LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Report on government contracting and procurement processes in the Australian Capital Territory

Select Committee on Government Contracting and Procurement Processes

July 2000

Resolution of appointment

On 6 May 1999, the Legislative Assembly resolved to appoint a select committee to inquire into and report, by 23 November 1999, on the government's contracting and procurement processes.[1]

On 14 October 1999, the Assembly resolved that the Committee may make interim reports and that the final report shall be presented to the Assembly by the first sitting day after 30 June 2000.[2]

On 10 July 2000, the Assembly resolved that the Committee report by the last sitting day of August 2000.[3]

Committee Membership

Mr Jon Stanhope MLA, Chair

Mr Paul Osborne MLA, Deputy Chair

Mr Greg Cornwell MLA

Secretary Mr Bill Symington (until 21 September 1999)
Mr James Catchpole (22 September 1999 – 22 March 2000)
Ms Laura Rayner (from 1 May 2000)

[1] ACT Legislative Assembly, *Minutes of Proceedings No 50*, 6 May 1999, p 421-422.
[2] ACT Legislative Assembly, *Minutes of Proceedings No 64*, 14 October 1999, p 574-575.
[3] ACT Legislative Assembly, *Minutes of Proceedings No 95***,** 10 July 2000 (proof copy, p.1).

Table of Contents

Foreword

The Select Committee on Government Contracting and Procurement Processes was established by the Legislative Assembly in response to a growing perception – by the broader community as well as Members – that there were flaws in the systems used in the ACT to undertake this most fundamental of government functions.

These concerns were reinforced first, by the controversy over the Bruce Stadium redevelopment, and second, by the Coroner's Report into the tragic Canberra Hospital implosion.

The Committee looked at both those issues, amongst a broader range, and it is particularly pleasing to record that its work has been a catalyst for some necessary change.

For instance, in the Government's response to the Committee's *Issues Paper*, the Minister for Urban Services acknowledged the need to ensure departments and agencies had access to procurement expertise, and foreshadowed initiatives to establish a system of accreditation of procurement competencies amongst relevant Government officers.

The Committee acknowledges the Minister's in-principle support for the creation of a Government Purchasing Board.

The Committee recognises that change is ongoing, and looks forward to further positive responses to its recommendations.

On behalf of the Committee's members, I would like to place on record our appreciation of the dedicated work of our various secretaries: Bill Symington, and particularly James Catchpole and Laura Rayner.

Jon Stanhope MLA
Chair

Executive Summary

The terms of reference of the Select Committee were to inquire into and report on the Government's contracting and procurement processes. The Committee decided to focus on three aspects of the contracting process:

- the degree to which contracts entered into by the Territory are open to **public scrutiny;**
- the **fairness** of the processes by which government agencies select and manage consultants and contractors; and
- the extent to which contracting offers **value for money** to local residents.

To assist their deliberations, Members decided to examine the tender processes and contracts entered into by the Territory for several major projects.

As one of its case studies the Committee sought to inquire into the redevelopment of Bruce Stadium, one aspect of which was covered by contracts related to the hiring arrangements between the Bruce Operations Ltd (BOPL) and the major hirers of the stadium. Through the Legislative Assembly, the Committee obtained copies of the contracts in December 1999. After discussions with the clubs and on receipt of legal advice, the Committee authorised the release of the contracts in February 2000.

After the Committee was established, the Auditor General began a performance audit on the Bruce Stadium Redevelopment and operating activities. Although the completion of the Auditor General's report has been delayed, the Members of the Committee have been conscious not to duplicate his inquiry. However, the Committee believes that the Assembly may need to consider further action after the Auditor General's report is received. This report is now due in August 2000.

In his findings on the death of Katie Bender, the ACT Coroner had suggested that the Committee investigate aspects of the tender process. However, the Committee believes that it can not satisfactorily undertake this investigation without access to the findings of the Harmer report on Totalcare. The Committee has recommended that the Assembly should undertake to pursue the Coroner's recommendation when the Harmer Report is made available without restriction.

Public scrutiny

The Committee believes that full public scrutiny is a benchmark for accountability. However, devolution and decentralisation of responsibility within bureaucracies are combining with greater use by governments of the private sector

in delivering government works and services to threaten the gains made in previous decades towards more open and accountable government.

The Committee's inquiry into public scrutiny concentrated to a large extent on commercial in confidence aspects of contracts between government agencies and the private sector, and the apparent use of the 'commercial in confidence' classification to shield government actions from scrutiny. The Committee examined treatment of the commercial in confidence designation under the *Freedom of Information Act 1989* and the ACT Government's *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies*.[4]

As a principle, the Committee believes that contracts once signed should be available for public scrutiny, especially those which have been negotiated outside a formal tender process. The Committee also seeks to have expired contracts exempted from the *Freedom of Information Act 1989*. The Committee recommends that public registers of contracts should be maintained and that the government Internet site, **'**basis'[5], be appropriately enhanced to facilitate the listing of details of recently awarded contracts.

The Committee is concerned that government agencies do not seem to be complying with the requirement to advise commercial partners in writing of the content of the Government's *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies.* The Committee recommends that the chief executives of government agencies be reminded of their obligations, and that the scope of the 'Principles and guidelines' be made to apply to all Territory owned entities except Territory Owned Corporations (TOCs) although TOCs should also be as open and as accountable as possible. The Committee is concerned that all government departments and agencies should include reference to the implications of the 'Principles and guidelines' for contractors.

The Committee is concerned that the ACT Ombudsman's role and jurisdiction could be being compromised by the increasing use of the private sector to provide government works and services. The Committee is also concerned that contracting out functions to the private sector may have made making complaints about the provision of government works and services difficult for citizens.

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[4] Australian Capital Territory. Chief Minister's Department, *Principles and Guidelines for the treatment of commercial information held by ACT Government agencies*. February 1999.
[5] 'Basis' is the ACT Government's Buyers and Sellers Information Service Internet Site.

Fairness

The Committee believes that the fundamental starting point for ensuring fairness in government contracting is the use of open or public tender, the method by which open and effective competition is most likely to occur and be seen to occur.

The Committee considers that it was unfortunate that the introduction of the *Financial Management Act 1996* was not immediately accompanied by the introduction of relevant supporting materials such as whole of government guidelines which would have assisted agencies to manage their new responsibilities. The Committee is concerned that the guidelines now being progressively released need strengthening and their status as best practice needs to be reinforced, and that the function of developing and promulgating whole-of-government procurement guidelines should be retained in the Department of Urban Services. The Committee agrees with Mr Sherman that '[t]here remains a general problem with compliance with [the] guidelines and procedures'.[6] The Committee therefore recommends that those departments and agencies which depart from the ACT purchasing guidelines should be obliged to report major divergences in annual reports to the Assembly.

Strong evidence was presented to the Committee pointing to a decline of contract and technical expertise within the public sector since devolution and decentralisation, which has led to agencies not being able to act as informed buyers. The Committee notes that the Government is now proposing to establish a government procurement board. While the Committee supports this proposal, it is with the proviso that the membership of such a board should be drawn from senior representatives of government departments and agencies. The Committee considers that the Government should consider reestablishing a cell of technical expertise within the Department of Urban Services.

The Committee received submissions and evidence indicating some confusion and concern regarding the status of Totalcare Industries Ltd in its role as a project director and in its relationship with government departments and agencies. Witnesses and submissions from the private sector also expressed concern regarding possible perceptions of conflict of interest involving Totalcare in its roles as both project director and contractor on some projects. This led the Committee to a more general recommendation that companies and corporations

[6]Sherman, Tom. *Report of an assessment of the ACT Government's response to the Coroner's Report on the inquest into the death of Katie Bender at the demolition of the Royal Canberra Hospital on 13 July 1997.* 14 February 2000, p.40.

taking the role of project director for or agent of the Territory should not also bid for other contracts within the same project.

The Committee considers that the Government should introduce an accreditation/ certification scheme to ensure that government agencies are capable of undertaking procurement at different levels of complexity. Agencies should be required to demonstrate their ability to undertake procurement tasks valued at $50,000 or more or valued at less than $50,000 where public tenders are called. The Committee has recommended that training and information sessions should also be offered to industry groups to overcome some of the confusion about, and lack of understanding of the Government's procurement processes.

The Committee received complaints about the lack of openness in purchase methods when public tender is not used. The Committee is concerned that the choice of select tender should be justified and seen to be so. The Committee believes that procurement methods should be listed on the Government's 'basis' Internet site with justifications when the choice is not public tender, allowing interested parties to contact the relevant minister to express any concerns with the method of procurement chosen.

A number of witnesses and submissions expressed concerns about re-issuing of tenders. While re-issuing of tenders is necessary and sometimes vital to satisfy probity requirements, it is often seen as resulting from poor initial design briefs or inadequate funding. Re-tendering can have significant cost implications for industry and agencies. The Committee therefore suggests that when a tender is re-issued, the relevant agency should consult with the accreditation authority to determine if additional training is required or if internal procedures need to be re-examined.

One issue which generated a great deal of interest was the pre-qualification system. Pre-qualification is claimed to have a detrimental effect on small and medium businesses, many of which have to restructure to meet requirements which favour large national companies. Many witnesses and submissions were disturbed by the apparent inconsistent application of the requirement for successful tenderers to be pre-qualified. Another complaint related to the practice of splitting contracts to subvert the pre-qualification requirement. It was also claimed that pre-qualification was creating a sub-contracting mentality in that many companies were no longer employing people but sub-contracting everything to the detriment of the apprenticeship system. The Committee recommends that the pre-qualification system should be reviewed to ensure that it is not having adverse and unintended effects on businesses and that chief executives of government departments and agencies should fulfil the Government's reporting

and certifying requirements with regard to pre-qualification by publishing those details on the ‘basis’ Internet site.

The Committee received complaints that many companies felt locked out of select tender procurement processes, despite feeling that they were qualified to undertake the work and possibly even pre-qualified to the necessary level. The Committee feels that where select tender methods are employed, the agency involved should be required to offer to registered and/or pre-qualified companies, at their request, a briefing to discuss why they had not been invited to express interest or to tender.

The Department of Treasury and Infrastructure told the Committee in December 1999 that the Government planned to establish an Office of Probity Adviser. While commending the Government on this initiative, the Committee is disturbed that this position has still not been filled.

Value for money

Ensuring that value for money is achieved is one of the most difficult tasks in the tender and contract process. The evidence received by the Committee does not indicate that government agencies are meeting the requirements of the value for money principle, nor that agencies have any method of assessing whether the value for money objective has been achieved. The Committee heard claims that there is a widespread belief in the private sector that the lowest priced tender was often judged to represent value for money because staff involved in the tender process lack the subject or technical expertise to be effective informed buyers. The Committee recommends that a two envelope tendering system should be developed to ensure that price does not outweigh other factors in the judgement of tenders.

The Committee heard claims that the introduction of School Based Management had resulted in a decline in the level and quality of maintenance carried out in schools. The Committee has recommended that the current review of School Based Management and the planned condition assessment of school facilities should include an evaluation of the value for money aspects of devolution.

The Committee received suggestions describing alternative approaches to ensuring a value for money outcome in government tender and contracting processes, including the use of value management and Qualification Based Selection (QBS). The Committee feels that the Government should review this latter option and should also review the assistance, resources and guidance it gives departments and agencies regarding achieving value for money outcomes in tendering and contracting processes. The Committee also believes that more work needs to be done to develop methodologies for measuring value for money outcomes.

Conclusion

Two major themes of the inquiry were the gap that the Committee perceived between the theory and practice of government contracting and procurement in the ACT, and the apparent threat to the publicly espoused values of accountability and fairness posed by devolution and decentralisation of responsibility for government procurement. The Committee is concerned that the efficiencies and savings promised by greater reliance on the private sector will break the chain of ministerial and public service accountability, undermine fairness, and prevent the achievement of value for money outcomes, unless the Government takes steps to reinforce the basic principles of public administration, especially accountability and fairness, in the procedures it requires the public sector to follow and be seen to follow.

Summary of Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly consider, after it receives the Auditor-General's report on Bruce Stadium, whether further action is required with regard to the Government's contracting and procurement processes for the Bruce Stadium Redevelopment and associated projects. (paragraph 10)

Recommendation 2

The Committee recommends that the Legislative Assembly consider referring the investigation of those aspects of the tender process relating to the hospital implosion suggested by the Coroner to the Standing Committee on Finance and Public Administration, or re-forming the Select Committee to undertake this investigation, once the Harmer Report on Totalcare is made available without restriction. (paragraph 19)

Recommendation 3

The Committee recommends that all principal agencies within each portfolio maintain a public register of all contracts with a value of $15,000 or over (or $5,000 or over for consultants) let by the administrative units, statutory authorities and other bodies within those agencies. The registers should include contracts for consultancies and contractors. The registers should also contain the contracts for joint ventures, business incentive agreements and other arrangements which commit or potentially commit the Territory to the expenditure of public funds and which have not been negotiated through a tender process. The Committee further recommends that details of these contracts, including their costs and the names of successful tenders be placed on the ACT Government's Buyers and Sellers Information Service ('basis') Internet site. (paragraph 40)

Recommendation 4

The Committee recommends that the 'basis' Internet site be re-developed, enhanced or changed as appropriate to enable it to fulfill the Committee's recommendations for greater public access to tender and contract information, and that access to the 'basis' Internet site should be available to citizens at all ACT Government shopfronts and public libraries. (paragraph 45)

Recommendation 5

The Committee recommends that Section 43 of the *Freedom of Information Act 1989* be amended to prohibit its application to those commercial contracts entered into by the Territory which have expired except in the case of those clauses which contain genuinely commercially sensitive information. (paragraph 47)

Recommendation 6

The Committee recommends that the *Financial Management Act 1996* be amended to prevent Ministers, ACT administrative units, statutory authorities and other bodies from entering into contracts or other obligations which would inhibit the disclosure of details of any actions taken under those contracts or agreements. (paragraph 50)

Recommendation 7

The Committee recommends that Chief Executives of agencies be reminded of the *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies*. The reminder should draw attention to the obligations placed on agencies by the guidelines. (paragraph 54)

Recommendation 8

The Committee recommends that the *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* be amended to apply to <u>all</u> Territory owned entities except those specifically listed as Territory Owned Corporations in Schedule One of the *Territory Owned Corporations Act 1990*. (paragraph 59)

Recommendation 9

The Committee recommends that the powers and jurisdiction of the ACT Ombudsman be reviewed to ensure that government purchasing and procurement reforms have not narrowed or lessened in any measure the Ombudsman's jurisdiction or powers. Such a review should also ensure that the Ombudsman has sufficient jurisdiction and powers to carry out his duties in the new contracting environment. (paragraph 64)

Recommendation 10

The Committee recommends that ACT Government departments and agencies involved in contracting for the provision of government works and services publicly identify the area within the organisation responsible for the receipt of complaints for each contract valued at $15,000 or over via government internet sites including 'basis'. (paragraph 68)

Recommendation 11

The Committee recommends that information about the complaint handling process for ACT Government contracts valued at $15,000 or over, including information on the number of complaints per contract, how many have been resolved and within what timeframe, form part of annual departmental and agency reports to the Legislative Assembly. (paragraph 70)

Recommendation 12

The Committee recommends that the Government review the status of the ACT Purchasing Guidelines to ensure consistency in their application across the ACT public sector in order to give full effect to the Coroner's recommendations and to assist government departments and agencies to achieve the Government's required purchasing policy outcomes. The Committee further recommends that the function of developing and promulgating whole-of-government guidelines be retained within the Department of Urban Services. (paragraph 78)

Recommendation 13

The Committee recommends that, as the ACT Government's purchasing guidelines aim to be best practice, departments and agencies not following them should be obliged to report major divergences in specified areas such as, but not limited to, the choice of purchase method or risk management strategies, and the reasons for them. An appropriate mechanism for such reports could be via annual reports to the Government and thus to the Assembly. (paragraph 79)

Recommendation 14

The Committee supports the Government's proposal to establish a government procurement board to provide whole-of-government consistency in procurement practices, with the proviso that board members should be senior representatives from within the public sector. (paragraph 85)

Recommendation 15

The Committee recommends that the ACT Government re-establish sufficient technical expertise within the Department of Urban Services to enable it to assist agencies to act as informed buyers and to provide a project director function. The Committee further recommends that any future decision to transfer contracting and/or technical expertise from DUS should be preceded by a public service wide audit of contracting and technical skills to ensure that such skills are retained in sufficient quantity and concentration to be an effective whole-of-government resource. (paragraph 96)

Recommendation 16

The Committee recommends that companies and corporations taking the role of project director for, or agent of, a government department or agency should be precluded from bidding for any other contracts within that project. (paragraph 103)

Recommendation 17

The Committee recommends that the ACT Government introduce an accreditation/certification system which requires all government departments and agencies to demonstrate their ability to meet certain standards of procurement skill before being able to undertake procurement tasks valued at $50,000 or more or valued at less than $50,000 where public tenders are called. Where certification has not been gained, tender and contract documentation should be referred to the Department of Urban Services for advice or oversight prior to finalisation. The Committee recommends that the development, implementation and management of this accreditation scheme be a function of the ACT Contracts and Purchasing Unit, or its successor, within the Department of Urban Services. (paragraph 112)

Recommendation 18

The Committee recommends that, as well as accrediting agencies and staff for procurement tasks above the threshold of $50,000, the Government should more systematically market procurement training to government departments and agencies for procurement tasks valued at under $50,000, and that information and training seminars should also be offered to the private sector. The Committee further recommends that all such training should be subject to certification by ACT Contracts and Purchasing, or its successor, to ensure a consistent outcome. (paragraph 115)

Recommendation 19

The Committee recommends that the choice of purchase method (if other than by public tender) for government contracts valued at $20,000 or over should be placed on the 'basis' Internet site with the justifications for such choice listed. This notification should be made after the purchase method is approved, but before tenders are called, to allow interested parties to notify the relevant Minister of any concerns they have with the choice of method. Such notifications and the Minister's response should be tabled in the Assembly within a specified period and be part of the public record. The Committee further recommends that the text of these and other tenders should be made available on the 'basis' Internet site. (paragraph 120)

Recommendation 20

The Committee recommends that the re-issuing of a tender should be undertaken only after consultation with the Office of the Probity Adviser. Re-issuing of tenders should also prompt a review of an agency's staff training needs and procedures, undertaken with assistance of the procurement accreditation authority. (paragraph 124)

Recommendation 21

The Committee recommends that the pre-qualification system be reviewed to ensure that it is not having adverse and unintended effects on businesses. (paragraph 132)

Recommendation 22

The Committee recommends that Chief Executives of government departments and agencies fulfil the Government's reporting and certifying requirements with respect to pre-qualification, as stated in *The Guideline for the Preparation of Request for Offers* document, by publishing those details on the 'basis' Internet site. (paragraph 133)

Recommendation 23

The Committee recommends that the ACT Government Purchasing Policy require the briefing, on their request, of registered or pre-qualified potential tenderers who have not been invited to express interest or tender for projects decided by select tendering methods. (paragraph 136)

Recommendation 24

The Committee recommends that the Office of Probity Adviser be filled without delay and that guidelines on the role of the Probity Adviser should be issued as quickly as possible. (paragraph 139)

Recommendation 25

The Committee recommends that a 'two envelope' tendering concept be developed and implemented as the most suitable method of ensuring that price does not outweigh other factors in the tender process. (paragraph 146)

Recommendation 26

The Committee recommends that a methodology to assess value for money be developed and used in the review being undertaken by the Department of Education and Community Services into School Based Management and in the condition assessment of school facilities also being undertaken by the Department. Such a methodology should include an assessment of the impact of the recent devolution of responsibilities to schools on value for money in the broader education budget. (paragraph 150)

Recommendation 27

The Committee recommends that the ACT Government review the resources, including staff, practical assistance and guidance, provided to agencies to ensure that value for money is able to be achieved in government contracting, and that its achievement is able to be assessed. (paragraph 154)

Background

Scope of the inquiry

The Committee's terms of reference are to 'inquire into and report on the Government's contracting and procurement processes'.[7]

Given the broad nature of these terms of reference, Members agreed to focus on the degree to which contracts entered into by the Territory are open to public scrutiny; the fairness of the processes by which government agencies select and manage contractors and consultants; and the extent to which contracting offers value for money to Territory residents.

To assist their deliberations, Members decided to examine the tender processes and contracts entered into by the Territory for several major projects, including the:

- Bruce Stadium redevelopment;
- use of Bruce Stadium by the Sydney Organising Committee for the Olympic Games ('the SOCOG contract');
- V8 Supercar race (the GMC 400);
- demolition of the former Royal Canberra Hospital; and
- Territory funded activities associated with the Year 2000 New Year's Eve celebrations.

The Committee also undertook to review the contracting practices of Totalcare and Cityscape.

On 14 October 1999, the Assembly resolved that the Committee may make interim reports and extended the date for its final report to be presented to the Assembly to the first sitting day after 30 June 2000. [8] On 10 July 2000, the Assembly resolved that the Committee report by the last sitting day in August 2000.[9]

Conduct of the inquiry

Initial advertisements detailing the inquiry's scope and inviting input were placed in *The Canberra Times* and *The Chronicle* in June 1999. Further advertisements outlining the Committee's interest in various major projects were placed in *The Canberra Times* and *The Chronicle* in October 1999. Advertisements detailing the

[7] ACT Legislative Assembly, *Minutes of Proceedings No 50*, 6 May 1999, p 421-422.
[8] ACT Legislative Assembly, *Minutes of Proceedings No 64*, 14 October 1999, p 574-575.
[9] ACT Legislative Assembly, *Minutes of Proceedings No.95*, 10 July 2000, (proof copy, p.1).

ACT Coroner's suggestion that the Committee review aspects of the tender process for the demolition of the Royal Canberra Hospital were placed in *The Canberra Times* and *The Chronicle* in November 1999.

In October 1999 invitations to make submissions to the inquiry and inviting input were sent to peak organisations, business groups and over 300 companies that had recently done business with the Territory.

In response, the Committee received 31 submissions and heard from witnesses at public hearings undertaken in December 1999 and February, March and May 2000.The Committee also took evidence in-camera from a number of witnesses. A list of submissions is in Appendix B and a list of witnesses who gave evidence at public hearings is in Appendix D.

The Committee also sought Government documents associated with the case studies being examined in the inquiry. Further information was also obtained through the Legislative Assembly by Members acting in their individual capacities. These actions will be described in greater detail in the section of the report on Bruce Stadium in the next chapter.

The nature of the case studies which the Committee decided to use as focal points and the issues of greatest concern to those private sector groups and individuals who made submissions to the inquiry meant that the Committee's inquiry concentrated on the procurement of goods mainly in the construction sector and the provision of services outside the area of human services. Private sector concerns were also focused mainly on the tender and contract award stages of the government-industry partnership rather than on the management of contracts.

Acknowledgements

The committee wishes to thank all those who took an interest in the inquiry.

Chapter 1 - Introduction

Structure of the report

1. This report focuses on three major issues identified by the Committee as important principles in ACT government contracting and procurement processes: the degree to which contracts entered into by the Territory are open to public scrutiny; the fairness of the processes by which government agencies select and manage consultants and contractors; and the extent to which contracting offers value for money to local residents. These three issues are contained within the six principles which underlie the ACT Purchasing Policy.[10]

2. The report uses information submitted to the Committee in the form of submissions, exhibits and evidence taken at public and in-camera hearings, as well as the case studies identified by the Committee and listed above, to examine aspects of the theory and the practice of government contracting and procurement processes in the ACT. However, before beginning a general discussion on these matters, the Committee's deliberations on aspects of two individual case studies need to be outlined.

Bruce Stadium

3. On 9 December 1999, Committee member Paul Osborne MLA successfully moved in the Assembly that copies of the contracts between Bruce Operations Pty Ltd (BOPL) and the major hirers of Bruce Stadium – the Canberra Raiders, ACT Brumbies and Canberra Cosmos football clubs – be provided to the Committee by noon the following day. The terms of the motion also required the Government to present the Committee with a copy of the contract between the Territory and SOCOG for the use of Bruce Stadium during the Olympic Games. The Government provided copies of the four contracts on the deadline.

4. As a result of receiving the contracts between BOPL and the major hirers of Bruce Stadium ('the Bruce Stadium contracts'), the Committee held private discussions with the major hirers about the confidential status of the contracts. Two of the contracts contain confidentiality clauses and all three hirers and the Government claimed that the confidentiality of the contracts should be respected. Private discussions were held on the same issue with the Auditor

[10] Australian Capital Territory. *ACT Government Purchasing Policy and Principles Guideline*s (July 1999), which was preceded by Australian Capital Territory. *Purchasing Policy: a Government and Industry Partnership* (September 1994).

General and, on several occasions, with Government officials during December 1999 and January 2000.

5. The Committee also obtained legal advice on whether the public release of the Bruce contracts would expose the Territory to litigation for breach of contract on the basis of the confidentiality clauses. The advice suggested that any such litigation was unlikely to succeed.

6. The major hirers advanced arguments that the contracts contained commercially sensitive information. The parties to the agreements also considered that there was an expectation of confidentiality. Notwithstanding these representations, a majority of the Committee considered that the arguments were overridden by the principles of transparent and accountable government.

7. Accordingly, on 25 January 2000, the Committee resolved to release copies of the Bruce contracts on 22 February 2000.[11] The delay was to allow time for the major hirers to test the Committee's decision in the Courts if they chose and to allow them a final opportunity to present new evidence to the Committee as to why the contracts should not be released. The Bruce contracts were authorised for publication at a meeting of the Committee on 28 February 2000. The Committee has not been made aware of any adverse outcomes for the parties involved following the release of the contracts.

Auditor-General's report

8. In late June 1999, the Auditor-General began conducting a performance audit of the Bruce Stadium redevelopment and operating activities – one of the Committee's case studies. The Auditor-General now expects to present his report to the Legislative Assembly in August 2000. Members have been conscious not to duplicate this inquiry. Accordingly, the Committee has not further investigated the redevelopment, other than releasing copies of the Bruce contracts.

9. Aspects of the commercial in confidence status of the Bruce contracts are dealt with in the next chapter, however, the Committee is of the view that the Assembly may need to consider further action after receipt of the Auditor-General's report.

[11] The Committee's power to authorise publication of documents is provided in Standing Orders 241 to 243 inclusive.

Recommendation 1

10. The Committee recommends that the Legislative Assembly consider, after it receives the Auditor-General's report on Bruce Stadium, whether further action is required with regard to the Government's contracting and procurement processes for the Bruce Stadium Redevelopment and associated projects.

Hospital implosion

Coroner's recommendation

11. In his *Inquest findings, comments and recommendations into the death of Katie Bender on Sunday 13th July 1997 on the demolition of the Royal Canberra Hospital Acton Peninsula, ACT*, the Coroner, noted that 'the Assembly conducts through one of its Standing Committees a review of the tendering contract system of the government authorities and its agencies.' The Coroner suggested that 'so much of the advertisement, tender selection and expression of interest phase of this project be revisited so as to invoke in the long term procedures that are more open to critical public scrutiny and accountability.'[12]

12. In his findings, the Coroner had expressed concern that the two meetings at which Project Coordination (Australia) Pty Ltd (PCAPL) was appointed as Project Manager and then confirmed in that role 'have all the hallmarks of a sham arrangement convened simply to lend credibility to the appointment process'.[13] The Coroner had also commented on lack of proper process when referring to the Chief Minister's agreement that an aspect of the tender process dealing with price differential between bids 'had not been negotiated at arms length from government officials'. The Coroner stated '[t]here is no doubt that this particular aspect of the tender process should have been conducted in a more responsible manner in terms of its independence from the Government.'[14] Although at this stage the Committee cannot undertake a thorough inquiry into the aspects of the tender process as recommended by the Coroner, in its report the Committee will deal with what it sees as a central theme of Mr Tom

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[12] Madden, Shane G. *Inquest findings, comments and recommendations into the death of Katie Bender on Sunday 13th July 1997 on the demolition of the Royal Canberra Hospital Acton Peninsula, ACT held at the Magistrates court, Knowles Place, Canberra City, between 17th March 1998 and 11th November 1998 (118 days of sitting) [Shane G. Madden, Coroner]*. Canberra, ACT Coroner,1999. (hereafter, 'Coroner's findings'), p.97, paragraph 13.

[13] Coroner's findings, 'Landswap to tender', page 130, paragraph 67.

[14] Coroner's findings, 'The public event – an issue of safety', page 433-34, paragraph 84.

Sherman's report, the challenge for public administration to ensure that procedures and guidelines are observed.[15]

13. The Committee had earlier decided to include the demolition as one of its case studies, but had delayed advertising the case study until the Coroner's findings were released. The Committee accepted the Coroner's suggestion, and in November 1999 advertised its intention to include the matter in its inquiry.

The Government's response and the Sherman Report

14. In December 1999 the Chief Minister's Department engaged Mr Tom Sherman to assess the ACT Government's response to the Coroner's findings and to ensure that, where appropriate, the Coroner's recommendations and other matters raised by the Coroner relevant to the ACT Public Service are addressed in current practices and procedures, and to report on the findings. Mr Sherman's report of 14 February 2000 extracted 30 recommendations from the Coroner's findings, identifying the recommendation relating to the Legislative Assembly Committee's review (above) as Recommendation No.14.

15. Mr Sherman assessed that, at the time of his report, seven recommendations had been substantially implemented, fourteen were well on the way towards implementation, five required more work to achieve implementation, and four were either outside the jurisdiction of the government (Recommendation no.14), or at a level of generality which makes implementation difficult to assess.

Harmer report on Totalcare

16. Totalcare Industries Limited, a Territory-owned corporation, was found by the Coroner to have been 'at all relevant times the Project director or Project agent on the Acton Peninsula project'. Totalcare engaged Mr John Harmer to undertake a detailed review of its project management procedures and guidelines in the context of all the findings, recommendations and views reflected in the Coroner's findings relating to the implosion and to the death of Katie Bender.[16]

17. During Totalcare's appearance before the Committee at the public hearing on 15 December 1999, the Committee asked the Chief Executive of Totalcare

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[15] Sherman, Tom. *Report of an assessment of the ACT Government's response to the Coroner's Report on the inquest into the death of Katie Bender at the demolition of the Royal Canberra Hospital on 13 July 1997*. 14 February 2000 (hereafter, 'Sherman Report'), p.16.

[16] Transcript of evidence to the Select Committee on Government Contracting and Procurement Processes (hereafter 'Transcript'), p.68.

Industries, Mr Palywoda whether the report would be released as a public document. At that time, Totalcare expected to receive Mr Harmer's report early in the new year and it was Mr Palywoda's expectation that Totalcare would be able to provide the Committee with a copy of the report unless there were some very substantial legal issues.[17] In evidence to the Committee on 18 May 2000, Mr Palywoda stated that due to Mr Harmer's other commitments, the report had only recently been received by the board of Totalcare and that the board would have to take into consideration the legal actions by the Bender family pending against Totalcare and one of its officers in making a decision on the public release of the Harmer Report.[18]

18. On 18 July 2000, Totalcare advised that, while accepting that all of the matters canvassed by the Harmer Report are matters of legitimate interest for the Select Committee, it (Totalcare) could not release the Harmer Report to the Committee or discuss or be examined on its contents at this time without requesting that a number of restrictions be placed on the Committee's investigations. Given that criminal and civil legal actions regarding the implosion are currently being undertaken, the Committee acknowledges that Totalcare has strong reasons for suggesting that the Committee's access to the report and its examination of Totalcare staff be covered by a number of conditions. However, the Committee feels that it cannot do justice to the Coroner's recommendation, or to the public interest, if its examination of the Harmer Report and of Totalcare officials is not undertaken in an open forum and in an accountable fashion. The Committee therefore believes that it is not able to carry out the review suggested by the Coroner into aspects of the tender process without the benefit of being able to examine Mr Harmer's report on its own terms and undertake what inquiries it feels are justified. However, the Committee does believe that the Assembly should undertake to pursue the Coroner's recommendation when the Harmer Report is able to be publicly released and when Totalcare officials are able to be examined without prejudicing criminal or civil legal actions.

Recommendation 2

19. The Committee recommends that the Legislative Assembly consider referring the investigation of those aspects of the tender process relating to the hospital implosion suggested by the Coroner to the Standing Committee on Finance and Public Administration, or re-forming the Select Committee to undertake this investigation, once the Harmer Report on Totalcare is made available without restriction.

[17] Transcript, p.72.
[18] Transcript, 18 May 2000 (p.24 of uncorrected proof)

Chapter 2 – Public Scrutiny

Introduction

20. The first of the three major issues identified by the Committee as important principles in government contracting and procurement processes was the degree to which contracts entered into by the Territory are open to public scrutiny. This issue is the basis for the principle of accountability, the concept of which 'recognises the principle that, in a democracy, public officials are seen as the people's representatives or trustees and are accountable to the public for the proper performance of their designated functions'.[19] Openness to public scrutiny is a prerequisite for the public to have confidence in both the fairness of the Territory's procurement processes and the degree to which such processes represent value for money outcomes.

21. Without public scrutiny, fairness and value for money cannot be judged and cannot be seen to have been achieved. However, there are inherent tensions between the requirement for public scrutiny and accountability and the efficiencies promised by contracting out the provision of government goods and services. Indeed it could be that less requirement for accountability might be one of the reasons for what appears to be greater private sector efficiency.[20] The ACT is not alone in facing this dilemma.[21] In this situation, the effectiveness of traditional avenues of public accountability is important. It is also for this reason that issues surrounding information which is deemed commercial in confidence are so central to discussions about accountability.

Avenues of accountability

22. There are a number of avenues through which the public can scrutinise the activities of government and hold government accountable for its actions and decisions. Traditionally, the main avenue has been 'through the hierarchical chain of departmental responsibility to ministers and through ministers to

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[19] Mulgan, Richard. 'Contracting out and accountability' in *Australian Journal of Public Administration*, December 1997, 56(4), p.107.
[20] Mulgan, op.cit., p.106.
[21] For instance, see: Australia. Parliament. Joint Committee on Public Accounts and Audit. *Report 369: Australian government procurement*. June 1999; Senate Finance and Public Administration References Committee, *Contracting out government services*: *second report*, May 1998, Chapter 4 – 'Accountability'; and its current inquiry: 'Accounting to the Senate in relation to government contracts'; Victoria. Parliament. Public Accounts and Estimates Committee, *34th Report*: *Report of the inquiry into outsourcing of government services in the Victorian public sector*, March 2000 and *Report no.35: Inquiry into commercial in confidence material and the public interest*, March 2000.

parliament and the public.'[22] ACT public servants appear before Assembly committees to give evidence and answer questions on any aspect of ACT Government operations. In addition, there are independent agents: the ACT Ombudsman and the ACT Auditor General who are empowered to investigate such operations. The ACT has a Freedom of Information Act giving citizens the right (with exceptions) to view documents in the possession of government departments and agencies. The ACT Administrative Appeals Tribunal provides citizens with an avenue of impartial review of some administrative decisions made by ACT ministers, departments and agencies.

23. These avenues were established during periods when, by and large, public administration was much more centralised than it is today. Greater devolution of responsibility to the chief executives of government departments and agencies has combined with the move to contract out the provision of government works, goods and services, to blur the view of, if not break, the chain of accountability and oversight. The use and possibly the abuse of the principle of commercial in confidence contracts between government agencies and contractors have further complicated the issue of accountability.

Commercial in confidence

24. There is no statutory definition of 'commercial in confidence' or 'commercially sensitive information' to guide ACT government agencies in their attempts to decide what information falls within these terms. The general understanding of what these terms mean is extremely broad and, thus, captures a wide range of commercial information held within agencies.

25. The *Freedom of Information Act 1989* (the 'FOI Act') gives the public a right of access to documents in the possession of Government departments and agencies – with certain exemptions. The release of any particular document depends upon whether it falls within any of the exemptions set out in the FOI Act.

26. Section 43 of the FOI Act outlines the exceptions relevant to the release of commercial information. The exemptions, in summary, are for:

- trade secrets;
- any other information having a commercial value that could be expected to be destroyed or diminished by disclosure;
- information which could unreasonably and adversely affect the conduct of the business, financial or professional affairs of a person or organisation;

[22] Mulgan op.cit., p.107.

- information the disclosure of which could reasonably be expected to prejudice the future supply of information to the Territory or an agency.

27. The Administrative Appeals Tribunal has considered each of these categories of documents in many cases. This case law, although not binding according to the usual rules of precedent, has established principles which should guide government agencies in their decision making under Section 43.

28. Section 27 of the FOI Act requires the agency holding the documents to give the person who may be adversely affected by the release of the information an opportunity to make a submission as to why the documents should not be released. Sections 44 and 45 of the FOI Act refer to other forms of exempt commercial information, but these are not directly related to a definition of commercial in confidence.

29. Similarly, the *Auditor-General Act 1996* allows the Auditor-General to withhold information from a report to the Legislative Assembly if disclosure of that information could, among other things:

- have a serious adverse impact on the commercial interests of any person or body; or
- reveal trade secrets of any person or body.[23]

30. Under both the FOI Act and the Auditor-General Act, it is a matter of discretion for the decision maker to determine whether the document containing the information is 'commercially sensitive' or not and, thus, whether it should be released or not.

31. An overly zealous approach to determining the commercial sensitivity of documents can lead to a situation where a document is released with all of its contents blacked out, as was the case with the first release of the list of expenses accompanying the Joint Promotion Agreement between BOPL and the International Touring Company to stage the Ultimate Rock Symphony at Bruce Stadium on 4th March 2000. In the next version of this document, the list of expenses was partially blacked out. When the third version was tabled in the Assembly all the information was visible.

[23] s. 19(1) *Auditor-General Act 1996*. Under ss. 19(3)–19(6) of the Act, the Auditor-General may prepare a report containing sensitive information for the Public Accounts Committee.

ACT Government guidelines for the treatment of commercial information

32. In February 1999 the Government released its *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* (the 'Principles & Guidelines'). These are 'to give effect to the Government's policy of transparency and openness in acting on behalf of the people of the ACT' and are based on the rights of public access to information under the FOI Act.[24] They oblige agencies to inform in writing those they deal with commercially that the Territory acts 'under a policy in favour of making available to the public information about its commercial dealings'.[25] The Principles & Guidelines also provide advice to agencies on whether commercial information should be kept confidential.

33. A version of the Principles & Guidelines has also been prepared for those seeking to do business with the Territory.[26]

34. The Principles & Guidelines apply to Territory agencies, including administrative units and statutory authorities and bodies. However, they do not apply to Territory Owned Corporations to the extent that access to documents relating to their competitive commercial activities is exempt under the FOI Act.[27]

When should information be commercial in confidence?

35. The Committee accepts that all tenders should remain confidential during the tender evaluation or negotiation process. However the nature of the commercial information in a tender changes once a contract is signed.

36. Once the tender evaluation process is over and the Territory has committed to spending public funds in a contract, there is a stronger public interest argument for access to the terms of the arrangement. Furthermore, once a contract has been signed, the number of people who become aware of contract details is likely to expand as the contract is administered. In short, the sensitivity of commercial information varies through the contracting process.

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[24] Australian Capital Territory. Chief Minister's Department, *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* ('the Principles & Guidelines'), February 1999, p. 3.
[25] Principles & Guidelines, p. 5.
[26] *Doing Business with the ACT Government: Balancing public right to information about the Government's commercial dealings and public interest in protecting sensitive commercial information*.
[27] A Territory Owned Corporation is such if named in schedule 1 of *the Territory Owned Corporations Act 1990*.

37. As a principle, the Committee believes that contracts once signed should be available for public scrutiny. That principle applies particularly to contracts that have been negotiated outside a formal tender process – such as the Bruce Stadium and SOCOG contracts and business incentive agreements.

38. It is interesting to note that in the United States, government contracts in the Federal sphere are considered to be public information, except those that are classified (usually for national security reasons.) While information identifying the contracting parties and pricing information is meant to be publicly accessible, information about a contracting party's product or organisational procedures may be considered proprietary. For example, a contracting company whose patent-protected product is to be used according to the terms of the contract is protected from having the product's details become public knowledge, even though the agreement between that company and the government agency remains public.[28]

39. The Committee concedes that some contracts may contain genuinely commercially sensitive information that should not be placed on the public record. That information is well protected under the FOI Act. However, exemptions under the Act on the grounds of commercial sensitivity should only occur rarely and should still not prevent the contracts, with the appropriate clauses, annexes[29] etc deleted, from being placed on the public record. There should be no case for exempting entire contracts from public scrutiny. To facilitate the placement of contracts on the public record, the Committee makes the following recommendation.

Recommendation 3

40. The Committee recommends that all principal agencies within each portfolio maintain a public register of all contracts with a value of $15,000 or over (or $5,000 or over for consultants) let by the administrative units, statutory authorities and other bodies within those agencies. The registers should include contracts for consultancies and contractors. The registers should also contain the contracts for joint ventures, business incentive agreements and other arrangements which commit or potentially commit the Territory to the expenditure of public funds and which have not been negotiated through a tender process. The Committee further recommends

[28] Information and Research Center, Office of Public Affairs, Embassy of the United States of America, Canberra.

[29] Commercially sensitive material (if any) will be in the annexes of a contract, eg specifications for a particular product, rather than in the terms and conditions.

that details of these contracts, including their costs and the names of successful tenders be placed on the ACT Government's Buyers and Sellers Information Service ('basis') Internet site.

41. The recommendation is worded so that the registers will capture unique contracts as well as the more routine ones for consultants and contractors. However, the Committee does not expect standard staff employment contracts or the like to be included. Nor does the Committee envisage the details of contracts let by Territory Owned Corporations being available through these registers.

42. Ideally, copies of the contracts on the register could be placed on agency Internet pages for viewing or on the 'basis' Internet site, the Territory's electronic (b)uyers' (a)nd (s)ellers' (i)nformation (s)ervice designed to assist suppliers tender for government contracts.[30] 'Basis' lists regional businesses, active and closed tenders, including the names of tenderers for closed tenders, and recently also details of some contracts. 'Basis' also provides additional information, including the ACT's purchasing policy principles and guidelines.

43. A new section of 'basis', entitled Contracts Arranged, contains: a short description of the contract, the contract number, the contract amount, commencement date and duration as well as details of the client and contractor. Currently, only contracts arranged on behalf of the Department of Urban Services are listed. The Committee believes that 'basis' can and should be used to enhance public accountability by also providing details about winning tenders for contracts arranged on behalf of all departments and agencies. This would be particularly valuable as there is no longer a requirement for this information to be listed in the ACT Government Gazette.[31] Listing such details on 'basis' would usefully combine contract information in one site as is done, for example, on the Western Australian Government's electronic Contracting Information Bulletin Board.[32] Similarly, from 1 July 2000, the Victorian Government Purchasing Board will require government departments to list basic details of all contracts (unless exempt) over $100,000 on its Internet site.[33] A possible alternative vehicle could be the Chief Minister's Department's Register of Significant Contracts in expanded and public form.

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[30] At <www.basis.act.gov.au>.
[31] The Gazette is available in hard copy and at <www.act.gov.au/government/reports/pub/gazette>.
[32] At <www.contracting.wa.gov.au>.
[33] At www.tenders.vic.gov.au/contracts.

'basis'

44. The Committee is impressed by the potential of Internet sites such as 'basis' to provide the ACT Government with a means to improve citizens' access to information on government contracting and procurement. Many of the Committee's recommendations make reference to enhanced roles for 'basis', and the Committee is aware that 'basis' might require re-development, enhancement or change to enable it to undertake those roles.

Recommendation 4

45. The Committee recommends that the 'basis' Internet site be re-developed, enhanced or changed as appropriate to enable it to fulfill the Committee's recommendations for greater public access to tender and contract information, and that access to the 'basis' Internet site should be available to citizens at all ACT Government shopfronts and public libraries.

Access to expired contracts

46. If commercial information in a contract is less likely to be sensitive once a contract has been signed, the same information is even less likely to remain sensitive once a contract has expired. The Committee sees no reason for withholding details on the expenditure of public money once a service has been provided. At this stage, the arguments for transparency and public accountability simply override any continuing claims for commercial secrecy, except in the case of genuinely commercially sensitive information. Accordingly, in order to provide a measure of accountability for expired contracts, comparable with the Committee's recommendations relating to future practice, the Committee makes the following recommendation.

Recommendation 5

47. The Committee recommends that Section 43 of the *Freedom of Information Act 1989* be amended to prohibit its application to those commercial contracts entered into by the Territory which have expired except in the case of those clauses which contain genuinely commercially sensitive information.

Confidentiality clauses

48. One practice that causes the Committee disquiet is the use of confidentiality clauses in Territory contracts. Two of the Bruce Stadium contracts contain such clauses which prohibit the unilateral release of 'confidential information'

by the parties.[34] Another associated contract requires the recipient of information from BOPL to keep confidential the fact that confidential information has been provided by BOPL.[35] The same contract requires the recipient, if required by law or court order to disclose confidential information, to 'use its best endeavours (without breach of applicable law) to delay and withhold disclosure until BOPL has had a reasonable opportunity to oppose disclosure by lawful means'.[36]

49. The Committee understands that the use of confidentiality clauses is the exception rather than the rule in Territory contracts and that there are occasions when their use is valid. However, these clauses can also be used to stymie attempts to ensure government accountability. Despite any caveats they may contain, confidentiality clauses also run counter to the principles of transparent and accountable government. The clauses contained in the contracts mentioned in the paragraph immediately above are a case in point. Accordingly, the Committee makes the following recommendation.

Recommendation 6

50. The Committee recommends that the *Financial Management Act 1996* be amended to prevent Ministers, ACT administrative units, statutory authorities and other bodies from entering into contracts or other obligations which would inhibit the disclosure of details of any actions taken under those contracts or agreements.

51. The Committee notes that the Western Australian Parliament has inserted section 58C into the *Financial Administration and Audit Act 1985 (WA)* to achieve the same objective.

Compliance with the FOI Act and the Principles & Guidelines

52. There appears to be generally low compliance by Territory agencies with the requirement to advise commercial partners in writing of the content and implications of the Principles & Guidelines. The advice that is provided may not conform with the requirements of the guidelines or may simply not be sent out at all.

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[34] See clause. 29, Canberra Raiders Hiring Agreement for Bruce Stadium; clause 27, Canberra Cosmos Hiring Agreement for Bruce Stadium (Attachments to Exhibit No.1).
[35] Clause 2.1(7), Confidentiality Agreement between BOPL and ACT Rugby Union Ltd. (Attachment to Exhibit No. 6).
[36] Clause 5.1, Confidentiality Agreement between BOPL and ACT Rugby Union Ltd.

53. The Committee has received anecdotal evidence to this effect which has been borne out by the Committee's own inquiries. On this basis, the Committee makes the following recommendation.

Recommendation 7

54. The Committee recommends that Chief Executives of agencies be reminded of the *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies*. The reminder should draw attention to the obligations placed on agencies by the guidelines.

55. As an observation, the Committee notes that the Principles and Guidelines and associated pamphlet for those entering contracts with the Territory, while available in electronic form through 'basis', are difficult to find on the site. They should be given greater prominence, both to remind agencies of their obligations and to help ensure that business partners are aware of the effect of the policies.

56. Members of the Committee are also concerned, through personal experience, at the application of the FOI Act by agencies when the interests of third parties must be taken into account - such as when 'commercially sensitive' documents are being considered for release. The decision by an agency to withhold documents simply because of an objection to their release by a third party on the untested grounds of commercial sensitivity is not sufficient. The FOI Act requires agencies to make an independent, properly reasoned decision and, if the decision is to release the documents, the onus is on the contractor to prevent that from occurring.

Scope of the Principles & Guidelines

57. One particular case of non compliance with the Principles & Guidelines was the failure by BOPL to advise the Canberra Cosmos Football Club in writing of the implications of the document.[37] The Chief Executive of the Department of Treasury & Infrastructure advised the Committee that BOPL did not have to comply with the Principles & Guidelines as BOPL is set up under Corporations Law and 'to this extent [is] not unlike a Territory Owned Corporation'.[38] Territory Owned Corporations (TOCs) are exempt from the Principles & Guidelines.

[37] There was no requirement for BOPL to advise the other major hirers of Bruce Stadium as the Principles & Guidelines were introduced after the their contracts were signed.
[38] Submission No. 26, p. 2.

58. The Committee is prepared to accept that TOCs should remain exempt from the disclosure obligations placed on Territory agencies because of their commercial orientation. However, BOPL was not a TOC and should not have been exempt from the Principles & Guidelines. Nor should it be assumed that the operations of TOCs should not be open and accountable to the greatest possible degree, subject only to commercial requirements, after all, TOCs belong to the people of the Territory. As so much of the Committee's efforts to date have focused on the contracts between BOPL and the major hirers and Bruce Stadium, Members wish to make the following recommendation.

Recommendation 8

59. The Committee recommends that the *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* be amended to apply to <u>all</u> Territory owned entities except those specifically listed as Territory Owned Corporations in Schedule One of the *Territory Owned Corporations Act 1990*.

Standard clauses in tender and contract documents

60. The Government Solicitor has approved standard conditions of contract clauses for inclusion in the various Requests for Offer documents and contracts. One of these clauses included a statement that the FOI Act gave members of the public rights of access to official documents. The Committee did not consider that this clause was enough on its own. Therefore, the Committee is pleased that since this issue was raised during the conduct of the inquiry, ACT C&P has revised the clauses in its tender and contract documents relating to confidentiality and disclosure. These clauses now refer to the implications of the *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* and to the requirement for contractors to justify why the territory should treat any contractual arrangements as confidential, as well as still referring to the FOI Act. The Committee remains concerned that while this clause is standard in ACT C&P contracts, there is no public sector wide standard clause.

Impact of devolution on accountability

Ombudsman's concerns

61. The role of the ACT Ombudsman is to respond to complaints about the application of policy or process to individual bids for contracts or to specific

contracts or to deal with complaints about contracted service delivery providers.[39]

62. The Committee received a submission from the ACT Ombudsman in which he expressed his concern that his jurisdiction to investigate the actions of contractors who deliver government services is not settled as securely as desirable.[40] The Ombudsman argued that it is important that he continue to have jurisdiction to investigate complaints arising from the delivery of government services irrespective of whether the service delivery was by a government agency or by a private contractor. The Ombudsman argues that such continued jurisdiction 'will ensure that external scrutiny and public accountability mechanisms are preserved, and that the citizen's access to redress or review mechanisms relating to government services does not disappear'.[41]

63. The Committee agrees that citizens' rights should not be jeopardised or obscured by the method of procurement or service delivery. The Committee also believes that changes made to government contracting and procurement practices may call for greater oversight by the Ombudsman.

Recommendation 9

64. The Committee recommends that the powers and jurisdiction of the ACT Ombudsman be reviewed to ensure that government purchasing and procurement reforms have not narrowed or lessened in any measure the Ombudsman's jurisdiction or powers. Such a review should also ensure that the Ombudsman has sufficient jurisdiction and powers to carry out his duties in the new contracting environment.

Complaint mechanisms

65. A matter related to the Ombudsman's concerns is the effect outsourcing has on complaint procedures preceding reference of an issue to the Ombudsman. This has two facets. The Committee has been made aware that the number of layers between the government agencies financing a project and the actual sub-contractor undertaking the work can mean that the sub-contractor can have difficulty identifying the appropriate avenue for resolving a dispute. The Committee is also concerned that the use of contractors has increased the distance between the citizen and government agency paying for the work to

[39] Submission No.21, p.3.
[40] Submission No.21 p.2.
[41] Submission No.21, p7.

such a degree that it can sometimes be confusing for citizens trying to find the most appropriate government body responsible for receiving a complaint.

66. The Committee is aware that since the beginning of its inquiry the Government has issued a guideline on effective complaint handling for ACT contracts.[42] The exposure draft of this guideline was issued on 12 August 1999. It was then issued in final format on 26 November 1999 and is available on the 'basis' Internet site. The guideline relates only to contracts for the provision of services to the community and to complaints against the actions of contractors.

67. The Committee acknowledges that the guideline provides for useful guidance for complaint handling including advice that the agency establish responsibility for the handling of complaints for each contract or service level agreement, and that information about the process be made accessible. The guideline also links customer satisfaction to contract management. However, the Committee believes that more formal requirements for the publishing of the appropriate contact details would further improve accountability. The Committee believes that 'basis' is one appropriate vehicle for the dissemination of such information. In addition, the Committee cannot see why the guideline for complaint handling should be restricted to contracts for the provision of services and not for contracts generally.

Recommendation 10

68. The Committee recommends that ACT Government departments and agencies involved in contracting for the provision of government works and services publicly identify the area within the organisation responsible for the receipt of complaints for each contract valued at $15,000 or over via government internet sites including 'basis'.

69. The Guideline on effective complaint handling outlines suggested systems of data collection and regular reporting without suggesting the final destination for this information. The Committee feels that the public interest would be served if information about the complaint handling process (eg, how many complaints were received, about which contracts, how many have been resolved and within what timeframe) formed part of departmental and agency annual reports to the Government and thence to the Assembly.

[42] Australian Capital Territory. Department of Urban Services. *Effective complaint handling for ACT contracts*. 26 November 1999.

Recommendation 11

70. The Committee recommends that information about the complaint handling process for ACT Government contracts valued at $15,000 or over, including information on the number of complaints per contract, how many have been resolved and within what timeframe, form part of annual departmental and agency reports to the Legislative Assembly.

Chapter 3 - Fairness

Introduction

71. The second issue which the Committee examined was the fairness of the processes by which government agencies contract out the supply of government works and services to the private sector. The Committee considers the fundamental starting point for ensuring fairness in government contracting is the use of an open or public tender system. Public tender is the method by which open and effective competition (the second of the Government's six purchasing principles) is most likely to occur and, just as importantly, can be seen to occur. Another related fundamental requirement for fairness in government contracting and tender processes is the necessity for an impartial and objective public service.

72. As well as the issue of open tender, the Committee heard evidence on a number of other matters which witnesses considered compromised the fairness of government procurement processes. Most of these issues concerned aspects of the tender process rather than the management of contracts and many of the issues raised related to construction projects.

ACT purchasing guidelines

73. The introduction of the Financial Management Act in 1996 which devolved all financial authority and accountability to chief executives, was unfortunately not immediately accompanied by the introduction of relevant supporting materials such as procurement guidelines to assist public sector agencies to take up their new procurement responsibilities. Consequently, in the hiatus between the introduction of the *Financial Management Act 1996* and the progressive appearance since mid 1999 of guidelines dealing with individual aspects of the tender and contract process, government agencies appear to have had to manage in the new decentralised, less regulated environment by juggling the technically obsolete purchasing manual (considered the *de facto* statement of purchasing procedures in the absence of a replacement) with their own interpretations of the new requirements. As the Sherman Report pointed out, in a decentralised and devolved environment, managers and staff of individual business units within government departments are judged on their own performance, and so '[i]t is not surprising in these circumstances that whole-of-government coordination issues receive lesser priority'. [43]

[43] Sherman Report, p.40, paragraph 195.

74. The *ACT Government Purchasing Policy and Principles Guidelines* document was released in July 1999.[44] It lists four policy objectives and six purchasing principles, and alerts agencies to the 'need to be conscious of other purchasing related policies, legislation, and inter-government agreements which support particular Government objectives and affect on the ACT Purchasing Policy framework,'[45] without indicating the source or location of these other elements. While all departments and agencies must comply with the *ACT Government Purchasing Policy and Principles Guidelines*, as Mr Sherman pointed out, it 'is a document which expresses general purchasing principles. The real application of the principles lies in the guidelines and the procedures.' [46]

75. The Committee is aware of the continuing work being done by ACT Contracts and Purchasing (ACT C&P) within the Department of Urban Services to develop and distribute guidelines to assist ACT Government agencies involved in tendering and contracting. ACT C&P are responsible for the majority of the whole of government guidelines which have so far been issued in final, draft ('in preparation'), or exposure form (see Appendix E). The guidelines are publicly available on the 'basis' Internet site.[47] The *ACT Government Purchasing Policy and Principles Guidelines* suggests that the purchasing guidelines are best practice, and indeed, the Department of Urban Services unit responsible for the drafting of the majority of the guidelines gave evidence that the guidelines are prepared in consultation with all of the agencies as a statement of best practice.[48]

76. The submissions and the evidence do not indicate major problems with the guidelines as guidelines, however, there is limited evidence as to the extent to which they are being applied by individual departments and agencies, and some unease is apparent with the status of the guidelines. Evidence was given by Department of Urban Services officers that it was expected that an officer authorising work which diverged from the purchasing guidelines was expected to document an explanation for what amounted to divergence from best practice.[49] However, as the Sherman Report states, 'while the guidelines and procedures have influence over practice in contract policy and administration, they are not binding and there is no assurance that they will be followed in all cases, particularly where the relevant work takes place outside ACT Contracts.' The Committee is aware that as a result of Mr Sherman's

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[44] In September 1994, the then ACT Government had released through the ACT Department of Urban Services, its new *Purchasing policy: a government and industry partnership.*
[45] *ACT Government purchasing policy and principles guideline*, July 1999.
[46] Sherman Report, p.40, paragraph 201.
[47] http://www.basis.act.gov.au
[48] Transcript, p.6
[49] Transcript, p.6.

investigations, chief executive officers of government departments agreed that 'there is a need for consistency throughout the ACT public service on at least core processes and principles to ensure that full effect is given to the Coroner's recommendations'.[50] Identifying the core principles and procedures and then reaching agreement that they will be followed are the two steps which need to be followed.

77. The Committee agrees with Mr Sherman that '[t]here remains… a general problem with compliance with [the] guidelines and procedures'.[51] The Committee believes that the status of the guidelines needs to be strengthened to give greater certainty that agencies will meet the Government's policy requirements and to give full effect to the Coroner's recommendations.

Recommendation 12

78. The Committee recommends that the Government review the status of the ACT Purchasing Guidelines to ensure consistency in their application across the ACT public sector in order to give full effect to the Coroner's recommendations and to assist government departments and agencies to achieve the Government's required purchasing policy outcomes. The Committee further recommends that the function of developing and promulgating whole-of-government guidelines be retained within the Department of Urban Services.

Recommendation 13

79. The Committee recommends that, as the ACT Government's purchasing guidelines aim to be best practice, departments and agencies not following them should be obliged to report major divergences in specified areas such as, but not limited to, the choice of purchase method or risk management strategies, and the reasons for them. An appropriate mechanism for such reports could be via annual reports to the Government and thus to the Assembly.

Decline of procurement expertise in ACT Government agencies

80. The Committee received submissions and evidence which indicated concern about the level of expertise within the ACT Government in contracting, technical and project management matters. The method of project delivery for Territory capital works was also a subject addressed in many submissions and

[50] Sherman Report, p.41, paragraph 204.
[51] Sherman Report, p.40, paragraph 200.

was frequently raised by witnesses at the Committee's hearings. The issues raised related to the general nature of the project management method of procurement for capital works and aspects of the relationship between Totalcare and government departments and agencies.

81. Generally, submissions and witnesses identified the decline in contracting and technical expertise as resulting from two related factors: the devolution of responsibility for capital works from a central area to individual agencies; and the virtually concurrent transfer of a large number of technical staff from the public service to Totalcare, a territory owned corporation. While the Committee feels that the work done by ACT C&P in developing guidelines for best practice has done much to fill the gaps left by the obsolete purchasing manual, in general the Committee believes that there are still gaps between the Government's procurement theory and the procurement practices of ACT Government agencies. The Committee is not necessarily advocating a return to the wholly centralised public works model of the past, however, the Committee is concerned that this devolution and decentralisation has indeed led to a dilution and/or loss of contracting and technical skills in the ACT public sector.

82. The Committee is pleased therefore that the Government is now supporting 'in principle proposals to create an ACT Government Purchasing Board to oversee the development of procurement competencies and the procedures and systems to support them'.[52] However, at this stage, the Committee cannot fully endorse the Government's proposal as set out in the Minister's submission, as the composition of the Board is unknown and its functions have not been fully explained. The Minister's submission suggests that appointments to the proposed board would include external members as well as key representatives of government agencies. The Minister further suggests that one of the board's functions would be to 'advise Chief Executives on major tenders and contracts', and that '[g]overnment procurement strategies would be driven by the board'.

83. There are examples of government procurement boards in other states. For instance, the NSW Government has a State Contracts Control Board (SCCB) which is responsible for the development of consistent procurement, purchasing and contractual policies to be implemented by government agencies'.[53] It also 'conducts a purchasing, supply and disposal function on behalf of public sector agencies by inviting and accepting tenders and

[52] Submission No.30, p.2, paragraph 8.
[53] New South Wales. Department of Public Works and Services. *Code of Practice: NSW Government procurement.* [Sydney, the Department], 1999. p.12.

quotations. This Board comprises senior representatives from major purchasing departments and authorities…and provides a formal structure for user participation in the contracting system'. [54] This arrangement differs from the Victorian Government Purchasing Board, in that the VGPB has members from the private sector.

84. The Committee is not in favour of the proposed board containing externally appointed members, as it believes that board members must not be seen to be in a position where they could potentially compromise or be perceived to compromise the independence and impartiality of decisions relating to the tendering for or awarding of government contracts. This would be especially difficult to avoid in a jurisdiction as small as the ACT where appropriately qualified external members would be likely to be, or to have been involved in tendering for government contracts. However, the ACT is in the happy position of having a number of examples of procurement boards, authorities and departments in other states, centralised to a greater or lesser extent, from which it can pick the best features in its quest to improve government procurement practices. While not fully endorsing the Government's initial proposals, the Committee sees merit in the concept of a procurement board which would provide consistency and a whole-of-government approach to procurement practice and which has the potential to solve some of the problems caused by decentralisation and devolution.

Recommendation 14

85. The Committee supports the Government's proposal to establish a government procurement board to provide whole-of-government consistency in procurement practices, with the proviso that board members should be senior representatives from within the public sector.

86. In the procurement of capital works, the ACT Government uses project directors who act as expert clients on behalf of the Territory, rather than having a public works department. [55] The Works and Commercial Services unit within the Department of Urban Services which employed a number of architects, engineers, and landscape architects etc, was moved into Totalcare Industries, a territory owned corporation (TOC) in 1997. As part of the original transfer, departments and agencies were required to use Totalcare as their agent or project director from 1st January 1997 until 1st July 1998 for capital works

[54] New South Wales. Department of Public Works and Services. *Annual Report: 1998-1999*. [Sydney, the Department], 1999. p.24
[55] Transcript, p.4.

projects. The Department of Urban Services is only now moving away from such an arrangement with Totalcare.[56]

87. The arrangement which tied agencies to Totalcare had the effect of somewhat cushioning the loss of expertise from within government departments and agencies in the short term. However, moving the capital works expertise from the public service to a TOC appears to have been done with little consideration as to how agencies would be able to manage to be informed buyers in the longer term. In effect, chief executive officers of departments and agencies were made responsible for their capital as well as recurrent budgets, but the expertise that was necessary to enable them to carry out their responsibilities for capital works was not also transferred to them. Therefore, the Committee is pleased that in his June 2000 submission, the Minister for Urban Services acknowledged 'that the level of purchasing expertise must be improved so that risk management and contracting procedures are at best practice'.[57]

88. The Committee received a substantial submission from the Australian Institution of Engineers arguing that access to technical expertise is becoming more of a critical issue for governments due to, amongst other reasons, devolution of procurement, and decentralisation of control. The Institution stressed the necessity for governments to have access to enough contracting expertise and subject expertise to be able to act as informed buyers.[58]

89. Other submissions and evidence also criticised ACT Government agencies' lack of expertise in tender and contracting processes.[59] The Master Builders Association of the ACT is concerned that devolution has resulted in a reduction in the technical expertise necessary to properly evaluate tenders.[60] MBA president, Stephen Pinter, gave evidence that '[t]here is a general nationwide move towards recognition that devolution of the public service has in some instances gone too far. Some of the expertise which existed has been reduced to a point where the selection of designers and specifiers is not being done as well as it perhaps should be in order to deliver the best value for government as a client'.[61] Similarly, the past president of the Air Conditioning and Mechanical Contractors Association of the ACT, Mr Ken Purves, told the Committee that '[b]roadly speaking, you will find that the people you are dealing with now in government are of a clerical background and have absolutely no idea of what they are asking you to do…They do not have the

[56] Transcript, 22 May 2000 (p.4 & 11of uncorrected proof).
[57] Submission No.30, p.1, paragraph 4.
[58] Submission No.25.
[59] For instance, Submission No.28.
[60] Submission No.20 and Transcript p.97.
[61] Transcript, p.97.

skills or expertise to know what they are asking in the first place. They can only do it on what they know, which is price. It is the only thing they can read.'[62]

90. Mr Purves commented that 'I would say that it would be more cost effective to put all your skills into one arena than to try to train and employ people with those skills over diverse departments. There are just too many of them.'[63] The MBA advocates the creation of a cell within the Department of Urban Services (DUS), staffed by public service personnel with no commercial interest in building projects which would have carriage of all government building projects.[64] The MBA model would result in the new unit in DUS acting as the project director for departments and agencies requiring building work. The Committee agrees with the thrust of the MBA's argument that there should be a cell in DUS capable of providing project director functions for capital works projects.

91. The Committee has noted that the Government now proposes to combine the existing functions of ACT C&P with the Construction Industry Policy unit (both currently in DUS) into a unit possessing 'expertise in both capital works and other forms of procurement'.[65] The Committee is concerned to ensure that this new unit should be given sufficient resources to provide access to technical advice within government which would allow agencies to act as informed buyers and enjoy more flexibility in the choice of project management method.

92. The Committee notes that in his response to the Committee's Issues Paper, the Minister for Urban Services stated that '[t]he Government would in principle support in the short term the transfer of staff providing Totalcare's project director function to Urban Services'.[66] The Minister's submission indicates that the Government has accepted that the current arrangements are not working, but it leaves many questions unanswered. The submission does not make clear whether all departments and agencies would be required to use DUS as their project director, and if so, for how long. It does not indicate whether Totalcare's viability would be affected by the removal of staff resources on which Totalcare Projects must currently depend, nor what will happen to the staff expertise being transferred back into government 'in the long term'. The Committee does not believe that a time limit can or should be placed on the need to provide agencies with independent expert advice.

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[62] Transcript, p.119.
[63] Transcript, p.120.
[64] Transcript, p.97; Submission No.20, p.3-4.
[65] Submission No.30, p.3, paragraph 10.
[66] Submission No.30, p5, paragraph 22.

93. On the project management method generally, the Institution of Engineers commented on the difficulties some clients had with delegating decision making to their agents.[67] Other witnesses and submissions complained that the 'project management method' was overused and that more projects should use the design and construct or lump sum method. Integrated Construction Management Services, while highlighting the strengths of the project management method, advocated that the Government should 'allow a greater proportion of the delivery of its capital works through direct contracting and Design and Construction, both of which could show significant savings to the Government if handled correctly'.[68]

94. The use of the project management method for small to medium priced projects was seen by ABA Construction Managers Pty Ltd as potentially adding unnecessary levels of management 'with one contractor overseeing another of equal or larger size and experience…Too many levels of management can lead to obscurity in defining roles and responsibilities'.[69] One consequence of this method can be the gap that seems to exist between the government agency paying for the project and the businesses actually carrying out the work. As Mr Mick Polsen, President of the Air Conditioning and Mechanical Contractors Association (AMCA) of the ACT, said in his evidence, '[i]n most instances you are not even sure whether anyone within the government department that is supposedly evaluating your tender has actually seen it'.[70]

95. The Committee believes that when responsibility for contracting for capital works procurement was devolved to agencies some economies of scale were lost. There are efficiencies to be had in having a focal point of procurement expertise within government, especially capital works expertise, and especially where individual agencies are not large enough or adequately resourced enough to have their own expert cells. Establishing a critical mass of technical expertise knowledgeable enough to be able to take advantage of the opportunities offered by a more flexible procurement regime is one such efficiency.

Recommendation 15

96. The Committee recommends that the ACT Government re-establish sufficient technical expertise within the Department of Urban Services to

[67] Transcript, p.92.
[68] Submission No.2, p.4.
[69] Submission No.16, p.2.
[70] Transcript, p.117

enable it to assist agencies to act as informed buyers and to provide a project director function. The Committee further recommends that any future decision to transfer contracting and/or technical expertise from DUS should be preceded by a public service wide audit of contracting and technical skills to ensure that such skills are retained in sufficient quantity and concentration to be an effective whole-of-government resource.

The role of Totalcare and competitive neutrality

97. The Committee received submissions and evidence indicating some confusion and concern regarding the status of Totalcare as both project director for, or agent of, the Territory and as a contractor. Between 1 January 1997 and 1 July 1998 Totalcare, a territory owned corporation (TOC), had an arrangement with the ACT Government which tied government agencies to Totalcare who acted as the Territory's Project Director.[71] While this is no longer the case on a government wide basis, it was evident to the Committee that companies are confused by the continued close relationship between Totalcare and government agencies, especially DUS which had renewed its agreement to use Totalcare for a further 18 months, and which still has tied arrangements with Totalcare.[72] Indeed, some firms continue to believe that government agencies have mandatory ties to Totalcare.[73] Mr John Short, Chief Estimator of ABA Construction Managers told the Committee that '[t]he construction industry would welcome clarification on the relationship between Totalcare and the ACT Government and what obligations, if any, are imposed upon Totalcare when tendering for ACT Government jobs.'[74]

98. While it is possible to argue that it is up to companies who want to do business with government agencies to keep up to date with the changes brought about by devolution, it is equally valid to argue that this confusion in the marketplace is a symptom of the need for further openness in government purchasing and better communication of changes in government practices. It might be, as was suggested to the Committee, that those companies which are regularly awarded contracts are aware of changes in the contractual relationships between government entities, but such misunderstandings and lack of knowledge in the wider business community are hardly conducive to getting the best from the private sector, and they are a very poor basis for a government-industry partnership.

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[71] Transcript, 18 May 2000 (p.14 of uncorrected proof)
[72] Submission No.31, p.4.
[73] For instance; Submission No.1, Transcript 18 May 2000 (p.2 of uncorrected proof), and Submission No.2.
[74] Transcript, p.127.

99. The role of Totalcare was also at the centre of private sector concern regarding the related issue of competitive neutrality. The Committee received submissions and evidence pointing to the perception of a possible conflict of interest in situations where Totalcare acted as project director while elements of Totalcare were bidding against private firms for contracts within the same project.[75] Mr John Short Chief Estimator of ABA Construction Managers told the Committee that '[w]hen tendering for the Mugga Lane dog pound extensions, Totalcare appeared to have a role in conjunction with the ACT Government yet were submitting a tender for the work in their own right. Had their tender been successful, this would have raised serious conflict of interest questions.'[76] Similarly, Mr Stephen Pinter in his role as a member of the Association of Consulting Engineers, pointed to 'a conflict of interest,…to some extent between their [Totalcare's] private interest and government interest'. Mr Pinter was aware that in the landscape area, Totalcare 'are doing the work, the landscape consultancy themselves. At the same time they let the work out'.[77]

100. Governments at all levels which have engaged in competitive tendering and contracting have faced complaints of unfairness or conflict of interest from the private sector when in-house-bids have been successful. In this respect Totalcare is in a somewhat different position. While it is owned by the Government, it is not a government department and it is in competition with the private sector. The MBA gave evidence that its members were concerned that the transfer from DUS to Totalcare of staff involved in the selection of companies for government work, has resulted in Totalcare exercising a purchaser function (rather than a provider function). The MBA argues that this purchaser function should more properly be located within DUS, ie within government.[78] The suggestion that the purchaser role be wholly within government from the point of view of re-establishing technical expertise within government was discussed above. But whether or not the Government re-establishes an expert cell within a government department such as DUS to assist agencies to be informed buyers, the Committee is concerned that the mixing of the purchaser and provider roles within Totalcare may have had a detrimental impact on government contracting. As Mr Stephen Pinter, in his role as president of the MBA of the ACT, expressed it, although MBA members could compete for work in what is essentially the provider role, 'we do not see how that work could be done and be seen to be done completely impartially if it is not within government'.[79]

[75] Transcript, pp. 36-37, 98, 129.
[76] Transcript, p.127.
[77] Transcript, p.184.
[78] Transcript, p.98.
[79] Transcript, p.98.

101. The Committee acknowledges that it is difficult to ensure the required separation between the purchaser and provider roles so necessary for probity and virtually impossible to guarantee a perception of probity when business units that are part of the Territory's project director are also bidding for contracts within the same project. This situation is complicated by the size of the market in the ACT. The MBA is not in favour of the purchaser function being undertaken outside government in the ACT. Mr Stephen Pinter, gave evidence that, while private project directors presumably can perform their function without conflict of interest in larger states because of the size of the market, the MBA does not think that 'in the long term it would serve the public interest, and it would probably lead to fragmentation of the industry and conflicts which would be difficult to resolve'.[80]

102. As detailed above, the Committee notes that the Government intends to transfer staff providing Totalcare's project director function to the Department of Urban Services (DUS), in the short term. This should go someway to alleviating industry concerns that the role of Totalcare as both a purchaser and a provider represents a conflict of interest. In the long term, the minister's submission suggests that agencies would be able to engage DUS or private sector directors in the project director role. While not wanting to completely rule out use of project directors from the private sector, the Committee feels that companies or corporations which act as agents for the Territory in the role of project director should be precluded from bidding for contracts at least within that project. Any exemption to this rule would be in exceptional circumstances only and would have to be approved by the relevant minister requiring independent probity advisers and auditors to be engaged.

Recommendation 16

103. The Committee recommends that companies and corporations taking the role of project director for, or agent of, a government department or agency should be precluded from bidding for any other contracts within that project.

Procurement accreditation and training

104. The Committee received submissions claiming that poorly prepared and inadequate project documentation was resulting in poor end products, eg products which do not meet statutory requirements, and services which require

[80] Transcript, p.98.

renovation within an unacceptably short time.[81] Mr David Dawes, executive director of the Master Builders Association of the ACT, told the Committee that '[t]he association believes that there is much the public sector can do to improve the initial design specifications on government projects.'[82] Mr John Short, chief estimator of ABA Construction Managers, gave evidence that '[d]ocumentation is frequently of poor standard, with many inconsistencies between documents. Architectural or structural detail that cannot be constructed or which is either inadequate or overdesigned for its intended purpose, specifications that do not comply with Australian standards and clients who do not use the Australian standards code of tendering are often encountered'.[83]

105. In his submission, the ACT Ombudsman suggested that consideration be given to the development of standard contracts and/or clauses which stipulate specific functions, desirable standards and accountability requirements.[84] The Ombudsman made the point that most complaints that he has received about procurement and contracting activities have arisen in areas where agencies have conducted almost all of the process themselves. The Committee sees this as another indication of the need to strengthen the whole-of-government approach to procurement. The Ombudsman suggests that consideration 'be given to setting a threshold dollar value of procurement/contract processes above which cases must be referred to ACT Contracts for advice or oversight prior to finalisation'.[85]

106. In his report, Mr Sherman pointed out that ACT C&P have introduced procedures to be followed prior to the issue of Letters of Acceptance. However, while Mr Sherman believed that the Coroner's concerns had been addressed by these new procedures, he pointed out that '[t]he challenge for public administration is to ensure that these procedures are observed.'[86] This observation is a theme of Mr Sherman's report. He refers to it in his discussion of vetting procedures (Recommendation No.17) and as previously discussed, in his section on consistent contract principles and procedures.[87]

107. As an example of the challenge of ensuring procedures are observed, the Committee heard evidence from Mr George Wason, secretary of the CFMEU, in relation to schools managing tenders, that the CFMEU's 'experience in

[81] Submission No.17, p.2.
[82] Transcript, p.97.
[83] Transcript, p.125.
[84] Submission No.21, p.6.
[85] Submission No.21, p.6.
[86] Sherman Report, p.16.
[87] Sherman Report, p.28, paragraph 129, & p.40, paragraph 201.

relation to tenders has been that there appears to be no control in relation to how tenders are conducted. There is no locked tender box'.[88] This is despite the requirement of the School Management Manual that 'When calling for tenders all Schools are required to provide a lockable Tender Box accessible during school hours for the lodgment of tenders'.[89] In its submission in late June 2000, the Department of Urban Services responded to the CFMEU's claims detailing the steps which had been taken in implementing the devolution to school based management. The Department of Urban Services states that no evidence has been provided of 'any instances where inappropriate activities or actions have occurred in relation to tendering processes in schools nor has the Department of Education and Community Services received any formal complaints regarding tender processes in schools'.[90] The CFMEU raised a number of concerns regarding the tendering and contracting process and aspects of specific tenders.[91] Although the Department of Urban Services responded to many of the points raised in its submission, the Committee feels that some points might need further investigation.

108. The Committee heard evidence from the Department of Urban Services (DUS) describing the Victorian Government Purchasing Board's procurement certification system which requires government departments and agencies to demonstrate the ability to meet certain standards of procurement skill before being able to undertake procurement at different levels of complexity above $100,000. DUS pointed out that introduction of a system such as Victoria's, where lack of agency accreditation means that the final package has to go to the purchasing board to be signed off, could involve adding extra layers to the procurement process and consequent delays. However, the Committee feels that any extra process and delay could be minimised in a small jurisdiction such as the ACT (in fact the size of the ACT should be an advantage in this regard), although with the aforementioned proviso that a government procurement board should be composed of public sector representatives. The Committee also agrees with the recommendation of the Australian Institution of Engineers that 'accredited procurement training should be mandatory for government purchasing officers, particularly for complex engineering purchases of high value'.[92]

109. The Committee believes that the introduction of procurement certification for government agencies would greatly increase both private sector and public

[88] Transcript, p.168.
[89] Australian Capital Territory. Department of Education and Training. *School Management Manual*. Vol.1, FM-22
[90] Submission No.31, p.2
[91] Submission No.27.
[92] Submission No.25, p.10, Recommendation No.8.

confidence in the current devolved environment, as well as ensuring the degree of necessary consistency suggested by the Sherman Report. Currently, ACT C&P identifies government departments and agencies which are experiencing problems with the procurement process and offers them training and advice in such circumstances. [93] The Committee is aware that ACT C&P offers a number of courses to assist staff in government agencies engaged in procurement tasks, and that in 1999, ACT C&P purchased a licence to deliver training in procurement competencies to nationally recognised accreditation levels.[94] Courses are advertised both on 'basis' and through the 'whole-of-government' email system for ACT Government staff with access to email facilities.

110. The Committee believes that in an increasing devolved environment, this initiative needs to be taken further. While the Committee is aware that it is currently not mandatory for ACT Government departments and agencies to use the services of ACT C&P, the Committee feels that ACT C&P is currently in the best position to provide training and advice to government agencies. The Committee believes that ACT C&P should market its training and advice function more proactively by targeting government agencies more systematically. The Committee feels that where departments and agencies use sources for training other than ACT C&P, such training should be accredited by ACT C&P to ensure consistency across the ACT and with national standards.

111. The Committee is pleased therefore that the Government has recognised that 'there is a need to promote procurement expertise across departments'. In his submission in response to the Issues Paper, the Minister for Urban Services gave notice that '[t]he Government will proceed with the establishment of a system of accreditation of procurement competencies and facilitate the creation of an accredited purchasing unit in each agency that requires one'.[95]

Recommendation 17

112. The Committee recommends that the ACT Government introduce an accreditation/certification system which requires all government departments and agencies to demonstrate their ability to meet certain standards of procurement skill before being able to undertake procurement tasks valued at $50,000 or more or valued at less than $50,000 where public tenders are called. Where certification has not been

[93] Transcript, p.3.
[94] The curriculum has been developed by the Procurement and Contracting Centre for Education and Research (PACCER) and is used by the Victorian Government Purchasing Board (VGPB).
[95] Submission No.30, p.2, paragraph 9.

gained, tender and contract documentation should be referred to the Department of Urban Services for advice or oversight prior to finalisation. The Committee recommends that the development, implementation and management of this accreditation scheme should be a function of the ACT Contracts and Purchasing Unit, or its successor, within the Department of Urban Services.

113. The Committee feels that the provision of training for procurement tasks valued at under $50,000 and undertaken by purchasing methods other than public tender is also very important, given that the methods of procurement in these circumstances are often less open to public scrutiny. Where public money is involved, competency in the procurement process is just as vital for the fairness and probity of contracts valued at less that $50,000 as it is for contracts above that amount. The Government should also be looking for a consistency in procurement and procurement training at this level.

114. Having received submissions and evidence indicating that there is confusion about and a lack of understanding of the Government's procurement processes in the private sector, the Committee is of the opinion that the Government could extend its formal training program to include courses or information sessions as appropriate for private sector groups on the most relevant aspects of procurement processes. This could be done through the various peak organisations in much the same way as the ad hoc information sessions that ACT C&P conducted for cleaning companies.[96]

Recommendation 18

115. The Committee recommends that, as well as accrediting agencies and staff for procurement tasks above the threshold of $50,000, the Government should more systematically market procurement training to government departments and agencies for procurement tasks valued at under $50,000, and that information and training seminars should also be offered to the private sector. The Committee further recommends that all such training should be subject to certification by ACT Contracts and Purchasing, or its successor, to ensure a consistent outcome.

Select tendering versus open source

116. The Committee took submissions and heard evidence from individuals and companies who complained about the lack of openness or consistency in the choice by ACT Government agencies of purchase methods for particular

[96] Transcript, p.9.

projects.[97] As discussed above, the Committee considers that the starting point for fairness in contracting is open or public tender, however, the Committee accepts that there are other purchasing methods which are legitimate in some situations. Examples of such circumstances are listed in the *Preparation of Requests for Offers* guideline which describes select tendering as the process by which agencies seek quotations from pre-qualified suppliers, a limited field of suppliers, or a single supplier. [98]

117. The differences between the final version of this guideline and the 'in preparation' version, less than six months older, would appear to suggest that the Government has recognised that more specific requirements are necessary in guidelines to ensure agencies meet the Government's policy requirements. The final version requires that an officer approving the invitation to Select Tender must sight and approve written justification for the proposed action. Chief Executives have to report quarterly on the use of select tender methods where the contract value exceeds $50,000, although it is not clear how they report or to whom, and despite a statement in a previous section of the guideline that ACT Purchasing Policy *requires* public tenders for contracts valued at $50,000 and above. Approval of the Chief Executive and certification of the reasons are mandatory for Single Select Tender for procurements valued at $50,000 or over.

118. The Committee heard examples of tender processes for which there was no apparent reason for select tendering to have been chosen over public tendering as the method of procurement[99]. If departments or agencies follow the example set in ACT C&P's Tender Evaluation Plan, reasons for the choice of procurement method should be apparent. The reasons might very well be justifiable and recorded as suggested by the *Guideline*, but without access to these records, it is not unreasonable for companies and the general public to question the process and even the probity of the process. This is especially so when the announcement of the name of the successful tenderer,[100] or the sighting of the successful tenderer undertaking the work, is the first other companies, who consider themselves to be equally well qualified to tender, are aware of the matter.

119. The Committee agrees that government agencies should be allowed some flexibility to provide the best service to taxpayers. The Committee is also aware that the form of select tendering which consists of a public request for

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[97] For instance, Submission No.16, p.2.
[98] Australian Capital Territory. Department of Urban Services. ACT Contracts and Purchasing. *Guideline for the preparation of Requests for Offers.* May 2000
[99] For instance Submission No.18, section 2.0.
[100] Transcript, p.126.

expressions of interest followed by a short listing process including an evaluation is seen to be more efficient in many instances than open tender, and more cost effective for companies, in that it saves a potentially large field of tenderers from having to develop a fully-fledged proposal. However the Committee is concerned that the choice of purchase method must be *seen* to be justified. For this reason, while accepting that tendering is an expensive and time consuming process for companies, the Committee cannot agree with the suggestions of the Masters Builders Association of the ACT that the number of tenderers invited to express interest in projects should be arbitrarily limited to no more than 3 for Design and Construct contracts or no more than 4 for contracts managed under the Project Management system.[101]

Recommendation 19

120. The Committee recommends that the choice of purchase method (if other than by public tender) for government contracts valued at $20,000 or over should be placed on the 'basis' Internet site with the justifications for such choice listed. This notification should be made after the purchase method is approved, but before tenders are called, to allow interested parties to notify the relevant Minister of any concerns they have with the choice of method. Such notifications and the Minister's response should be tabled in the Assembly within a specified period and be part of the public record. The Committee further recommends that the text of these and other tenders should be made available on the 'basis' Internet site.

Re-issuing of tenders

121. The Master Builders Association of the ACT, amongst others, raised the issue of the number of projects which have been re-tendered, sometimes more than once and of the consequent costs to industry.[102] In some instances the necessity to re-tender can be traced back to poor initial design briefs and inadequate funding at the estimating stage. MBA president Stephen Pinter gave evidence that one reason for the need to re-tender 'is that projects are inadequately funded at the beginning, at the estimating stage'.[103] 'I think it is the responsibility of the Government as the client; if they are going to call for tenders, to have the money to actually carry out the work that is required'.[104] Mr Michael Raffety, Managing Director of Integrated Construction and Management Services, told the Committee that in relation to the re-tendering for the construction of the Koomarri pool, 'I think it was clearly the

[101] Submission No.20, p.3.
[102] Transcript, p.109, Submission No.16, p.3-4.
[103] Transcript, p.109.
[104] Transcript, p.110.

Government seeking an opportunity to obtain an even cheaper price than they received the first time, which they were disappointed with, obviously'.[105]

122. Besides the cost to industry of having to prepare new tenders or amend previously submitted tenders, re-tendering can also introduce substantial unfairness into the process. The MBA suggested that instances of re-tendering have allowed unsuccessful tenderers to rejig their tender or change their prices. Mr John Short, Chief Estimator of ABA Construction Managers, pointed out that 'in a community as close as Canberra's, everybody knows everybody's price by the second round'.[106] The Committee also heard evidence from the Institution of Engineers and others of agencies using the intellectual property contained in original tenders to re-evaluate their requirements and re-tender the project, and then choosing another company in the second tender round.[107]

123. The Committee accepts that the re-issuing of tenders is necessary and sometimes vital to satisfy probity requirements. In such cases, agencies should refer the matter to the proposed Office of the Probity Adviser (see below). However, the Committee suggests that the re-issuing of tenders also indicates the possibility that agency staff might need further training or that tender procedures might require review. The Committee sees a role for the procurement accreditation authority in assisting agencies in these circumstances.

Recommendation 20

124. The Committee recommends that the re-issuing of a tender should be undertaken only after consultation with the Office of the Probity Adviser. Re-issuing of tenders should also prompt a review of an agency's staff training needs and procedures, undertaken with assistance of the procurement accreditation authority.

Pre-qualification

125. One issue of great concern to many individuals and organisations giving evidence to the inquiry is the pre-qualification system which is used as a risk management tool for construction projects. A variety of organisations from private companies to the CFMEU criticised the current system and its application. Mr John Ainsworth, the general manager of ABA Construction Managers said 'I….believe the department [DUS] applies rules inconsistently

[105] Transcript, p.137.
[106] Transcript, p.133.
[107] Transcript, p.88.

in regard to pre-qualification'.[108] Mr George Wason, the secretary of the CFMEU stated that 'We would suggest here that the pre-qualification criteria seems to be used when people feel like it. It should be a mandatory policy that must be applied, not an optional extra.'[109]

126. Pre-qualification of agents (project directors / superintendents, design and construct contractors, project managers, consultants and sub-consultants) is assessed using criteria recommended by the Construction Industry Development Agency (CIDA). The Department of Urban Services maintains a register of agents and pre-qualifies those suitably registered. Pre-qualification is seen by the Government as a risk management process that allows it to have a list of prime contractors and consultants who the Government is confident can manage jobs on behalf of the Territory in terms of quality, timeliness and financial soundness.[110] Additionally, in the final version of the *Guideline for the preparation of Requests for Offers*, pre-qualification for capital works is characterised as the initial stage of a two stage tender process which the guideline claims satisfies the requirement for effective competition as pre-qualification is inherently competitive. Chief Executives are required to report quarterly on the reasons that suppliers without pre-qualification have been used, and to certify that an equivalent risk management process has been applied to the selection of tenderers.[111]

127. Evidence from the MBA and others indicated a belief that the practice of awarding contracts which required pre-qualification to non pre-qualified firms was widespread.[112]The Committee received evidence from the Air Conditioning and Mechanical Contractors Association of ACT (AMCA) which argued that the pre-qualification system was being subverted. Government contracts are awarded to non pre-qualified contractors, despite the tender requiring pre-qualification. AMCA president, Mr Mick Polsen, gave evidence that 'the only time contractors become really irate is when they have complied with all the tender requirements, they have got pre-qualification, they have complied with their OH&S and QA, they have got their technical expertise in place and the contract is awarded to a non-pre-qualified contractor, which basically means to them that they have wasted their time doing a tender and the cost involved in doing the tender is out the door.'[113]

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[108] Transcript, p.124.
[109] Transcript, p.169.
[110] Transcript, 22 May 2000 (p.13 of uncorrected proof)
[111] Australian Capital Territory. Department of Urban Services. ACT Contracts and Purchasing. *Guideline for the Preparation of Requests for Offers*. May 2000
[112] Submission No.20, p.2.
[113] Transcript, p.114.

128. The practice of splitting a large contract into a number of smaller projects which allows a contractor otherwise not pre-qualified to do the work subverts the pre-qualification requirements. According to the AMCA, the current pre-qualification system is also forcing the industry into a 'sub-contracting mentality'.[114] Mr Polsen spoke of 'post office box contracting' where members of his organisation do not employ anyone, but subcontract everything. The flow on effect of this, according to Mr Polsen, is that 'no-one is training apprentices anymore.'[115] It is unclear to the Committee whether splitting of large contracts into smaller units might be done to circumvent the requirement for public tender for contracts over $50,000.

129. Pre-qualification measures intended to control financial failure are claimed to favour large national companies and be punitive to smaller mid-range contractors.[116] Mr David Dawes, executive director of the MBA of the ACT gave evidence that 'we are seeing companies now having to change the structure of their companies to meet the paid up capital requirement'.[117]The MBA and others commented that pre-qualified contractors did not enjoy a level playing field if work was given to non-pre-qualified tenderers who did not have the burden of the cost of pre-qualification built into their tender. The MBA suggested a 2% margin could be paid to pre-qualified contractors on the completion of the contract to offset this.[118]

130. The apparent disregard of the pre-qualification requirement has been particularly galling for those companies which complained to the Committee that they had not been successful in being invited into select tender processes, despite the money and effort they had spent in getting and maintaining pre-qualification over a number of years.[119]

131. The Committee is not convinced that the inclusion of pre-qualification for capital works in the *Guideline for the Preparation of Requests for Offers* will satisfy any of the concerns expressed by disappointed pre-qualified companies. In addition, the Committee is concerned that the use of pre-qualification as a stage in the tender process should not be seen as replacing the need to ensure open and effective competition through the calling for public tenders or advertising for expressions of interest.

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[114] Submission No.13, p.2; Transcript, p.112-113.
[115] Transcript, p.117-118.
[116] Submission No.2, p.4.
[117] Transcript, p.103.
[118] Submission No.20, p.2.
[119] For instance: Submission No.16, Transcript, p.126 & Transcript 18 May 2000 (p.2 of uncorrected proof).

Recommendation 21

132. The Committee recommends that the pre-qualification system be reviewed to ensure that it is not having adverse and unintended effects on businesses.

Recommendation 22

133. The Committee recommends that Chief Executives of government departments and agencies fulfil the Government's reporting and certifying requirements with respect to pre-qualification, as stated in *The Guideline for the Preparation of Request for Offers* document, by publishing those details on the 'basis' Internet site.

Briefing

134. One of the major issues to emerge during the Committee's inquiries was the perceived lack of feedback to companies wanting to tender for government work, but feeling locked out of the tender system.[120] The Committee is aware that the Department of Urban Services has prepared an exposure draft guideline to assist agencies to debrief disappointed tenderers.[121] However, this guideline covers only the debriefing of companies which have made unsuccessful bids or companies which are not short listed after submitting expressions of interest in a two stage purchasing process. It does not cover briefing those companies who are registered and/or pre-qualified but do not receive an invitation to express interest or tender.

135. As discussed above, there has been a lack of information in the public arena about a number of projects decided by select tender. The Committee believes that the ACT Purchasing Policy's aim of achieving an environment of open and effective competition would be advanced by the introduction of a means of briefing potential tenderers who have been disappointed to find that they have not been invited to express interest or tender in a select tendering process. This requirement would not be met by the Committee's previous recommendation that choice of purchasing method be publicly notified, but would compliment that process.

[120] For instance: Submission No.18, Transcript, p.155-156; Submission No.1.
[121] ACT Government. *Guideline for debriefing unsuccessful tenderers*. Exposure Draft, 19 August 1999.

Recommendation 23

136. The Committee recommends that the ACT Government Purchasing Policy require the briefing, on their request, of registered or pre-qualified potential tenderers who have not been invited to express interest or tender for projects decided by select tendering methods.

Office of Probity Adviser

137. The ACT Department of Treasury and Infrastructure (DTI) gave evidence to the Committee in December 1999 regarding the role that the Government envisaged for the office of Probity Adviser.[122] At that time the position had been advertised but not filled, a situation which has continued for over six months. DTI envisaged that the probity adviser would be involved in ensuring sufficient probity exists in the overall framework of the tendering and contracting process and also in advising on probity requirements at the beginning of individual contracts and projects where necessary. The Committee was advised that probity auditors, on the other hand, are used to ensure compliance during a contract or project.

138. The Committee commends the Government's decision to establish the Office of Probity Adviser, but is concerned that the establishment and staffing of the position may not have been given a high enough priority to ensure that it is filled within a reasonable period. The Committee is of the opinion that the position should be filled as soon as possible, and that clear guidelines should be issued quickly to enable agencies to make the most appropriate use of the Office of Probity Adviser.

Recommendation 24

139. The Committee recommends that the Office of Probity Adviser be filled without delay and that guidelines on the role of the Probity Adviser should be issued as quickly as possible.

[122] Transcript, p.23.

Chapter 4 - Value for Money

Introduction

140. Value for money is one of the six ACT Government purchasing principles. The *ACT Government Purchasing Policy and Principles Guidelines* describes value for money being achieved when all costs and potential benefits associated with the purchase and use of a product or service are considered. Value for money is both the basis for comparing alternative procurement solutions and an outcome itself. That is, agencies should apply the value for money principle in comparing alternative solutions and, when the procurement process has been completed, be able to assess an outcome as representing value for money for the taxpayer.

141. Value for money is not necessarily represented by the lowest priced tender, but cost is a very important consideration when public money is to be spent. The key is the definition of what constitutes value for money for each project. The Committee agrees with the MBA that the elements which constitute the client's perception of value for money for individual projects should be incorporated in the initial brief.[123] Currently there is no guarantee that they will be included in the initial brief for ACT Government projects.

142. The Committee commends ACT C&P's work in promoting and encouraging the use of formal tender evaluation plans, the preparation of which should assist agencies to focus on tender evaluation criteria and the value for money objective. However, ensuring that value for money is achieved is one of the most difficult tasks in the tender process and the evidence received by the Committee does not indicate that government agencies are meeting the requirements of the value for money principle, nor that agencies have any method of assessing whether, in the final analysis, the value for money objective was achieved.

Lowest price

143. The Department of Urban Services gave evidence that for the financial years 1994-95, 1995-96 and 1996-97, 66% of construction contracts went to the lowest price tender.[124] There is nothing wrong with government getting the goods and services it needs at the lowest price it can. However, the Committee is concerned that submissions and evidence from a number of companies and organisations indicated a widespread belief in the private sector that the lowest

[123] Submission No.20, p.2.
[124] Transcript, p.17.

price tender was often judged to represent value for money because government agency staff involved in the tender process lack the subject or technical expertise to be effective informed buyers.[125] It is interesting to note that similar complaints about value for money being interpreted as lowest purchase price were also submitted by private sector groups to a recent Commonwealth parliamentary inquiry.[126]

144. The Committee heard evidence that the use of project management companies could have an effect on the value for money outcome of projects. Mr Kevin Hart, the Managing Director of Control and Electric, and Mr Ken Purves, in his role as Director of Stellar Engineering, gave evidence to the Committee that project management companies which did not employ anyone, but subcontracted all work, were able to tender lower prices than companies which employed staff to carry out work. However, this could have an effect on the quality of the completed job because project management companies, which had shed resources and expertise to be competitive were no longer able to effectively ensure that the work was done correctly.[127]

145. The Committee is aware that government agencies in other jurisdictions use the so-called 'two envelope' tendering concept. Two envelope tendering can be used to ensure that price does not outweigh other criteria, especially in the initial assessment. Tenders are assessed on their technical, business and other merits, with the price being quoted by the tenderer remaining unknown to the evaluation team until tenders have been ranked against the other criteria. Once this ranking is done, the evaluation team is exposed to the prices quoted by all the tenderers. The team then reassesses its conclusion based on the knowledge of the pricing structure.[128] The Committee feels that this method provides a suitable method of ensuring that price does not dominate the tender evaluation process, especially for larger and more complex projects.

Recommendation 25

146. The Committee recommends that a 'two envelope' tendering concept be developed and implemented as the most suitable method of ensuring that price does not outweigh other factors in the tender process.

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[125] For instance: Transcript, pp.97, 119.
[126] Joint Committee of Public Accounts and Audit. Report 369: *Australian government procurement*. Canberra, the Committee, June 1999. p.42.
[127] Transcript, p.199-201.
[128] Transcript p.187.

Value for money and devolution

147. The CFMEU raised concerns regarding of the devolution of responsibility for school maintenance which have value for money implications. Under School Based Management, introduced into ACT Government schools in January 1997, responsibility for funding and decision making for a number of operational activities (cleaning, minor maintenance etc) devolved to schools. The CFMEU expressed concern that the combined effect of the untying of Education Department clients from Totalcare as service provider and the introduction of School Based Management had resulted in maintenance of plant and equipment in schools now being done on what Mr George Wason, secretary of the CFMEU, described as 'a reactionary type basis', with unskilled and unqualified people being allowed to do the work in one situation, rather than the planned maintenance undertaken previously.[129] Ms Sarah Schoonwater, president of the CFMEU, stated that 'schools simply do not have the funding, nor the ability to come up with fund raising to pay for the maintenance that is required'.[130] The CFMEU warned the Committee that this could lead to depreciation of publicly owned assets as well as having health and safety and public liability implications.[131]

148. The Department of Education and Community Services introduced scheduled mandatory maintenance plans for all government schools from 1998 (School Based Management was introduced in January 1997) and the submission from the Department of Urban Services claims that there is no evidence to suggest that mandatory maintenance of equipment in schools is receiving attention from unqualified and or unskilled persons.[132] However, the Committee is aware that the Department is about to undertake its first comprehensive central assessment of the condition of school facilities, and suggests that this is an ideal opportunity for the Department to assess whether the level of maintenance has declined since the introduction of School Based Management and whether the level and quality of maintenance being undertaken represents value for money.

149. Feedback being received as part of the current review of School Based Management being undertaken by the Department of Education and Community Services indicates that 'schools have experienced an improved level of service and value for money since they have had direct contact with

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[129] Transcript, p.168-9.
[130] Transcript, p.174.
[131] Transcript, p.169, 173.
[132] Submission No.31, p.2. This begs the question as to whether non-mandatory maintenance is indeed being carried out by 'mums and dads' as the CFMEU claims (Transcript, p.169).

contractors'.[133] However, no objective method of assessment of value for money has been employed, and the Committee remains concerned that devolution of decision making for these operational expenditures (minor maintenance, communications, cleaning, utilities) amounting to approximately $26m annually needs to be objectively evaluated to ensure that the new practices do actually represent value for money. This evaluation should be undertaken in the broader context of inquiring whether diverting the attention, resources and energies of education professionals away from their core business of educating the Territory's children actually represents value for money for the education budget.

Recommendation 26

150. The Committee recommends that a methodology to assess value for money be developed and used in the review being undertaken by the Department of Education and Community Services into School Based Management and in the condition assessment of school facilities also being undertaken by the Department. Such a methodology should include an assessment of the impact of the recent devolution of responsibilities to schools on value for money in the broader education budget.

Value for money methodologies

151. The Institution of Engineers expressed concern at the paucity of information on value for money that would be useful to members of tender evaluation teams. It commented that what guidance that did exist was conceptual in nature rather than providing examples and methodologies for assessing the merits of tenders on a value for money basis.[134] The Institution suggests four methodologies which would encourage the prime selection to be value for money, rather than up-front cost.

> **Value Management** (a framework from within which 'value' from projects can be identified). It provides a flexible process to contract delivery that allows and encourages contract changes which will improve the contract's value for money to be made easily and as early as possible. The NSW Government requires at least one Value Management Study to be undertaken before budget approval is given for capital works or maintenance projects costing $5 million or more.

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[133] Submission No.31, p.2.

[134] Submission No.25, p.12. The Committee does note, however, that since its inquiry began, ACT C&P has issued a *Guideline for Evaluation of Offers* (September 1999, 'In preparation') which includes at Attachment A an example of an evaluation methodology for calculating marginal utility versus marginal cost.

Pre-qualification schemes. The Institution suggests the scheme run by the Tasmanian Department of Treasury and Finance, Government Building Services Branch as an example. The ACT Government runs its own pre-qualification scheme, discussed above.

Registration schemes for contractors and contracting companies. The Institution refers to independent competency-based registers such as its own National Professional Engineers Register, and the Queensland Professional Engineers Act 1988 which prohibits non-registered persons or organisations from offering professional engineering services.

Qualification Based Selection (QBS) (under which potential contractors are selected on the basis of qualifications, demonstrated competence and capabilities). Negotiations with the most highly qualified finalise detailed service specifications, contractual terms and contract price.[135]

152. A number of witnesses and submissions put forward QBS as an alternative method of ensuring value for money when selecting professional consultants. The Association of Consulting Engineers Australia (ACEA) argued that QBS gives the client best value in important projects because if its guidelines are followed, the best professional consultant will be chosen within the client's budget. The Department of Urban Services, gave evidence that QBS was more suitable for major and unusual projects rather than routine projects and could result in higher costs.[136] The Committee feels that the use of the QBS system could be investigated for such projects.

153. The Committee agrees with Mr Rolfe Hartley, the immediate past president of the Canberra Division of the Institution of Engineers, Australia, who gave evidence that 'for the Government to get maximum value from its contracts, it needs to be an informed buyer,'[137] in other words, value for money cannot be achieved if government agencies lack the subject and technical expertise to be able to make an informed judgement. While the Committee acknowledges that judging value for money is difficult, it is concerned that the Government has not necessarily provided enough resources, practical assistance or guidance to enable the value for money principle to be consistently applied in government tender processes, especially in a devolved environment. The Committee also believes that more work needs to be done to develop methodologies for

[135] Submission No.25, pp.12-14.
[136] Transcript, 22 May 2000 (p.14 of uncorrected proof)
[137] Transcript, p. 82.

measuring value for money outcomes both at the project level and more broadly across portfolios.

Recommendation 27

154. The Committee recommends that the ACT Government review the resources, including staff, practical assistance and guidance, provided to agencies to ensure that value for money is able to be achieved in government contracting, and that its achievement is able to be assessed.

Chapter 5 – Conclusion

Theory versus Practice; Efficiency versus Accountability and Fairness

155. Two major themes of the inquiry were the gap that the Committee perceived between the theory and the practice of government contracting and procurement in the ACT, and the apparent threat to the publicly espoused values of accountability and fairness posed by devolution and decentralisation of responsibility for government procurement.

156. While the progressive release of guidelines to assist agencies to achieve the Government's required procurement outcomes has been useful in providing a framework for procurement activities, the Committee considers that the guidelines lack the status and strength necessary to ensure that efficiencies are not achieved at the expense of public accountability and procedural fairness. A trade-off between the principles of accountability and fairness and improvements in efficiency in government contracting and procurement processes should not be viewed as inevitable. As the Governor General, Sir William Deane stated: 'Incorruptibility, accountability and fairness … are…basic values underlying public administration. They are in no way inconsistent with the process of desirable change or the search for greater efficiency.'[138] These basic values are essential in a functioning democracy.

157. The Committee is pleased to note that the Government has recognised, in the Department of Urban Services' response to the Committee's Issues Paper, the need to provide agencies with greater assistance in procurement processes. However, the Committee remains concerned that the efficiencies and savings promised by greater reliance on the private sector will break the chain of ministerial and public service accountability, undermine fairness, and prevent the achievement of true value for money outcomes, unless the Government takes steps to reinforce these basic principles of public administration in the procedures it requires the public sector to follow and be seen to follow.

Jon Stanhope MLA
Chair
26 July 2000

[138] Deane, William. Address to the National Conference of the Australian Institute of Public Administration. November 1996.

Appendix A - Glossary of terms

ACT C&P	ACT Contracts and Purchasing, a unit of the ACT Department of Urban Services
'basis'	the Territory's electronic (b)uyers' (a)nd (s)ellers' (i)nformation (s)ervice on the Internet at http://www.basis.act.gov.au/
BOPL	Bruce Operations Ltd
CFMEU	Construction Forestry Mining and Energy Union
CIDA	Construction Industry Development Agency
DUS	Department of Urban Services
FOI	Freedom Of Information, also *Freedom of Information Act 1989*
MBA	Master Builders Association
OH&S	Occupational health and safety
PCAPL	Project Coordination Australia Pty Ltd
QA	Quality assurance
QBS	Qualification Based Selection
SOCOG	Sydney Organising Committee for the Olympic Games
TCL	Totalcare Industries Ltd
TOC	Territory Owned Corporations, as listed in Schedule One of the *Territory Owned Corporations Act 1990*.

Appendix B - Submissions list

The Committee received and authorised for publication submissions from the following authors:

Number	Organisation
1	Dsb Landscape Architects
2	Integrated Construction Pty Ltd
3	Ausdoc On Demand Pty Ltd
4	ACT Government
5	Fire Control
6	Aussie Junk
7	IOF Australia (ACT) Pty Ltd
8	ACT Government
9	Anti Graffiti Systems
10	Bright Lights Electrical Pty Ltd
11	Commercial Furniture Industry
12	Ms McCahon
13	Air Conditioning & Mechanical
14	CFMEU
15	Assoc. of Consulting Engineers
16	ABA Construction Managers Pty
17	Stellar Engineering Pty Ltd
18	Haskins Contractors Pty Ltd
19	Totalcare Industries Ltd
20	Master Builders Assoc. ACT
21	Office of the ACT Ombudsman
22	ACT Government
23	Confidential
24	Confidential
25	Institution of Engineers Aust.
26	ACT Government
27	CFMEU ACT Branch
28	WS Gregory & Associates Pty
29	Confidential
30	Minister for Urban Services
31	Department of Urban Services

Appendix C – List of Exhibits

Number	Organisation
1	Chief Minister
2	Department of Urban Services
3	Hunt & Hunt Lawyers
4	Hunt & Hunt Lawyers
5	Received in-camera
6	Auditor-General ACT
7	Hunt & Hunt Lawyers
8	Chief Minister
9	Association of Consulting Engineers
9a	Master Builders Association
10	ACT Rugby Union
11	Hunt & Hunt Lawyers
12	The Institution of Engineers, Australia
13	The Institution of Engineers, Australia
14	Chief Minister
15	CFMEU
16	TDK Security
17	Chief Minister
18	Chief Minister
19	Department of Treasury & Infrastructure
20	Department of Treasury & Infrastructure
21	Confidential

Appendix D – Public Hearings: program and witnesses

15 December 1999

For the Department of Treasury and Infrastructure
Mr Mick Lilley, Under Treasurer
Mr Ian Keightley, Manager, Superannuation and Insurance Provision Unit

For the Chief Minister's Department
Mr Rod Gilmour, Chief Executive
Ms Sandra Lambert, General Manager, Policy Group
Mr John Wynants, Senior Manager, Policy Group

For the Canberra Tourism and Events Corporation (CTEC)
Mr James Service, Chairman

For the Department of Urban Services
Mr Gordon Davidson, Director of Infrastructure Policy
Peter Tinson, Manager, Canberra Urban Parks and Places
Mr Paul Taylor, Executive Director, Operations
Alan Eggins, Director, City Operations

For Totalcare Industries
Mr Steve Palywoda, Chief Executive
Mr Tony Farrell, General Manager, Facilities Maintenance
Mr Greg Mitchell. Principal Architect, Totalcare Projects

23 February 2000

For the Institution of Engineers, Australia
Mr Rolfe George Hartley, Immediate Past President of the Canberra Division
Mr Athol Yates, Policy Analyst

For the Master Builders Association of the ACT
Mr David Dawes, Executive Director
Mr Stephen Pinter, President
Mr Frank Gillingham, Director, Industrial Relations

For the Air Conditioning and Mechanical Contractors Association of the ACT
Mr Mick Polsen, President
Mr George Komorowski, Vice-President
Mr Ken Purves, Past President

For ABA Construction Managers
Mr John Ainsworth, General Manager and Director
Mr Ian Evans, Director
Mr John Short, Chief Estimator

For Integrated Construction and Management Services
Mr Michael Albert Rafferty

22 March 2000

For Haskins Contractors
Mr Ron Maginness, Manager of Business Development
Mr Mike Jarvis, Operations Manager, ACT (previously project manager, Bruce Stadium)

For the CFMEU
Ms Sarah Schoonwater, President
Mr George Wason, Secretary

For the Association of Consulting Engineers Australia
Mr Peter Skurka, Chairman of the Canberra Division; Managing Director of D. Rudd and Partners
Mr Stephen Pinter, Past Chairman; Managing Director of W.P. Brown and Partners, Consulting Engineers
Mr Brad Dobson, Director of Hughes Truman Reinhold Pty Ltd
Mr William Faithful

For Stellar Engineering Pty Ltd
Mr Ken Purves, Director

For Control and Electric Pty Ltd
Mr Ken Hart, Managing Director

For Spry Associates Pty Ltd
Mr Paul Spry

18 May 2000

For dsb Landscape Architects
Mr Paul Bombadier, Director

For J. Easthope and Associates
Mr John Easthope, Director

For Totalcare Industries
Mr Stephen Palywoda, Chief Executive
Mr Michael Ernest Joseph Sullivan, General Manager, Totalcare Projects

For the Chief Minister's Department
Mr Robert Tonkin, Chief Executive
Ms Sue Baker-Finch, Director Olympics Unit
Ms Pam Davoren, Director, Public Sector Management Group

For the Canberra Tourism and Events Corporation
Mr David Marshall, Chief Executive
Ms Katie Reardon, Director, Motorsport and Operations

22 May 2000

For the Department of Urban Services
Mr Alan Thompson, Chief Executive
Mr Ken Horsham, Executive Director, Policy Coordination
Mr Pat Hanrahan, Manager, ACT Contracts and Purchasing
Mr Steve Greenhalgh, Manager, Construction Industry Policy

31 May 2000

For the Department of Treasury and Infrastructure
Mr Mick Lilley, Under Treasurer
Mr Andrew Clark, Director, Finance

In-Camera Evidence

In addition to the above public hearings, in-camera evidence was taken on: 8 July 1999; 15 December 1999; 16 December, 1999; 25 January 2000; 23 February 2000; and 22 March 2000

Appendix E – ACT Purchasing Guidelines[139]

GUIDELINE	AGENCY RESPONSIBLE	CURRENT STATUS	EXPOSURE DRAFT	FINALISED
PURCHASING POLICY				
ACT Purchasing Policies & Principles	Urban Services	Issued	N/A	May 1999
PROCESS				
Ethical Behaviour and Probity Audits in ACT Government Purchasing	Urban Services	Issued	May 1999	September 1999
Buying Locally	Urban Services	Exposure Draft	January1999	
Environmentally Responsible Purchasing	Urban Services	Issued	September 1997	December 1997
Checklist for Purchasing Environmentally Responsible Products	Urban Services	Issued	N/A	September 1999
Purchasing Process	Urban Services	In Preparation		
Preparation of Request for Offers	Urban Services	Issued	February 2000	May 2000
Industry Briefings and Site Inspections	Urban Services	Issued	July 1999	November 1999
Evaluation of Offers	Urban Services	Exposure Draft	June 2000	
Tender Evaluation Plan	Urban Services	Issued	N/A	July 1999
Tender Evaluation Report	Urban Services	Issued	N/A	September 1999
Tender Evaluation & Analysis Model (Custom Software)	Urban Services	Issued	N/A	July 1999
Debriefing Unsuccessful Tenderers	Urban Services	Issued	July 1999	November 1999
Purchasing Legal Issues and Purchasing Dictionary	Urban Services	In Preparation		
Australian Capital Region Industry Plan	Urban Services	Exposure Draft	July 1998	
Competitive Tendering & Contracting	Treasury and Infrastructure	Issued (Being revised)	N/A	January 1996
Services purchasing from nonprofit non-government organisations	Chief Minister's	Exposure Draft	January 2000	
Consultants – Achieving Value for Money	Chief Minister's	In Preparation		
CONTRACT MANAGEMENT				
Contract Management	Urban Services	Exposure Draft	October 1999	
Effective Complaint Handling for Contractual Arrangements	Urban Services	Issued	July 1999	November 1999
Treatment of Commercial Information	Chief Minister's	Issued	September 1998	February 1999
Balancing public right to information (Pamphlet)	Chief Minister's	Issued	March 1999	June 1999
Doing Business with ACT Government (Commercial Information)	Chief Minister's	Issued	N/A	June 2000
DISPOSAL				
Disposal of Surplus Assets	Urban Services	Issued	October 1997	February 1998
RISK MANAGEMENT				
Risk Management	Urban Services	Issued	April 2000	June 2000
OH&S in the Purchasing Process	Urban Services	Exposure Draft	April 2000	
Quality Assurance in Purchasing Goods and Services (Buyers)	Urban Services	Issued	N/A	March 1997
Quality Assurance Policy – Information for Suppliers	Urban Services	Issued	N/A	March 1997

[139] As at 25 July 2000. Source: Department of Urban Services.