procurement process to award new passenger transport service contracts under the PTA.

Approval and execution of the extension and variation agreements for each of the existing operators is shown in figure 2.7.

Figure 2.7: Contract extensions with existing operators

	 Contract areas	 Extension period	 Estimated value
Australian Transit Enterprises Pty Ltd Extension executed on 10 May 2019	<ul style="list-style-type: none"> Hills Outer North Outer South 	1 July 2019 – 19 April 2020*	\$77.6 million
Torrens Transit Pty Ltd Extension executed on 21 June 2019	<ul style="list-style-type: none"> East West North South Outer North East 	30 June 2019 – 30 June 2020	\$134.9 million

* There was an option to further extend the contract to 30 June 2020. Services continued to be provided until new services started.

Source: Developed from information provided by DPTI.

To minimise disruption to operations, it was agreed between the Minister and the existing operators that handover of services occur on the first weekend in July 2020. Contract extension agreements were executed to extend the existing service contracts by four days from 30 June 2020 to 4 July 2020.

3 Audit mandate, objective and scope

3.1 Our mandate

This review was conducted under section 39(3f) of the PTA.

The PTA requires the Minister, on awarding service contracts to operate regular passenger services with a value of \$4 million or above, to provide the Auditor-General with:

- a copy of the service contracts
- a report on the processes leading to the award of the contracts.

The PTA requires the Auditor-General to examine the contracts and prepare a report to Parliament on the probity of the processes that led to them being awarded.

3.1.1 Section 39 of the *Passenger Transport Act 1994*

The relevant provisions of section 39 of the PTA are:

(3e) If under a service contract awarded under this section the Minister is, or is reasonably expected to be, liable to make payments equal to or exceeding \$4 000 000 (in total) over the term of the contract, the Minister must within 28 days after awarding the contract, forward to the Auditor-General-

- (a) a copy of the contract; and*
- (b) a report which describes the processes that applied with respect to the awarding of the contract.*

(3f) The Auditor-General must, within the period of 4 months after the receipt of a service contract and report under subsection (3e)-

- (a) examine the contract; and*
- (b) prepare a report on the probity of the process leading up to the awarding of the contract.*

(3g) Section 34 of the Public Finance and Audit Act 1987 applies with respect to the examination of a service contract, and the preparation of a report, under subsection (3f).

(3h) The Auditor-General must deliver copies of a report prepared under subsection (3f) to the President of the Legislative Council and the Speaker of the House of Assembly.

3.2 Our objective

The objective of our review was to conclude on:

- the probity of the process leading up to the awarding of service contracts for provision of bus and light rail passenger transport services in metropolitan Adelaide
- whether the service contracts meet the requirements of the PTA.

3.3 What we reviewed and how

3.3.1 The probity of the process leading up to the awarding of service contracts

As required by section 39(3f) of the PTA we have reviewed the probity of the procurement process leading to the award of six contracts in March 2020 for providing Adelaide metropolitan passenger transport services (bus and light rail).

To assess the probity of the procurement process we considered whether DPTI effectively implemented a procurement process that addressed:

- concepts and requirements in the SPB policy framework
- the probity principles outlined in section 3.4.

In conducting this review we also considered whether:

- procurement procedures, processes and probity controls outlined in the procurement acquisition plans, evaluation plans and probity plan were effectively implemented
- registration of interest and invitation to supply (tender) requirements were followed.

3.3.2 Assessment of whether the service contracts comply with the requirements of the *Passenger Transport Act 1994*

In examining the service contracts we assessed whether the Minister addressed specific requirements in the PTA in conducting processes leading up to and following the awarding of the service contracts. This included whether the Minister and DPTI had effective processes to properly consider the following four principles outlined in the PTA:

- avoiding a monopoly
- developing sustainable competition
- integrating passenger transport services
- efficiency and promoting innovation.

We also assessed whether matters required to be included in the contracts by the PTA were included. We also considered whether the contracts protect the State's interests.

We engaged a legal firm to help us examine the contracts and review legal compliance with the PTA.

3.4 Key probity principles

For the probity of the process leading up to the awarding of the service contracts we identified key probity principles to use in conducting the review. We considered SPB policies and guidelines. The SPB's *Probity and Ethical Procurement Guideline* states:

Probity is the evidence of ethical behaviour commonly associated with the practice of adopting and following well considered procedures and processes to ensure that procurement decisions are fair, transparent and defensible...

... In a general sense, probity means a process that is able to withstand internal and external scrutiny. Procurement process and procedures must be clear, open, well understood, communicated and applied equally to all parties to ensure purchasers and suppliers are able to deal with each other on the basis of mutual trust and respect.

We also considered our previous reviews of the procurement of bus passenger transport services and DPTI's probity plan.

We identified the following key probity principles for our review of the procurement:

- compliance with the law
- transparent and consistent decision making
- security and confidentiality of information
- fairness, impartiality, integrity and equality provided to all parties
- management of conflicts of interest
- maintenance of records, including maintaining an audit trail that enables independent review of processes
- conducting an appropriately competitive process.

3.5 What we did not review

Our review was limited to the Auditor-General's mandate in section 39 of the PTA. We did not review:

- the arrangements implemented by DPTI to transition to the new service contracts
- the contract management framework (including plans) developed to help manage the new service contracts
- the impact of the SA Government's decision not to proceed with the proposed bus network changes on the procurement objectives and contract management arrangements (see section 1.6).

4 Procurement governance arrangements

What we found

The project structure and governance arrangements established and documented by DPTI were reasonable to provide structured decision making and accountability.

We found that:

- terms of reference for the Steering Committee were authorised after it had been meeting for about six months
- the initial appointment of a person to conduct the procurement process by the Minister under the PTA did not appoint all Steering Committee members
- Steering Committee meeting minutes were not maintained for its first 10 months of operation.

What we recommended

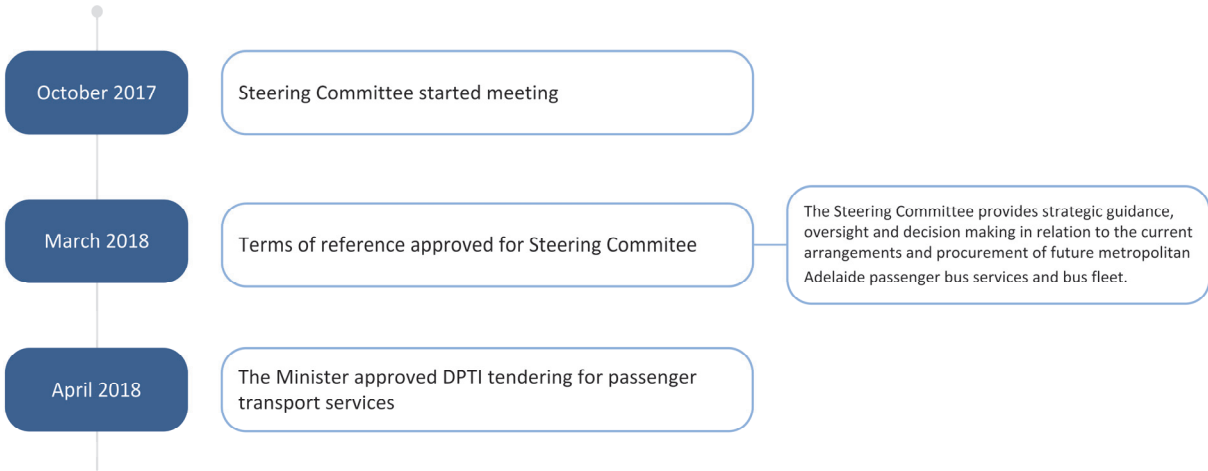
For future procurements, DPTI should:

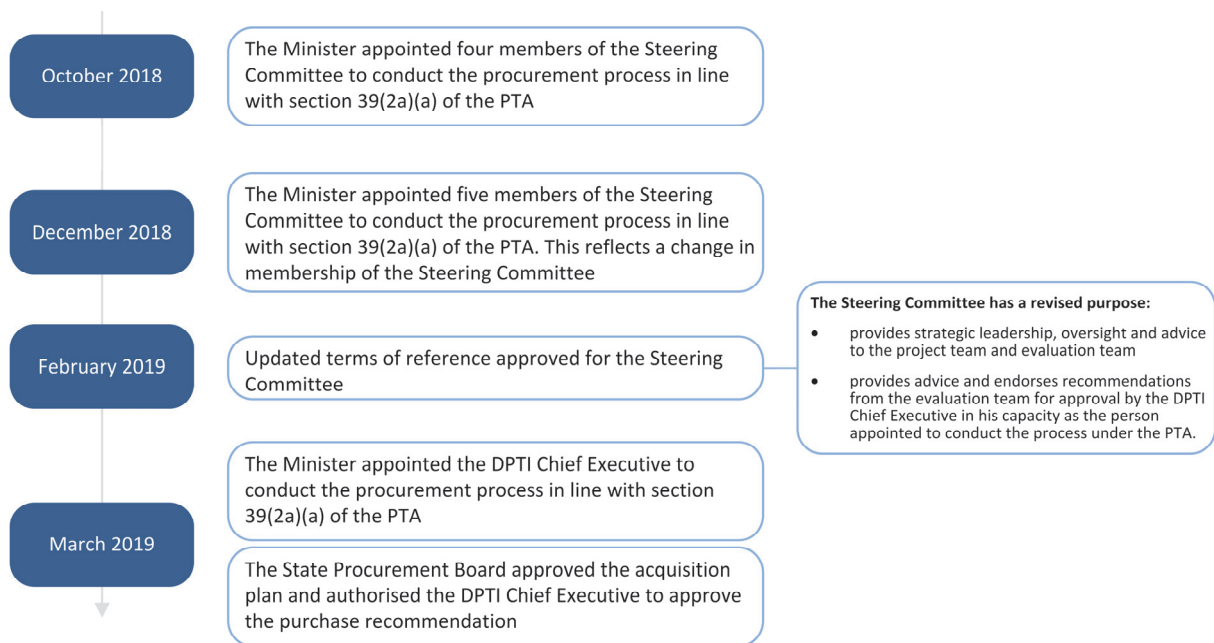
- ensure terms of reference for the Steering Committee are approved as soon as practical from the time it starts meeting. This will help to ensure that roles and responsibilities are understood from the start of the procurement planning process
- future appointments made under the PTA are consistent with the governance arrangements established for the procurement. Where a committee or group is appointed, the appointment should include all members of the group
- minutes are maintained for all Steering Committee meetings.

4.1 Introduction

DPTI implemented governance structures to plan and conduct the procurement.

Figure 4.1: Timeline of key governance changes





Source: Developed from information provided by DPTI.

Terms of reference were first approved for the Steering Committee in March 2018, before the Minister approved going to tender for metropolitan Adelaide passenger transport services. At this time, the Steering Committee was established to oversee both the procurement of buses and the future tender for passenger transport services.

The Steering Committee membership reflected these two separate procurements. The terms of reference stated that the Steering Committee’s objective was to provide strategic guidance, oversight and decision making for current arrangements and procurement of future Adelaide metropolitan passenger bus services and bus fleet.

In January 2019 governance arrangements were reviewed and revised. New terms of reference were approved by the DPTI Chief Executive in February 2019. Under the new terms of reference bus procurement was removed from the Steering Committee’s scope of responsibilities and decision making for the passenger transport services procurement was moved to the DPTI Chief Executive.

4.1.1 Person appointed to conduct the process

Where the Minister determines that a service contract should be awarded by tender, section 39(2a)(a) of the PTA requires the Minister to appoint a person or people to conduct the process, including the assessment of any responses to the tender.

The Minister appointed members of the Steering Committee on 9 October 2018 and 18 December 2018 to conduct the procurement process under section 39(2a)(a). The change in the governance structure discussed in section 4.1 resulted in the change of appointment to the DPTI Chief Executive.

The DPTI Chief Executive was appointed by the Minister to conduct the process on 13 March 2019.

Each appointment made by the Minister for this procurement process revoked the previous appointment.

4.1.2 The Passenger Transport Services Procurement Steering Committee

The Steering Committee started meeting in October 2017. It included the following DPTI staff:

- Executive Director, South Australian Public Transport Authority (formerly the General Manager, Transport Operations)
- Director, Procurement and Contracting
- Director, Finance
- Director, Customer, Community and Public Affairs.

The Steering Committee's function was to provide strategic leadership, oversight and advice to the Bus Services Procurement Project Team (the project team) and evaluation team to meet government, departmental and community needs in line with the requirements of the PTA.

The Steering Committee was responsible to the DPTI Chief Executive and the Minister. Its responsibilities included:

- ensuring effective governance and risk management frameworks were in place for the procurement
- reviewing and endorsing key procurement documents
- providing advice and options to the DPTI Chief Executive and the Minister as required
- reporting on project progress to key stakeholders such as the DPTI Chief Executive and the Minister.

The Steering Committee's purpose and membership changed over the life of the procurement process as shown in figure 4.1.

4.1.3 The project team

DPTI established the project team to coordinate and undertake all aspects of the procurement process from project initiation to service commencement.

The project team's role included:

- developing and managing the project plan

- identifying, monitoring and reporting on key project risks and monitoring the implementation of mitigation strategies
- developing and managing an evaluation plan to ensure strategic objectives are met
- consulting with stakeholders
- obtaining all necessary project approvals
- facilitating all operational requirements for the evaluation team and specialist assessment teams (SATs).

4.1.4 The evaluation team

The evaluation team was formed to evaluate all submissions and make recommendations to the Steering Committee and the DPTI Chief Executive. Its responsibilities included:

- maintaining probity
- reviewing advice received from the SATs
- identifying clarification required and reviewing clarifications received
- assessing risk and determining risk management strategies
- identifying the need for references and visits
- evaluating the submissions received against the evaluation criteria and determining value for money assessments for each submission
- preparing an evaluation report
- maintaining appropriate administrative arrangements and ensuring appropriate management of records.

4.1.5 Specialist assessment teams

SATs were formed to assess specific criteria in the evaluation process. Their responsibilities included:

- providing specialist advice or support to the evaluation team on the strengths, weaknesses and risks associated with each response
- maintaining probity
- undertaking required due diligence
- identifying necessary clarification questions and reviewing clarifications received
- maintaining appropriate administrative arrangements and ensuring required records were prepared.

4.1.6 Probity advisor

DPTI engaged an external probity advisor in August 2018 during procurement planning. The probity advisor's role, as documented in the acquisition plan, included:

- developing a probity plan

- attending Steering Committee meetings and reviewing documents as required by the committee
- briefing the Steering Committee, project team and other DPTI staff on probity as required
- attending events organised as part of the procurement process where proponents were invited to participate (ie market sounding presentations, industry briefings, site visits, one-on-one interactive sessions and clarification sessions)
- providing advice on issues referred by the Steering Committee, the project team, the DPTI Chief Executive or the Minister
- attending key evaluation meetings
- providing reports for key milestones.

4.1.7 Other specialist advisors

DPTI also engaged specialist advisors to assist in the procurement and evaluation process. Specialist advice was obtained for:

- reviewing financial evaluation results
- light rail assets and light rail asset management
- network and service planning
- applying the PTA's monopoly and sustainable competition requirements.

4.2 Audit approach

We assessed the project structure and governance arrangements by reviewing:

- appointments made by the Minister to conduct the process in line with section 39(2a)(a) of the PTA
- legal advice provided to DPTI on appointments made under section 39(2a)(a) of the PTA
- terms of reference prepared for the Steering Committee
- roles and responsibilities established in the acquisition plans and evaluation plans
- Steering Committee meeting minutes and records.

4.3 Findings

4.3.1 Not all members of the Steering Committee were appointed by the Minister to conduct the process

Recommendation

DPTI should ensure that future appointments made under section 39(2a)(a) of the PTA are consistent with the governance arrangements established for the procurement.

Where members of a committee or group are appointed, the appointments should be made for all members who make up the group and act jointly to achieve the outcomes of that group. Alternatively, DPTI could consider only having officers appointed by the Minister as members of the steering committee.

Finding

The first instrument of appointment authorised by the Minister under section 39(2a)(a) of the PTA appointed four of the Steering Committee's seven members. The Steering Committee, at that time, had decision-making responsibility for the procurement process as outlined in the terms of reference:

The Bus Contracts/Supply Steering Committee will provide strategic guidance, oversight and decision making in relation to the current arrangements and procurement of future Adelaide metropolitan passenger bus services and bus fleet.

The Steering Committee members act together as one entity to undertake the objectives, functions and responsibilities assigned to it in its terms of reference. As such, it would be prudent for all members to be appointed by the Minister under section 39(2a)(a) of the PTA.

DPTI response

Not accepted. As the Auditor-General notes, in the early stages of the process, a single integrated Steering Committee was established with oversight of both vehicle procurement and service contract procurement. DPTI acted consistently in excluding the two members who did not have a role in the bus services contract procurement from being appointed under section 39(2). Subsequently, they left the Steering Committee, there was a reset in the governance and oversight, the appointments under section 39(2a)(a) of the PTA were changed and the process commenced as outlined in our report to the Auditor-General.

4.3.2 Terms of reference for the Steering Committee were not established promptly

Recommendation

DPTI should ensure that terms of reference for future steering committees are established and authorised promptly so that their objectives, responsibilities and operations are understood by all members and stakeholders.

Finding

Terms of reference for the Steering Committee were approved by the DPTI Chief Operating Officer in March 2018. It had been meeting for about six months before they were finalised.

The terms of reference establish the Steering Committee's objectives, scope, responsibilities and operating procedures. It is good practice to ensure that these arrangements are

documented, approved and made available to all members as soon as possible from the time the committee starts operating.

DPTI response

Accepted in principle.

It is noted that this finding relates to the period prior to matters set out in the report by DPTI to the Auditor-General in accordance with the requirements of section 39 of the PTA, during the initial preliminary planning period prior to preparation of an acquisition plan. A steering committee's terms of reference and governance arrangements may evolve as the thinking in preliminary planning develops. Timing of approval of a terms of reference will need to take account of the maturity of the potential procurement approach, and interim arrangements made should circumstances require.

The relevant DPTI policy and/or procedure will be amended accordingly.

4.3.3 Steering Committee meeting minutes were not recorded for the first 10 months of meeting

Recommendation

DPTI should ensure that minutes are maintained for all Steering Committee meetings to provide a record of key matters discussed and rationale for decisions made by the committee.

Finding

Our review of Steering Committee meeting records identified that meeting minutes were not maintained for meetings held between October 2017 and August 2018. We acknowledge that an action items register was maintained during this period, along with papers and reports tabled at meetings.

The Steering Committee was the key decision-making group for the procurement project in the early planning stage of the process. Without documented meeting minutes, it may be difficult for the committee to demonstrate the matters it considered, the rationale for key decisions and how it discharged its responsibilities.

DPTI response

Accepted. It is noted that other records were available that provide evidence of matters considered at meetings, the actions determined to be taken, and papers that included underpinning analysis. However, DPTI will ensure terms of reference for major services procurement steering committees call explicitly for meeting minutes to be kept. The relevant DPTI policy and/or procedure will be amended accordingly.

5 Procurement planning

What we found

DPTI prepared a comprehensive acquisition plan that addressed SPB requirements.

We found some gaps in procurement planning including:

- DPTI did not document how it assessed there were no perceived probity risks for the deviation to the approved acquisition plan to include light rail services in the procurement scope
- controls designed to ensure that evaluation criteria descriptions in the phase 1 evaluation plan were the same as in the invitation to supply documents were not effectively implemented
- there was no written record to support that the Steering Committee received assurance from the probity advisor that the evaluation plans were consistent with the invitation to supply documents
- final evaluation plans for each phase were endorsed by evaluation team members and approved by the DPTI Chief Executive after invitation to supply responses were opened.

What we recommended

For future procurements, DPTI should:

- document the evidence and rationale to support and demonstrate how it has assessed the potential probity impacts of deviations to acquisition plans and provide this information to those responsible for approving the deviations
- establish and undertake a checking process to ensure evaluation criteria descriptions in evaluation plans are the same as those in tender documents issued to proponents. This control activity should occur before the evaluation process starts
- ensure that where probity advisors provide assurance that evaluation plans are consistent with market documents, a record to support this is maintained
- ensure the final evaluation plan is endorsed by all evaluation team members and approved before tender responses are opened.

5.1 Introduction

5.1.1 DPTI prepared a comprehensive acquisition plan that was approved by the State Procurement Board

DPTI prepared an acquisition plan for the procurement process. It was a comprehensive

document that included an evaluation plan, risk management plan, risk register, probity plan and draft contract management plan.

In February 2019 DPTI conducted an interactive market sounding process aimed at seeking feedback and ideas from market participants on how the procurement could be structured to best drive the improvements sought. DPTI used the feedback and ideas to inform its market strategy. This resulted in the market approach being split into two phases.

The SPB approved the market approach and acquisition plan on 13 March 2019 and also delegated approval of the purchase recommendation to the DPTI Chief Executive.

5.1.2 The State Procurement Board approved a deviation to the acquisition plan for the procurement to include light rail services

On 27 May 2019 the SA Government determined that light rail services should be added to the scope of the bus passenger transport services procurement. DPTI assessed the potential impact of the deviation as major therefore requiring SPB approval. The SPB considered and approved a revised acquisition plan that included light rail on 27 June 2019.

5.1.3 Evaluation plans were prepared for phase 1 and phase 2

DPTI prepared similar evaluation plans for phase 1 and phase 2 that outlined the processes, evaluation criteria and weightings to be used to evaluate tender responses. These plans also documented principles and procedures designed to make sure the evaluation process was fair, defensible and consistent with government policies and objectives.

The evaluation plans were provided to the SPB as attachments to the acquisition plans that they approved. DPTI later updated and finalised the evaluation plans. Some changes were made to evaluation criteria descriptions and evaluation team members were included. The DPTI Chief Executive approved the final phase 1 evaluation plan on 22 August 2019 and the final phase 2 evaluation plan on 21 November 2019.

5.2 Audit approach

Our review of procurement planning assessed whether:

- appropriate procurement planning activities were undertaken, including whether a detailed acquisition plan that addressed SPB requirements was prepared
- the acquisition plan was approved before DPTI approached the market and any deviations to the acquisition plan were approved in line with SPB requirements
- risk management was adequately considered during acquisition planning and treatments were identified to mitigate identified probity risks
- an evaluation plan was prepared, endorsed by the evaluation team and approved in line with relevant procurement delegations before tender responses were opened.

5.3 Findings

5.3.1 DPTI did not document how it assessed there were no perceived probity risks for the deviation to include light rail

Recommendation

For future deviations to approved acquisition plans DPTI should document the evidence and rationale that supports and demonstrates how it has assessed potential impacts on the probity of the procurement process. This information should be provided to those responsible for approving deviations.

Finding

The SPB's *Supplier Selection Policy* explains that deviations occur where there is a material departure from the procurement strategy approved in the acquisition plan before contracts are executed. The policy requires agencies to assess deviations to determine the type of approval required by considering the:

- potential impact on the procurement strategy, probity and/or procurement outcome
- stage in the procurement process
- level of deviation.

For the deviation to include light rail services DPTI assessed the level of deviation as 'high'. This required the SPB to approve the deviation. DPTI documented its assessment in an email to the SPB that stated the change in scope impacted on the perceived risks for industrial relations and asset maintenance rather than on probity.

We found that DPTI's assessment did not explain or discuss the basis for how it assessed and considered that there were no perceived risks or impacts on the probity of the procurement. The project team advised us that in assessing the deviation they considered there was no probity impact or disadvantage to any market participant. They explained this was because the decision to include light rail services in phase 2 was made before the phase 1 invitation to supply closed and was announced to all market participants at the same time.

DPTI response

Accepted. A framework and template for deviation risks assessment will be developed for inclusion in the relevant DPTI procedures and related process controls, so as to formalise the analysis (noting that it was completed in this instance but not formally documented). The relevant DPTI policy and/or procedure will be amended accordingly.

5.3.2 Controls to ensure that evaluation criteria descriptions in the phase 1 evaluation plan were the same as in the invitation to supply documents were not effectively implemented

Recommendation

For future procurements DPTI should ensure that:

- a checking process is established and carried out before the evaluation process starts to make sure that the evaluation criteria descriptions in the evaluation plan are the same as those in tender documents issued to proponents
- where probity advisors provide assurance that evaluation plans are consistent with market documents, a record of this is maintained.

Finding

We found that some evaluation criteria descriptions in the final phase 1 evaluation plan differed from the invitation to supply documents issued to proponents and that the controls designed to ensure they were the same were not effectively implemented.

We found that the five evaluation criteria headings¹¹ and weightings in the evaluation plans were consistent with the invitation to supply documents. However, we found some differences including instances where evaluation criteria descriptions in the phase 1 evaluation plan were:

- not included in the invitation to supply documents or SAT evaluation reports/worksheets
- referred to in the specifications document but not included in the evaluation criteria section of the procurement process guidelines issued to proponents.

The descriptions provided under the evaluation criteria headings explained to proponents the specific elements that they needed to demonstrate. They also provided guidance to, and were used by, the SATs and evaluation team in assessing and evaluating the tender submissions.

The differences occurred because the evaluation criteria descriptions in the evaluation plan were updated after the invitation to supply documents were released. The DPTI Chief Executive advised us that these updates were made to give more guidance to the evaluation team on how to evaluate some of the criteria.

To avoid potential challenges to the evaluation process and ensure probity and transparency the probity plan required the evaluation plans to be consistent with the invitation to supply documents. The acquisition plan required the probity advisor to review the evaluation plans and provide assurance to the Steering Committee that they complied with the probity plan.

The project team told us that the probity advisor provided verbal advice to the Steering Committee on the probity of the process at Steering Committee meetings. This included compliance with the probity plan. The Steering Committee minutes do not record this verbal advice from the probity advisor.

The DPTI Chief Executive promptly initiated a health check for the procurement process after becoming aware of the differences. DPTI engaged an external advisory firm to undertake the health check after the phase 1 evaluation had started. The external firm reviewed and reported on the consistency of the evaluation plans and invitation to supply documents. The external firm reported that they:

¹¹ See figure 7.1 for the five evaluation criteria headings.

- identified a range of updates to evaluation criteria between evaluation plan versions for phase 1 that reflected changes based on the specifications document
- found that these changes were considered to either capture the specification requirements or represent the same meaning as the original criteria
- considered that there were no material impacts from the updates.

They also reviewed phase 2 documents and found they were consistent. The project team told us that the evaluation team gave focus to ensuring phase 2 documents were consistent after becoming aware of the phase 1 differences.

DPTI response

Accepted. As the Auditor-General has noted, this issue was identified internally, and a "Health Check" was instituted to ensure it had no impact on the assessment in Phase 1 and was amended to align with this finding prior to Phase 2. This "Health Check" process will be adopted and formalised for nominated major service contract procurements, and the relevant DPTI policy and/or process amended accordingly.

5.3.3 The final evaluation plans were endorsed and approved after invitation to supply responses were opened

Recommendation

For future procurements DPTI should ensure that final evaluation plans are endorsed by all evaluation team members and approved before tender responses are opened.

Finding

We found the final evaluation plans¹² for both phases were provided to and approved by the DPTI Chief Executive after the invitation to supply responses were opened. Specifically, the invitation to supply responses for:

- phase 1 were opened on 15 August 2019 while the final evaluation plan was approved by the DPTI Chief Executive on 22 August 2019
- phase 2 were opened on 14 November 2019 while the final evaluation plan was approved by the DPTI Chief Executive on 21 November 2019.

The SPB's *Supplier Selection Policy* requires the evaluation plan to be prepared and approved before tender responses are opened.¹³

¹² As discussed in section 5.1.3, evaluation plans were attached to the acquisition plans approved by the SPB in March 2019 and June 2019. The SPB endorsed but did not approve the evaluation plans attached to the acquisition plans. The evaluation plans were later updated and finalised. Consistent with the approval process set out in the acquisition plans the project team sought approval for the final revised evaluation plans from the DPTI Chief Executive.

¹³ State Procurement Board, *Supplier Selection Policy*, version 3.3, issued April 2019, page 5.

We also noted that the evaluation team members endorsed the final evaluation plans after the invitation to supply responses were opened.

Endorsing and approving evaluation plans before tender responses are opened reduces the risk that the evaluation plan is changed after responses are opened and any potential advantage or disadvantage this may provide particular proponents.

We note the DPTI Chief Executive initiated an investigation into why the phase 1 evaluation plan was approved after the invitation to supply responses were opened. This investigation found there were shortcomings in the process to ensure that the evaluation plan is approved before the tender box is opened.

DPTI response

Accepted. It is noted that the investigation referenced above identified that earlier versions of the evaluation plan were reviewed and endorsed by several bodies, including SPB and the Steering Committee prior to the opening of the tenders, and signed off by the Chief Executive. The shortcomings in the process that were found will be addressed in the relevant DPTI policy and/or procedure.

6 Invitation to supply release and opening of responses

What we found

Sound arrangements were established and implemented to manage receiving and opening tender responses and the confidentiality and security of them.

Some processes established by DPTI to manage interactions with potential proponents before tenders closed were not implemented. This included that DPTI did not:

- fully implement advice received from the probity advisor to maintain a complete record of site visit attendees and obtain acknowledgement of site visit protocols from all attendees
- maintain records of key matters discussed at one-on-one interactive sessions

What we recommended

For future procurements, DPTI should:

- ensure that when it follows advice provided by probity advisors it establishes mechanisms to confirm that the advice is fully implemented
- maintain records of key matters discussed with proponents at interactive sessions.

6.1 Introduction

A competitive invitation to supply market approach was used for the procurement.

DPTI split the invitation to supply process into two phases, with three contract areas allocated to each phase.¹⁴ Phase 1 included the East West, Hills and Outer North East contract areas, while phase 2 included the North South, Outer North and Outer South contract areas.

The release of the invitation to supply documents for each phase was staggered so that interested parties had enough time to adequately respond to the requirements of each phase. Phase 1 was released in April 2019, with phase 2 released in July 2019.

6.1.1 Interested parties were required to register their interest to participate in the invitation to supply process

Interested parties were required to undertake a registration of interest to participate in the invitation to supply process. The purpose of the registration of interest was to confirm that interested parties:

¹⁴ See Appendix 1 for a map that shows each contract area.

- were bona fide providers of passenger transport services
- signed a non-disclosure deed and accepted the rules that DPTI established for accessing information provided in the electronic data room.

The registration of interest closed on 1 August 2019 for phase 1 and on 24 October 2019 for phase 2.

A total of 38 interested parties registered their interest to participate in the invitation to supply process. Twenty two of them were assessed to meet the essential criteria, given access to the electronic data room and allowed to participate in the invitation to supply process.

6.1.2 Release of invitation to supply documents

The invitation to supply documents for the two phases were released as follows:

- Phase 1 was released on 23 April 2019 and closed on 15 August 2019.
- Phase 2 was released on 8 July 2019 with an initial closing date of 22 October 2019. This was later extended to 14 November 2019.

The invitation to supply documents were made available in an electronic data room to the interested parties that were assessed as successful in the registration of interest process. The documents included procurement process guidelines, specifications and draft contract documents.

6.1.3 Information was made available to interested parties in an electronic data room

To help interested parties to prepare a response to the invitation to supply a range of due diligence information was made available in the electronic data room. This included validation and revenue data, patronage, route and timetable information, bus fleet information (including manuals, specifications and maintenance records), and bus depot and layover area information and plans.

To be successful in the registration of interest process interested parties were required to sign off that they and their authorised representatives would observe the data room rules that DPTI established.

6.1.4 Industry briefings, site visits and interactive sessions

For both phases an industry briefing, site visits and one-on-one interactive sessions were held after the invitation to supply documents were released and before the invitation to supply closed to help potential proponents prepare their tender responses.

DPTI used the industry briefings to discuss the procurement process and timeline, probity and invitation to supply response requirements.

The site visits gave potential proponents an opportunity to inspect government owned depots and vehicles used by the incumbent operators.

One-on-one interactive sessions were held with potential proponents to provide an opportunity for them to individually meet with DPTI to:

- ask questions to further inform and clarify their understanding of DPTI's requirements set out in the invitation to supply documents
- discuss their proposed solutions, concepts, methods and designs, and seek DPTI's feedback before submitting their proposals.

6.1.5 Receipt and opening of invitation to supply responses

The evaluation plan addressed the receipt and opening of tender responses. It required that they be opened and scheduled (ie recorded) in line with DPTI policies and that the probity advisor be present.

A schedule of tenders recording the invitation to supply responses received was completed. It shows that the tender responses were opened by two authorised officers. Further, the initial page of each tender response was date stamped to evidence that phase 1 and phase 2 responses were opened at the time and date that the invitation to supply closed for each phase.

Five sets of responses to the invitation to supply were received for phase 1 and phase 2.

6.2 Audit approach

We reviewed:

- the registration of interest process to assess whether:
 - procedures were developed to assess and approve registration of interest applications
 - the outcome of the registration of interest assessment was documented and approved
 - interested parties signed non-disclosure deeds and data room rules
- the invitation to supply documents released to the market to assess whether they were consistent with SPB requirements and the evaluation plans
- the arrangements established and implemented to manage:
 - the probity of industry briefings, site visits and one-on-one interactive sessions
 - the receipt and opening of tender responses. We also assessed whether any late tender responses were managed in line with SPB and DPTI policies
 - the confidentiality and security of tender responses.

6.3 Findings

6.3.1 Incomplete record of site visit attendees and not all companies confirmed they acknowledged site visit protocols

Recommendation

When DPTI implements advice that is provided by probity advisors it should establish mechanisms to confirm that the advice is fully implemented.

Finding

Before proponents attended the site visits, they had to provide DPTI with a list of attendees. They also had to provide a signed copy of the site visit protocols developed by the probity advisor to acknowledge that attendees would follow them. The protocols required all attendees at the site visits to sign an attendance register.

Before the site visits, the probity advisor informed the project team that for completeness they should obtain copies of attendance registers from the incumbent operators.¹⁵ They advised this was to reconcile whether actual attendees at the site visits were the same as those included in the proponents' acknowledgment of the protocols. We found that:

- a signed copy of the site visit protocols was not provided by two companies that attended phase 2 site visits
- the project team did not obtain sign-in sheets for three phase 1 site visits and two phase 2 site visits. Therefore, they could not fully implement the probity advice and check that actual attendees at site visits were included on the protocol list.

The project team told us that they did not fully implement the probity advice due to administrative oversights. We acknowledge this was of low risk to the probity of the process.

DPTI response

Noted. As noted, these omissions were a minor administrative oversight. Additional processes would add unwarranted administrative burden taking into account the risk.

6.3.2 No records of matters discussed with potential proponents at one-on-one interactive sessions

Recommendation

For interactive sessions with proponents DPTI should maintain a record of key points discussed to demonstrate the interaction process is fair, transparent and auditable.

¹⁵ The incumbent operators managed the attendance registers as the site visits were held at various government owned depots that they operated from.

Finding

Our review of file notes maintained by DPTI for the phase 1 and phase 2 interactive sessions found that they only recorded the attendees, meeting date and if any questions were taken on notice. They did not record any matters discussed by DPTI or the potential proponents.

To manage the probity of the one-on-one interactive sessions held for both phases, DPTI developed competitive interaction protocols to:

- provide a structured, transparent and auditable interaction process
- ensure that any interactions could withstand objective and independent scrutiny.

The protocols were reviewed by the probity advisor. They stated that DPTI should take minutes/records of key matters discussed at interactive sessions. The SPB guidelines support this sound practice, which helps to maintain the integrity of the procurement process.¹⁶

The project team advised us that the probity advisor attended and observed the conduct of the interactive sessions. We consider that this was a sound practice that helped to mitigate probity risks for these interactions.

DPTI response

Accepted in principle. The risks identified by the Auditor-General were materially mitigated by the probity advisor attending and observing all sessions and all parties acknowledging the Bus Services Procurement Competitive Interaction and Dialogue Protocols and Principles.

DPTI will amend the relevant policy and/or procedure to add a requirement for records of interactive sessions to include the subject matters on which the proponent sought and was provided with clarification; and a list of the matters on which the proponent sought feedback.

¹⁶ The SPB's *Probity and Ethical Procurement Guideline* explains that officers should pay particular attention to documenting all relevant communication with prospective suppliers. Also, that appropriate records (such as meeting minutes) should be maintained of relevant verbal discussions during the procurement process.

7 Evaluation of invitation to supply responses

What we found

The evaluation of invitation to supply responses followed the process established in the evaluation plans.

We identified the following processes and practices that should be improved for future procurements:

- attendance records were not maintained for pre-evaluation briefing sessions
- SAT members did not formally endorse records of assessment outcomes including consensus scores that they provided to the evaluation team for them to consider in determining their consensus scores
- the evaluation team did not maintain minutes to record key matters discussed at clarification sessions held with proponents for phase 1
- processes set out in the evaluation plans to review and approve clarifications and information requested from proponents were not always followed
- the evaluation and financial assessment teams did not document how they considered and addressed two matters raised in the financial evaluation.

What we recommended

For future tender evaluation processes, DPTI should:

- maintain attendance records for pre-evaluation briefing sessions
- ensure the records that document the outcome of assessments and advice provided by SATs to the evaluation team are signed by all SAT members
- maintain records of key matters discussed with proponents at clarification sessions
- ensure clarifications and requests for information from proponents are approved in line with the approval processes set out in evaluation plans and reviewed by the probity advisor where one is engaged
- ensure evaluation teams clearly document their rationale to demonstrate how they have considered and addressed matters that are raised but not actioned during the evaluation process.

7.1 Introduction

Separate evaluation processes were completed for invitation to supply responses for phase 1 and phase 2. The following sections outline the evaluation criteria and processes undertaken.

7.1.1 Evaluation criteria

Tender responses for both phases were evaluated against mandatory criteria and five weighted qualitative evaluation criteria. Separate weightings for the five qualitative evaluation criteria applied for the contract areas that only include bus services and for the North South contract area (bus and light rail services).

The mandatory criteria for both phases was the demonstrated ability to hold or obtain operator accreditation under the PTA and the North South contract area also included the capability to achieve appropriate accreditation requirements.¹⁷

Figure 7.1 shows the five qualitative evaluation criteria.

Figure 7.1: Qualitative evaluation criteria for phase 1 and phase 2



Both the evaluation plans and the procurement process guidelines issued to proponents provided descriptions for each evaluation criteria. These indicated the specific elements that proponents needed to demonstrate and would be assessed against during the evaluation process.

7.1.2 Evaluation team and specialist assessment teams

An evaluation team was formed to evaluate the tender responses and identify the preferred proponents for the Steering Committee to consider.

SATs were also established for each evaluation criterion. The SATs separately assessed the evaluation criteria assigned to them to identify and provide specialist advice to the evaluation team about the strengths, weaknesses and risks of each tender response.

A financial evaluation was undertaken by a separate financial assessment team and was independently reviewed by an external advisory firm. The financial assessment team also used another external advisory firm to assess each proponent’s financial capacity.

7.1.3 Similar evaluation process was undertaken for the two phases

The evaluation process for both phases was similar. Figure 7.2 provides a high-level summary of the evaluation process that was undertaken.

¹⁷ The operator of the North South contract area has to hold and maintain accreditations for light rail services under the *Rail Safety National Law (South Australia) Act 2012* in addition to operator accreditation under the PTA.

Figure 7.2: Summary of the evaluation process for phase 1 and phase 2



Section 2.2.4 discusses that the service contracts include two service models. Proponents were required to submit two different service plans in their invitation to supply response: a service plan based on the existing network (scenario one) and another that included proposed changes to the current network and services intended to achieve better, more efficient services at a lower cost (scenario two). The evaluation process mainly assessed and gave focus to the proposed network and services outlined in service plans for scenario two.

7.1.4 An evaluation report was prepared that included both phases

The evaluation process completed for both phases was outlined in a single evaluation report. It was endorsed by the evaluation team on 26 February 2020. The evaluation team's ranking of proponents was based on the assessed quality of tender responses and estimated costs and did not consider the monopoly requirements of the PTA.

The Steering Committee considered the evaluation report and monopoly requirements and provided a list of preferred proponents to the DPTI Chief Executive. The DPTI Chief Executive approved the recommended proponents and evaluation report on 28 February 2020.

7.2 Audit approach

Our review of the evaluation of invitation to supply responses assessed whether:

- responses were evaluated in line with the approved evaluation plan
- any requests for further information and/or clarification of tender responses were carried out in line with the evaluation plan and probity plan
- the probity advisor ensured that the evaluation process was consistent with the evaluation plan
- any deviations to the evaluation plan were approved in line with SPB requirements
- an evaluation report was prepared, approved and outlined the result of the evaluation process.

7.3 Findings

7.3.1 No attendance records for pre-evaluation briefing sessions

Recommendation

DPTI should ensure attendance records are maintained for pre-evaluation briefing sessions to monitor and demonstrate that all relevant personnel responsible for evaluating submissions have attended.

Finding

We found there were no attendance records maintained for pre-evaluation briefing sessions held for either phase 1 or phase 2.

The evaluation plans required all evaluation team and SAT members to attend a pre-evaluation briefing before the tender closing dates.

The purpose of the briefing was to provide evaluation team and SAT members with an overview of the principles, procedures and probity requirements involved in the process. It also provided an opportunity to reinforce the importance of their roles and their responsibilities for the security of documents received from proponents.

Without records such as sign-in sheets or attendance registers, there is no clear evidence to demonstrate that all evaluation team and SAT members attended these sessions and received important information about the evaluation process and responsibilities.

DPTI response

Accepted. The relevant DPTI policy and/or procedure will be modified to require an attendance record to be kept for these briefings, and for each team member in attendance to sign them off.

7.3.2 Specialist assessment team members did not formally endorse evaluation worksheets and consensus scores

Recommendation

For future procurements, DPTI should ensure that the evaluation worksheets and/or reports that record the outcome of assessments and advice provided by SATs to the evaluation team are signed by all SAT members to:

- demonstrate that they are a true reflection of the assessment process
- record whether all SAT members agree with the assessment outcome and advice that is provided to the evaluation team.

Finding

Each SAT documented its consensus scores and assessment of each proponent's strengths, weaknesses and risks in evaluation worksheets. We found for both phases that SAT members did not formally endorse these records to evidence whether all members agreed with the assessment outcome, including the consensus scores they provided to the evaluation team to consider in determining their consensus scores.

The evaluation principles in the evaluation plans stated that assessment and evaluation reports needed to be completed by each team and all reports acknowledged (and signed where possible) and approved by each team member.

The SAT chairs advised us that:

- consensus scoring meetings were held where SAT members brought their individual scores and then agreed on a consensus score
- while no formal record exists, SAT members were provided with a draft of their team's presentation to the evaluation team and some members attended the presentations, which would indicate they endorsed the consensus scores.

It is good practice for each SAT member to formally endorse records that document the outcome of assessment processes. This evidences that the key discussions and decisions of the assessment process are agreed and accurately reflected in evaluation records that are provided to evaluation teams for them to consider.

DPTI response

Accepted. The relevant DPTI policy and/or procedure will be modified to include a requirement that each SAT member signs the final SAT report as a record of their endorsement of it.

7.3.3 DPTI did not maintain minutes to record the main points discussed with proponents at clarification sessions

Recommendation

For future procurements, DPTI should prepare and maintain records of the main points discussed with proponents at clarification sessions.

Finding

We found the evaluation team did not maintain minutes to record matters discussed during clarification sessions with proponents for phase 1 contract areas.

The evaluation plan required all discussions with proponents to be documented and minutes maintained to record the main points discussed in face-to-face meetings and telephone or electronic communications. The SPB's *Probity and Ethical Procurement Guideline* supports this probity principle.¹⁸ The project team advised us that:

- the format of the clarification sessions involved questions being sent to proponents before the sessions and the proponents providing responses through a presentation
- DPTI did not maintain detailed minutes as a record of the discussion topics is documented in the presentation slides provided by the proponents.

While discussion topics were documented in the presentation slides, we note that as these were prepared by proponents before the meetings they do not capture any other matters that may have been discussed by both parties during the sessions. We also note that where discussion records are prepared by proponents they may not completely or accurately reflect DPTI's view of the main points discussed by both parties.

DPTI response

Noted. Records were in effect maintained as the phase 2 clarification sessions dealt with clarifications for both phases of the procurement. The records were in the form of an issues register. As recommended the relevant DPTI policy and/or procedure will be modified to require both a record of the main points of discussion, and an updated issues register.

7.3.4 Evaluation plan processes to review and approve information requested from proponents were not always followed

Recommendation

DPTI should ensure for future procurements that clarifications and requests for information from proponents are:

¹⁸ The SPB's *Probity and Ethical Procurement Guideline* explains that officers should pay particular attention to documenting all relevant communication with prospective suppliers. Also, that appropriate records (such as meeting minutes) should be maintained of relevant verbal discussions during the procurement process.

- approved in line with the approval processes set out in evaluation plans
- reviewed by the probity advisor where one is engaged.

Finding

We found that the evaluation team chair did not authorise clarifications and requests for further information that were sent to proponents before phase 1 clarification sessions, as part of the phase 2 SAT assessment and for the phase 1 financial evaluation. We also found that the probity advisor was not consulted before phase 1 and phase 2 clarifications were sent to the proponents.

Where communication with proponents was needed, the evaluation plan required:

- the chair of the evaluation team to authorise seeking further information or clarifications from proponents
- the probity advisor to be consulted before the chair of the evaluation team provided authorisation.

Where communication protocols are not followed DPTI may not be able to demonstrate that the procurement process met appropriate probity standards (in terms of fairness, transparency and equity). Requiring the evaluation team chair and probity advisor to approve and review clarification questions and responses is a sound practice that helps to ensure proponents are treated fairly and no advantages are provided from responses being inconsistent with original submissions or presenting new information.

DPTI response

Accepted. The relevant DPTI policy and/or procedure will be modified accordingly.

7.3.5 Evaluation and financial assessment teams did not document how they considered and addressed two matters raised in the financial evaluation

Recommendation

For future procurements, the evaluation team should clearly document its rationale for instances where it does not:

- complete additional assessments that it identifies as required
- implement recommendations made by external firms for consideration.

This should include a risk analysis of the consequences of not undertaking the additional assessments or implementing the recommendations.

Finding

We found that the financial assessment and evaluation teams did not document how they considered and addressed two matters raised about the need to undertake additional financial assessments.

For the first matter, the financial assessment team's evaluation reports included a summary of financial capacity assessments that were undertaken for each proponent by an external advisory firm. In discussing the results of these assessments, the financial assessment team's reports stated that a more detailed assessment would be sought for the highest ranked proponents for each contract area.

We found that more detailed assessments were not sought by the financial assessment team or the evaluation team and the rationale for why this did not occur was not documented. The financial assessment team did not document the reasons for not seeking a more detailed assessment and the project team could not explain to us why this was included in the report.

For the second matter, financial assessment reports prepared by the external firm recommended that DPTI consider requesting credit rating reports before awarding the contracts. The external firm explained this was due to the overall risk associated with the size of the contracts and that:

- credit rating reports contain a more comprehensive assessment of the proponent's financial viability and capacity to complete their contractual commitments
- the increased level of analysis may uncover underlying issues or concerns not identified by the scope of the financial assessment reports.

We found that the financial assessment and evaluation teams did not request any credit rating reports and did not document their rationale for this. The project team advised us the credit rating reports are very detailed, time consuming to produce and cover many aspects that were not needed to assess financial capacity.

For both matters, the project team also advised us that the evaluation plan and financial evaluation guidelines did not require additional assessments. Despite this, in our view the financial assessment team and/or evaluation team should have documented their rationale for not undertaking the additional assessments, including any risks and consequences of not undertaking the additional assessments.

DPTI response

Accepted. In this instance the FAT [financial assessment team] determined accepting the recommendation would impose an onerous burden not commensurate with the additional assurance that would be obtained; and would not materially affect their assessment. Accordingly it was determined to be unnecessary in the circumstances. The relevant DPTI policy and/or procedure will be modified to make it explicit that where an evaluation team decides not to accept advice from external advisers, it should record its reasoning appropriately in its final report.

8 Negotiations with proponents

What we found

A negotiation plan was drafted but it was not approved and implemented.

The file notes of meetings held to negotiate and finalise the service contracts did not record details of the specific matters discussed and negotiated.

Lists used to record the issues to be negotiated between DPTI and proponents and the outcome of the negotiations were incomplete.

What we recommended

For future procurements, DPTI should ensure that:

- a negotiation plan is developed and approved before negotiations start and it is implemented
- complete and accurate records are maintained to support negotiation activities, including detailed minutes of negotiation meetings and records that outline the resolution of negotiation issues.

8.1 Introduction

8.1.1 What is negotiation

Negotiation is the process of arriving at an agreement on contract conditions through discussions between buyer and seller.

Distinguishing negotiations from clarifications

The SPB *Supplier Selection Policy* indicates that negotiations are different from clarifications.

Clarifications focus on clarifying aspects of a tenderer's submission which are ambiguous and/or unclear to enable a fair judgment to be made of the submission.¹⁹

Conversely, negotiations is a process in which through dialogue both parties move from their initial positions to achieve a mutually agreed improvement in the procurement outcome. Negotiations may include discussions on contractual clauses the supplier has indicated it wants changed, rectify aspects of an offer that presents unacceptable risk or explore opportunities for creations of additional value.²⁰

¹⁹ State Procurement Board, *Supplier Selection Policy*, version 3.4, issued September 2019, page 12.

²⁰ Ibid, page 13.

8.1.2 Overview of negotiations conducted

Negotiation team and negotiation plan

A draft negotiation plan was developed and tabled at a Steering Committee meeting on 20 December 2019. The project team advised us that the negotiation plan was not provided to the DPTI Chief Executive for approval and was not implemented.

The evaluation plan provided that the negotiation team was to comprise three members of the evaluation team including the chair of the evaluation team. There is no evidence that a dedicated negotiation team was appointed as specified in the evaluation plan.

Conducting the negotiations

Negotiations were conducted with the two highest ranked bidders for each contract area through clarification meetings held between 6 January 2020 and 27 February 2020. The following records were maintained of these interactions:

- lists of issues to be negotiated
- file notes of the clarification meetings held to negotiate and finalise the service contracts.

The lists of issues to be negotiated indicate that the significant matters negotiated included:

- network plans for all contract areas
- a request from a tenderer for a contract departure for the carve out of the intellectual property rights
- treatment of latent defects associated with light rail assets
- DPTI's request for more customer-centric KPIs
- whether disputes resolved by an expert are 'final and binding'
- the potential pricing impact of insurance excesses/deductibles proposed by the SA Government's insurer (SAicorp)
- the inclusion in the contract of an exclusion for consequential-type loss, including loss of revenue and loss of anticipated savings.

Consistent with the acquisition plan, the probity advisor attended meetings to finalise and negotiate the contracts.

8.2 Audit approach

We assessed whether DPTI:

- developed and implemented an appropriate plan for negotiations with the preferred proponents
- maintained records of negotiation activity to ensure transparency and evidence accountability for the negotiation process.

8.3 Findings

8.3.1 Negotiation plan not approved and implemented

Recommendation

For future procurements DPTI should ensure that the negotiation plan is developed and approved before negotiations start and it is implemented.

Finding

We found that a negotiation plan was drafted but it was not approved and implemented.

It is best practice for a negotiation plan to be developed and approved before negotiations start. An approved negotiation plan ensures there is a clear objective for the negotiation and that negotiation priorities and strategies are understood by the negotiation team.

DPTI response

Accepted in principle. For each of the matters listed by the Auditor-General, it remains a matter of interpretation as to whether DPTI sought to materially change its position or whether it merely sought to clarify its existing position and ensure the contract provided sufficient clarity as to how it would operate in certain circumstances. Notwithstanding, to assist in providing more clarity in future procurements, the relevant DPTI policy and/or procedure will be modified to make it explicit that the procurement team determine whether the issues they identify are classified as requiring clarification or requiring negotiation, using the SPB definitions to which the Auditor-General refers. Where the matters are for negotiation, a Negotiation Plan will be prepared and approved, and appropriate records kept.

8.3.2 Minutes to record key matters discussed in negotiation meetings not maintained

Recommendation

For future procurements DPTI should ensure that detailed minutes are maintained of all negotiation meetings.

Finding

We found the file notes of meetings held to negotiate and finalise the contracts did not record details of the specific matters discussed and negotiated. They only record the date, location and who attended.

The SPB's *Supplier Selection Policy* requires negotiation proceedings to be documented to provide a clear audit trail.²¹

It is important to keep proper written records of all negotiation meetings to help avoid disputes due to a different understanding of the agreements reached on issues.

DPTI response

Accepted. Refer to response on 8.3.1.

8.3.3 Lists used to assist with negotiations and record outcomes were incomplete

Recommendation

For future procurements DPTI should ensure complete and accurate records are maintained of issues being negotiated including:

- the SA Government's position on the issues
- the proponent's position on the issues
- the agreed outcome after negotiation of the issues
- the impact on contractual arrangements.

Finding

The issues to be negotiated between DPTI and proponents to finalise the service contracts were recorded in issues lists. These lists also recorded some outcomes of negotiations. We found they were incomplete as they did not always detail:

- the proponent's position on the issue
- the agreed final position on the issue
- the actions taken to resolve the negotiation issue.

Further, for some negotiation issues the issues list recorded that further discussions and negotiation was required, with no details recorded in the issues list of the outcome of these further discussions and negotiations.

Maintaining complete records of issues that are negotiated is important for demonstrating accountability and transparency for how these issues were addressed during the negotiations.

DPTI response

Accepted. Refer to response on 8.3.1.

²¹ Ibid, page 13.

9 Purchase recommendation and contract approval

What we found

The evaluation team prepared and endorsed a purchase recommendation that addressed SPB requirements and recommended that the six passenger transport service contracts be awarded to four companies.

The DPTI Chief Executive approved the purchase recommendation on 5 March 2020 and the Minister executed contracts with the four successful proponents on 10 March 2020.

DPTI did not have documented advice from the Department of Treasury and Finance on the budget impact and other budgetary aspects until the day after the contracts were executed.

What we recommended

For future procurements, DPTI should ensure that it receives documented budget advice from the Department of Treasury and Finance before the Minister authorises contracts over \$15 million.

9.1 Introduction

9.1.1 A purchase recommendation was prepared to recommend the preferred proponents for contract award

A purchase recommendation must be approved before contracts are awarded by the designated delegate in the approved acquisition plan.²² The SPB's *Supplier Selection Policy* specifies the issues that must be addressed in the purchase recommendation.

The evaluation team prepared and endorsed a purchase recommendation that included:

- a summary of the evaluation process
- the findings from the evaluation of tender responses for phase 1 and phase 2
- the outcome of negotiations undertaken with proponents
- contract management and transition arrangements.

The purchase recommendation also details how the evaluation team considered the four principles in section 39(3) of the PTA. These principles are outlined in section 3.3.2. The final recommendation did not completely align with the highest ranked proponents detailed in

²² Ibid, page 15.

the evaluation report. This is because after the evaluation report was prepared the Steering Committee considered the monopoly principle²³ in the PTA and determined that the preferred proponent for one of the contract areas should change. Section 13.1.2 discusses the monopoly principle in more detail and the impact that it had on the procurement outcome.

The purchase recommendation recorded that the evaluation team recommended by consensus that contracts be awarded to:

- Torrens Transit Pty Ltd, Australian Transit Enterprises Pty Ltd and Busways South Australia Pty Ltd to provide bus services
- Torrens Connect Pty Ltd²⁴ to provide bus and light rail services.

The DPTI Chief Executive approved the purchase recommendation on 5 March 2020.

9.1.2 Contract approval and execution

Contracts were executed by the Minister on 10 March 2020 in line with recommendations made in the purchase recommendation. Figure 2.1 shows the contracts that were awarded.

The contractual agreements for each of the successful proponents include:

- a services agreement
- a bus/vehicle hire agreement
- depot lease/licence agreements (where applicable).

Treasurer's Instruction 8 *Financial Authorisations* (TI 8) establishes the authorisation regime for entering into agreements and incurring expenditure through contractual arrangements. The Minister can approve the execution of a contract over \$15 million if they have taken into account advice from the Department of Treasury and Finance on the budget impact and other relevant budgetary aspects associated with the contract.

9.2 Audit approach

We reviewed the purchase recommendation to determine if it:

- was approved before the contracts were awarded
- was signed by the evaluation team
- was approved by the designated authority in the approved acquisition plan
- adequately addressed requirements detailed in the SPB's *Supplier Selection Policy*.

We assessed whether the contracts awarded were subject to legal advice and were approved in line with TI 8 requirements.

²³ The PTA states that service contracts should not be awarded to allow a single operator to obtain a monopoly or market share that is close to a monopoly.

²⁴ Torrens Connect Pty Ltd is a joint venture between Torrens Transit Pty Ltd, John Holland Pty Ltd and UGL Rail Services Pty Ltd.

9.3 Findings

9.3.1 DPTI did not receive documented advice from the Department of Treasury and Finance on the budgetary impact of the contracts before contract approval

Recommendation

DPTI should ensure that it complies with the requirements of TI 8 by obtaining documented advice from the Department of Treasury and Finance before the Minister authorises any contract over \$15 million.

Finding

The Minister executed contracts for passenger transport services with the four successful proponents on 10 March 2020. DPTI did not receive documented advice from the Department of Treasury and Finance before contract execution on the budgetary impact and other budgetary aspects associated with the contracts as required by TI 8. It was received a day later on 11 March 2020.

The DPTI Chief Executive and project team advised us that the DPTI Chief Executive sought information about the Department of Treasury and Finance advice and provided the Minister with verbal assurance before executing the contracts.

DPTI response

Accepted.

10 Probity management arrangements

What we found

DPTI appointed a probity advisor to provide independent probity advice for the procurement and developed a probity plan which included communication protocols. Sound processes were also established to manage the security and confidentiality of documents, submissions and commercial information.

We identified that DPTI did not maintain sufficient records in the following areas:

- DPTI had not clearly defined and agreed with the probity advisor the nature and extent of services to be provided, key deliverables and reporting requirements
- no written record was maintained for some probity advice received and matters discussed at probity briefings
- a register of probity matters reported and how they were dealt with was not maintained by the probity advisor as required by the acquisition plan and provided for review to those responsible for the procurement process.

We also identified some processes and practices that should be improved for future procurements including:

- a copy of the probity plan was not provided to key officers involved in the procurement and some probity risks were not considered in the probity plan
- DPTI did not ensure the probity advisor provided probity reports as detailed in the acquisition plan
- a conflict of interest declaration from a consulting firm engaged to assist in evaluating phase 2 responses could not be provided
- the probity plan requirements for considering conflict of interest disclosures were not always followed and the register of conflict of interest disclosures did not record details of all conflict of interest disclosures.

What we recommended

For future procurements, DPTI should:

- document and agree with the probity advisor the nature and extent of probity assurance services to be provided, key deliverables and reporting requirements
- maintain a written record of probity advice received and matters discussed at probity briefings
- maintain a register of all probity matters reported and actions taken and provide it to those responsible for the procurement regularly throughout the process and before the procurement is finalised

- provide a copy of the probity plan to key officers involved in the procurement process, and confirm they understand and will adhere to it
- review processes to understand why a conflict of interest declaration was not obtained from a consulting firm engaged to assist in evaluating phase 2 responses and ensure any gaps in processes are addressed for future procurements
- consider all conflict of interest disclosures in line with the probity plan and ensure the consideration is properly evidenced.

10.1 Introduction

10.1.1 Importance of probity in procurement

Probity is the evidence of ethical behaviour commonly associated with the practice of adopting and following well considered procedures and processes to ensure procurement decisions are fair, transparent and defensible.²⁵

The SPB's *Probity and Ethical Procurement Guideline* states:

Implementing good probity and ethical practices in procurement will:

- ensure the achievement of value for money
- reduce the risk to the Government in terms of legal and/or financial loss
- provide potential suppliers with the confidence that they will be treated fairly.²⁶

10.1.2 A probity plan was developed for the procurement

The identification of potential probity issues, and the specific controls to deal with these issues, is of critical importance in monitoring the probity of the conduct of a tender process.²⁷ An effective probity plan details probity issues and specific controls.

The SPB's *Probity and Ethical Procurement Guideline* states that a probity plan should be used for higher value and risk procurements.²⁸

A probity plan was developed and approved by the Steering Committee on 28 September 2018. It addressed:

- probity objectives and principles

²⁵ State Procurement Board, *Probity and Ethical Procurement Guideline*, issued August 2019, page 3.

²⁶ Ibid, page 4.

²⁷ *Report on the Auditor-General's Examination, Pursuant to Section 39 of the Passenger Transport Act 1994, of Certain Bus Contracts and the Probity of Processes Leading up to the Awarding of the Contracts*, 2005, page 39.

²⁸ State Procurement Board, *Probity and Ethical Procurement Guideline*, issued August 2019, page 9.

- the need to maintain confidentiality
- the need to identify and manage actual and/or potential conflict of interests
- communication protocols.

10.1.3 DPTI appointed a probity advisor for the procurement

Due to the complexity and value of the procurement DPTI engaged a consultancy firm on 13 August 2018 to provide independent probity advice for the procurement process.

Role of a probity advisor

A probity advisor is typically engaged to provide independent advice and assistance to management on probity/process issues. A probity advisor actively works with the evaluation team to ensure probity issues are considered and actioned during the procurement process.

Engaging a probity advisor does not release, remove or replace the responsibilities of those involved in the procurement process to conduct the procurement consistent with probity requirements.

The probity advisor performed a range of probity assurance activities including:

- probity briefings to officers involved in the procurement process
- presenting probity principles and protocols at the industry briefings
- reviewing key procurement documents from a probity perspective
- attending market soundings, one-on-one interactive sessions and the opening of invitation to supply responses
- providing advice to the project team on probity matters
- attending evaluation team meetings and some SAT meetings
- providing reports to DPTI on the probity of the procurement process.

Probity reporting

A probity advisor should provide a report concluding whether the procurement process conducted was consistent with requirements outlined in the probity plan and probity standards and principles. The probity advisor's report should state what probity advice was provided and the extent to which all probity risks and issues were satisfactorily managed.

In addition to a final written report on the probity of the procurement process, the procurement acquisition plan required the probity advisor to provide a written report on probity at specific milestones.

Probity advisor's final report on probity of the procurement process

On 27 February 2020 the probity advisor provided a final written report on the probity of the procurement process. It stated that the procurement was conducted in line with the probity plan and communication protocols and evaluation plans, and that no material issues of a probity nature were observed.

10.1.4 Participants in the procurement were required to complete a conflict of interest declaration and confidentiality agreement

Identifying and managing actual, potential and perceived conflicts of interest and maintaining confidentiality are two important probity considerations for procurement.

Officers involved in the procurement process, including external advisors, were required to complete a conflict of interest declaration and confidentiality agreement.

10.1.5 Communication protocols were established for the procurement

To ensure fairness, transparency and equity in the procurement process, communications within the project team and with proponents must be carefully managed to mitigate any risks to the procurement process.

Communication protocols were developed and formed part of the probity plan. They addressed communications within the project team, with potential and actual proponents, and with project stakeholders.

10.1.6 Security and confidentiality of documents, submissions and commercial information

A key probity requirement is ensuring the security and confidentiality of documents, submissions and commercial information. DPTI implemented the following processes and controls:

- the USB devices containing the invitation to supply responses were kept in a locked cupboard in DPTI's locked tender room
- copies of the invitation to supply responses were stored in a records management system and an electronic data room with access restricted to authorised officers
- the project team was located on a secure floor and evaluation and SAT team meetings occurred in locked rooms on this secure floor. The financial assessment team was based in a different location and had a dedicated room that was secured by lock and key
- a clean desk policy was implemented (ie documents were locked away each night and not left lying around)
- officers involved in the procurement process signed a confidentiality agreement.

10.2 Audit approach

We assessed whether DPTI managed the probity of the procurement process in line with its policies and procedures and best practice principles.

For this review we considered:

- DPTI's procurement policies and procedures
- the SPB's *Probity and Ethical Procurement Guideline*.

10.3 Findings

10.3.1 Probity plan not provided to all key officers involved in the procurement

Recommendation

DPTI should ensure that key officers involved in the procurement process:

- are provided with a copy of the procurement probity plan
- provide a sign-off to confirm that they have reviewed and understood the probity plan and will adhere to the processes/controls in it that address probity issues and risks.

Finding

We found that a copy of the probity plan was not distributed to key officers involved in the procurement process.

Further, we found the officers involved in the procurement process did not provide a sign-off to confirm that they:

- had reviewed the probity plan
- understood the content of the probity plan
- would adhere to the guidelines in the probity plan.

The probity plan included a control requiring officers involved in the procurement process to sign off that they had reviewed and understood the plan and would adhere to the guidelines in the plan.

While the probity advisor provided probity sessions to officers involved in the procurement process, it is good practice to:

- provide a copy of the probity plan to all officers involved in the procurement process
- confirm that the officers understand the probity plan and its requirements.

This is consistent with the SPB's *Probity and Ethical Procurement Guideline*, which requires procedures to be understood, communicated and observed to ensure process integrity.²⁹

Failure to provide the probity plan and obtain sign-off from officers involved in the procurement process increases the risk that probity issues will not be adequately managed and addressed throughout the procurement process.

DPTI response

Accepted in principle. DPTI maintains that in some instances a probity briefing is sufficient, subject to a record of attendance being signed by each

²⁹ Ibid, page 6.

participant, as per the response to the Auditor-General's recommendation at 7.3.1. Notwithstanding, in the relevant DPTI policy and/or procedure a requirement will be included to determine the officers to provide a copy of the plan, and records kept to enable auditors to confirm that the officer has been provided a copy of the document and agrees to adhere to its requirements.

10.3.2 Probity plan did not consider some specific probity risks

Recommendation

For future procurements DPTI should ensure the probity plan clearly identifies relevant probity risks and the management strategy to mitigate them, and should assign specific responsibility to relevant officers for ensuring the management strategy is implemented.

Finding

We found the probity plan did not identify the following probity risks along with management strategies to mitigate them:

- records not being maintained to evidence the transparency of key procurement activities and accountability for procurement decision making
- team members not being familiar with relevant documentation and policies.³⁰

We also found the following probity risks were identified as a principle in the probity plan. However, management strategies to mitigate the following risks were not identified in the probity plan:

- non-compliance with legislation and regulations and agency guidelines, policies and procedures
- the procurement process not being conducted in line with the approved acquisition and evaluation plans.

It is also our view that it is sound practice for the probity plan to include strategies to ensure:

- probity advice received is acted on or where probity advice is not acted on the reason for this is documented and reported to those responsible for the procurement and the probity advisor
- the requirements in the probity plan are complied with during the procurement process.

An effective probity plan clearly identifies relevant probity risks along with management strategies to mitigate them and assigns specific responsibility for implementing the strategies.

³⁰ The SPB's *Probity and Ethical Procurement Guideline* identifies this as a probity matter that should be considered in probity plans.

We also found the probity plan did not outline the nature and scope of probity services to be provided by the probity advisor, including the form of probity reports and/or the sign-off opinion (ie assurance) required from the probity advisor.

DPTI response

Accepted. The probity plan referenced the SPB guidelines and was reviewed and endorsed by the probity advisor. The additional guidance provided here by the Auditor-General as to how to interpret and apply the SPB guidelines will be incorporated into the relevant DPTI policy and/or procedure.

10.3.3 Probity assurance arrangements were not clearly defined, documented and agreed

Recommendation

DPTI should ensure that the nature and extent of probity assurance services to be provided, key deliverables and reporting requirements are documented and agreed in detail before a probity engagement starts.

Finding

DPTI did not clearly define and document in the agreement with the probity advisor the nature and extent of probity assurance services to be provided, key deliverables and reporting requirements.

The only deliverable in the agreement was 'probity advisory services as required and final report on probity of the project'. The agreement did not specify:

- the nature, extent and scope of reporting responsibilities
- the probity advisor's role in managing conflicts of interest
- the probity advisor's role in reviewing or responding to any enquiries made by proponents
- services included in evaluating compliance with the acquisition plan, evaluation plans and requirements of procurement policy frameworks
- the probity advisor's role in reviewing post-evaluation negotiations with preferred proponents.

We have previously recommended that agencies should document and agree in detail the nature and extent of probity assurance services to be provided, key deliverables and reporting requirements.³¹

³¹ Auditor-General's Report for the year ended 30 June 2015 *New Royal Adelaide Hospital report: November 2015*, pages 62-63.

To ensure that all parties clearly understand and agree on the services and the level of assurance to be provided by the probity advisor, the scope of the probity advisor's engagement should be clearly documented in the probity service agreement.

Documenting the nature and extent of probity assurance services in the probity service agreement will help make the probity advisor accountable for the services they are engaged to provide.

DPTI response

Accepted.

10.3.4 Probity advisor provided probity advice before DPTI executed a contract with them to provide probity services for the passenger transport services procurement

Recommendation

DPTI should ensure the procurement process for a probity advisor is finalised, and the service contract executed, before seeking probity advice.

Finding

We found the project team sought advice from the probity advisor on the passenger transport services procurement before:

- the tender process to select a probity advisor for the procurement was conducted
- executing the contract with them to provide probity services procurement.

The probity advisor provided DPTI with probity advice for the procurement project in May 2018 and June 2018. However, the procurement process to select a probity advisor for the project did not start until July 2018. The contract with the probity advisor was signed on 13 August 2018.

We note that the probity advisor had been engaged by DPTI to provide probity services for the bus supply procurement process. At the time of receiving this advice the Steering Committee also had oversight of the bus supply procurement process.

It is important that procurement processes are finalised and contracts are executed before the services start.

Obtaining advice from the probity advisor before:

- the tender process to select a probity advisor is conducted, increases the risk and/or perception that the procurement of the probity advisor was not fair and equitable
- executing a service contract increases the risk that DPTI will not be able to hold the probity advisor accountable for delivering the probity services needed.

DPTI response

Accepted. In this instance the probity advisor provided advice in accordance with the services contracted for bus supply during a period that the Steering Committee was overseeing both. We agree better practice would have been to fully partition the scopes of probity services for each procurement process to maintain accountability. The relevant DPTI policy and/or procedure will be amended accordingly.

10.3.5 No written record maintained for some probity advice received

Recommendation

For future procurements DPTI should ensure a written record is maintained for probity advice received and matters discussed at probity briefings. In implementing this recommendation, we recognise that the nature of the advice and the probity risks should be considered when determining the extent of this documentation. For instance, discussions on minor administrative and procedural matters would not require documenting.

Consistent with this recommendation a written record of probity advice received that supports decision making and/or how the procurement process is conducted should be maintained.

Finding

We found DPTI did not maintain a written record for some probity advice it received during the procurement process. For example, DPTI could not provide a written record of the following verbal advice referred to in various procurement documents:

- advice on conflict interest disclosures provided at probity briefing sessions
- ad hoc advice provided during one-on-one interactive sessions
- advice on the management of communication and correspondence to and from respondents
- advice on 'business as usual' meetings with incumbent operators.

Further, while DPTI had the presentation slides used at probity briefings, it did not have a written record of matters discussed at the briefings.

DPTI indicated that advice from the probity advisor was not always in writing.

An audit trail of probity advice provided is important because it supports the reasons for the procurement decisions taken and confirms to those involved in the process that the process was conducted with integrity.³²

³² Report on the Auditor-General's Examination, Pursuant to Section 39 of the Passenger Transport Act 1994, of Certain Bus Contracts and the Probity of Processes Leading up to the Awarding of the Contracts, 2005, page 42.

We have previously recommended that all probity advice received and probity briefings held during a tender process should be documented and available for audit review.³³

DPTI response

Partially accepted. DPTI accepts that written record of probity advice on all conflict of interest disclosures is a prudent measure. DPTI does not accept that a written record of advice should be maintained in relation to other aspects of the procurement process, except where a potential issue or a potential probity matter arises. Where these exceptions occur, it would be prudent for a record to be maintained including the analysis, any recommended action, what was done in response to it, and the outcome. DPTI will modify the appropriate policy and/or procedure to include these requirements of any probity advisor contracted to provide services in a major procurement. To address the balance of the Auditor-General's observations in this section, DPTI will also amend its policy and/or procedure to include a requirement for the probity services provider to provide a written assurance and certification as to the completeness of its records of probity matters and issues, and that otherwise the process was in its opinion conducted in accordance with the requirements of the probity plan and all relevant SPB standards. DPTI will make explicit the requirement to provide a draft of this report to the Chief Executive (or senior responsible officer) for consideration prior to the formulation of the purchase decision.

10.3.6 DPTI did not ensure the probity advisor's reports included sufficient information to understand the nature and extent of probity assurance provided

Recommendation

For future procurements where a probity advisor is engaged DPTI should ensure the information and the assurance required from the probity advisor in its reports is defined and agreed with the probity advisor.

Finding

The reports prepared by the probity advisor did not provide sufficient details to enable DPTI and/or relevant external parties to fully understand the nature of probity services provided and the extent of assurance obtained from them. This is because the probity advisor's reports did not include details on:

- key probity advice provided and instances where probity advice was not followed
- probity issues identified and how they were or were not addressed
- departures from the probity plan.

We found that neither the probity advisor's contract or the probity plan outlined the information and sign-off (ie the extent of assurance) that DPTI required the probity advisor to provide in its reports.

³³ Ibid, page 5.

As DPTI is responsible for the probity of the procurement it should have:

- defined the information and sign-off (ie assurance) required from the probity advisor in their reports
- ensured the probity advisor clearly understood the information and sign-off required from them, with this appropriately documented, for example in the probity plan.

If the information and sign-off required in probity reports is not defined and communicated there is increased risk that the probity reports will not provide information necessary to understand the nature and extent of assurance provided. This is particularly important if the probity of the procurement process is challenged.

The probity advisor advised us that where there are no material matters of probity that arise and that probity advice is appropriately implemented then this is recorded to a sufficient level of detail based on their professional experience.

DPTI response

Accepted. Refer to response to 10.3.5.

10.3.7 Probity advisor did not report as detailed in the acquisition plan

Recommendation

For future procurements where a probity advisor is engaged DPTI should ensure the nature and extent of probity reporting required is documented and agreed in detail before the engagement starts.

Finding

DPTI did not ensure the probity advisor provided probity reports as detailed in the acquisition plan.

The acquisition plan indicated that the probity advisor was to provide a written report on probity for the following milestones:

- before releasing the invitation to supply
- after meetings involving proponents
- the opening of tenders
- the evaluation process.

We found the probity advisor provided only two interim reports.

As noted in section 10.3.3, the agreement between DPTI and the probity advisor did not detail the nature, extent and scope of reporting responsibilities.

DPTI response

Accepted. Refer to response to 10.3.5.

10.3.8 Final probity report not provided to those responsible for approving the purchase recommendation and signing the contracts

Recommendation

For future procurements, DPTI should ensure the final probity report is provided to those responsible for approving the purchase recommendation and signing the contracts before the approval of the purchase recommendation and signing of contracts.

Finding

We found the final probity report was not provided to the DPTI Chief Executive to support his approval of the purchase recommendation or to the Minister before he signed the service contracts. Both were provided with a copy of the second interim probity report.

The DPTI Chief Executive advised us that he was made aware of probity issues and the strategies to address them.

It is good practice to provide the final probity report to those responsible for approving the purchase recommendation and signing contracts as it provides them with independent confirmation that the procurement met appropriate probity standards.

DPTI response

Accepted. Refer to response to 10.3.5.

10.3.9 Written probity reports were not tabled at Steering Committee meetings

Recommendation

For future procurements, DPTI should ensure probity reports are provided to those responsible for overseeing the procurement process.

Finding

We found the probity advisor's written reports were not tabled at Steering Committee meetings. The project team advised us that the probity advisor provided verbal updates to the Steering Committee. These verbal updates were for the two interim probity reports. The Steering Committee was disbanded before the final probity report was completed.

As the Steering Committee was responsible for overseeing the procurement process it should have been provided with copies of the probity reports. This would have enabled the members to understand the scope of the probity advisor's work and the level of probity assurance it provided.

DPTI response

Accept in principle. DPTI will change the policy to require a simple pro-forma report to be completed by the probity advisor and tabled at each Steering Committee.

10.3.10 Register of probity matters raised not maintained

Recommendation

DPTI should ensure that a register is maintained to record all probity matters reported and the actions taken. It should be provided to those responsible for the procurement process regularly throughout the process and before the procurement is finalised.

Finding

A register of probity matters reported and how they were dealt with was not maintained by the probity advisor and provided to those responsible for the procurement process (ie the DPTI Chief Executive and the Steering Committee) for review.

The acquisition plan required the probity advisor to maintain a register of probity matters reported and how these were dealt with. We note this requirement was not specifically stated in DPTI's agreement with the probity advisor.

Maintaining a register of probity matters and how they were addressed helps those responsible for the procurement process to understand the probity issues, and therefore the probity of the procurement process. It also helps those responsible for the procurement process to take corrective action where the probity of the procurement process might be compromised.

DPTI response

Accepted. Refer to response to 10.3.5 and 10.3.9.

10.3.11 DPTI unable to provide declarations and confidentiality agreements for some officers involved in the procurement

Recommendation

For future procurements DPTI should implement a process to ensure conflict of interest declarations and confidentiality agreements are completed by all officers before they start their role in the procurement process and records of them are retained.

Finding

DPTI could not provide signed conflict of interest declarations and confidentiality agreements to us for:

- a member of the Steering Committee
- a member of the probity advisor team.

The SPB's *Probity and Ethical Procurement Guideline* requires all participants in the procurement evaluation process to complete a conflict of interest declaration and confidentiality agreement.³⁴ Where they are not completed there is a risk that:

- actual and/or potential conflicts of interest are not identified, and the impact on the probity of the procurement process is not assessed and mitigation strategies not implemented
- officers involved in the procurement are not aware of their responsibilities when dealing with confidential information, resulting in the ineffective management and/or unauthorised use or disclosure of confidential information.

DPTI response

Noted. These were minor administrative oversights. Refer also to response to 6.3.1.

10.3.12 Probity plan not always followed in considering conflict of interest disclosures

Recommendation

For future procurements, DPTI should ensure all conflict of interest disclosures are assessed in line with the procurement probity plan.

Finding

Some officers involved in the procurement made a disclosure in their conflict of interest declaration. We found DPTI did not always follow the probity plan in assessing whether actions were required to manage these disclosures.

The probity plan provided a framework for the proper consideration of conflict of interest disclosures. It required the project team to:

- consider all disclosures with the probity advisor
- advise the chair of the Steering Committee of any disclosure, together with details of the action taken to respond to it.

We found:

- for several conflict of interest disclosures these were not referred to the probity advisor for advice
- in some instances, the probity advice received by the project team did not outline the reasons why no management action was required for the disclosure made
- there was no written record that the chair of the Steering Committee was advised of all conflict of interest disclosures and the action taken (or not taken). The project team advised us that in some instances the chair was not advised of disclosures and action taken.

³⁴ State Procurement Board, *Probity and Ethical Procurement Guideline*, issued August 2019, page 7.

Not assessing conflict of interest disclosures in line with the probity plan increases the risk that the agency managing the procurement may not be able to demonstrate that probity risks have been addressed and the probity of the process was not compromised.

The probity advisor advised us that when it is asked to review declarations a risk management approach is adopted where the status of the process, the role of the person making the declaration and the nature of the declaration were taken into account. They also advised that with many declarations, when the probity risk is assessed as minimal, no further action is advised as being required by the project team to mitigate. In the relatively few situations, where management action is required to be implemented, the suggested mitigating actions to be taken are provided.

DPTI response

Accepted. Refer to response to 10.3.5.

10.3.13 Conflict of interest register did not record details of all conflict of interest disclosures

Recommendation

DPTI should ensure all conflict of interest disclosures are recorded in the conflict of interest register established for the procurement.

Finding

We found the conflict of interest register established for the project did not record the details of all conflict of interest disclosures. Of the 18 disclosures made, 10 were not recorded in the register.

The probity plan required the project team to maintain a register of conflict of interest disclosures.

Where a conflict of interest disclosure is not recorded in the conflict of interest register there is increased risk that the disclosure will not be assessed to determine the management action, if any, required. Failure to properly manage conflicts of interest can impact the probity of the procurement process.

DPTI response

Accepted. Refer to response to 10.3.5.

10.3.14 Conflict of interest declaration for a consulting firm engaged to assist in evaluating phase 2 responses could not be provided

Recommendation

DPTI should review processes to understand why a conflict of interest declaration was not obtained and ensure any gaps in processes are addressed for future procurements.

Finding

We found DPTI did not obtain a conflict of interest declaration from a consulting firm engaged to assist with the evaluation of phase 2 invitation to supply responses.

One employee of this consulting firm did provide a conflict of interest declaration. It noted that the consulting firm provided services to some proponents of the phase 2 invitation to supply, including one proponent that was successful.

The consulting firm had a potential or perceived conflict of interest as they:

- had a commercial relationship with some of the proponents of the phase 2 invitation to supply
- helped DPTI to evaluate phase 2 invitation to supply responses as part of the asset management SAT.

Where a potential or perceived conflict of interest exists and it is not identified and managed appropriately there is a risk that the procurement process may be challenged.

DPTI response

Noted. These were minor administrative oversights. Refer also to response to 6.3.1.

11 Managing communications with proponents

What we found

We found no evidence of any specific probity matter that compromised the probity of the procurement process. We found several instances where probity processes did not operate effectively during the process.

Sufficient records of communications and interactions between senior SA Government representatives and potential proponents were not maintained for several meetings.

The response to advice from the probity advisor that a proposed meeting with a proponent should not proceed was not documented. Further, the probity advisor was not informed of the response.

Only one SA Government representative attended a meeting with a potential proponent.

What we recommended

For future procurements, DPTI should:

- establish mechanisms to ensure that meetings between SA Government representatives and proponents outside of other established arrangements are identified timely and probity risks are managed
- document the response to probity advice it receives including, where relevant, the basis for not following the advice
- ensure at least two SA Government representatives attend meetings with potential proponents where it is important for managing perceived or inherent probity risks.

11.1 Introduction

Communications and interactions with potential proponents during a procurement process must be carefully managed to ensure the probity of the process is maintained. Sound practices to manage them include maintaining proper records of any communications with proponents.

The SPB provides sound guidance on record keeping including communications with potential proponents. In particular, its *Probity and Ethical Procurement Guideline* provides that:

Officers should pay particular attention to documenting all relevant communications with prospective suppliers. This includes both written communications, along with appropriate records of relevant verbal discussions throughout the whole process (eg minutes of a meeting, file notes of telephone discussions). All verbal discussions should be recorded via a file

*note, and significant verbal discussion, which include any decisions should be followed up in writing to confirm conversation.*³⁵

The procurement team established a communications register to record communications between SA Government representatives and potential proponents. The register was to record communications and interactions outside the specific mechanisms established in the procurement process (eg one-on-one interactive sessions, industry briefings, site visits, clarifications).

We identified a number of meetings held between SA Government representatives (including the DPTI Chief Executive and the Minister) and potential proponents that were not recorded in the communications register. To discharge our responsibilities under the PTA in reporting on the probity of processes leading up to awarding service contracts, we sought to understand:

- what meetings were held with potential proponents/proponents from April 2018 when the Minister approved to approach the market
- the purpose of the meetings, who attended, when they occurred, what was discussed and the arrangements to manage any probity risks arising from them.

11.2 Audit approach

To gain an understanding of the extent and nature of meetings held with potential proponents and arrangements to manage probity risks we made specific enquiries with the project team and reviewed the communications register.

Our enquiries included requesting details of meetings held, records of meetings (meeting minutes/notes) and details of any probity advice sought on those meetings.

We tested whether designed probity procedures were consistently implemented and operated throughout the procurement process.

11.3 Findings

11.3.1 Sufficient records of communications were not always maintained

Recommendation

For future procurements DPTI should establish mechanisms to ensure that meetings between SA Government representatives and proponents outside of other established arrangements are identified timely and probity risks are managed. This should include:

- developing a robust system so that the procurement team is advised of meetings before they occur

³⁵ State Procurement Board, *Probity and Ethical Procurement Guideline*, issued August 2019, page 10.

- undertaking and documenting an assessment of probity risks for meetings with DPTI management who have the potential to influence the procurement process. This should include assessing the need to obtain probity advice
- recording meetings in the communications register and assessing and documenting the impact on the probity of the procurement and any responses
- keeping notes or minutes of meetings including decisions and actions.

We recognise there are challenges in dealing with proponents that are also incumbent operators. They are involved in a range of business-as-usual contract management and operational interactions, and probity arrangements should not impose a barrier to these interactions. Further, some of the risk exposure for interactions is potentially outside of the dedicated procurement team. Future processes should include a risk assessment of all potential procurement interactions with proponents and appropriate responses should be established to maintain the probity of the procurement process. These responses should be appropriate and proportionate to the assessed risk.

These risk assessments and processes established should consider the probity exposure of the SA Government and not focus only on the dedicated procurement team's interactions.

Finding

We found there were seven meetings during the procurement process between senior SA Government representatives and potential proponents/proponents outside of established procurement process arrangements.³⁶ The DPTI Chief Executive attended all of these meetings and three were also attended by the Minister. We found that DPTI had not maintained sufficient records to demonstrate how it established effective arrangements to manage the probity risks arising from these meetings. Specifically, we found that:

- for six of the meetings no records (ie minutes) detailing the purpose, who attended, when it occurred, the location and what was discussed were maintained
- four of the meetings were not recorded in the communications register
- no specific probity advice was received for four of the meetings and an assessment of the probity risks was not documented, including the rationale for not seeking probity advice.

We also noted that for one of the meetings, the project team became aware of the meeting through DPTI's media monitoring service. The meeting was recorded in the communications register with a comment that it had no influence on the procurement process.

We found there was a lack of documentation to explain how the project team determined and recorded that it had no impact on the procurement process. We noted that:

- no meeting records were maintained
- probity advice on the meeting was not obtained.

³⁶ For the context of this observation 'established procurement process arrangements' includes clarification sessions, industry briefings, one-on-one interactive sessions and negotiation meetings.

DPTI response

Noted.

11.3.2 A response to probity advice recommending that a meeting not proceed was not documented

Recommendation

For future procurements, DPTI should document the response to any probity advice it receives on meetings with proponents including, where relevant, the basis for not following the advice given. In doing so, a risk-based approach should be applied to determine the extent of documentation required.

Finding

We noted that for one meeting with a potential proponent, the probity advisor recommended that the meeting should not occur. The proposed meeting was between the DPTI Chief Executive, the Minister and a potential proponent. The advice from the probity advisor was communicated to the project team verbally and the DPTI Chief Executive signed a briefing note to the Minister recommending that the Minister consider cancelling the meeting. The briefing note explained that:

- the proponent forwarded a letter requesting to meet to discuss specific ideas including a bus replacement strategy, redesigning sections of the Adelaide bus network and replacing some of the fixed bus routes
- DPTI recommended that the Minister not meet with the proponent to discuss the matters requested
- DPTI received advice from the probity advisor that engaging in discussions with potential market participants throughout the procurement process was not recommended
- the matters for discussion could be addressed as part of the procurement process
- if the meeting went ahead the procurement process should not be discussed and a record of the meeting should be maintained.

Two meetings were subsequently held with the potential proponent. One included the Minister and the DPTI Chief Executive, while the other included the DPTI Chief Executive and senior DPTI management.

The DPTI Chief Executive advised us that:

- the Minister exercised his discretion in relation to the advice and elected not to cancel the meeting
- the Minister otherwise followed the advice by not discussing the matters set out in the letter, or any aspect of the procurement
- on learning of the Minister's decision, the DPTI Chief Executive sought the Minister's permission to attend the meeting to ensure that a departmental person was present, to provide a measure of control.

We found that the response to the probity advice not to hold the meeting was not documented. We also found that no records (eg minutes) of the meetings were maintained and the way the probity risks were to be managed was not documented.

We also noted the probity advisor was not informed that the meetings with the potential proponent occurred. As a result, the probity advisor could not assess and comment on any probity implications associated with the meetings.

As noted in section 11.4 we made specific enquiries with State representatives who attended the meetings including corroborating the information we received. We found no evidence of any specific probity matter that provided an advantage to any potential proponent and that compromised the fairness of the procurement process.

We maintain that to best manage probity risks, appropriate records should be maintained of meetings with proponents outside of other established procurement processes.

DPTI response

Accepted. Refer to response at 11.3.3.

11.3.3 Only one State representative attended a meeting held with a potential proponent

Recommendation

For future procurements, DPTI should ensure that at least two SA Government representatives attend meetings with potential proponents where it is important for managing perceived or inherent probity risk.

Finding

For one meeting with a potential proponent we found there was only one SA Government representative who attended. The meeting occurred after the decision to approach the market but before the registration of interest and invitation to supply were issued. Where it is deemed appropriate to meet with potential proponents, it is sound practice that at least two SA Government representatives attend the meeting. This will help to effectively manage any perceived or unintended probity risks once a decision is taken to meet.

DPTI response

Accepted in principle. Where the agency becomes aware of a meeting to be held with the Minister, it will propose attendance of a senior officer, who will maintain a record of the meeting and provide it to the probity advisor. As the Minister is a South Australian Government representative, this then satisfies the Auditor-General's recommendation.

11.4 Impact of findings on our assessment of probity

For communications and interactions with potential proponents/proponents we made enquiries and requested information including:

- knowledge of meetings
- the specific purpose of meetings, who attended, when they occurred and the location
- arrangements to manage probity risks.

We made specific enquiries with SA Government representatives who attended the meetings about their purpose and what was discussed. In our enquiries we corroborated key information with attendees and ensured there were no inconsistencies or irregularities with existing procurement documentation.

As a result of our enquiries, we found details of the procurement process were not discussed at the meetings and found no evidence of any specific probity matter that provided an advantage to any potential proponent that compromised the fairness of the procurement process.

12 Extension of existing service contracts

What we found

Extension agreements were executed with the existing bus services operators to provide time to conduct a competitive procurement process.

The extension agreements were executed after the phase 1 registration of interest was issued to the market.

We found that DPTI did not adequately identify and/or address possible risks to the probity of the procurement process while negotiating and finalising the extension agreements with the incumbent operators, who were also likely to be proponents in the procurement process.

We also found that DPTI did not maintain records of its discussions and negotiations with the existing operators while negotiating the extension agreements.

What we recommended

DPTI should document risk analysis and management plans where there is potential for another business activity to impact on the probity of a procurement process. It should also involve the probity advisor (where one has been engaged) to advise on the risks and how they should be managed.

DPTI should also ensure that records are maintained for all communications held with actual or potential proponents who are current operators about extending existing contracts, particularly where there is a real or perceived risk to the probity of the procurement process.

12.1 Introduction

Existing bus service contracts for the six Adelaide metropolitan contract areas were due to expire on 30 June 2019. The contracts had an option to renew for a further four years, but this was not taken up by the Minister.

In September 2018 the SA Government approved extending the existing contracts from 1 July 2019 to 18 January 2020, with an option to extend to 30 June 2020.

The extension agreements were executed with:

- Australian Transit Enterprises Pty Ltd for the Hills, Outer North and Outer South contract areas on 10 May 2019
- Torrens Transit Pty Ltd for the East West, North South and Outer North East contract areas on 21 June 2019.

Section 2.5 provides further details on the contract extensions.

12.2 Audit approach

We assessed whether the extensions to the existing bus services contracts gave rise to any risks to the probity of the procurement process by considering:

- the timing of the contract extensions for the current procurement
- the processes DPTI had in place to identify and manage risks arising from extending existing contracts
- records maintained by DPTI of discussions and negotiations held with the existing operators to extend the existing contracts.

12.3 Findings

12.3.1 DPTI did not implement adequate processes to identify risks and manage probity for extending the existing contracts

Recommendation

DPTI should conduct a risk analysis where an activity, such as the negotiation of contract extensions with incumbent operators, has the potential to impact on the probity of the procurement process. Plans to mitigate risks (both actual and perceived) should be developed, documented and reviewed by the person or people responsible for the procurement.

DPTI should also involve the probity advisor, where one has been engaged, to advise on appropriate probity arrangements and observe the negotiation process.

Finding

Extensions to the existing Adelaide metropolitan bus services contracts were finalised in May 2019 and June 2019, after the phase 1 registration of interest was advertised on 20 April 2019.

These extensions were negotiated by staff involved in the procurement process.

We found that there was no documented risk analysis or probity management plans for negotiating or finalising the extension to the existing contracts. In addition, we found that the probity advisor engaged to advise on the passenger transport services procurement process was not involved in the contract extension negotiations and discussions.

Negotiating and finalising extensions to the existing contracts required interactions between DPTI and the incumbent operators, who were also likely to submit bids in the open tender process.

Negotiating with incumbent operators during an open tender process creates the potential for probity issues because it may be perceived as an opportunity for them to gain an unfair advantage in the procurement process.

While we have not observed any specific impacts to the probity of the process from extending the existing contracts, without appropriate strategies in place to identify and mitigate any risks, DPTI could not demonstrate how it ensured that probity principles were upheld for the procurement process.

DPTI response

Accepted. Measures proposed in Section 10, and in particular 10.3.2 and 10.3.5, will provide an adequate control framework for this risk.

12.3.2 Records of negotiation and discussions with incumbent operators to extend existing contracts were not maintained

Recommendation

Communication with potential or actual proponents about extending existing contracts should be documented to demonstrate that probity principles were maintained.

Finding

We found that DPTI did not maintain file notes or other records of meetings held with the incumbent operators while negotiating and finalising extensions to the existing contracts.

As discussed in section 12.3.1, the interactions between DPTI and the incumbent operators to negotiate the extensions to the existing contracts created a risk to the probity of the procurement process.

The absence of appropriate records for the negotiation of the existing contracts increases the risk that DPTI may not be able to adequately demonstrate that probity principles of transparent decision making, fairness and equality for all participants were met.

DPTI response

Noted. In DPTI's view the exchange of correspondence, and supporting documentation, constitute sufficient records of matters discussed whilst finalising contract extensions.

13 Compliance with *Passenger Transport Act 1994*

What we found

The Minister materially complied with the requirements of the PTA leading up to and following the awarding of contracts. We did find one instance of non-compliance.

The Minister's report to Parliament on the contracts awarded disclosed the aggregate value of the six service contracts awarded, rather than the individual value of each service contract awarded as required by the PTA.

We also found there are different interpretations as to the date that the Minister was required to forward his reports to the Economic and Finance Committee.

These matters were minor in nature and did not impact the procurement process.

The service contracts entered into with the operators addressed the mandatory requirements set out in sections 40(1) and 41(1) of the PTA.

What we recommended

For future passenger transport procurements DPTI should:

- ensure the Minister's report to Parliament discloses the individual value of each contract awarded
- seek specific Crown Law advice to confirm the applicable date the invitation was published for the purposes of the PTA.

13.1 Introduction

13.1.1 Requirements of the *Passenger Transport Act 1994* in the process leading up to and following the awarding of service contracts

The PTA requires the Minister to do specific things in conducting the processes leading up to and following the awarding of any service contract. These include the Minister:

- appointing a person or people to conduct the tender process if the Minister determines that a service contract should be awarded by tender under section 39(2a)(a)
- providing reports to certain parties, including:
 - the Economic and Finance Committee on the proposed tender and assessment process (section 39(2a)(b))

- the Parliament on the contracts awarded and how certain principles were applied in awarding the contracts (section 39(3b))
- the Auditor-General on the process leading to the awarding of the contracts along with copies of the contracts awarded (section 39(3e))
- observing the following principles in awarding service contracts within metropolitan Adelaide:
 - avoiding a monopoly
 - developing sustainable competition
 - integrating passenger transport services
 - efficiency and promoting innovation (section 39(3)(a)(i-iv))
- reporting on ministerial directions in connection with the process of awarding a service contract (section 39(2a)(c)).

Figure A3.1 in Appendix 3 summarises the results of our review of whether the Minister complied with the requirements of the PTA leading up to and following the awarding of the service contracts.

13.1.2 Application of the monopoly and sustainable competition principles

Section 39(3)(a) of the PTA requires the Minister, when awarding contracts for regular passenger services within metropolitan Adelaide, to take into account the following principles:

- service contracts should not be awarded so as to allow a single operator to obtain a monopoly, or a market share that is close to a monopoly, in the provision of regular passenger services within metropolitan Adelaide (section 39(3)(a)(i))
- sustainable competition in the provision of regular passenger services should be developed and maintained (section 39(3)(a)(ii)).

As was the case in the 2011 procurement process for regular passenger services for metropolitan Adelaide, the Minister engaged the services of Deloitte to review the monopoly and sustainable competition impacts on the current procurement process.

We reviewed the advice provided by Deloitte and found that consideration was given to the monopoly and sustainable competition principles in line with the PTA.

The Steering Committee considered Deloitte’s review and determined that for one contract area, contract negotiation should start with a proponent who was not ranked first by the evaluation team. That proponent was assessed by the evaluation team to provide the next best value for money offer. The Steering Committee determined that this would ensure a strong, competitive bus market is maintained in Adelaide.³⁷ This proponent was subsequently awarded the contract for the Outer South contract area.

³⁷ Knoll, Hon S MP (Minister for Transport, Infrastructure and Local Government) 2020, *Report to Parliament pursuant to section 39 of the Passenger Transport Act 1994: Adelaide Metropolitan Passenger Transport Service Contracts*, 23 March.

13.1.3 Service contracts required to make provision for certain mandatory requirements

The PTA requires the service contract to make provision for certain requirements detailed in sections 40(1) and 41(1). Other sections of the PTA, for example sections 40(2) and 41(2), detail other requirements that may be included in the service contract.

Figure A3.2 in Appendix 3 summarises the results of our assessment of the compliance of the service contracts with the PTA.

13.2 Findings

13.2.1 Different interpretation of time frames for provision of the Minister's reports to the Economic and Finance Committee required by the *Passenger Transport Act 1994*

Recommendation

For future passenger transport service tender processes DPTI should seek specific Crown Law advice to confirm the applicable date the invitation was published for the purposes of the PTA.

Finding

We found there are different interpretations as to the date that the Minister was required to forward his reports to the Economic and Finance Committee on the tender and assessment process.

Section 39(2a)(b) of the PTA requires the Minister to forward a report to the Economic and Finance Committee on the tender and assessment process within 14 days of the invitation being published.

We sought advice on this matter. After receiving this advice we concluded that the date the invitation was published for the purposes of PTA could be interpreted as the date the registration of interest was published on the SA Tenders and Contracts website. This is because this is the first occasion an invitation to tender for the passenger transport service contracts was made public, albeit by requiring interested parties to first register their interest to do so.

We found the Minister's report on:

- the phase 1 tender process was forwarded to the Economic and Finance Committee on 6 May 2019. Based on when the registration of interest was advertised on 20 April 2019 the report should have been forwarded to the Economic and Finance Committee by 4 May 2019
- the phase 2 tender process was forwarded to the Economic and Finance Committee on 17 July 2019. Based on when the registration of interest was advertised on 2 July 2019 the report should have been forwarded to the Economic and Finance Committee by 16 July 2019.

DPTI advised us that the date the invitation was published for the purposes of the PTA is a technical matter that is subject to interpretation. DPTI further advised that the publication of the registration of interest is merely a statement of the imminent publication of the invitation and instructions to interested parties as to how to obtain a copy of it when it is published. The purpose of the registration of interest is to gather information and ensure that only those parties properly registered and authorised are entitled to receive a copy of the invitation when published.

We note this matter is minor in nature and did not impact the procurement process, but is worth clarifying for future procurement processes.

DPTI response

Accepted. Crown advice will be sought.

13.2.2 Minister's report to Parliament disclosed the aggregate value of contracts awarded instead of the individual contract values

Recommendation

DPTI should ensure that the Minister's report to Parliament discloses individual contract values.

Finding

We found the Minister's report to Parliament disclosed the estimated aggregate value of the six contracts awarded, \$3.008 billion (GST inclusive), rather than the individual value of each contract awarded.

Section 39(3b) of the PTA requires the Minister to prepare a report to Parliament on the contracts awarded. The report is to include information on the amount or amounts that will be payable by the Minister under the contracts.

We previously recommended that individual contract values be disclosed.³⁸

DPTI response

Accepted. It is noted that individual contract values were subsequently disclosed.

³⁸ Report of the Auditor-General *Probity of the processes leading to the awarding of three service contracts in 2011 for the provision of regular passenger bus services for Metropolitan Adelaide*, December 2011, page 31.

14 Key contractual provisions to protect the State's interests

What we found

We found that the service contracts contained a broad range of contractual provisions that should help to protect the State's interests. To what extent will depend largely on the effectiveness of the contract management framework and processes established to manage the contracts and their related operational and legal risks.

14.1 Provisions in the service contracts designed to protect the State's interests

14.1.1 Provision of services

The scope of services to be provided is detailed in schedules to the service contracts.

The Minister³⁹ has discretion to require the operators to implement variations to the services including changes to the frequency of services, routes and the operator's operating arrangements. The operators can also request changes to the services after consulting the Minister. If this occurs the Minister retains discretion to approve the operator's proposed service change and the operator must not act on the services change until it is approved.

The operators must provide the services in a professional manner, in line with best practices, due care and skill and all applicable laws, standards and government policies (including any changes to those requirements over the term of the contract). The operators must comply also with the specifications, contract plans and protocols specified in the service contract.

The operators must also comply with the requirements of the PTA, including holding all the relevant accreditations required by the PTA for itself, its staff, and its vehicles. Further, Torrens Connect Pty Ltd is required to have relevant accreditations for the light rail services under *the Rail Safety National Law (South Australia) Act 2012*.

Risk and insurance

The operators must operate the services at their own risk and without risk to the Minister. Further, they must have certain insurances in place and provide the Minister with proof of insurance on placement and renewal of the insurance policy and when requested by the Minister.

The operators must also indemnify the Minister against any potential liability to third parties from delivery of the services.

³⁹ In section 14 for the North South contract area a reference to the Minister refers to the Principal. The Principal comprises the Rail Commissioner and the Minister.

Guarantees and indemnities

The operators are required to provide an unconditional bank guarantee as security for their performance of the services. The amount of the bank guarantee provided is around 10% of the operator's annual base service payment.

The bank guarantee is to be provided before the services start and maintained for the whole contract term and for six months after the end date or, if there is a dispute between the parties, until the dispute is resolved.

In addition, the operator's parent entity guarantor provides guarantees and indemnities for the performance of the operator's obligations.

Service payment

A service fee is payable to the operators monthly. The key elements of the service fee are detailed in section 2.2.6. As discussed in section 14.1.2, the service fee is adjusted to apply abatements for any KPI failures.

The base monthly service fee can also be adjusted for:

- service changes agreed between the parties
- additional services that the operator is requested to provide (beyond those specified in the contract)
- any changes to the applicable laws, standards and government policies that impact the operator's cost of providing services
- any other adjustments detailed in the service contracts.

As detailed in section 2.2.7, the service contracts include a revenue share incentive scheme to encourage strategies and investment to improve customer experience and patronage growth. Under the scheme the operators will receive an incentive payment for achievements in reducing average costs per passenger and/or increase in customer satisfaction/patronage. The revenue share incentive payment can be either positive or negative.

14.1.2 Performance monitoring

The service contracts require regular and comprehensive reporting by the operators on their performance. This includes operational matters and financial reporting. The Minister also has general audit and information gathering powers to review performance of the services at any time.

The operators are obliged to immediately report to the Minister any:

- instances of disruption to the services
- incidents in its provision of the services
- breach of its contractual obligations.

The service contract also provides for a mid-point review of the operator's performance of the services during the first four years.

Key performance indicators

The operators must meet a series of prescribed KPIs.

A failure to meet the KPIs may result in a potential default (following which further action might be taken by the Minister) and/or negative adjustments or abatements being applied to the service payments payable to the operator. Further, for any KPI failures that occur, the Minister may require the operator to prepare and implement an approved cure plan setting out how it intends to remedy the performance issues.

The key performance areas and KPIs (including performance benchmarks and performance targets) will be reviewed annually and the Minister can make changes to them provided they act reasonably.

14.1.3 Defaults, Minister's step-in rights and termination

The Minister may issue the operators with a default notice for any breach of their obligations, including for serious or persistent KPI failures. If a default notice is issued, the operator has 60 days to make good the default, following which the Minister's further rights may be instigated, including step-in rights, a call on the operator's performance guarantee and/or termination rights.

If the operator's default threatens delivery of the services, the Minister may step in and take over providing the services for a period of time. In doing so, the Minister is entitled to use the operator's employees, depots, vehicles and any other business assets. The operator/guarantor must cooperate to assist the Minister and indemnify the Minister for any losses or expenses incurred in exercising these step-in rights.

The Minister can terminate the service contract where:

- the operator becomes insolvent
- the operator has not met required performance standards in the first four years (arising from the mid-point review)
- a material breach by the operator remains unremedied
- the operator or guarantor rejects the agreement.

Further, the contract is automatically terminated if the operator ceases to hold the accreditations needed to provide the services under the PTA and, for the North South contract area, the rail safety accreditations and rail environmental authorisations required.

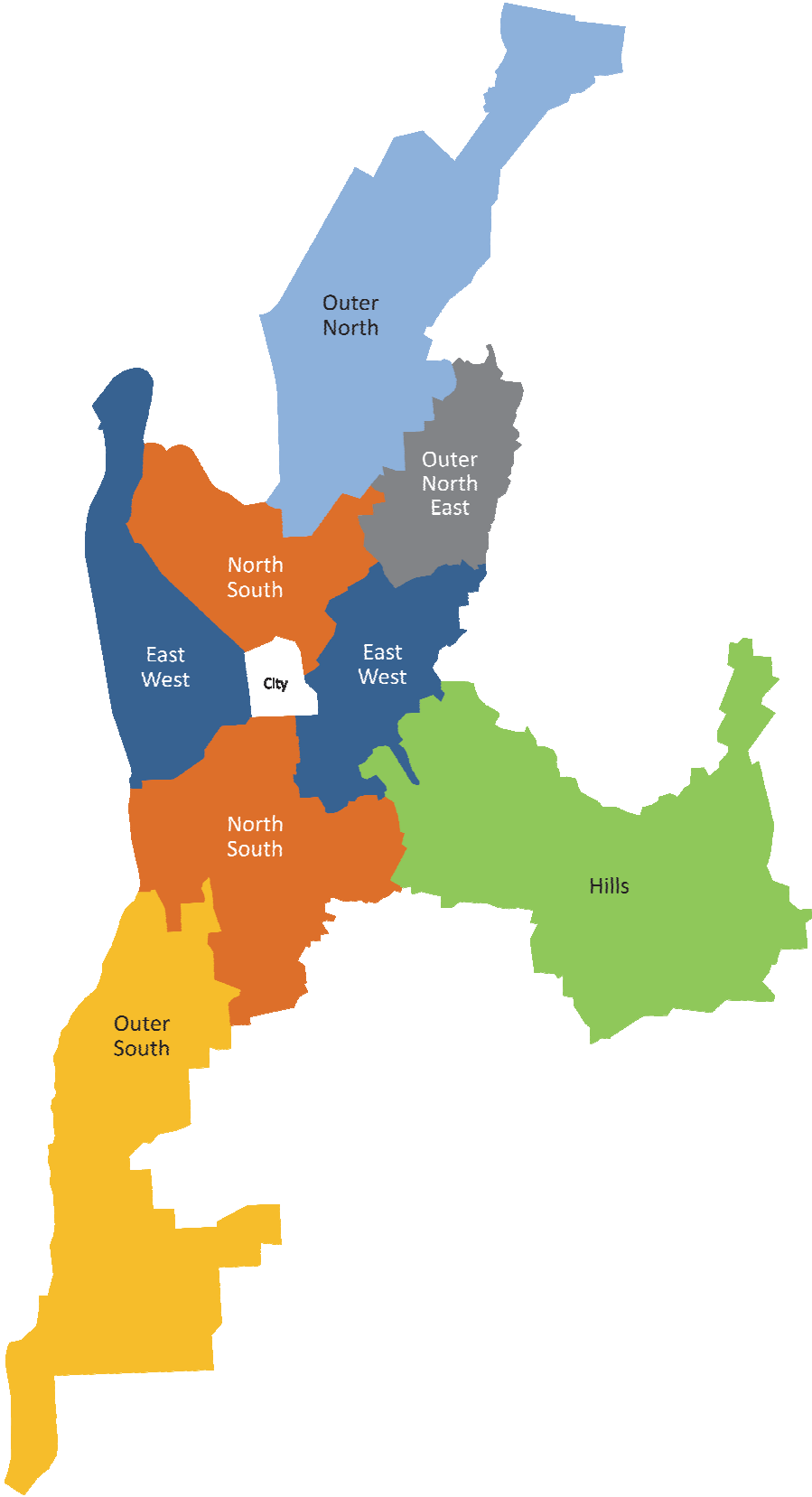
The Minister may also terminate the service contract at any time without cause, provided that six months' notice is provided. The Minister is required to pay the operator its lost profits and reasonable costs if the Minister terminates the service contract without cause.

14.1.4 Disengagement

The service contracts provide a detailed regime for the operator's disengagement from operating the services and its replacement by a subsequent service provider. This includes the requirement for the operator to provide the Minister with a detailed disengagement plan nine months in advance of the conclusion of the term, which once approved by the Minister must be implemented.

Where the time frame for the operator's replacement is compressed by any early termination, the service contract sets the rules for how that handover is to occur and gives the Minister broad powers to direct the handover.

Appendix 1 – Map of contract areas



Appendix 2 – Chronology of events

Date	Event
2018	
19 March	Steering Committee terms of reference are approved by the DPTI Tier 1 Reform Committee and the Chief Corporate Officer.
5 April	The Minister endorsed the recommendation by DPTI to proceed with a competitive tender process for the provision of metropolitan Adelaide bus services in line with section 39(2) of the PTA.
28 May	The SA Government noted the start of the process to competitively tender for the provision of metropolitan Adelaide bus services.
13 August	Probity advisor engaged to provide independent probity advice for the procurement process.
3 September	The SA Government approved negotiation of one-year contract extension with existing bus service providers.
28 September	Steering Committee approved the probity plan and communications protocol, risk management plan and risk register for the bus services procurement acquisition plan.
9 October	Instrument of Appointment for Persons to undertake the tender process approved by the Minister.
18 December	Instrument of Appointment for Persons to undertake the tender process approved by the Minister on 9 October was revoked.
	Instrument of Appointment for Persons to undertake the tender process approved by the Minister to reflect changes in membership of the Steering Committee.
2019	
14 February	DPTI undertook a market sounding process to better inform its market approach, which ended on 20 February 2020.
28 February	Revised terms of reference for the Steering Committee approved by the DPTI Chief Executive.
13 March	SPB approved the acquisition plan.
13 March	Instrument of Appointment for Persons to undertake the tender process approved by the Minister on 18 December was revoked.
	Instrument of Appointment for Persons to undertake the tender process approved by the Minister to reflect changes in governance arrangements. Only the DPTI Chief Executive was appointed as the responsible person.
1 April	The SA Government approved the Minister overseeing the conduct of an invitation to supply through a competitive tender process to re-tender Adelaide's outsourced bus services contracts.
20 April	Registration of interest for phase 1 advertised.
23 April	Invitation to supply documents for phase 1 released.

Date	Event
6 May	The Minister provided a report to the Economic and Finance Committee on the proposed tender and assessment process for the phase 1 invitation to supply in line with section 39(2a)(b) of the PTA.
10 May	Contract extensions executed for Hills, Outer North and Outer South contract areas.
17 May	Industry briefing session held for phase 1.
27 May	The SA Government approved the Adelaide Rail Transformation Program to outsource the light rail (tram) and heavy rail (train) services. The SA Government determined that light rail services should be included in the scope of the bus services procurement.
21 June	Contract extensions executed for East West, North South and Outer North East contract areas.
27 June	SPB approved deviation to the acquisition plan to include the operation and maintenance of light rail services in the procurement for phase 2.
2 July	Registration of interest for phase 2 advertised.
8 July	Invitation to supply documents for phase 2 released.
17 July	The Minister provided a report to the Economic and Finance Committee on the proposed tender and assessment process for the phase 2 invitation to supply in line with section 39(2a)(b) of the PTA.
24 July	Industry briefing session held for phase 2.
1 August	Registration of interest for phase 1 closed.
15 August	Invitation to supply for phase 1 closed.
24 October	Registration of interest for phase 2 closed.
14 November	Invitation to supply for phase 2 closed (extended from 22 October 2019).
2020	
26 February	Evaluation report signed by the evaluation team.
28 February	Evaluation report approved by DPTI Chief Executive.
5 March	Purchase recommendation approved by the DPTI Chief Executive.
10 March	The Minister signed the service contracts for all six contract areas. The service contracts commenced.
23 March	The Minister prepared a report to Parliament on the service contracts awarded and how certain principles were applied in line with section 39(3b) of the PTA.
25 March	The Minister's report to Parliament on the service contracts awarded and how certain principles were applied is tabled in line with section 39(3d) of the PTA.
7 April	The Minister provided a report to the Auditor-General on the process leading to the awarding of the service contracts in line with section 39(3e) of the PTA.
5 July	Operators start to provide services under the awarded service contracts.

Appendix 3 – Compliance with sections 39, 40 and 41 of the *Passenger Transport Act 1994*

Figure A3.1: Compliance with the PTA in the process leading up to and following the awarding of contracts

Section of the PTA	Summary of requirement	Audit findings
39(1) – Contract for passenger transport services	The terms and conditions for passenger transport services are to be set out in a service contract between an operator and the Minister.	The Minister complied with section 39(1) of the PTA.
39(2a)(a) – Minister’s appointment of person(s) to conduct the tender process	The Minister must appoint a person(s) to conduct the tender process, including the assessment of responses.	The Minister complied with section 39(2a)(a) of the PTA.
39(2a)(b) – Report to the Economic and Finance Committee	The Minister must prepare and forward a report to the Economic and Finance Committee within 14 days after the tender invitation is published. The report is to include details of the proposed tender and assessment process.	The Minister complied with section 39(2a)(b) of the PTA.
39(2a)(c) – Minister’s directions during the assessment or selection process	The Minister must forward a statement of any directions made during the assessment process to the Economic and Finance Committee within 14 days of the direction being given. Any directions must also be published in the annual report of the Minister’s department for the relevant financial year.	The Minister did not make any directions during the assessment process.
39(3)(a)(i) – Monopoly principle	The Minister must consider the monopoly principle in awarding service contracts. A contractor should not obtain a monopoly or a market share that is close to one.	The Minister complied with section 39(3)(a)(i) of the PTA.

Section of the PTA	Summary of requirement	Audit findings
39(3)(a)(ii) – Sustainable competition principle	<p>The Minister must consider the sustainable competition principle in awarding service contracts.</p> <p>Sustainable competition in providing passenger transport services should be developed and maintained.</p>	The Minister complied with section 39(3)(a)(ii) of the PTA.
39(3)(a)(iii) – Integration principle	<p>The Minister must consider the integration principle in awarding service contracts.</p> <p>The integration of passenger transport services should be encouraged and enhanced.</p>	The Minister complied with section 39(3)(a)(iii) of the PTA.
39(3)(a)(iv) – Efficient and innovation principle	<p>The Minister must consider the efficient and innovation principle in awarding service contracts.</p> <p>The service contracts should support efficient operation and promote innovation to meet the needs of commuters.</p>	The Minister complied with section 39(3)(a)(iv) of the PTA.
39(3b) – Preparing report to Parliament	<p>The Minister must prepare a report to Parliament within 14 days after awarding a contract.</p> <p>The report is to include information on the contractor, term of the contract, regions or routes, amounts payable under the contract and how the principles have been applied.</p>	<p>The Minister complied with section 39(3b) of the PTA with one exception.</p> <p>The Minister’s report to Parliament disclosed the estimated aggregate value of the six contracts rather than the individual value of each contract awarded.</p>
39(3d) – Tabling report to Parliament	The Minister must have the report tabled in both Houses of Parliament within six sitting days of the report being completed.	The Minister complied with section 39(3d) of the PTA.
39(3e) – Report to the Auditor-General	The Minister must forward a copy of the contract and a report that describes the processes leading up to the awarding of the contract to the Auditor-General within 28 days of awarding the contract if the total contract value exceeds \$4 million.	The Minister complied with section 39(3e) of the PTA.

Figure A3.2: Service contract compliance with mandatory requirements in the PTA

Section of the PTA	Summary of requirement	Audit findings
40(1)(a) – Period of operation	The service contract must include the period for which it operates.	All service contracts complied with section 40(1)(a) of the PTA.
40(1)(b) – Termination	The service contract must include the manner in which it may be terminated.	All service contracts complied with section 40(1)(b) of the PTA.
40(1)(c) – Standard of services	The service contract must include standards relating to the provision of services.	All service contracts complied with section 40(1)(c) of the PTA.
40(1)(d) – Scale of service levels	The service contract must include a scale of service levels. This refers to the periods of time when services are to be operated, the extent of operations and the frequency of operations during the specified periods.	All service contracts complied with section 40(1)(d) of the PTA.
40(1)(e) – Fares	The service contract must include the fares to be charged.	All service contracts complied with section 40(1)(e) of the PTA.
40(1)(f) – Remuneration	The service contract must include the manner in which the contractor will be remunerated or gain revenue from the provision of services, including any subsidy arrangements.	All service contracts complied with section 40(1)(f) of the PTA.
40(1)(g) – Other matters	The service contract must include other matters required by the PTA or the regulations specified in the service contract.	All service contracts complied with section 40(1)(g) of the PTA.
41(1) – Regions or routes	The service contract must specify a region or route of operation.	All service contracts complied with section 41(1) of the PTA.

Appendix 4 – Glossary of abbreviations and terms

Abbreviation/Term	Description
DPTI	Department of Planning, Transport and Infrastructure
DTF	Department of Treasury and Finance
KPI	Key performance indicator
Minister	Minister for Transport, Infrastructure and Local Government
PTA	<i>Passenger Transport Act 1994</i>
SAT	Specialist assessment team
SPB	State Procurement Board

