

Report 7 of 2020
Flinders Link Project



Report of the Auditor-General

Report 7 of 2020 Flinders Link Project

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6 April 2020

The Hon T J Stephens MLC
President
Legislative Council
Parliament House
ADELAIDE SA 5000

The Hon V A Tarzia MP
Speaker
House of Assembly
Parliament House
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Dear President and Speaker

**Report of the Auditor-General:
Report 7 of 2020 *Flinders Link Project***

As required by the *Public Finance and Audit Act 1987*, I present to each of you Report 7 of 2020 *Flinders Link Project*.

Content of the Report

We have completed a review of the Flinders Link Project. We assessed whether the arrangements established by the Department of Planning, Transport and Infrastructure to procure design and construction services for the project met appropriate procurement standards.

We concluded that the procurement process was not effectively managed because key elements did not meet those standards, proportionate to the high risk, high value nature of the project.

Acknowledgements

The audit team for this report was Salv Bianco, Philip Rossi and Grace Lum.

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

We have completed a review of the Flinders Link Project (FLP). We assessed whether the arrangements established by the Department of Planning, Transport and Infrastructure (DPTI) to procure design and construction services for the project met appropriate procurement standards.

The FLP, originally estimated to cost \$85.5 million, is now a \$141 million project that will extend the Tonsley rail line to the Flinders Medical Centre. DPTI attributed the budget increase to factors including addressing essential scope items that were excluded from the original cost estimate, changes in market conditions and adding construction of a new Tonsley Station. A significant part of the project overlaps the Darlington Upgrade Project (DUP) motorway on Main South Road and is being constructed concurrently with the DUP.

DPTI undertook direct negotiations¹ with Gateway South (the major works contractor for the DUP) for the FLP works. A multi-stage procurement process commenced in 2016 and considered the interface risks between the two integrated projects. In May 2019, Gateway South was awarded the design and construction contract for the FLP.

Major construction commenced in June 2019 and passenger services are expected to commence along the new section of the rail line in the last quarter of 2020. DPTI expects that passenger boardings across the rail network will increase by about 2800 per day as a direct result of the FLP.

1.2 Conclusion

We concluded that the procurement process was not effectively managed because key elements did not meet appropriate procurement standards, proportionate to the high risk, high value nature of the project. They included:

- robust procurement planning was not completed before procurement activity started
- proper records of communications with Gateway South before completing the acquisition plan were not maintained
- arrangements to manage probity were not implemented from the outset of the procurement
- there was a lack of evidence-based analysis and documentation to support key decisions made during the procurement process, including using a direct negotiation approach
- the nature and extent of work performed to demonstrate value for money was not sufficiently documented.

¹ A procurement approach undertaken by directly approaching and negotiating with one or more suppliers without testing the market.

The absence of these key elements increased the risk of not achieving procurement outcomes and fundamental procurement principles.

DPTI advised that the contract with Gateway South for design and construction of the DUP did not specifically provide for another contractor to work within the project boundary including above the motorway. It also advised that having another contractor working on the same site would have presented significant risks to both projects.

Without evidence-based analysis and comprehensive market research, it is not known what innovative solutions other suppliers could offer and if another supplier could potentially deliver better value for money.

DPTI's plan was to construct the FLP in parallel with the DUP to maximise design integration and achieve construction efficiencies. DPTI expected direct negotiation would save six months compared to an open market approach. This time saving was not achieved mainly because of time taken to:

- obtain an exemption from the Commonwealth Government to use a direct negotiation approach²
- satisfy conditions imposed by the Commonwealth.

These Commonwealth requirements were not factored into procurement planning.

There are circumstances where a direct negotiation approach is appropriate, such as where it is impossible or impractical to use a competitive procurement approach. For all procurements it is essential that there are effective arrangements to ensure the process is fair and transparent, value for money is achieved and it is in the best interest of the public. It is also essential that proper and timely records are captured and retained to evidence the basis of all critical project decisions.

1.3 What we found

Acquisition planning (section 5)

Services were procured from Gateway South prior to completing procurement strategy planning and finalising the acquisition plan. Additionally, the acquisition plan lacked key elements of sound acquisition planning.

DPTI did not maintain adequate records of communications with Gateway South leading up to completing the acquisition plan to evidence transparency and fairness in the procurement process.

Arrangements to manage probity from the outset of the procurement, such as establishing a probity plan and engaging a probity advisor, were not implemented until a year after DPTI started discussions with Gateway South about delivering the FLP.

² The *National Land Transport Act 2014* requires public tenders to be called for all work on relevant Commonwealth funded projects unless the Minister has granted a written exemption.

Basis for key decisions (section 6)

There was a lack of evidence-based analysis and documentation to support key decisions made during the procurement process. These decisions included:

- who approved the use of a direct negotiation approach and when this occurred
- the rationale for selecting a direct negotiation approach and awarding concept design services to Gateway South
- awarding FLP works to Gateway South before considering Gateway South's performance on the DUP
- various changes to the procurement approach.

Procurement management (section 7)

Processes to manage FLP works prior to finalising the procurement were not properly established:

- Design deliverables from the early works phase were not effectively managed so that work could be readily transferred to another contractor had DPTI decided to hold an open market call to complete the detailed design and construction.³
- FLP works were performed as a variation to the DUP design and construction contract, which was not ideal.
- Gateway South provided services for about four months before the Project Development Agreement was executed.

Evaluation of the single offer for design and construction (section 8)

The nature and extent of work performed to demonstrate value for money was not sufficiently documented:

- The nature and extent of work performed by the value for money advisor was not sufficiently documented and they did not form an overall conclusion.
- DPTI did not provide Gateway South's final tender for design and construction to the value for money advisor for them to assess whether it was competitive and represented value for money from a price perspective.
- Changes made to benchmark comparative prices used for evaluation purposes contained errors.
- An evaluation report was not prepared for the final tender outcome.

³ DPTI used an Early Contractor Involvement (ECI) procurement model. In Stage 1 (early works phase), the contractor works collaboratively with DPTI to produce detailed planning and preliminary design. Under this model, DPTI may engage the contractor to continue on to Stage 2 to deliver detailed design and construction or can competitively tender the works to another contractor.

Probity management (section 9)

Probity management arrangements to oversee the procurement were not properly established:

- DPTI did not involve the probity advisor in all evaluation and negotiation activities as required by the probity plan.
- The terms of engagement for the probity advisor did not specify the nature and extent of probity reporting.
- The probity advisor's final report covering the request for tender (RFT) process for design and construction of the FLP was issued almost two months after the design and construction contract was executed.

Record keeping (section 10)

There was also the need to improve record keeping.

1.4 What we recommended

While the FLP procurement process is now complete, DPTI should consider our findings and apply our recommendations to future procurements. This will help to ensure that important procurement principles such as fairness and transparency, sound evidence-based decision making and demonstrating value for money are met.

Acquisition planning (section 5)

To address the shortcomings in the acquisition planning process, we recommended that for future procurements DPTI should:

- plan, analyse and research the procurement based on fundamental procurement principles and develop a comprehensive acquisition plan prior to starting any procurement activity and acquiring goods and services. The procurement strategy should consider how any actual or perceived advantage held by any incumbent contractors is to be managed
- document all communications with potential suppliers to evidence transparency and fairness
- implement arrangements to manage probity, such as probity plans and probity auditors, at the start of the procurement process.

Basis for key decisions (section 6)

For future projects, we recommended that DPTI should:

- obtain approval to use a direct negotiation approach before starting direct negotiations
- perform robust, balanced and evidence-based analysis to select the appropriate market approach

- document the decision-making process, including evidence of research, discussions and communication with senior officers, and relevant approvals
- review the past performance of potential suppliers before awarding work to them, including mitigation strategies to address performance concerns and/or issues
- evaluate the impact of any changes to the procurement approach on procurement principles, objectives and risks and document the evaluation and basis for decisions.

Procurement management (section 7)

For future projects, we recommended that DPTI:

- develop a plan for the early works phase with clearly defined deliverables and time frames and monitor progress against this plan
- finalise contracts before works start and ensure that works are carried out under appropriate and relevant contractual terms and conditions
- consistent with revised DPTI policy, ensure contracts are executed before contractors start work and payments are made.

Evaluation of the single offer for design and construction (section 8)

We recommended that DPTI ensure that advisors involved in the evaluation process document:

- the nature, extent and scope of work performed
- the analysis performed, results and their conclusions.

DPTI should also review the final price for value for money and document reasons, decisions and outcomes from the review in an evaluation report.

Further, DPTI should implement robust review processes over benchmark comparison prices and document the basis for any adjustments made. As part of this DPTI should consider using the expertise of the value for money advisor to interrogate the appropriateness and accuracy of any adjustments made.

Probity management (section 9)

For future procurements, where a probity advisor is used, we recommended DPTI:

- involve the probity advisor in all necessary procurement activities so that they can fulfil the role set out for them in the probity plan
- ensure the nature and extent of probity advisory services are documented and agreed before the engagement starts
- ensure the probity advisor's final probity report is completed and obtained prior to supplier selection so that any probity findings can be considered before finalising supplier selection outcomes.

We also recommended improvements in records management processes to ensure that documents that support key procurement processes and outcomes are retained and readily available for review (see section 10).

1.5 Response to our recommendations

The Chief Executive, DPTI (who started in late October 2018 during the final stages of the supplier selection process for the FLP) responded to our detailed findings and recommendations. DPTI accepted most of our recommendations and for some areas provided additional context to the matters we raised. Its responses to the specific findings are included in sections 5 to 10.

The Chief Executive, DPTI also provided a response to our proposed report to Parliament, which is included as Appendix 2.

We thank the procurement team and Procurement and Contracting directorate for their cooperation during the review.

2 Background

2.1 What the Flinders Link Project will deliver

The FLP will extend the Tonsley rail line to the Flinders Medical Centre and create new connections to Flinders University, Flinders Private Hospital and other destinations in the precinct.

The FLP includes:

- constructing a 650 metre extension of the Tonsley rail line, including an elevated single track over Sturt Road, Laffers Triangle and Main South Road
- constructing a new Flinders Station
- removing the existing Tonsley Station and constructing a new Tonsley Station south of Alawoona Avenue⁴
- building an integrated shared pedestrian/cycle path adjacent to the rail line.

Figure 2.1 is an artist's impression of the project.

Figure 2.1: Artist's impression of the FLP



Source: DPTI.

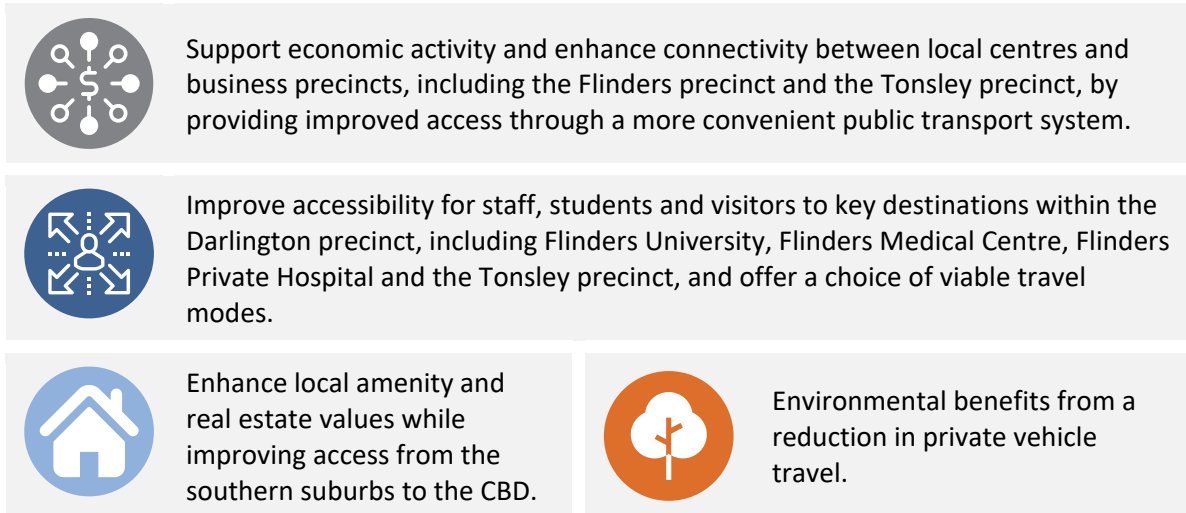
The FLP is part of the State's broader strategy to improve performance of the southern public transport network to meet the public transport target in South Australia's Strategic Plan.⁵

⁴ Construction of a new Tonsley Station was added to the project scope in November 2019 following community consultation and provision of additional State and Commonwealth Government funding.

⁵ Target 63 in South Australia's Strategic Plan (2011) was to 'increase the use of public transport to 10% of metropolitan weekday passenger vehicle kilometres travelled by 2018'.

2.1.1 Strategic objectives and benefits that the FLP is expected to provide

Figure 2.2: Strategic objectives and benefits of the FLP⁶



2.2 Interface between the FLP and DUP

The FLP significantly overlaps part of the DUP on Main South Road and is being constructed concurrently with the DUP. Figure 2.3 shows the proposed physical interface between the DUP motorway and the FLP rail line.

Figure 2.3: Artist's impression of the DUP with Flinders Link rail crossing over Main South Road and lowered motorway



Source: DPTI.

⁶ South Australian Government 2017, House of Assembly, Public Works Committee, *Final Report Flinders Link Project – Extension Of Tonsley Rail Line To Flinders Medical Centre*, 17 October 2017, page 9.

2.3 Project delivery status

Major construction work started in June 2019 and is progressing. Tonsley Station and parts of the rail line are no longer operational and have been decommissioned. Piers to support the elevated structures have been constructed and the elevated rail bridge is well progressed. At the time of this Report, seven of the 10 bridge spans across the project had been installed. Construction of the Flinders Link Station has also started.

Key construction activities in progress and/or remaining include:

- constructing the ramp on approach to the elevated rail bridge
- fabricating and installing the remaining three bridge spans
- completing the elevated walkway
- installing the rail track, overhead power transmission, signalling and train control systems
- completing the Flinders Station
- constructing the new Tonsley Station.

Train services were originally planned to commence at the start of 2019 to coincide with the start of the university semester. They are now expected to commence in the last quarter of 2020, with the project due to be completed in the first quarter of 2021.

Figure 2.4 shows the elevated rail bridge span being installed over Main South Road.

Figure 2.4: Installation of elevated rail bridge span



Source: DPTI.

2.4 Funding arrangements

The Commonwealth and SA Governments are jointly funding the FLP up to \$141 million, with an equal contribution from each party.

Figure 2.5: Commonwealth and SA Government funding for the DUP



2.4.1 National Land Transport Act 2014 requirements

Commonwealth funding for the FLP is provided under the *National Land Transport Act 2014* (the NLT Act) and as such the FLP must comply with the conditions in this Act.

The NLT Act requires public tenders to be called for all work on funded projects unless the Minister⁷ has granted a written exemption from this condition.

In June 2017, in line with the NLT Act, the SA Government obtained a written exemption to use a direct negotiation approach.

2.4.2 The Commonwealth Government's role

The Commonwealth Department of Infrastructure, Transport, Cities and Regional Development (DITCRD)⁸ helps the Commonwealth Government and its Ministers to evaluate, plan and invest in infrastructure.

DPTI must submit information to DITCRD to assess of the SA Government's compliance with the NLT Act. DPTI must also notify DITCRD of significant scope, time and cost variations.

The funding instrument issued by the Commonwealth Government sets out its approved maximum funding contribution towards the FLP. The Commonwealth Government makes payments to the SA Government when agreed milestones are achieved.

2.5 Project budget and cost status

The original project budget of \$85.5 million was revised to \$125 million in October 2018. DPTI attributed the budget increase to:

⁷ The Commonwealth Minister with portfolio responsibility for infrastructure.

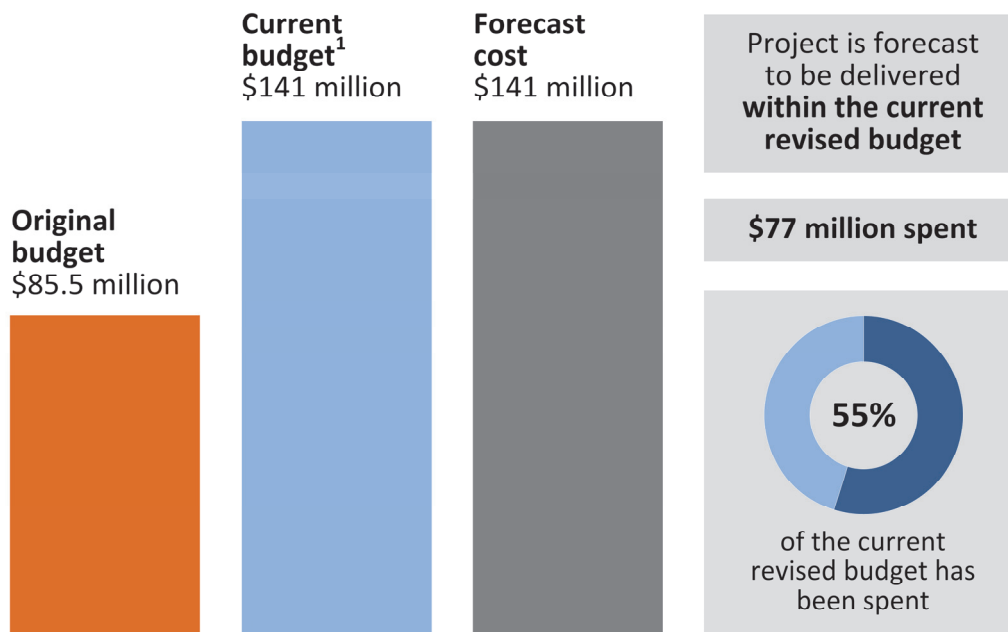
⁸ Known as the Department of Infrastructure and Regional Development prior to 20 December 2017.

- changes in market conditions (project cost escalation and increased national demand for experienced rail project contractors)
- greater project scope clarity which revealed that essential scope items were excluded from the original cost estimate.

In November 2019, the project budget increased by a further \$16 million to \$141 million to cater for the new Tonsley Railway Station.

Figure 2.6 summarises the financial position of the project as at 29 February 2020.

Figure 2.6: Project financial summary as at 29 February 2020



¹ The budget increased following revisions in October 2018 and November 2019.

Source: Developed from information provided by DPTI

3 Audit mandate, objective and scope

3.1 Our mandate

The Auditor-General has authority to conduct this review under section 31(2) of the *Public Finance and Audit Act 1987*.

3.2 Our objective

We assessed the effectiveness of the arrangements established by DPTI to procure design and construction services for the Flinders Link Project to meet appropriate procurement standards.

3.3 What we reviewed

Our review scope included:

- acquisition planning
- evaluation of tender submissions
- contract negotiation and execution processes
- probity management arrangements.

Our assessment considered SA Government requirements including Treasurer's Instructions, State Procurement Board (SPB) policies and procedures,⁹ other authoritative documentation (such as approvals and contractual documentation) and relevant DPTI policies, procedures and guidelines. We also considered best practice principles from our prior reviews and from other jurisdictions.

3.4 What we did not review

In completing the FLP review, we did not:

- review the project initiation processes including the business case
- conclude if the procurement represents value for money. We focussed on the arrangements DPTI established to assess and determine if value for money was achieved
- review the procurement of the new Tonsley Station as this part of the project was announced after our review and is being procured separately.

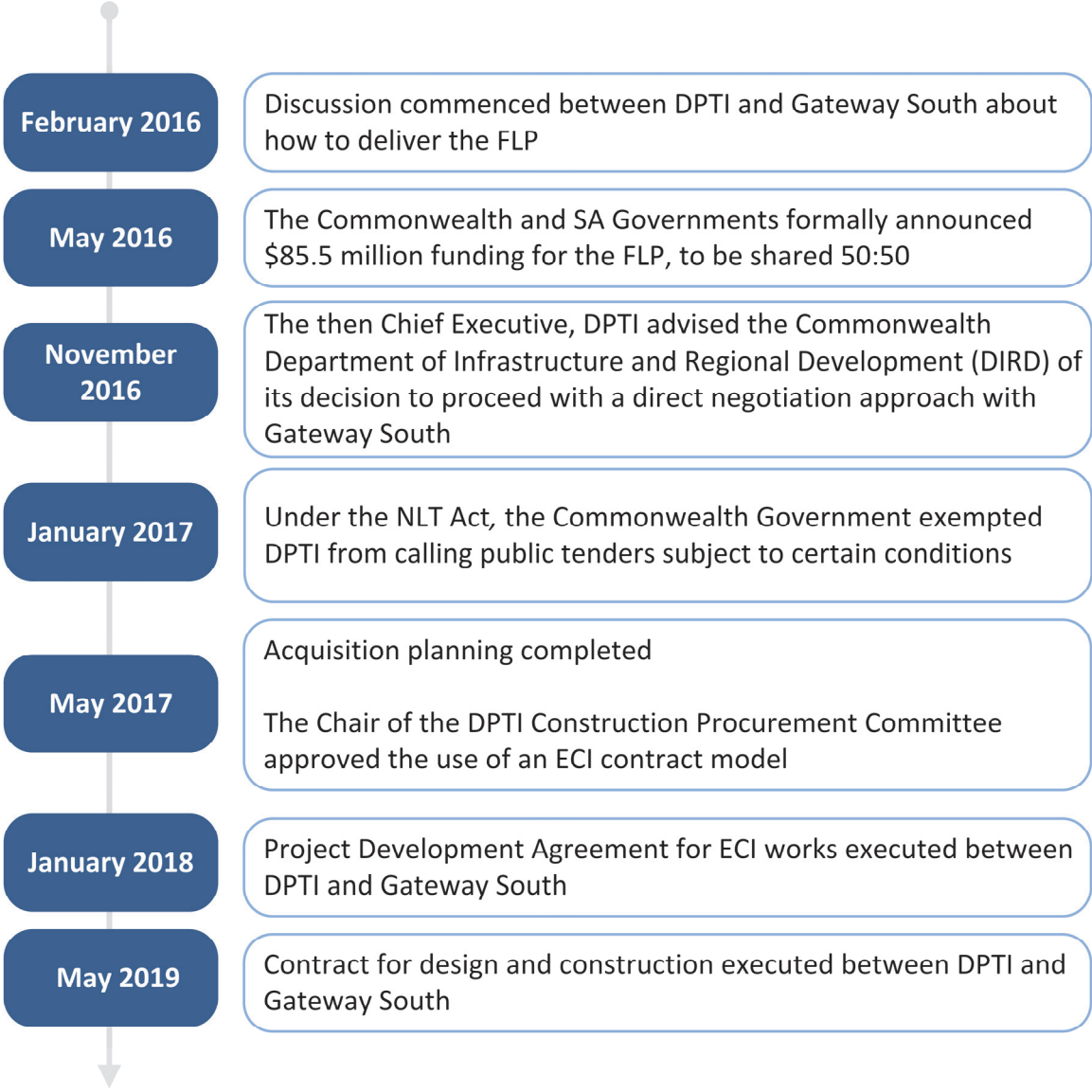
⁹ In line with the *State Procurement Act 2004*, the procurement process for the FLP was not required to comply with SPB policies and guides as it is a prescribed construction project exceeding \$150 000, however we consider SPB policies and guides to be good practice for any procurement activity.

4 Detailed description of the procurement process

4.1 Chronology of key events

A multi-stage procurement process was undertaken. Figure 4.1 provides a chronology of key events. Refer to Appendix 1 for a detailed chronology of events.

Figure 4.1: Chronology of key events



A new Chief Executive, DPTI commenced in late October 2018, towards the end of the procurement process.

4.2 Key parties

Figure 4.2 provides an overview of the key parties involved in the procurement process and their roles.

Figure 4.2: Role of key parties involved in the procurement process

Party	Role
Department of Planning, Transport and Infrastructure (DPTI)	SA Government department responsible for procurement and delivery of the FLP on behalf of the State.
Department of Infrastructure and Regional Development (DIRD)	Commonwealth Government department that helps the Commonwealth Government and its Ministers to evaluate, plan and invest in infrastructure. Assesses the SA Government's compliance with the NLT Act.
Gateway South	A joint venture between Laing O'Rourke and Fulton Hogan. Design and construction contractor for the DUP.
Darlington Upgrade Project – Collaborative Governance Team	Established under the DUP design and construction contract to provide guidance and leadership for the DUP. Comprises senior DPTI and Gateway South representatives.
Independent estimator	Undertakes independent costing of the project for comparison with the price received by Gateway South.
Probity advisor	Their role included: <ul style="list-style-type: none"> • reviewing and providing probity comments on key procurement documents and processes • providing guidance on probity principles to the evaluation team • reviewing confidentiality arrangements and investigating conflicts of interest

4.3 Acquisition planning

4.3.1 Selecting the market approach

In July 2016, DPTI prepared an options analysis paper assessing different procurement approaches and contract models, considering the characteristics of the FLP and its relationship with the DUP as well as project risks.

The analysis identified an imperative to deliver the FLP concurrently with the DUP, driven by:

- the need to produce a well integrated solution between the two projects and minimise costly rework to the DUP if FLP piers (pillars to support the elevated structures) were constructed after the DUP was completed
- the opportunity to take advantage of critical construction equipment scheduled to be on site for the DUP, removing the need to re-mobilise equipment from interstate and saving significant costs.

The analysis recommended the use of a direct negotiation approach with Gateway South and a delivery partner model.¹⁰

4.3.2 Exemption from calling public tenders

In December 2016, DPTI submitted information to the Commonwealth Government to obtain an exemption from the NLT Act requirement to call public tenders for the FLP and to directly negotiate with Gateway South. DPTI sought the exemption under section 24(1)(c)(iv) of the NLT Act on the basis that competitive tenders were unlikely to be received.

On 6 January 2017, the Commonwealth Minister for Urban Infrastructure exempted DPTI from calling public tenders on the basis that Gateway South would undertake the following activities (non-contestable work):

- project and contract management for the FLP (including management, supervision and procurement of contestable works¹¹)
- design of the works (ensuring a well-integrated solution and reducing risk to works and program)
- complex bridge pier and foundation works directly in the vicinity of the DUP works
- rail electrical overhead and commissioning works.

The exemption approval was conditional on:

- engaging an independent estimator to cost the project, with current design information, for comparison with the price received by Gateway South
- the price received by Gateway South providing value for money and DPTI demonstrating that competitive tenders are unlikely to be received. This required the achievement of a significant saving in the order of at least 5% of the costing provided by the independent estimator
- all contestable work complying with the NLT Act and Gateway South calling for public tenders for these works
- DPTI being a member of the tender assessment panel where a member of the Gateway South consortia submits a proposal for a package of work publicly tendered, to ensure fair and equitable assessment of proposals.

4.3.3 Selecting the contract model

DPTI identified an ECI model as the preferred contract form for the project development phase. It prepared an acquisition strategy document recommending the following approach:

- a direct negotiation with Gateway South
- an ECI contract model for the project development phase

¹⁰ A collaborative procurement model.

¹¹ Contestable works are project works that will be competitively tendered.

- a design and construct contract model based on GC21 (Edition 2)¹² for the delivery phase.

The acquisition strategy document noted that DPTI would hold an open market call if the above contracts were not awarded to Gateway South.

On 31 May 2017, the approach in the acquisition strategy document was approved by the Chair of DPTI's Construction Procurement Committee.

4.4 Early engagement activities

Before the procurement strategy was finalised on 31 May 2017, DPTI and Gateway South had various interactions on the delivery of the FLP (early engagement activities), including:

- discussions at DUP Collaborative Governance Team meetings from April 2016
- Gateway South making a non-price presentation to DPTI
- Gateway South submitting a proposal for concept design services
- DPTI accepting Gateway South's proposal and instructing Gateway South to carry out concept design work.

DPTI also requested Gateway South to provide a price:

- for the FLP based on the concept design
- to undertake design from the 'concept design' stage to the 'issued for construction design'¹³ stage.

Correspondence relating to these activities indicated that if the parties could not agree on the price and risk allocation, DPTI could negotiate with others or seek offers for design and construction of the works.

These two requests for pricing were put on hold and then superseded by the ECI procurement process described in the next section.

4.5 Early contractor involvement for project development

4.5.1 Request for tender

In May 2017, DPTI sought single source offers from:

- Gateway South for project development activities

¹² A standard form of construction contract. It differs from other forms of design and construct contracts used by DPTI in various ways including removing the role of superintendent, being a more collaborative form of contracting and requiring the contract to deliver a defect-free product at completion.

¹³ 'Issued for construction design' is the contractor's documents to be issued for construction of the works that all necessary approvals, verification, certification and release of applicable hold points.

- Gateway South’s design joint venture partner (comprising Jacobs, SMEC and KBR) for project design.

In July 2017, after evaluating the offers received, DPTI determined that it was preferable to combine the two work packages for project development and design into a single tender package. The design joint venture would be subcontracted to Gateway South, as DPTI wanted a single point of accountability and felt it would better enable the ECI objectives to be met.

An RFT for the project development phase was issued to Gateway South. It was concurrently issued to the independent estimator to cost the project (acting as an independent competing contractor who was not currently incumbent on site) as required by the conditions of the tender exemption.

To facilitate a like-for-like comparison between the prices submitted by Gateway South and the independent estimator, parties were required to provide their prices using a prescribed level and format.

4.5.2 Evaluation outcome

An evaluation panel and evaluation plan were established to assess the submissions received.

The evaluation panel concluded that Gateway South’s price provided DPTI with value for money. This was on the basis that it achieved at least a 5% saving when compared to the independent estimator’s costing, as required by the conditions of the tender exemption (refer to section 4.3.2 for details about the conditions of the exemption).

The evaluation panel recommended awarding the Project Development Agreement for Early Contractor Involvement (project development phase) to Gateway South.

To progress works on the FLP while the procurement process for ECI works was being finalised, DPTI instructed Gateway South to start design and investigation work on the FLP up to the value of \$1.2 million.¹⁴ This was done through variation orders under the DUP design and construction contract.

4.5.3 Project development agreement

The Project Development Agreement was executed on 10 January 2018 after work covered by the agreement had commenced.

The Project Development Agreement was for:

- Stage 1 – ECI services including project development and reference design preparation

¹⁴ The original variation issued in September 2017 was for works up to the value of \$800 000. In October 2017 the variation order was extended by a further four weeks, and the maximum value was increased to \$1.2 million.

- Stage 2 – Ongoing management of the design prior to starting the detailed design and construction phase.

Under the Project Development Agreement, at or before the end of the Stage 1, Gateway South would submit an offer to undertake detailed design and construction of the FLP.

4.6 Detailed design and construction

A multi-stage RFT process was undertaken for detailed design and construction of the FLP, as initial tenders submitted by Gateway South did not meet the savings conditions in the tender exemption granted by the Commonwealth.

Figure 4.3 sets out the tender iterations leading up to execution of the design and construction contract.

Figure 4.3 RFT for detailed design and construction

Party	Role
December 2017	Gateway South submits tender based on preliminary design
October 2018	Gateway South submits tender based on detailed design
December 2018	Gateway South submits revised tender
May 2019	Gateway South submits final tender based on updated contract award date and project completion date
May 2019	Contract executed with Gateway South

4.6.1 Request for tender based on preliminary design

On 11 December 2017, in line with the Project Development Agreement, Gateway South and the independent estimator submitted tenders based on preliminary design (nominal 30%) for the design and construction of the FLP.

An evaluation panel and evaluation plan were established to assess the submissions received.

DPTI expected to enter into a design and construction contract with Gateway South by February 2018, however both Gateway South’s tendered price and the independent estimate significantly exceeded the project budget of \$85.5 million. No contract was awarded as the tender exceeded the available funding and DPTI suspended direct negotiations to determine the project budget implications.

Revision to estimated project cost

DPTI found that the initial project budget of \$85.5 million estimated several years prior was unachievable due to:

- changes in market conditions (project cost escalation and increased national demand for experienced rail project contractors)

- changes to the project scope arising from progressing the detailed design during the project development phase. Essential scope items were found to have been excluded from the original budget estimate. The scope and form of several elements of the original project were changed to meet refined safety, technical and stakeholder requirements, which resulted in higher costs than originally estimated.

To reduce the cost of the project, workshops were held to review the project design. DPTI decided to alter the design, but identified that the project still could not be delivered within the project budget of \$85.5 million without major reduction to functionality and benefits. The revised project cost was estimated to be \$125 million. DPTI sought additional funds from the Commonwealth and SA Governments to fund the increase in project cost.

While seeking approval for additional funding, DPTI continued with the procurement process to minimise further delays to the FLP.

Continuation of a direct negotiation approach

Given that substantial time had elapsed without reaching tender acceptance or contract award, DPTI considered it was prudent to review the benefits and risks of continuing with a direct negotiation approach compared to calling for public tenders.

On 8 June 2018, the Chair of DPTI's Procurement Committee approved the continuation of the direct negotiation approach.

During this time, in line with the Project Development Agreement, Gateway South continued to manage the FLP design. By this stage, design had reached the detailed design (nominal 70%) review stage for most of the work packages.

4.6.2 Request for tender based on detailed design

On 29 August 2018 Gateway South and the independent estimator were requested to resubmit tenders for design and construction of the FLP based on detailed (nominal 70%) design.

DPTI's value for money advisor assessed the price criteria. Their role was to provide cost estimation expertise and review Gateway South's price against the independent estimator's price to determine whether the Gateway South tender was sufficiently competitive and represented value for money.

Gateway South's tender failed to satisfy the conditions in the tender exemption as only one of the four required project areas achieved a saving of at least 5% when compared to the independent estimator's submission.

After negotiations, on 13 December 2018 Gateway South submitted a revised tender based on updated dates and its best value for money offer. Once again this tender did not achieve the required savings in each of the four required project areas, but the areas in aggregate achieved a 17% saving and a total saving of 6.75% for the overall project when compared with the independent estimator's submission.

Final revised tender and execution of contract

As some time had passed since Gateway South's last tender submission, on 9 May 2019 Gateway South submitted a revised tender based on an updated contract award date and project completion date.

After obtaining additional project funding from the Commonwealth and SA Governments and other approvals, on 17 May 2019 DPTI and Gateway South executed a contract for the design and construction of the FLP. The contract value was \$90.4 million¹⁵ and the contractual completion date was 23 October 2020.

On the same day, the parties executed a deed to amend the DUP contract. DPTI advised that the purpose of the deed was to mitigate time related claims arising from interface issues between the FLP and DUP. The deed transfers certain works under the DUP contract to the FLP contract to limit DPTI's liability for an extension of time (42 working days) and delay costs (\$5.2 million) under the DUP contract.

¹⁵ The difference between the contract value and project budget is mainly due to contingencies, other project works and project management costs.

5 Acquisition planning

What we found

We identified a number of shortcomings in the acquisition planning process. These included the following:

- DPTI procured services from Gateway South prior to completing procurement strategy planning and finalising the acquisition plan.
- The acquisition plan lacked key elements of sound acquisition planning.
- A single integrated acquisition plan was not prepared.
- Proper records of communications with Gateway South leading up to completing the acquisition plan were not maintained for DPTI to demonstrate that the process was fair and transparent.
- Arrangements to manage probity, such as establishing a probity plan and engaging a probity advisor, were not implemented at the beginning of the procurement process. These arrangements were put in place a year after DPTI started to discuss delivering the FLP with Gateway South.

What we recommended

For future procurements we recommended that DPTI should:

- plan, analyse and research the procurement based on fundamental procurement principles and develop a comprehensive acquisition plan prior to starting procurement activity and acquiring goods and services. This should include how any actual or perceived advantage held by any incumbent contractor is to be managed
- perform comprehensive acquisition planning that includes key elements of sound acquisition planning
- prepare a single integrated acquisition plan document that captures the procurement strategy for the entire procurement lifecycle
- document communications with potential suppliers to evidence transparency and fairness in the procurement process
- for large and complex procurements, develop a plan to manage probity at the start of the procurement process and ensure the plan is approved and communicated to relevant officers
- where probity advisors are used, engage the probity advisor before the procurement process starts to ensure high standards of probity are considered and addressed as early as possible in the procurement process.

5.1 Introduction

5.1.1 Importance of acquisition planning

Acquisition planning consists of three stages.

Figure 5.1: Three stages of acquisition planning



Source: State Procurement Board, *Acquisition Planning Policy*, September 2019, page 5.

Successful acquisition planning ensures the most appropriate acquisition strategy is selected to meet procurement objectives, in a timely manner and at an acceptable cost. Successful planning results in:

- improved risk identification and management
- better value for money outcomes.¹⁶

The rigour of acquisition planning should be proportional to the scale and risk profile of the procurement activity. Given the high risk, high value nature of the FLP, we consider that a rigorous and comprehensive acquisition planning process was required.

In line with DPTI's procurement planning guidelines the planning process should be formally documented, including the rationale for selecting the preferred procurement strategy and associated risks.

Developing and approving an acquisition plan is a critical deliverable of the acquisition planning process that:

- pulls together the analysis and requirements from planning processes
- defines the agreed procurement methodology and strategy.

Ideally, planning the procurement strategy should occur as soon as the need to acquire goods and services is identified, but most certainly should be completed before any procurement activity starts. A properly thought out strategy gives direction to the procurement process from the outset to manage how it should be carried out. A lack of proper planning early in the process can result in:

- compromise of fundamental procurement principles
- subsequent decisions not being based on solid foundations
- not identifying risk and issues
- not achieving procurement objectives.

¹⁶ State Procurement Board, *Acquisition Planning Policy*, September 2019, page 5.

5.2 Audit approach

We assessed whether acquisition planning was in line with DPTI policies and procedures, best practice principles and Commonwealth Government funding requirements. Specifically, we considered:

- DPTI's procurement policies and procedures
- the SPB's *Acquisition Planning Policy*
- the SPB's *Market Analysis Guideline*
- the conditions attached to the exemption from calling public tenders granted by the Commonwealth Government on 6 January 2017.

Under the *State Procurement Act 2004*, the procurement process for the FLP was not required to comply with SPB policies and guides as it is a prescribed construction project exceeding \$150 000, however we consider SPB policies and guides to be good practice for any procurement activity.

5.3 Findings

5.3.1 Procurement activity commenced prior to completing procurement strategy planning and finalising the acquisition plan

Recommendation

For future procurements, DPTI should plan, analyse and research the procurement based on fundamental procurement principles and develop a comprehensive acquisition plan before starting any procurement activity and acquiring goods and services.

Where an incumbent contractor is involved, the procurement strategy should consider how any actual or perceived advantage held by the incumbent contractor should be managed. This should be done before interacting with the contractor.

Finding

From February 2016, numerous interactions occurred between DPTI and Gateway South about using Gateway South to deliver the FLP. DPTI also procured concept design services and started procuring other services directly from Gateway South. These activities (early engagement activities) occurred prior to completing procurement strategy planning and finalising an acquisition plan outlining:

- the preferred strategy to achieve the procurement objectives
- how associated risks would be managed.

DPTI did not analyse how it was going to manage the risk of any actual or perceived advantage held by Gateway South as the incumbent contractor on the DUP, before engaging with Gateway South. The absence of a well-planned approach to manage this risk compromises DPTI's capacity to demonstrate that it has met key procurement principles such as:

- obtaining the best value in expending public money
- ethical and fair treatment of suppliers
- probity, accountability and transparency.

As the intent of an acquisition plan is to establish the agreed procurement methodology and strategy to guide the procurement process, it should have been completed before acquiring any services.

It can be appropriate to engage with potential suppliers as part of market research to inform the procurement strategy. Where this occurs, interactions should be carried out in line with a properly planned approach to ensure that procurement principles and outcomes are not compromised. This importance is heightened where a direct negotiation approach is planned, and interactions occur with a proponent that has a potential incumbent advantage.

DPTI response

DPTI accepted the finding and advised that:

- its procurement planning guidelines have been reviewed, updated and issued to relevant staff. The guidelines require appropriate and effective procurement planning, and the development and finalisation of an acquisition plan prior to commencing any procurement activity
- future projects will comply with this policy.

DPTI also noted that an acquisition strategy was developed and approved early in 2017, after the single source procurement approach was selected.

5.3.2 Acquisition planning lacked key elements

Recommendation

For future procurements, DPTI should perform comprehensive acquisition planning that includes:

- evidence-based market research
- procurement specific risk assessment and risk management plan
- governance arrangements
- evaluation approach
- procurement time frames
- probity requirements.

Finding

Our review of the acquisition planning process found that the following elements of sound acquisition planning were missing:

- evidence-based analysis of market capability and capacity
- procurement specific risk assessment and risk management plan
- the procurement governance framework
- the evaluation approach
- procurement time frames.

These details must be documented in the acquisition plan to provide decision makers with:

- evidence that they were sufficiently considered and addressed
- the necessary information to make informed decisions about the acquisition approach.

Market research – analysis of market capability and capacity

Market research enables understanding of the supply market for the planned procurement. It is sound practice to undertake market research prior to formulating a market approach and determining a subsequent course of action.¹⁷

We found that there was a lack of engagement with potential suppliers other than Gateway South to understand what alternative solutions and innovative ideas they could offer, compared to Gateway South. Engagement should have occurred with a range of suppliers to obtain a balanced understanding of alternative solutions, make a well-informed decision about the appropriate procurement strategy and drive value for money outcomes.

There was also no documented analysis of market capability and capacity. DPTI advised us that it was aware of the market capability and capacity through its experience with other rail projects and knowledge of market conditions. DPTI considered there was a limited market for the project, but it could not provide evidence to support this assertion (such as advice from a market industry expert).

Procurement specific risk assessment and risk management plan

DPTI could not demonstrate that it had performed a comprehensive assessment of procurement specific risks. We found that:

- procurement risks were identified in various acquisition planning documents, but analysis of the impact, consequences, likelihood and treatment actions was not documented for all risks
- a central record of all procurement risks did not exist.

We also found that a risk management plan detailing the risk management approach for the procurement was not prepared.

¹⁷ State Procurement Board, *Acquisition Planning Policy*, September 2019, page 6.

Procurement governance framework

Procurement governance arrangements setting out roles, responsibilities, authorities and accountabilities (including procurement approvals) were not comprehensively documented in the acquisition plan.

We note the acquisition plan did consider some governance arrangements such as:

- Commonwealth Government requirements
- applicable governance policies
- use of a probity advisor.

Evaluation approach

The acquisition plan did not set out the approach to evaluating non-price criteria (including consideration of Gateway South's performance on the DUP).

Procurement time frames

The proposed timeline for the procurement, setting out milestones and target dates, was not documented in the acquisition plan.

DPTI response

DPTI accepted the finding and advised that it has reviewed and updated its Infrastructure Acquisition Plan template and issued the template to relevant staff. The updated template includes the requirements identified in our recommendation.

5.3.3 Absence of a single integrated acquisition plan

Recommendation

For future procurements, DPTI should prepare a single integrated acquisition plan that captures the procurement strategy for the entire procurement lifecycle.

Finding

A single integrated acquisition plan was not prepared for the procurement.

The procurement team advised that the procurement strategy was captured in various documents that collectively form the acquisition plan.

It is sound practice for a single integrated acquisition plan document to be prepared that cohesively captures the proposed procurement strategy for the entire procurement lifecycle, including market approach and contract model, with supporting rationale. A single acquisition plan also provides those involved in the procurement process with a central point of reference to guide the procurement process and measure performance against.

DPTI response

DPTI accepted the finding and advised that for future projects a single integrated acquisition plan will be established prior to any procurement activity.

5.3.4 Early engagement with Gateway South was insufficiently documented

Recommendation

DPTI should document communications with potential suppliers to evidence transparency and fairness in the procurement process.

Finding

Throughout 2016, including prior to DPTI deciding on a direct negotiation approach, discussions were held between DPTI and Gateway South at DUP Collaborative Governance Team meetings about using Gateway South to deliver Flinders Link. The nature and outcomes of these discussions were not always well documented.

In June 2016 Gateway South made a non-price presentation to DPTI to 'get agreement to proceed with discussions with DPTI to make a deal for the delivery of Flinders Link'. DPTI advised that it initiated this presentation but could not provide documentation to support this. As a result, we were unable to confirm the nature of Gateway South's proposal, including whether it was an unsolicited proposal.

DPTI advised us that these discussions with Gateway South did not commit DPTI to awarding Flinders Link work to them.

Proper records of all communications with Gateway South should have been maintained to enable DPTI to demonstrate a fair and transparent process.

Without proper records there is also a risk that DPTI may bypass government requirements such as the requirement to assess unsolicited proposals in line with the SA Government's *Guidelines for the Assessment of Unsolicited Proposals*.

DPTI response

DPTI noted the finding and referred to the proposed actions in its responses in sections 5.3.1 and 10.2.1.

5.3.5 Probity plan established after early engagement activities

Recommendation

For large and complex procurements, DPTI should develop, approve and communicate a plan at the start of the procurement to manage probity.

Finding

The probity plan was finalised on 31 May 2017, a year after DPTI started interacting with Gateway South on delivering the FLP.

A probity plan should have been implemented before engaging with Gateway South covering probity requirements during early engagement activities such as:

- fair and equitable treatment of all potential suppliers during early market engagement
- consideration of how to address Gateway South's incumbent advantage
- maintaining adequate records of interactions/meetings to provide a management audit trail
- considering the need for a probity practitioner (such as a probity advisor or probity auditor) during early market engagement.

The plan should also identify and assess key probity risks and develop strategies to address them. This plan should have been in place at the start of the procurement process, as probity issues can arise in the early stages of the procurement and compromise the probity of the entire procurement.

The SPB's *Probity and Ethical Procurement Guideline* highlights the importance of using probity plans for high value and high risk procurements to help ensure that probity issues are considered throughout the procurement process.

Not establishing a probity plan and providing it to relevant officers when the procurement process starts increases the risk of probity risks and issues not being adequately considered and addressed throughout the procurement process.

DPTI response

DPTI accepted the finding and advised that for future procurements, where required, probity plans will be developed and approved at an appropriate stage of the procurement process.

5.3.6 Probity advisor not engaged to oversee early engagement activities

Recommendation

For future procurements where probity advisors are used, DPTI should engage the probity advisor before the procurement process starts to ensure high standards of probity are considered and addressed as early as possible during the procurement process.

Finding

A probity advisor was engaged in March 2017, a year after DPTI started early engagement activities with Gateway South. As a result, the probity advisor could not:

- conduct a risk assessment, identify possible probity issues and communicate them to relevant officers before the process started

- review and assess probity risks associated with holding discussions and written correspondence with Gateway South prior to March 2017
- provide advice about, or attend, meetings held with Gateway South prior to March 2017.

Not having robust arrangements to manage probity from the outset of the procurement, such as the use of a probity advisor, may lead to the entire procurement process being compromised.

DPTI response

DPTI accepted the finding and advised that:

- its revised Infrastructure Acquisition Plan template includes consideration of probity requirements at the acquisition stage and confirmation of whether a probity advisor will be required
- its procedures have been updated to provide further instruction to DPTI staff on probity matters
- for future procurements, where required or as identified in the acquisition planning, a probity advisor will be engaged at an appropriate stage of the procurement process.

6 Basis for key decisions

What we found

There was a lack of evidence-based analysis and documentation to support key decisions made during the procurement process to demonstrate that the chosen procurement approach represented the best value in the public's interest. These decisions included:

- who approved the use of a direct negotiation approach and when this occurred
- the rationale for using a direct negotiation approach
- the basis for using Gateway South to provide concept design services
- the basis for deviating from the contract model in the approved acquisition plan
- changes to the procurement approach and their impact on procurement principles and objectives.

DPTI also could not demonstrate that it had considered Gateway South's performance on the DUP before awarding FLP works to them.

What we recommended

For future projects, we recommended that DPTI should:

- obtain approval to use a direct negotiation approach in line with departmental authorisations. Ensure that approval is obtained before starting direct negotiations and that it is documented
- perform robust and balanced evidence-based analysis to inform the selection of the appropriate market approach. It should also explore alternative approaches and explain why other approaches are not appropriate in the circumstances
- document the decision-making process, including evidence of research, discussions and communication with senior officers, and relevant approvals
- review the past performance of potential suppliers before awarding work to them, including mitigation strategies to address performance concerns and/or issues, and document the outcomes
- assess deviations to the acquisition plan to determine their impact on the procurement strategy, probity and/or procurement outcome, and document this assessment. It should obtain the delegate's approval when material deviations occur
- when changes to the procurement approach occur, evaluate the impact of them on procurement principles, objectives and risks. Document the evaluation and the decision-making process, including risks identified and strategies to address them.

6.1 Introduction

The principles of probity and value for money are critical for a direct negotiation approach. To demonstrate these principles the basis for key decisions must be sufficiently documented. This will evidence that the chosen approach represents the best value from public money and is a fair and transparent procurement.

6.2 Audit approach

We assessed whether the analysis and rationale for using a direct negotiation procurement approach and for other key decisions was sound, evidence based and documented before the procurement process started.

6.3 Findings

6.3.1 Lack of evidence of approval to use a direct negotiation approach

Recommendation

DPTI should ensure that any future direct negotiation approach is approved in line with departmental authorisations. The approval should be obtained before starting direct negotiations.

DPTI should also document the decision-making process, including the basis for decisions made and any relevant approvals.

Finding

It is unclear who approved the use of a direct negotiation approach and when this occurred.

The DPTI Director, Procurement and Contracting advised that approval for a direct negotiation approach was granted through a letter signed by the then DPTI Chief Executive to DIRD advising of DPTI's decision to negotiate directly with Gateway South. Our review of the letter dated 1 November 2016 found it was unclear whether this constituted approval of the procurement approach or was only informing the Commonwealth Government of the decision.

We also found there was a lack of evidence of discussions held and matters considered to reach this decision. DPTI could not demonstrate that the then Chief Executive was provided with sufficient information about the options available and risks associated with a direct negotiation approach.

As noted in DPTI's single source procedure, single source procurement approaches must only be made in extenuating circumstances and must be approved in line with departmental authorisations. DPTI's procurement delegations provide for the Chief Executive and/or Chair

of the Construction Procurement Committee to approve single source procurements.¹⁸ We consider the approval to be particularly important where the procurement by direct negotiation is of high dollar value, of special importance, politically sensitive and/or involves significant risks. These factors apply to the FLP.

The direct negotiation approach should be approved by the appropriate delegate, and evidenced, before direct negotiations start to ensure that DPTI does not engage in unauthorised activities that could adversely affect the procurement process.

DPTI response

DPTI advised that the direct negotiation approach was conducted on the basis that it had been approved by the former Chief Executive in line with departmental authorisations on 1 November 2016.

DPTI accepted that more complete documentation of the decision-making process would be beneficial.

6.3.2 Lack of documented evidence-based analysis to support using a direct negotiation approach

Recommendation

DPTI should perform robust and balanced evidence-based analysis to inform the selection of the appropriate market approach. It should explore alternative approaches and explain why they are not appropriate in the circumstances.

DPTI should also document the decision-making process, including evidence of research, discussions and communication with senior officers.

Finding

There was a lack of evidence-based analysis to support using a direct negotiation approach and show that the chosen approach represented the best value from public money. While DPTI's analysis identified many advantages to using a direct negotiation approach, it could not support all its reasoning with balanced and sound evidence-based analysis.

For example:

- *Using another contractor was expected to result in late program delivery of six months due to the time required to go to market*

The six-month delay was quantified by Gateway South. DPTI could not demonstrate how it had independently assessed the validity of this assertion. DPTI did not compare procurement time frames between a direct negotiation and open market approach to quantify the potential delay caused by using a different procurement approach.

¹⁸ For prescribed construction projects greater than \$2.2 million.

- *A direct negotiation approach was expected to mitigate significant interface risks between two separate contractors*

DPTI could not demonstrate that it had reviewed the programming and sequencing of works between the FLP and DUP to identify the extent of potential disruption and delays if the project was delivered concurrently by a contractor other than Gateway South. DPTI was also unable to demonstrate that it had considered opportunities to minimise the interface risk, such as making changes to the programming and sequencing of work to reduce impacts on safety, program and contractual implications.

We also noted the following shortcomings in DPTI's analysis:

- As noted in section 5.3.2 there was lack of analysis of market capability and capacity. As DPTI did not provide other potential suppliers with an opportunity to register their interest in the FLP, it had no information on what innovative solutions other suppliers could offer to address risks and problems identified (ie interface risks) and if they could potentially deliver better value for money than Gateway South.
- The resources required to obtain approval to use a direct negotiation approach and satisfy Commonwealth Government requirements were not considered.

DPTI's analysis did not consider the additional time, effort and costs (ie for DPTI staff and advisors) needed to obtain a tender exemption from the Commonwealth Government and satisfy the associated conditions, compared to an open market approach that did not require a tender exemption.

The procurement process was protracted partly because of the need to obtain an exemption from the Commonwealth Government to use a direct negotiation approach and satisfy the conditions they prescribed. These requirements, which would not have been necessary if DPTI went to the open market, added time to the length of the procurement process and had a flow on effect to the DUP and FLP programs.

The DPTI Director, Procurement and Contracting advised us that a major driver for using a direct negotiation approach was that Gateway South, under the DUP design and construction contract, had sole possession of the DUP site. As the FLP was to be constructed on the same site, it limited DPTI's ability to provide another contractor with access to the site. We noted:

- this reasoning was not included in the rationale for selecting a direct negotiation approach in the acquisition planning documents
- DPTI did not explore what options were available to provide another contractor with site access, or test with Gateway South whether it had an appetite to allow another contractor site access. Further, DPTI did not obtain relevant advice until July 2017, which was well after a direct negotiation approach was selected.

DPTI response

DPTI noted the finding and advised that it engaged an external contractor to objectively assess the delivery options available for the FLP to identify the best value for money approach. The results of the assessment were provided to key senior officers in DPTI.

DPTI accepted the finding that further detailed analysis would prove beneficial in a single source decision.

6.3.3 Lack of documented evidence-based analysis to support the basis for using Gateway South to provide concept design services

Recommendation

DPTI should perform robust, balanced and evidence-based analysis to inform the selection of the appropriate market approach. It should explore alternative options to undertake concept design work and explain why other options, such as using a separate contractor, are not appropriate in the circumstances.

DPTI should also document the decision-making process, including evidence of research, discussions and communication with senior officers.

Finding

On 8 July 2016, DPTI instructed Gateway South to undertake concept design work for the FLP as a variation to the DUP design and construction contract. The value of the work was \$987 000.

DPTI could not provide documented evidence-based analysis to justify the decision to award this work to Gateway South, including consideration of:

- the options available to undertake this work
- why another designer was not suitable
- how the chosen approach represented the best value for money
- the risks (including the procurement risks) associated with undertaking work relating to the FLP under the DUP design and construct contract terms.

DPTI advised the following rationale in response to our enquiries:

... it was not appropriate to engage a different designer as it was imperative that the design features and calculations being undertaken by the Darlington designers were properly understood and the relevant features of both the Darlington and Flinders Link structural requirements were properly integrated. This had to be done by the same designer. These decisions occurred at senior level within the Department.

To ensure the fairness and transparency of the procurement process it is our view that key decisions, such as awarding components of significant infrastructure works to incumbent contractors working on related projects, are supported by robust evidenced-based analysis. This should include consideration of options, specific engineering advice, specialist programming advice and risk analysis.

DPTI response

DPTI noted the finding and referred to the proposed actions in its responses in sections 5.3.2, 6.3.1 and 6.3.2.

6.3.4 DPTI could not demonstrate consideration of Gateway South's past performance on the DUP before awarding work to them

Recommendation

DPTI should review the past performance of potential suppliers and document the outcome of the review.

Finding

It is sound practice to consider the past performance of suppliers when evaluating their capability and suitability for a project. DPTI could not demonstrate that the evaluation process specifically considered Gateway South's performance on the DUP.

We noted that Gateway South had lodged several claims against DPTI for extension of time and delay costs relating to the DUP contract. These contractual claims were lodged during the FLP procurement process. The circumstance of the claims and Gateway South's performance should have been formally considered as part of the evaluation process before awarding work to them.

Certain works under the DUP contract were transferred to the FLP contract to limit DPTI's liability for extension of time claims and delay costs. In our view, these contract amendments do little to mitigate the risk of poor performance by Gateway South, and do not alleviate the need for DPTI to evaluate Gateway South's past performance.

DPTI response

DPTI noted the finding and advised that Gateway South's performance on the DUP was considered before awarding the FLP contract. However, DPTI accepted that improved documentation would be beneficial.

DPTI will set out the requirements and expectations for post-contract review processes, including past performance, in a revised contract management framework.

6.3.5 Basis for deviating from the approved acquisition plan was not adequately explained

Recommendation

DPTI should assess deviations to the acquisition plan to determine their impact on the procurement strategy, probity and/or procurement outcome, and document this assessment.

DPTI should obtain the appropriate delegate's approval when material deviations occur.

Finding

DPTI did not implement the risk based incentivised ECI contract model approved in the acquisition plan. It could not explain why this model was not implemented or demonstrate that it had assessed the impact of the deviation from the acquisition strategy.

The approved acquisition plan sets out the agreed procurement strategy. Where a deviation to the acquisition plan occurs, it is sound practice to assess the significance of its impact on the procurement strategy, probity and/or the procurement outcome. Where material deviations occur, approval should be sought for the change.

The acquisition strategy proposed the use of a risk based incentivised ECI contract model, with an incentive pool aligned to achieve key project objectives. In the absence of performance incentives and proper analysis of the impact of this deviation, DPTI may be exposed to additional risks and optimal contract outcomes may not be achieved.

DPTI response

DPTI accepted the finding and advised that its Summary of Acquisition Plan Requirements procedure has been reviewed, updated and issued to relevant staff. The procedure now includes clear guidance for managing deviations from the approved acquisition plan.

6.3.6 Lack of consideration of certain conditions in the tender exemption granted by the Commonwealth Government

Recommendation

For future procurements, DPTI should obtain timely approval from the Commonwealth Government to waive the conditions precedent before completing the procurement process.

Finding

It was not clear how and why certain conditions in the tender exemption granted by the Commonwealth Government were not required to be fulfilled by DPTI. DPTI could not provide evidence of any communication with the Commonwealth Government explaining the basis for waiving these conditions or that this approach was agreed with the

Commonwealth Government before completing of the procurement process. DPTI also could not demonstrate that the consequences and risks of not fulfilling these requirements had been considered during the procurement process.

On 6 January 2017, under section 24(1)(c)(iv) of the NLT Act, the Commonwealth Minister for Urban Infrastructure exempted DPTI from calling public tenders for the FLP, subject to certain conditions including:

- all work identified as contestable complying with the NLT Act and Gateway South calling for public tenders for these works
- DPTI being a member of the tender assessment panel if a member of the Gateway South consortia submitted a proposal for any publicly tendered work, to ensure fair and equitable assessment of proposals.

The intent of these conditions was to provide fair access to work for other construction industry participants and promote market competition.

We noted that procurement planning processes did not consider how DPTI would satisfy these requirements (such as introducing provisions in the FLP contract to enforce the need for Gateway South to comply with them).

DPTI advised that these conditions were no longer relevant as the Commonwealth Government granted approval for a full tender exemption (ie with no conditions attached) on 2 April 2019, which superseded the previous tender exemption. We note however that this full tender exemption was granted at the conclusion of the procurement process. There was no evidence that the conditions were waived before that or that DPTI ever intended to comply with them. To demonstrate transparency and fairness, it would have been prudent for DPTI to have obtained the approval sooner and documented why certain conditions in the tender exemption were no longer required to be fulfilled.

DPTI response

DPTI noted the finding and advised that approval to waive the conditions in the tender exemption was granted on 2 April 2019 by the Commonwealth Minister for Infrastructure, Transport and Regional Development.

6.3.7 Impact of changes to the procurement approach were not effectively analysed and decisions were not comprehensively documented

Recommendation

As changes are made to the procurement approach, DPTI should evaluate the impact of them on procurement principles, objectives and risks.

DPTI should document the evaluation and the decision-making process, including risks identified and strategies to address them.

Finding

Decisions were made to change aspects of the procurement approach during the procurement. We found that DPTI did not effectively analyse the impact of these decisions on procurement principles and objectives and risks. The absence of effective analysis can lead to fundamental procurement principles being compromised, risks and issues not being identified and ultimately procurement objectives not being achieved.

We also found the rationale for making these decisions was not comprehensively documented.

These decisions included:

- not awarding a new and single contract
- not using a delivery partner contract model
- not capping the management fee.

DPTI response

DPTI accepted the finding and referred to the proposed action in its response in section 6.3.5.

7 Procurement management

What we found

Processes to manage FLP works prior to finalising the procurement were not properly established. We found:

- design deliverables from the early works phase were not clearly defined and effectively managed to enable work to be readily transferred to another contractor had DPTI decided to hold an open market call to complete the detailed design and construction
- FLP works were performed as a variation to the DUP design and construction contract, which was not ideal
- the Project Development Agreement was executed four months after Gateway South had already started providing services relating to the agreement.

What we recommended

For future projects, we recommended that DPTI should:

- develop a plan for the early works phase with clearly defined deliverables and time frames and monitor progress against this plan to ensure the deliverables can be readily transferred and used by another contractor in the detailed design and construction phase
- finalise contracts before works commence and ensure that works are carried out under appropriate and relevant contractual terms and conditions
- consistent with revised DPTI policy, ensure contracts are executed before contractors start work and payments are made.

7.1 Introduction

There were two key phases to the procurement:

- an RFT for early works (ie early contractor involvement)
- an RFT for detailed design and construction.

Sections 4.5 and 4.6 provide the background on these RFT processes.

7.1.1 Request for tender for early contractor involvement

To progress works on the FLP while the procurement process for early contractor involvement (ECI) works was being finalised, DPTI instructed Gateway South to start design and investigation work on the FLP up to the value of \$1.2 million. This was done through variation orders under the DUP design and construction contract. Procurement documentation indicated an urgency to commence ECI works immediately for the FLP to be operational by the start of the 2019 university semester.

Following an evaluation process and approvals, on 10 January 2018 DPTI and Gateway South executed a Project Development Agreement for the ECI works.

Consistent with an ECI contract model, the Project Development Agreement allowed for Gateway South to submit an offer for detailed design and construction of the FLP at or before the end of Stage 1. There was no obligation for DPTI to accept this offer and, in line with the acquisition plan, DPTI could have held an open market call to complete the design and construction if it did not enter into a contract with Gateway South. As such it was critical that the design deliverables from the ECI phase could be readily transferred to another contractor if required.

The Project Development Agreement also included clauses to transfer design deliverables to another contractor if DPTI did not award the design and construction contract to Gateway South.

7.1.2 Request for tender for detailed design and construction

On 11 December 2017, in line with the Project Development Agreement, Gateway South submitted a tender for detailed design and construction of the FLP.

Gateway South submitted multiple revisions to its tender submission, as initial tenders did not satisfy the savings requirements in the tender exemption granted by the Commonwealth Government.

To progress works on the FLP while the procurement process for design and construction works was being finalised, DPTI instructed Gateway South to construct elements of some piers. DPTI advised us that this was necessary to take advantage of construction equipment from interstate already onsite for the DUP and integrate construction with the DUP construction program, resulting in time and cost savings. The value of this work was approximately \$2.5 million.

Following a multi-stage evaluation process and obtaining approvals, a design and construction contract between DPTI and Gateway South was executed on 17 May 2019.

7.2 Findings

7.2.1 ECI design deliverables were not effectively managed to enable work to be readily transferred to another contractor

Recommendation

For future ECI procurements, DPTI should develop a plan with clearly defined deliverables and time frames and regularly monitor progress against this plan to ensure that deliverables can be readily transferred and used by another contractor in the detailed design and construction phase.

Finding

An ECI contract model was used for the FLP. The acquisition strategy noted that:

- if a design and construction contract was not entered into with Gateway South, there would be an open market call to complete the design and construction of the FLP
- while DPTI was tendering the project, the design joint venture would continue to perform the design obligations of its contract, nominally to the 70% design review stage.

DPTI did not sufficiently demonstrate that it effectively managed the design deliverables from Gateway South in the ECI phase to enable their work to be readily transferred to another contractor had it decided to hold an open market call for the detailed design and construction.

We found that:

- the Contract Scope and Technical Requirements provided to us, which was supposed to identify all the design deliverables, was incomplete and not the final version. We were therefore unable to ascertain if there was a clearly defined and agreed list of design deliverables
- while DPTI established a register to track the design deliverables, it could not explain how it used the register to ensure that all deliverables were completed and delivered on time.

An ECI model has various potential benefits including better design and construction outcomes, and time and cost savings. However a key disadvantage, as noted by Austroads,¹⁹ is that it is unlikely that DPTI will reject the offer from the incumbent contractor for the detailed design and construction phase of the project, given:

- the time invested in developing the relationship in the ECI phase
- disruptions to the project program from re-tendering.

In this sense, we note DPTI can become locked in to awarding the design and construction contract to the incumbent contractor if the ECI phase is not effectively managed.

To reduce this risk and the impact of being locked in, the deliverables of the incumbent contractor (in this case Gateway South) must be properly managed, with clearly identified deliverables and time frames so that they can be readily transferred and used by another contractor.

DPTI response

DPTI accepted the finding and noted that a design deliverables register was implemented in December 2017 that aligns with the Contract Scope and Technical Requirements and details the design package deliverables. The design deliverables register has since been updated, together with the implementation of a Requirements, Deliverables and Hold Points register.

¹⁹ Austroads 2014, *Building and Construction Procurement Guide – Principles and Options*, page 30.

7.2.2 Performing FLP works as a variation to the DUP design and construction contract was not ideal

Recommendation

DPTI should finalise contracts before works commence and ensure that works are carried out under appropriate and relevant contractual terms and conditions.

Finding

DPTI issued variations under the DUP design and construction contract to the value of around \$4.75 million to progress the FLP while the FLP procurement process was being finalised. In our view, it was not ideal for Gateway South to perform works for the FLP as a variation to the DUP contract.

Performing FLP works under the DUP contract broadens the scope of works in the DUP contract and can introduce additional risks to the State, such as interfacing and quality management risks, that were not originally envisaged when the DUP contract was formed. As the DUP contract was entered into before a decision was made to undertake the FLP, it makes no reference to the interdependencies between the two projects. It was drawn up to meet specific DUP objectives with protections for a particular project scope, and mechanisms to address project-specific risks (ie hold point requirements, audit and surveillance arrangements). As such, there is a risk that the DUP contract may not adequately protect the State from additional risks due to FLP works and ideally it should not have been used to deliver FLP works. Risk exposures may include difficulties in DPTI ensuring FLP deliverables are met and could lead to contractual disputes, which are time consuming and costly to resolve. There may be other risk exposures to the State for either or both projects.

Variations are contractually binding instructions and ideally should not be used as a mechanism to expedite unrelated works because procurement processes have not been finalised.

DPTI response

DPTI accepted the finding.

DPTI also noted that it updated its contract formation processes to include a mandatory requirement for contracts to be executed before starting any work. Further, it highlighted that:

- variations issued under the DUP contract form part of the DUP scope and are covered by the protections of that contract
- FLP integration works undertaken as part of the DUP were consistent with the technical requirements of the DUP contract
- quality control documentation was developed consistent with contract requirements, including construction verification by the DUP construction verifier.

7.2.3 Project Development Agreement was not executed timely

Recommendation

Consistent with revised DPTI policy, for future projects DPTI should ensure contracts are executed before contractors start work and payments are made.

Finding

We have previously communicated to DPTI the importance of ensuring that contractual arrangements are formally executed before contractors start work.

We found that Gateway South provided services for about four months²⁰ before the Project Development Agreement for ECI works was executed in 10 January 2018.

Delays in finalising contracts can result in parties to the arrangement being unclear on their respective rights and obligations, particularly for contract works that are complex.

As I noted in my 2019 report on the DUP,²¹ DPTI advised us that its practices changed from July 2018 with executed contracts now required before contractors start work. We support the change in practice and note that the contract with Gateway South was entered into before this requirement was introduced.

DPTI response

DPTI accepted the finding.

²⁰ This work was undertaken under the DUP design and construction contract.

²¹ Refer to Auditor-General's Report 11 of 2019 *Darlington Upgrade Project*.

8 Evaluation of the single offer for design and construction

What we found

- The nature and extent of work performed by the value for money advisor was not sufficiently documented and they did not form an overall conclusion.
- Gateway South's final tender was not provided to the value for money advisor for them to assess whether it was competitive and if it represented value for money from a price perspective.
- Changes made to benchmark comparative prices used for evaluation purposes contained errors.
- An evaluation report was not prepared for the final tender outcome. While an initial evaluation report was prepared and approved, contract negotiations were still ongoing, and terms and conditions were not finalised.

What we recommended

For future procurements DPTI should:

- ensure that advisors involved in the evaluation process document:
 - the nature, extent and scope of work performed
 - the analysis performed, results and their conclusions
- review the final price for value for money and document the outcome of the review
- implement robust review processes over benchmark comparison prices to ensure that adjustments made to prices are appropriate and accurate. It should document the basis for any adjustments made to prices and consider using the expertise of a value for money advisor to interrogate the appropriateness and accuracy of adjustments made
- prepare an evaluation report at the conclusion of the selection process documenting the reasons and decisions involved in evaluating the tender, including the outcomes achieved from tender negotiations.

8.1 Introduction

The procurement for the detailed design and construction phase of the project involved several phases over an extended period. In keeping with the Project Development Agreement, on 11 December 2017 Gateway South submitted a tender based on preliminary design (nominal 30%) for design and construction of the FLP. The contract was executed a year and a half later on 17 May 2019.

Evaluation plans and panels were established for the key phases.

A key factor driving the evaluation approach was the need to satisfy the conditions in the tender exemption granted by the Commonwealth Government in January 2017. The exemption required:

- the engagement of an independent estimator to cost the project, with current design information, for comparison with the price received by Gateway South
- Gateway South's tender to demonstrate a 5% saving compared to the independent estimate in four areas:
 - project and contract management for the delivery of the FLP
 - design of the works
 - complex bridge pier and foundation works directly in the vicinity of the DUP works
 - rail electrical overhead and commissioning works.

As the scope of work tendered was much broader than the four areas specified in the tender exemption there was still a need, consistent with sound procurement principles, for DPTI to ensure the remaining aspects of the tender (comprising approximately 80% of the tender sum) represented value for money.

A value for money advisor was engaged by DPTI to help evaluate the RFT for design and construction based on detailed design (nominal 70%). Their intended role was to provide cost estimation expertise and independently review and interrogate the prices submitted by Gateway South and the independent estimator. The value for money advisor compared the two prices to determine whether the Gateway South tender was competitive and represented value for money.

8.2 Audit approach

We assessed the processes established to evaluate the single offer including arrangements to assess if value for money was achieved.

8.3 Findings

8.3.1 The nature and extent of work performed by the value for money advisor was not sufficiently documented and they did not form an overall conclusion

Recommendation

DPTI should ensure that any advisors involved in an evaluation process document the:

- nature, extent and scope of work performed
- analysis performed, results and their conclusions.

Finding

The value for money advisor was intended to play a major role in evaluating the price criteria by independently examining and comparing the prices submitted by Gateway South and the independent estimator.

We found that:

- the nature and extent of work performed by the value for money advisor was not sufficiently documented
- the value for money advisor did not provide a final recommendation as to how Gateway South's overall price compared to the independent estimator's price
- the value for money advisor did not prepare a detailed report at the conclusion of their assessment as required by the evaluation plan and terms of engagement.

As a result, the existing documentation does not clearly indicate whether the price submitted by Gateway South was competitive and represented value for money.

The work performed by the value for money advisor should be sufficiently documented to:

- make them accountable for the services they are engaged to provide
- allow DPTI to demonstrate that value for money has been obtained.

We consider that a report should have been prepared with this information and presented to the evaluation panel to assist with their evaluation of Gateway South's tender.

DPTI response

DPTI accepted the finding. For future projects, it will formalise the requirement for reporting in the contractual terms and conditions for a value for money advisor, and require a formal report detailing the scope of the works performed, how they were performed, any limitations and the conclusions reached.

8.3.2 Gateway South's final tender was not provided to the value for money advisor for review

Recommendation

For future procurements, DPTI should review the final price for value for money and document the outcome of the review.

Finding

The value for money advisor did not assess whether the final tender submitted by Gateway South on 9 May 2019 was competitive and if it represented value for money from a price perspective.

DPTI decided not to provide the final tender price to the value for money advisor to review and did not document the rationale for this decision. We were advised by an evaluation panel member that the panel considered it was not necessary for the value for money advisor to review the final tender as DPTI already had sufficient information to form a conclusion.

The price reviewed by the value for money advisor was from an earlier tender submitted on 4 October 2018 based on 70% nominal design, which was \$438 000 less than the final tender price. This was the net effect of various additions and deductions.

While the net impact was not material in this case, not reviewing the final price could result in more significant variations not being identified and assessed for value for money.

DPTI response

DPTI accepted the finding. The difference between the tender price reviewed by the value for money advisor and the final tendered price was considered immaterial, and DPTI did not consider a further review to be necessary. However, where necessary, this will be considered for future procurements.

8.3.3 Inaccurate adjustments made to the independent estimator's benchmark comparative price

Recommendation

For future procurements, DPTI should implement robust review processes over benchmark comparison prices to ensure that adjustments made to prices are appropriate and accurate.

DPTI should document the basis for any adjustments made to prices.

DPTI should also consider using the expertise of a value for money advisor to interrogate the appropriateness and accuracy of adjustments made.

Finding

The final tender price submitted by Gateway South on 9 May 2019 for design and construction of the FLP was benchmarked against the price submitted by the independent estimator on 4 October 2018. Gateway South's price reflected a completed design and the final negotiated outcomes. As the two prices were not comparable, the chair of the evaluation panel manually adjusted the independent estimator's submission to enable a comparison.

We found that there was a lack of rigour applied to the adjustments made to the independent estimator's price, resulting in inaccuracies. DPTI also did not document the rationale for making the adjustments.

Gateway South and the independent estimator were required to submit tenders conforming to the same work breakdown structure²² to enable comparability. However, as there can be differing approaches to cost aggregation and different assumptions applied, it is important that pricing is interrogated in detail to ensure that tenders are comparable, and any adjustments made are appropriate. This is an area where the value for money advisor could have helped by reviewing DPTI’s benchmarking approach and the appropriateness and accuracy of adjustments made.

The net impact of the inaccuracies was relatively small (approximately \$1 million), and the Gateway South tender was more than 5% below the price submitted by the independent estimator. However, without appropriate review processes over adjustments to the benchmark comparison price there is a risk that the impact could have been more significant.

DPTI response

DPTI accepted the finding. For future procurements, it will introduce mechanisms to improve documentation and review the rationale for price adjustments.

8.3.4 An evaluation report was not prepared for the final tender outcome

Recommendation

DPTI should prepare an evaluation report at the conclusion of the selection process documenting the reasons and decisions involved in evaluating the tender, including the outcomes achieved from tender negotiations.

Finding

At the time the evaluation report was approved, negotiations were still ongoing with Gateway South and a final tender price and terms and conditions had not been reached.

The final tendered price was approximately \$4.5 million higher than the price evaluated in the evaluation report. An evaluation report was not prepared for the final tender outcome to demonstrate the extent to which Gateway South’s final tender represented value for money and to justify awarding the contract to them.

DPTI advised us that the evaluation panel met and discussed the final tender outcome but discussions and conclusions reached were not documented.

DPTI response

DPTI accepted the finding that detailed reporting at the conclusion of the evaluation and negotiation process is good practice.

²² A hierarchical structure that outlines the activities or work that needs to be done to complete the project scope.

DPTI also noted that the difference between the tender price reviewed and final tendered price was not considered significant and would not have altered the final tender outcome.

8.3.5 Benefit cost analysis ratio was not revisited after a significant increase in the estimated project cost

Recommendation

For future projects, DPTI should update and review the benefit cost ratio when significant changes to project costs and/or benefits occur to evaluate the merit of proceeding with the project.

Finding

In early 2018, during the preliminary design phase of the project, the estimated project cost was revised from \$85.5 million to \$125 million.

We found a benefit cost analysis was not undertaken to consider the merit in proceeding with the project given the increased cost.

A benefit cost analysis assesses whether the economic, social and environmental benefits of a project outweigh the costs imposed on the community. It seeks to assess if there is an aggregate net benefit to a project.

A benefit cost analysis was undertaken during the project planning phase based on the original total project cost of \$85.5 million. It produced a benefit cost ratio of 0.7.^{23,24}

Given the significant increase in project costs and the intended benefits remaining unchanged it is likely that the net benefit of the project would have decreased.

DPTI response

DPTI accepted the finding and advised that for future projects, where a significant cost increase is encountered, a review of the benefit cost ratio will be performed.

8.3.6 Gateway review was performed after the design and construction contract was awarded

Recommendation

DPTI should perform gateway reviews at the required points in time to maximise their effectiveness and improve the likelihood of project success.

²³ A benefit cost ratio of greater than one implies a positive net present value.

²⁴ Using a 7% real discount rate and a P90 capital cost estimate (this represents a 90% level of confidence that the estimated cost will not be exceeded at project completion).

Finding

The Gate 3 gateway review was not performed timely and was therefore not fully effective.

The gateway review process examines projects at six decision points (or gates) in the project lifecycle to ensure that it is well positioned to move to the next phase. DPTI's Gateway Review Framework states that the Gate 3: Investment Decision review is intended to:

... confirm the suitability of the recommended investment decision prior to contract award, and ensures the business is prepared and appropriately resourced for delivery.

The FLP's Gate 3 gateway review started three days after the design and construction contract was executed. Therefore any investment decision issues and risks could not be addressed before DPTI committed to the contractual arrangements with Gateway South.

DPTI response

DPTI accepted the finding and advised that for future projects, implementation of the Gate 3 review processes will be considered within the acquisition planning stages.

8.3.7 The evaluation report was not signed by all evaluation panel members

Recommendation

DPTI should ensure the evaluation report is signed by all evaluation panel members to demonstrate that it is a true reflection of the selection process and to confirm whether all members agree with the evaluation outcome and recommendations.

Finding

The evaluation report was not signed by all evaluation panel members. It is good practice for the evaluation report to be signed by all evaluation panel members.

This evidences that the key discussions and decisions of the tender evaluation process are agreed by panel members and accurately reflected in the evaluation report.

DPTI response

DPTI accepted the finding and noted that acceptance and approval of the evaluation report was provided in the final evaluation meeting. DPTI acknowledged that not ensuring that all panel members signed the evaluation report was an oversight.

9 Probity management arrangements

What we found

In addition to the shortcomings identified in section 5, we found that probity management arrangements to oversee the procurement were not properly established, including:

- DPTI did not involve the probity advisor in all evaluation and negotiation activities as required by the probity plan
- the terms of engagement for the probity advisor did not specify the nature and extent of probity reporting
- the probity advisor's final report covering the RFT process for design and construction of the FLP was issued almost two months after the design and construction contract was executed.

What we recommended

For future procurements where probity advisors are used, DPTI should:

- involve the probity advisor in all necessary procurement activities to enable them to fulfil their role in the probity plan
- document and agree the nature and extent of probity advisory services before the engagement starts
- ensure the final probity report from the probity advisor is completed and obtained prior to supplier selection so that any probity findings are considered before finalising supplier selection.

9.1 Introduction

The principles of probity involve evidence of ethical behaviour and good process and are demonstrated by:²⁵

- implementing processes and actions that are consistent, accountable, transparent and auditable
- good record keeping
- maintaining an audit trail
- equity in decision making
- clear, honest communication
- independent checks and approvals that can identify probity issues

²⁵ State Government of Victoria, *Guide to probity in procurement*, viewed 29 August 2019, <https://buyingfor.vic.gov.au/sites/default/files/2019-07/Guide-to-probity-in-procurement_0.DOCX>.

- security and confidentiality of information
- identifying and managing conflicts of interest whether actual, perceived or potential.

Consistent with sound practice, DPTI established a probity plan for the FLP procurement. A probity plan is an important tool to ensure probity issues are addressed throughout the procurement process, particularly where a procurement is sensitive or of high value, high risk and/or is subject to a high degree of public scrutiny. As such it should be closely followed and regularly reviewed.

DPTI's probity plan included using a probity advisor. A probity advisor provides independent advice and works actively with the evaluation panel to ensure key probity issues are considered and actioned during the procurement process. Engaging a probity advisor does not absolve, remove or replace the responsibility of those involved in the procurement process to conduct the procurement consistent with probity requirements, but rather should complement existing probity practices.

9.2 Audit approach

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

For this review, we considered:

- DPTI's procurement policies, procedures and guidelines
- the SPB's *Probity and Ethical Procurement Guideline*
- the NSW Government's *Buyer's Guide to Procurement*
- NSW Government procurement information.

9.3 Findings

9.3.1 DPTI did not involve the probity advisor in all evaluation and negotiation activities required by the probity plan

Recommendation

DPTI should involve the probity advisor in all necessary procurement activities to enable them to fulfil the role set out for them in the probity plan.

Finding

We found that DPTI did not involve the probity advisor in all evaluation and negotiation activities required by the probity plan. Consequently, the probity advisor did not oversee the probity of the full evaluation and selection process. Not complying with the probity plan increases the risk of not adequately considering and addressing probity risks and issues during the procurement process.

DPTI response

DPTI accepted the finding and advised that the intention was for the probity advisor to attend the final evaluation meeting once negotiations had concluded. Due to a delay in these negotiations, this did not happen. This was an oversight and should not have occurred.

9.3.2 Terms of engagement did not specify the nature and extent of probity reporting

Recommendation

For future procurements where probity advisors are used, DPTI should ensure that the nature and extent of probity advisory services are documented and agreed before the engagement starts.

Finding

The terms of engagement for the probity advisor did not specify in detail the nature and extent of probity reporting requirements, other than that a report would be issued to DPTI on completion of the project or when requested.

We also found the reports prepared by the probity advisor did not provide sufficient detail about the nature and extent of tasks performed, advice provided, and the issues identified and how they were managed.

In our view, DPTI should clearly define and document the nature and extent of probity assurance services to be provided to make the probity advisor accountable for them. This is particularly significant in situations where the probity of the procurement process is challenged.

DPTI response

DPTI accepted the finding and advised that it will review current contractual terms with probity advisors and propose standardised terms for future procurements, including the provision of reporting.

9.3.3 Probity advisor's final report was not completed timely

Recommendation

DPTI should ensure the final probity report from the probity advisor is completed and obtained prior to supplier selection to enable any probity findings to be considered before finalising supplier selection.

Finding

The probity report covering the RFT process for design and construction of the FLP (see section 7.1.2) was issued almost two months after the design and construction contract was

executed. Therefore, any findings by the probity advisor in this report could not be considered by DPTI before finalising the procurement process.

Whilst a draft report was provided to DPTI for consideration in February 2019, it was produced three months before DPTI completed the procurement and as such did not reflect the full procurement process. For instance, the draft report did not consider evaluation activities, negotiations and decision-making processes that occurred after the draft report was prepared.

DPTI response

DPTI accepted the finding and referred to the proposed actions in its response in section 9.3.2.

10 Record keeping

What we found

- Some documents we requested either could not be located by DPTI or were not easily accessible.
- Key documents for the procurement process were not maintained in a single records management file, which contributed to instances where the documents we requested either could not be located or were not easily accessible.

What we recommended

We recommend DPTI should:

- Review records management processes to ensure documents that support the conduct and outcome of the procurement process are properly maintained and readily available for review.
- For each procurement ensure a single records management file is created and used to maintain a complete record of all documents that support key processes and outcomes.

10.1 Introduction

Thorough and accurate record keeping is critical to ensuring the transparency of government procurement activities and accountability of procurement decision making.²⁶ We have communicated the need to improve record keeping in government activities in a number of our previous reports to Parliament²⁷ and this is also supported by the Independent Commissioner Against Corruption.²⁸

Sound record keeping is particularly important for direct negotiations to demonstrate whether key probity principles have been satisfied. These probity principles include fairness, impartiality, accountability, transparency and value for money.

Sound record keeping²⁹ involves:

- keeping accurate records for all stages of the procurement process

²⁶ NSW Government, *Procurement recordkeeping*, viewed 29 August 2019, <<https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-government-procurement-information/procurement-recordkeeping>>.

²⁷ Refer to Auditor-General's Report 6 of 2019 *Annual report for the year ended 30 June 2019*, Report 9 of 2018 *Battery storage procurement* and Supplementary report for the year ended 30 June 2017 *Adelaide Riverbank (Festival Plaza) Development: November 2017*.

²⁸ The Hon. Bruce Lander QC 2019, *Troubling Ambiguity: Governance in SA Health*, SA Independent Commissioner Against Corruption.

²⁹ State Procurement Board 2019, *Probity and Ethical Procurement Guideline*.

- documenting decisions made and the process followed to arrive at that decision. For example:
 - details on specification development
 - how evaluation criteria were decided
 - the tender evaluation process, including the officers involved
 - who gave approvals at sign-off points
- documenting all relevant communication with prospective suppliers (both written and verbal).

All records for the procurement should be centrally kept and easily retrievable if the procurement is subject to external review or legal challenge.

10.2 Findings

10.2.1 Difficulties locating procurement documents

Recommendation

DPTI should review its records management processes to ensure documents that support the conduct and outcome of a procurement process are properly maintained and readily available for review.

Finding

Some documents we requested either could not be located by DPTI or were not easily accessible. For example:

- the final version of the options analysis paper (recommending the use of a direct negotiation approach) could not be found
- certain records of communication with Gateway South could not be found (such as who initiated the non-price presentation by Gateway South)
- difficulties were experienced locating the final version of tender documents issued to Gateway South
- there were difficulties finding conflict of interest forms for all evaluation panel members. A conflict of interest form for one member could not be found.

DPTI response

DPTI accepted the finding and advised that its procurement documentation procedure has been reviewed, updated and issued to relevant staff. The procedure instructs DPTI staff in the naming and filing protocols to be adopted for procurement documentation.

10.2.2 A single records management file was not used to maintain a complete record of key procurement documents

Recommendation

For each procurement DPTI should ensure a single records management file is created and used to maintain a complete record of all documents that support key processes and outcomes.

Finding

Key documents for the procurement process were not maintained in a single records management file. Documents were spread over various places including:

- Knet – DPTI’s document management system
- staff email inboxes
- Teambinder – a document management system jointly used by DPTI and Gateway South.

The absence of a central records management system contributed to instances where the documents we requested either could not be located or were not easily accessible. Some documents were only found after an extended period of searching.

It is sound practice to maintain a single records management source that is a complete record of all documents that support key processes and outcomes of a procurement. This is particularly useful where there are staff movements.

Where documents that support the outcome of the procurement process cannot be located the agency managing the procurement may not be able to demonstrate that:

- procurement objectives were achieved
- established standards and processes were met and followed during the procurement.

DPTI response

DPTI accepted the finding and advised its proposed action to address the issue.

Appendix 1 – Chronology of events for the Flinders Link Project

Date	Event
2015	
30 November	The SA Government approved the reallocation of \$85.5 million in funding from the Goodwood and Torrens Rail Junctions Upgrade projects to the extension of the Tonsley rail line to the Flinders Medical Centre. ^{30,31}
20 December	The Commonwealth and SA Governments announced that they were working together to consider Flinders Link.
2016	
February	Discussion commenced between DPTI and Gateway South about delivering the Flinders Link at DUP Collaborative Governance Team meetings.
13 May	The Commonwealth and SA Governments formally announced \$85.5 million in funding for the FLP, to be shared on a 50:50 basis.
June	Gateway South made a non-price presentation to the DUP Collaborative Governance Team about delivering the FLP.
22 June	Gateway South submitted a proposal for concept design services including: <ul style="list-style-type: none"> • developing the concept design • preparing a target outturn cost for Gateway South’s whole delivery of the works, program and procurement strategy for the project.
8 July	DPTI instructed Gateway South to proceed with the concept design for Flinders Link. This work was undertaken as a variation order under the design and construction contract for the DUP. The cost of the variation was \$987 000.
29 July	DPTI prepared an options analysis paper assessing different procurement approaches and contract models. The analysis recommended using a direct negotiation approach with Gateway South and a delivery partner model.
September ³²	Gateway South submitted a sole source paper to DPTI, which set out the benefits of engaging Gateway South and proposed commercial model for developing a sole source offer.
1 November	The then Chief Executive, DPTI advised DIRD of the decision to proceed with a direct negotiation approach with Gateway South for procurement of the FLP. ³³
21 December	DPTI wrote to DIRD seeking an exemption from calling public tenders to directly negotiate with Gateway South.

³⁰ Now known as the Flinders Link Project.

³¹ Subject to approval from the Commonwealth Government.

³² DPTI could not provide the specific date that this paper was submitted to DPTI.

³³ DPTI advised that this was the approval to use a direct negotiation approach.

Date	Event
2017	
6 January	Under section 24(1)(c)(iv) of the NLT Act, the Commonwealth Minister for Urban Infrastructure exempted DPTI from calling public tenders subject to certain conditions.
3 March	DPTI requested Gateway South provide a price: <ul style="list-style-type: none"> • for the FLP based on its concept design • to undertake the design from the 'concept design' stage to 'issued for construction design' stage.
6 March	Probity advisor appointed.
31 March	Request for pricing for design from concept design to issued for construction (issued on 3 March 2017) withdrawn.
11 April	Request for pricing for the FLP based on concept design (issued on 3 March 2017) withdrawn.
3 May	Commercial meeting with Gateway South to discuss incentivised ECI model.
31 May	Acquisition strategy was approved by the Chair, Construction Procurement Committee.
31 May	RFP for early contractor involvement – delivery of Flinders Link (including management of design development) issued to Gateway South and the independent estimator.
31 May	RFT for design of Flinders Link issued to the Gateway South design joint venture partner (comprising Jacobs, SMEC and KBR, collectively referred to as 'Jacobs') and the independent estimator.
31 May	Probity plan issued.
14 June	RFP for early contractor involvement – delivery of Flinders Link closed. Submissions received from Gateway South and the independent estimator.
14 June	RFT for design of Flinders Link closed. Submissions received from Jacobs and the independent estimator.
14 July	RFP for early contractor involvement – delivery of Flinders Link and RFT for design of Flinders Link put on hold. Decision made to combine ECI and design into one tender package, and engage solely with Gateway South (with Jacobs being a subcontractor of Gateway South).
24 July	Deviation to acquisition strategy approved by Chair, Construction Procurement Committee.
28 July	Gateway South submitted a revised tender for both early contractor involvement – delivery of Flinders Link and design of Flinders Link (hereon referred to as the early contractor involvement – project development phase). Gateway South accepted the tendered price submitted by Jacobs for the design of Flinders Link to DPTI on 14 June 2017. The costs associated with

Date	Event
	directly engaging Jacobs was reflected in Gateway South's revised tender submission.
30 August	Probity advisor issued its first report to inform DPTI of its findings since being appointed on 6 March 2017.
4 September	Independent estimator submitted a value for money report assessing the revised Gateway South submission for the early contractor involvement – project development phase.
8 September	Evaluation report prepared for the early contractor involvement – project development phase. The evaluation panel recommended awarding the Project Development Agreement to Gateway South.
12 September	<p>DPTI instructed Gateway South to commence design work relating to the Project Development Agreement.</p> <p>This work was undertaken as a variation order under the design and construction contract for the DUP. The value of this variation was \$800 000.</p>
13 September	General Manager, Procurement and Contracting approved the recommendation from the evaluation panel to award the early contractor involvement – project development phase to Gateway South and its design subcontractor (Jacobs).
29 September	<p>Acting Minister for Transport and Infrastructure approved acceptance of the tender submitted by Gateway South for early contractor involvement – project development phase.</p> <p>The Acting Minister noted that the Project Development Agreement would only be awarded subject to the Commonwealth Minister of Urban Infrastructure's approval being obtained with respect to the savings conditions in the tender exemption being satisfied.</p>
10 October	<p>DPTI instructed Gateway South to continue works relating to the Project Development Agreement, while DPTI sought the necessary approvals from the Commonwealth Government to execute the Project Development Agreement.</p> <p>The variation order issued on 12 September 2017 was extended for a further four weeks (expiring on 7 November 2017) and the maximum value increased to \$1.2 million.</p>
12 October	<p>DIRD acknowledged that early contractor involvement – project development phase had met the conditions for the project management and design elements of the work covered by the tender exemption.</p> <p>DIRD endorsed the proposed procurement method of early contractor involvement followed by design and construction.</p>
17 October	The Public Works Committee tabled its final report on the FLP and recommended that the proposed public work proceed.

Date	Event
11 December	In line with the Project Development Agreement, Gateway South and the independent estimator submitted tenders based on preliminary design (nominal 30%) basis for the design and construction of the FLP.
12 and 14 December	Evaluation panel met to evaluate tenders submitted on 11 December 2017 for design and construction of the FLP. No award of the contract was made as the tender exceeded the available funding. DPTI suspended direct negotiations to determine project budget implications.
2018	
10 January	Formal instrument of agreement for the project development of the FLP (Project Development Agreement) executed between DPTI and Gateway South.
17 January – 13 March	Value engineering/cost challenge workshops were conducted to review the project design and cost. The revised project cost was determined to be \$125 million.
8 June	DPTI reviewed the benefits and risks associated with continuing with a direct negotiation approach versus seeking a competitive tender from market participants. Chair of the Procurement Committee approved continuation of direct negotiation approach.
29 August	DPTI issued RFT for design and construction of the FLP based on detailed design (nominal 70%) to Gateway South and the independent estimator.
4 October	RFT for design and construction of the FLP based on detailed design (nominal 70%) closed. Submissions received from Gateway South and independent estimator.
22 October	New Chief Executive, DPTI commenced.
29 October	SA Government approves the reallocation of \$39.5 million savings from current and completed Commonwealth and SA Government funded projects to the FLP. The project budget is revised from \$85.5 million to \$125 million.
26 November	Negotiation plan approved by the General Manager, Procurement and Contracting.
30 November, 4 December, 6 December	Negotiation meetings held with Gateway South.
13 December	As a result of negotiation outcomes, Gateway South submitted a revised tender based on updated dates and commercial terms.

Date	Event
2019	
7 February	Probity advisor issued a draft probity report to inform DPTI of its findings since its first report dated 30 August 2017.
26 February	<p>Evaluation report for RFT for design and construction of the FLP prepared, summarising the evaluation process and outcomes to date.</p> <p>The report noted that negotiations were still ongoing and therefore did not include a recommendation.</p>
9 March	DPTI provided further information to DIRD to progress approval of additional funding for the FLP and obtain conditional approval to award the design and construction contract to Gateway South.
21 March	<p>Minister for Transport, Infrastructure and Local Government provided financial approval to:</p> <ul style="list-style-type: none"> • enter into a contract with Gateway South for the design and construction of the FLP conditional on confirming approval from the Commonwealth Government for additional project funding • early procure long lead items.
2 April	<p>The Commonwealth Minister for Infrastructure, Transport and Regional Development:</p> <ul style="list-style-type: none"> • under paragraph 21(1)(c) of the NLT Act, granted DPTI an exemption from calling public tenders for planning, design and construction work associated with the FLP up to \$125 million • approved additional funding of \$19.75 million for the project.
9 May	Gateway South submitted revised tender for design and construction of the FLP based on a contract award date of 13 May 2019 and project completion date of 23 October 2020 and reflecting final negotiation outcomes.
17 May	<p>Contract executed between DPTI and Gateway South for the design and construction of the FLP.</p> <p>The contract value was \$90.4 million and contractual completion date was 23 October 2020.</p> <p>The parties also executed a deed to amend the DUP contract and transfer certain works from the DUP contract to the FLP contract to limit DPTI's liability for extension of time and delay costs.</p>
20 May	Gate 3 procurement phase gateway review commenced.
31 May	Gate 3 procurement phase gateway review finalised.
11 July	Probity advisor issued its second report to inform DPTI of its findings from since its first report on 30 August 2017.
18 November	The Commonwealth and SA Governments announce \$16 million additional funding for the FLP to increase total funding for the project to \$141 million.

Appendix 2 – Response from the Chief Executive, DPTI under section 37(2) of the *Public Finance and Audit Act 1987*



Government of South Australia

Department of Planning,
Transport and Infrastructure

*In reply please quote 2020/00512/01
Enquiries to Jon Whelan
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Mr Andrew Richardson
Auditor-General
Level 9
State Administration Centre
200 Victoria Square
ADELAIDE SA 5000

Dear Mr Richardson,

RESPONSE TO REPORT 7 OF 2020: FLINDERS LINK PROJECT

Thank you for providing a copy of your proposed Report 7 of 2020, *Flinders Link Project* and for your invitation to respond to it.

The Department of Planning Transport and Infrastructure (DPTI) appreciates the thoroughness and objectivity of the analysis of arrangements established for the procurement of design and construction services on the Flinders Link Project.

Your report provides clarity on when and where issues have arisen, and provides recommendations on what should be done to address them.

As the body of the report notes, I have responded separately on each of the findings and recommendations detailed in the report, with actions that DPTI will take to address each of them. DPTI is fully committed to following through on these actions.

Earlier this year we secured external advisers with relevant expertise to assist us in reviewing, reshaping, and updating our Program Management Tool Kit, and implementing it across all major projects. Subject to the outcome of the work being undertaken by these external advisers, consideration will be given to extending this work to include our Procurement and Contract Management Tool Kit.

The guidance your report provides on the measures for DPTI to take to improve procurement standards, will enhance our capability to perform our role effectively in delivering transport infrastructure for South Australia.

Finally, thank you for the words of appreciation for the support of our staff and management. Equally, I would like to thank you and your team for their diligence and professional conduct.

Yours sincerely,



Tony Braxton-Smith
CHIEF EXECUTIVE

30 March 2020

Appendix 3 – Abbreviations used in this Report

Abbreviation/Term	Description
DIRD	Commonwealth Department of Infrastructure and Regional Development
DITCRD	Department of Infrastructure, Transport, Cities and Regional Development
DPTI	Department of Planning, Transport and Infrastructure
DUP	Darlington Upgrade Project
ECI	Early Contractor Involvement contract model
FLP	Flinders Link Project
NLT Act	<i>National Land Transport Act 2014</i>
RFT	Request for tender
RFP	Request for proposal
SPB	South Australian State Procurement Board

