



OMBUDSMAN AN OFFICER OF
THE ACT LEGISLATIVE ASSEMBLY 

Investigation of a complaint about certain procurement practices

CHIEF MINISTER, TREASURY AND
ECONOMIC DEVELOPMENT DIRECTORATE

ACT HEALTH

November 2016

Report by the ACT Ombudsman,
Colin Neave, under the *Ombudsman Act 1989*

REPORT NO. **01 | 2016**

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Reports by the ACT Ombudsman

Under the *Ombudsman Act 1989*, the ACT Ombudsman investigates the administrative actions of ACT Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

By virtue of the transitional arrangements in place at the time of self-government, the Commonwealth Ombudsman is also the ACT Ombudsman. The ACT Ombudsman role is delivered by the Commonwealth Ombudsman under a Services Agreement between the ACT Government and the Commonwealth Ombudsman.

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report can also be prepared to describe an investigation, including any conclusions drawn from it, even if the Ombudsman has made no adverse findings.

A report by the Ombudsman is forwarded to the Directorate concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Speaker or the Legislative Assembly.

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ISBN 978-0-9875235-0-1

Date of publication: November 2016

Publisher: Commonwealth & ACT Ombudsman, Canberra Australia

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BACKGROUND

The Australian Capital Territory (ACT) Ombudsman investigates the administrative actions of ACT Government agencies. The Ombudsman has wide powers to access information held by agencies. At the conclusion of an investigation, the Ombudsman can prepare a report and make recommendations.

Procurement and Capital Works (PCW) is part of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) and is responsible for delivering procurement and tender services to ACT Government directorates.

A firm was engaged through PCW by ACT Health to provide a professional service on a capital works project. The initial contract commenced in early 2014 for four months. The contract was extended on two occasions, ceasing in mid-2015.

Complaint

In July 2015 the complainant, the director of the firm, wrote to Chief Minister Andrew Barr expressing concerns about a series of tenders conducted by PCW for a professional service to ACT Health for an infrastructure project. The complainant also alleged inappropriate interference by a Treasury officer with a consultant and subsequent falsification of the complainant's account of this incident by his manager to a senior Treasury executive. The complainant sought a meeting with Mr Barr to discuss the concerns he had raised.

Mr Barr referred the matter to the Head of Service, Ms Kathy Leigh. Following her review, Ms Leigh referred the matter to this office. The Ombudsman considered the referral from Ms Leigh and undertook an own-motion investigation of the complaint.

Agency roles

A subunit in PCW, the Health Infrastructure Procurement branch, services the ACT Health Directorate, who were clients of a program of capital works for health-related facilities under the banner of 'Health Infrastructure Program' (HIP). It was under this arrangement that PCW undertook procurement for ACT Health for the professional service. PCW prepared a recommendation for approval on the proposed procurement and the subsequent tender evaluation to the delegate, the Director-General ACT Health. ACT Health was represented by senior officers on tender evaluation panels reviewed in this investigation.

The Procurement Board is made up of five senior government executives and four non-government members, usually with business and government experience. Its role is to review and give advice to ACT Government entities and Ministers on procurement issues and practices, and to review certain procurement proposals.

Procurement framework

The legislative framework for procurement is set out in the *Government Procurement Act 2001* (ACT). Section 22A sets out the broad assessment principles for decisions about procurement:

S 22A Procurement principle—value for money

- (1) A territory entity must pursue value for money in undertaking any procurement activity.*
- (2) Value for money means the best available procurement outcome.*
- (3) In pursuing value for money, the entity must have regard to the following:*
 - (a) probity and ethical behaviour;*
 - (b) management of risk;*
 - (c) open and effective competition;*
 - (d) optimising whole of life costs;*
 - (e) anything else prescribed by regulation.*

PCW issues a number of 'Procurement Policy Circulars', endorsed by the Procurement Board, which provide high-level, principle-based definitions and explanations.

The investigation showed that PCW has a standard format for preparing a Procurement Plan Minute (PPM), which sets out the purpose and method of procurement, seeking delegate approval for the proposed procurement. The delegate is the Director-General of the acquiring agency (not PCW). Once tenders are received PCW leads the preparation of the Tender Evaluation Team (TET) report. The TET includes members from the acquiring agency and assessments are conducted against the criteria set out in the tender. The report goes with a recommendation to the delegate that the procurement take place (or not).

Investigation methodology

The Ombudsman's office reviewed the material provided by the complainant and met with him. The Ombudsman notified the agencies of the investigation and sought all records from PCW, Treasury (both in CMTEDD) and ACT Health relating to the particular tenders and the incident related to a consultant and subsequent events. PCW provided a comprehensive record of the identified tenders and negotiations. Treasury provided its response and records for the other matter. No material was provided directly by ACT Health; this was coordinated through PCW. The Ombudsman reviewed this material and sought and received further information and explanation about the tenders and related negotiations from PCW.

INVESTIGATION OF COMPLAINTS

The procurement complaint allegations

The complainant's allegations and the Ombudsman's office view on these are summarised below.

The complainant was concerned that PCW undertook a series of procurement exercises with the purpose of engineering an outcome to get lower than market rates. The complainant alleges that the conduct by PCW during the period beginning of 2014 to mid-2015 was irregular and inappropriate, that it was in breach of the *Government Procurement Act 2001 (ACT)*, specifically s 22A. He stated that throughout these exercises PCW did not act reasonably and in good faith.

The complainant highlighted the cost of having to submit multiple tenders to seek to continue the firm's work for ACT Health. In his view, the apparent reissuing of tenders also has the effect of undermining consultant confidence in doing business in the ACT.

Tender processes

The firm was initially engaged by the ACT Government after a select tender in early 2014. The investigation showed that each of the rates submitted in this process were higher than PCW anticipated and higher than the select tender exemption threshold. The firm provided an alternative tender to undertake the work in four months, rather than six. The TET recommended this be engaged, noting that firm's alternative tender was under the exemption threshold.

In May 2014 the firm's contract was varied and extended by a further four months from June 2014 to October 2014 at the same rate, due to the inclusion of additional projects and noting that a longer term tender was being prepared.

The investigation considered each of the processes raised by the complainant over the period, from mid-2014 to mid-2015 in support of his complaint.

Mid-2014—open tender, three year term—RFT A

The complainant complained that this tender was cancelled without explanation.

The investigation showed that the TET determined that no tenders had met each of the threshold criteria and that it was unable to recommend a preferred tender. The firm's tender did not meet the criterion that capped annual rates. The Ombudsman notes that the TET agreed, 'that the tenders received represented the current consultancy market situation'. There is no indication that the complainant sought a debrief on this tender outcome.

It is the Ombudsman's view that the action by PCW was reasonably open to it in the circumstances and does not consider this matter requires further investigation.

The TET recommended that the firm's contract be extended a further 10 months under a single select exemption until mid-2015 to ensure continuity of service.

Mid-2014—Project Advisory Services Panel (PASP)—RFT B

The complainant indicated to the Ombudsman that his firm would not normally tender for a panel, but did so because he had received advice from PCW that ongoing procurement of the professional services that the firm had been providing, would be made through the Panel. The complainant noted that his firm had been ranked 16th in this process and 15 providers were given panel contracts. He

believed that this indicated that he had been deliberately excluded by PCW and that the Panel was an exercise in market testing in order to force down his rates. He complained about the time taken to conclude the evaluation and was particularly concerned about the evaluation methodology applied to the rates (fees) criteria by the TET, which he stated was outside the requirements of the Act. He argued that the rates evaluation method had the effect of comparing his tender unfairly with others.

The Ombudsman considers that, given the scale of the tender, the assessment was completed in a reasonable time (two months). Once signed by the delegate, all unsuccessful tenders were initially notified in mid-December 2014. The investigation showed that some additional time was taken to finalise contract arrangements with the Panel firms before a meeting could be arranged, which took place in early-2015.

The Ombudsman noted that the Panel was sought to provide for a variety of professional services to a range of capital works specialities, and was not limited to the professional services provided by the firm. It is the Ombudsman's view from the investigation that the averaging of rates applied by the TET may have worked against tenders providing higher cost single consultancy business when compared with the same services in tenders alongside lower cost services (where averaging had the effect of reducing the daily rate).

PCW noted that it later conducted an assessment solely on the particular professional services that had been tendered and found that firm's rates were comparatively higher than others. This indicates that even if a direct comparison had been made, the outcome would not have been different.

Noting the concerns about the averaging applied, the Ombudsman accepts that the PCW approach to its assessment was not unreasonable, particularly given that it sought to identify a range of consultants to be drawn on for the panel.

It is the Ombudsman's view that there was no evidence that firm had been deliberately excluded from the Panel or that the Panel tender had been conducted by PCW with the intention to test the market rates for the particular professional services.

Early 2015—Negotiations

On instructions from ACT Health, PCW sought a proposal directly from the firm for a further 12 months of service. The complainant stated that PCW made it clear to him that his rates were considered too high and would need to be lowered to secure further work. The complainant was concerned that the PASP tender had been cited as evidence of his rates being too high. He alleged that the panel had been conducted as a market testing exercise and was being used to force him to lower his cost. During this time the complainant continued his dispute that firm's rates had been unfairly assessed during the panel and was not satisfied by PCW's attempts to explain its evaluation methodology.

It is the Ombudsman's opinion that while PCW did explain how the fees had been 'calibrated' and then evaluated consistently within the weighted ranges for the Panel tender, it did not address the complainant's concern about the basis for the averaging across each tender for the sake of the comparison.

The Ombudsman noted that while it was open to ACT Health to seek further services from the firm, and this indicated satisfaction with the service the firm provided, it had also demonstrated an ongoing willingness to extend the firm's contract on terms above its perception of the industry rate. While it was required to maintain continuity of service, it was also incumbent on PCW to ensure that

it achieved value for money. In the context of the previous tenders, however, it is not surprising that the complainant grew concerned about the intentions of PCW.

The Ombudsman's investigation showed that PCW did undertake a comparative assessment of the rates (benchmarking) of the particular professional services provided to the Panel and those of its other contractors during these negotiations. However, PCW did this with a view to preparing a single-select exemption to the delegate to enable the firm to enter into a new contract to continue its service provision, as requested by ACT Health.

Mid-2015—select tender to five consultants, 12m service—RFT C

The complainant made a formal request for information (RFI) during this tender, including querying whether it was the ACT Government's intention to award a contract, citing the previously cancelled tenders. In its response, PCW affirmed that it intended to award a contract, subject to value for money, while noting that in every tender it reserves the right to cancel a tender. PCW also affirmed that a TET had been established and would conduct an assessment in accordance with the evaluation criteria. The complainant stated that this tender was then cancelled without explanation.

The investigation showed that a tender evaluation did not occur and that the Chair of the TET cancelled the tender based on his assessment that the prices (three) received did not reflect best value for money. PCW stated that the evaluation was not undertaken due to the urgency to maintain service, given that the firm's contract was due to expire and it had to prepare a public tender.

The Ombudsman noted that the tender did not place a cap on fees. PCW stated that it did not cap fees, 'giving the firm an opportunity to respond via tender with a better than the original offer considering continuity of services'.

Given the experience of the Panel and subsequent negotiations with the firm, the question is, was it necessary or reasonable to issue this tender.

It is the Ombudsman's view that this tender was poorly thought through. The subsequent cancellation of the tender without proper assessment indicates that PCW had not properly articulated its parameters on cost when approaching the market, particularly where cost was such a determining factor. In hindsight, putting the market, including the firm, through this exercise may not have been necessary.

Mid-2015—open tender, particular professional services, 12 months, fee cap set—RFT D

The complainant raised several concerns in the conduct of this tender. He alleged that PCW had acted to ensure his exclusion from the tender. The complainant explained that he had prepared a tender in conjunction with a PCW employee. However, when seeking referees from PCW, the complainant believes that the employee had been forced by PCW to withdraw from the firm's tender, and that this occurred at late notice. The complainant did not know the reason for the employee's decision, but attributed it to inappropriate conduct by PCW.

There is no evidence that PCW attempted to deliberately disadvantage the firm, as alleged. After becoming aware of the PCW employee's connection to the firm's tender, PCW advised that it removed the employee from the project and discussed the probity risks with the employee. There is no evidence that the decision by the employee not to continue involvement in the firm's bid is attributable to inappropriate conduct by PCW. The Ombudsman accepts that PCW acted reasonably to manage a conflict of interest if the employee participated in the firm's tender bid. It is the Ombudsman's view that the PCW employee could make their own decision about whether or not to

be a part of the tender. There is no evidence to suggest the employee was pressured by PCW to withdraw from the firm's tender. It is not considered that further inquiry into this matter is warranted.

The complainant also alleged that the TET had not properly conducted its assessment and that a conflict of interest existed. The complainant stated that he was aware, allegedly through a member of the panel, of the outcome before tenders closed. He alleged that the Chair improperly determined the outcome of the assessment and that the TET were asked to endorse this. The complainant stated that one of the successful tenders had worked with the Chair in previous employment.

The investigation showed that there was no evidence that there had been improper conduct in the assessment of tenders. The Ombudsman noted that the TET report acknowledged that most of the tenders were known to the TET. If the complainant had made a submission, he too would have been known to four of the five members of the panel, having worked closely with each for the period.

PCW claim that this tender demonstrated that it could achieve value for money for these professional services, in line with its estimated annual costs. The Ombudsman noted that none of the applicants from the previous uncapped select tenders lodged a tender. This indicates that there was a market, though different to that previously submitting, that was willing to provide the service at that rate and that PCW accepts that this service is sufficient for ACT Health's requirements.

Other matters

The complainant also complained about matters unrelated to procurement. He believes that an ACT Government officer could be seen to have intimidated and threatened a consultant. The complainant claims that senior government executives then acted improperly when he raised this issue and sought to conceal his concerns.

Intimidation

The complainant stated that he became concerned when he was advised by a consultant for ACT Health that a Treasury officer had contacted the consultant to encourage a particular outcome for a capital works business case being prepared.

The investigation noted that the experienced consultant had been contacted by the Treasury official to share their views on the business case, as they were relevant. In response to the complainant raising his concerns, a senior Treasury executive contacted the consultant and was advised by the consultant that no threats had been made and differing views were to be expected.

It is the Ombudsman's view that the actions of the officers involved were not unreasonable. To follow up on an allegation of intimidation by a staff member was an appropriate response, given the senior official's leadership responsibilities. Once an allegation of intimidation had been made, the senior official had an obligation to carry out follow up action.

Concealment

The complainant emailed his manager about this interaction between the consultant and the Treasury official twice. The first email detailed the alleged intimidation. In the second email the complainant had been asked to clarify his concerns to be provided to the senior Treasury executive and characterised the incident as a breakdown in governance. The complainant's manager sought his agreement to a number of changes to the email, before sending it on to the senior Treasury executive. The complainant did not respond to his manager's request and it is understood to have been sent later.

The investigation showed that the edits by the manager removed some sentences, but did not amend those that were retained. While amending another person's email is inadvisable, in the Ombudsman's view the revisions do not reflect behaviour that amounted to that alleged, of 'concealment of actions'. There was no evidence that the complainant pursued his concerns further with his manager at the time.

OMBUDSMAN DISCUSSION & RECOMMENDATIONS

This matter amounts to a dispute over reasonable costs for the particular professional services in the health capital works program delivery. PCW consistently held the view that the professional services could be achieved for a lower annual amount, particularly where the arrangement was over a longer term (2–3 years). The firm consistently provided and tendered its services at rates higher than that and, through two contract extensions, provided services to ACT Health at this rate for almost 18 months.

While PCW appeared to have been satisfied with the work by the firm and had an interest in maintaining project stability, there was no obligation on PCW to engage the firm on an ongoing basis at this rate, and no requirement for the firm to accept a lower rate.

Procurement processes

The investigation showed that ACT Health sought to retain the firm and reduce the costs incurred at the same time. It was reasonable and appropriate for PCW to seek value for money.

The Ombudsman investigation showed that PCW did undertake a series of procurement activities for the same or similar services while continuing to seek to engage the ongoing services of the firm. While the series of procurement activities were related and they resulted in a poor experience for the firm, in the Ombudsman's view, there was no evidence of the misconduct claimed by the complainant in the individual PCW processes.

Based on the investigation, it is the Ombudsman's view that there were not irregularities in the administration of the evaluation of tenders by PCW. The proposal and evaluation stages were carried out reasonably and diligently. The assessment and documentation appeared consistent and thorough. The exception to this was tender RFT #D, when the Chair of the TET (not the delegate) cancelled the tender based on rates alone and without an assessment taking place.

This investigation did note that the decisions around the initiation and management of tendering needs were not as direct as they ought to have been. It is the Ombudsman's view that this conduct was arguably poor, but not inappropriate.

The Ombudsman is of the opinion that this type of repeat offering of tenders needs to be avoided. While it is always a commercial decision for businesses to participate in a tender process, it appeared that PCW did not recognise the effect that it had on business when offering repeat tenders. PCW and its client directorates need to take more care when these practices can have a negative impact on business, including costs and impact on confidence in doing business with the ACT Government.

Responding to disputes, providing confidence

The Ombudsman appreciates how the complainant came to form his views, particularly given the series of activities and the information that was provided to him along the way. It appears that PCW did not properly consider the burden and cost to businesses tendering for its repeated approach to the market for the same service based on a price outcome.

The Ombudsman considers that, in response to ACT Health, PCW drew the firm through a series of intensive exercises in order to balance acquiring the service for what it considered a more reasonable rate and the subsequent urgency to continue project services when the firm did not meet this desire and the contract was concluding.

It appears to the Ombudsman, in hindsight, that PCW's initiation of some of the tenders and the firm's proposals were reactive in nature. For the confidence and trust of the consultant community who engage in the offers to do business with the ACT Government, greater oversight of this procurement may have avoided the protracted nature of this procurement.

In this case ACT Health were closely connected to the procurements and it was difficult to see where the division between agencies and responsibilities were, at times. This can be an added complexity of the procuring agency working closely with the expert procurement service. There is the potential for different views in the preferred methods and different relationships with service providers. The complainant had a close, though different, relationship with both agencies.

Recommendation 1

The Procurement Board and PCW review how tenders are initiated, approved and monitored so that PCW has visibility of instances of multiple related procurement activities in order to avoid unnecessary costs to business and Government.

When the complainant raised his concerns it seemed apparent to the Ombudsman that there was not an appropriate avenue to make or respond to the complaints or disputes. Consideration was given to a tender evaluation by a probity advisor, but this was limited to a narrow slice of the activity which gave rise to the concerns raised by the complainant.

Recommendation 2

The ACT Government review the capacity for the Procurement Board to undertake independent review of complaints or disputes that are made about procurement.

It was reasonable and appropriate for PCW to seek value for money. There was also an onus on PCW to review what it thought the reasonable estimated cost for the service was when, in more than one tender, the consultants tendered substantially more than this estimate.

The investigation found that PCW assessments of tenders were guided heavily by estimated costs. As noted above, PCW consistently held the view that certain professional services could be achieved for a certain annual rate. PCW was not prompted to review its own rate estimate despite the evidence of higher rates across a series of tender activities, one which PCW explicitly noted to have represented the consultant market at the time. Eventually, subject to a tender criterion cap on the annual rate, thus making its cost limitation known, PCW achieved certain professional services for what it considered market rate.

The Ombudsman does not agree that this conduct amounts to a breach of good faith obligations by 'engineering' the outcome, as claimed by the complainant, but understands how he came to form that view. While the Ombudsman considers that it is reasonable for a procurer not to reveal its hand on cost, however, when it is guided by an estimate that functions as a limit, then it should consider making that known to the market. The outcome of the final tender supports this view.

For the confidence and trust of the consultant community who engage in the offers to do business with the ACT Government, it is important that the ACT issue tenders with all information to be considered critical to the determination of the preferred tender. It was not evident that there was guidance on how to distinguish and determine the differences in the estimated market costs in approval processes and the actual market costs provided in tenders.

Recommendation 3

The Procurement Board undertakes a review of its policy guidance to officers. That guidance should address the reasonable occasions where a criterion cap on costs should be used.

Remedy to the firm

It is understandable that the complainant became distrustful of PCW and formed the view that it had conducted market testing. Ultimately, the complainant did not make an offer to PCW which reflected its desire for a reduced rate for the longer term engagement. Both parties can reasonably maintain their view on what the cost of a service should be, however, it has taken PCW several tenders to get to its desired outcome and this has caused undue inconvenience and cost to consultants, such as the firm. In the tender RFT #D, it may have been preferable for PCW to articulate its price limit in a cap, particularly where cost proved to be the sole determining factor.

Recommendation 4

In recognition of the effort required by the firm to submit a tender to RFT #D, when there was no reasonable prospect of an outcome, that the ACT Government consider recommending an act of grace payment to the Treasurer (under s 130 of *Financial Management Act 1996*) to cover the firm's costs of responding to that RFT.

RECOMMENDATIONS

Recommendation 1

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Recommendation 4

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DIRECTORATE RESPONSE

The draft report was provided to ACT Health and CMTEDD. CMTEDD provided a response as a whole of government. Its response is reproduced below. The Ombudsman noted the comments, but did not amend the report as a result.

At the time of responding the ACT public service was under caretaker period conventions for the ACT election in October 2016. CMTEDD stated that due to this it was unable to respond to the recommendations. The Ombudsman will continue to discuss these with CMTEDD after the conclusion the report.



Our ref: CM2016/348
Your ref: A18501

Mr Colin Neave
ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr Neave

Section 9 Notice – draft report for comment

Thank you for providing me with a draft report arising from your own motion investigation of a complaint made by [REDACTED], about certain procurement processes and other matters. Thank you also for the meetings with ACT Government officials by your staff.

You invited a written response to your draft report for your further consideration.

In response, I wish to clarify the context in which the ACT Government was operating at the time of the procurement processes for the period covered by your draft Report. I understand from Procurement and Capital Works in Chief Minister, Treasury and Economic Development Directorate and the Health Directorate that they were not attempting to drive down the cost of [REDACTED] services through repeated approaches to market.

Market testing in a related field for a [REDACTED] led ACT Government to form the view that similar rates could be achieved for this project. Under a public tender process held in 2013-14, the [REDACTED] for the [REDACTED] project was engaged at an annual fee of [REDACTED] indexed with CPI. [REDACTED] only continued to be engaged at the short-term higher rate due to the need for the Territory to maintain the services on key Health Infrastructure projects until longer term lower cost arrangements could be put in place.

The Territory is mindful of the costs of procurement to the market and the decision to cancel a procurement process also has cost implications for the ACT Government and needs to be well considered. In the instance of the tender [REDACTED] in [REDACTED] ACT Government had benchmarked the cost of services and tenders and all were significantly outside this cost. I understand the Tender Evaluation panel considered it fruitless to continue an evaluation process when all prices were considerably above the approved budget. I would also like to clarify that I have been advised that the estimated cost in the Procurement Plan Minute is the approved budget allowance for procurements as authorised by the relevant delegate and does indeed constitute the cap for a price.

Chief Minister, Treasury and Economic Development
GPO Box 158 Canberra ACT 2601 | phone: 132281 | www.act.gov.au

In relation to the allegations of interference and misconduct on the part of CMTEDD officials, I am pleased that your draft report finds the individuals involved have no case to answer and that further investigation is not warranted.

I look forward to receiving your final report on these matters in due course.

Yours sincerely



Kathy Leigh
Head of Service
13 October 2016