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THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY

GOVERNMENT RESPONSE TO

ACT AUDITOR-GENERAL'S REPORT

NO. 7 OF 2015 ON THE SALE OF ACTTAB

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Treasurer

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Government Response to the Auditor-General’s Performance Audit into the Sale of ACTTAB

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Introduction/Background

The Government acknowledges the Auditor-General's Performance Audit *Sale of ACTTAB* has confirmed the ACTTAB sale successfully met all of the sale objectives and the payment of $105.5 million far exceeded expectations.

The flexible sales strategy agreed by the Government followed a careful and thorough process in order to achieve a successful sale that met all the sale objectives. Following legal advice provided to the Government, the sale was not required to be undertaken under the ACT *Government Procurement Act 2001*.

The ACTTAB sale was appropriately conducted at arm's length from the Executive by relevant Government officials and specialist advisers by way of a committee structure involving a Project Team and a Steering Committee.

The Government is assured that:

- The sale followed a carefully structured framework and the sale objectives were used as a constant point of reference throughout the sale process.

- Expert legal and commercial advisers actively participated in the entire sale process and performed integral roles, together with the Project Team.

- The framework that was adopted followed those commonly used in government business sales in other jurisdictions.

The audit report has indentified "it would have been prudent to structure and manage the sale with regard to the requirements of the *Government Procurement Act 2001* until it was clear the Act did not apply (i.e. only assets were being sold and not shares)". This view is contrary to legal advice provided before the sale commenced and again during the conduct of the audit.

The sale was conducted on the basis of legal advice that neither the *Government Procurement Act 2001* nor the notion of a process contract had any application. As such, the Government considers that the *Government Procurement Act 2001* did not apply. The Government agrees that it was important to conduct the sale through a fair and transparent process and considers that this was done to an extraordinarily high standard.

The purpose for inviting expressions of interest in the first stage of the sale process was to use approved and documented eligibility criteria to short list interested parties to participate in the competitive bidding stage.

It was logical as part of this process to require applicants to demonstrate they had the capacity to successfully operate a totalisator. Three of the five applicants did not fulfil this requirement which is clearly documented in the report provided by the Project Team to the Steering Committee, together with the final Deloitte report.

Although the Project Team used a detailed risk register to manage the associated risks during the sale process, the Auditor-General's report observed that it was never formally endorsed. The Government notes that managing risks through the sale process was a central focus of the Project Team and Steering Committee. Indeed, key risks were considered regularly at each meeting of the Project Team and Steering Committee, with expert independent advice provided by the professional legal and commercial advisers.

The Government notes the audit report questions the engagement of the ACT Government Solicitor to perform the dual role of legal adviser and probity adviser. This was consistent with past ACT practice as it is considered to effectively ensure Government contracts comply with the law and principles of fairness, while also being cost effective, and is in keeping with guidelines that have been issued by the Commonwealth (*Managing probity and process issues in procurement*, Commercial Note N0. 15, 14 March 2005) which state inter alia:

- The probity adviser can also fulfil the role of legal adviser to the client.

- The extent of proactive involvement by a probity or legal process adviser varies from project to project and client to client.

- In some cases the client may require the adviser to be involved at certain key stages of the tender process (for example, at tender opening and to review the tender evaluation process).

- In other projects, a client might see the adviser as being an integral member of the tender team and expect the adviser to play a proactive role throughout.

- In other words the role needs to be tailored to the client's own requirements and expectations.

It is also relevant to note that the ACT Government Solicitor was supported by a team of legal advisers both internal and external to the Territory.

Government Position on Recommendations

Recommendation 1 Procurement Policies, Procedures and Processes

The Chief Minister, Treasury and Economic Development Directorate should examine, and if needed amend, its procurement policies, procedures and processes so they comprehensively cover:

Risk management:

1) all complex, high value or high risk procurements should be subject to a procurement risk assessment and be supported by an approved risk plan which is developed before procurement activity commences (this plan may subsequently be modified as needed); and

2) the risk assessment should guide mitigation measures and inform governance and administrative processes for the procurement;

Evaluation criteria:

3) evaluation criteria should be designed to match the way in which they will be evaluated; and

4) the assessment of evaluation criteria by an assessor and/or panel members should be precise, rigorous and documented;

5) Procurements that are not subject to the ACT Government Procurement Act 2001:
    - i) need to have the policies, procedures and processes to be used defined and documented at the beginning of a procurement activity; and
    - ii) need to be the subject of a risk assessment and have an approved risk plan;

Probity Plan and Probity Advisor role in complex, high value or high risk procurements:

6) a Probity Plan should include a requirement for the provision of written independent assurance at key stages of the procurement;

7) the Probity Advisor role as a principle should be independent of other roles in the procurement process. However, if this does not occur, the reasons for not so doing should be documented and a risk assessment undertaken to identify how any associated risks are to be managed;

Documentation and record-keeping requirements:

8) complex, high value or high risk procurements should be well documented; and

9) an audit should be undertaken immediately at the conclusion of the procurement to identify any gaps so that they can be corrected in a timely manner.

Noted.

Procurement processes are regularly reviewed in consultation with stakeholders and many of the separate components of the recommendation are already incorporated in current procedures. CMTEDD is reviewing the existing procurement policies, procedures and processes. It will consider potential changes to remove any doubt about their applicability or potential exemption in particular circumstances while continuing to allow flexibility to structure transactions to meet the needs of the market, maintain market interest and ensure that sale value is not materially impacted.