

REPORT OF THE INTEGRITY COMMISSION

No. 4 of 2019

A summary report of an own motion
investigation into an alleged conflict of
interest and improper use of position by a
manager in the Department of Education

INTEGRITY
COMMISSION



The objectives of the Integrity Commission are to –

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania;
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

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President
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Speaker
House of Assembly
Parliament House
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Dear Mr President

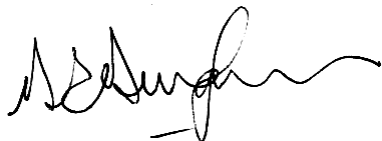
Dear Madam Speaker

Pursuant to section 11(3) of the *Integrity Commission Act 2009* (the Act), the Integrity Commission presents *Report 4 of 2019* to Parliament, a summary report of an own-motion investigation into an alleged conflict of interest and improper use of position by a manager in the Department of Education.

Yours sincerely



Aziz Gregory Melick AO RFD SC
Chief Commissioner
On behalf of the Board



Richard Bingham
Chief Executive Officer

31 October 2019



SUMMARY REPORT OF THE INTEGRITY COMMISSION BOARD

An own-motion investigation into an alleged conflict
of interest and improper use of position by a manager
in the Department of Education

31 October 2019

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Foreword

This is a summary of the Board of the Integrity Commission's report of an own motion investigation commenced on 30 April 2018. The matter relates to allegations that a manager in the Department of Education ('the Department') improperly awarded contracts for the production of digital education resources to companies associated with his friend.

The investigation followed an earlier complaint to the Commission in September 2017, which was not investigated given the Department had commenced proceedings against the manager under Employment Direction No 5 ('ED 5') for a similar complaint. In April 2018, representatives of the Department sought the Commission's assistance to progress the matter, given they were experiencing difficulty in doing so.

The Commission subsequently investigated the complaint to determine the factual basis for any misconduct, as defined in the *Integrity Commission Act 2009* (the *IC Act*).

A report of the investigation was prepared by a Commission investigator and submitted to the Board in accordance with s 57(1) of the *IC Act*. The investigator made findings of fact on the basis of the evidence obtained during the investigation. The investigation addressed the main allegations of misconduct as identified in the complaint, and also considered any additional issues that were identified during the investigation.

The Board considered the investigator's report and determined to refer the complaint and the investigation report to the Secretary of the Department, for action. The Board then finalised this summary of the report, that it considered suitable for tabling in both Houses of Parliament.

In presenting the summary, it is noted that the products resulting from the contracts are acknowledged to be of a high quality, meet their intended purpose very well, and are of benefit to the State.

For this summary, the Board has not reproduced all the detailed evidence outlined in the investigator's report, upon which it relied in coming to its conclusions. It has also anonymised or redacted that report, where the Board considered that it was in the public interest to do so. The principal factors which the Board had regard to in determining the format of this report are:

- the manager is not a senior officer and thus is not a designated public officer under the *IC Act*;
- the private individuals involved are not subject to the *IC Act*;
- the manager has resigned from his position in the State Service; and
- the potential privacy and health implications for the public officers and private individuals involved.

PART A – Background

1. Introduction

1.1. The matter

- [1] This matter arises from an own-motion investigation undertaken in accordance with section 45(1)(a) of the *Integrity Commission Act 2009* ('IC Act').
- [2] The investigation relates to allegations that a manager in the Department of Education ('the Department') improperly awarded contracts for the production of digital education resources to companies associated with his friend.
- [3] The Commission had previously received a complaint about this issue in September 2017. Assessment of that complaint revealed that the Department had itself received a similar complaint in March 2017 and had commenced proceedings against the manager under Employment Direction No 5 ('ED 5'). Given this, the original complaint to the Commission was dismissed on the basis that it would be an unjustifiable use of the Commission's resources and not in the public interest to investigate it, pursuant to ss 36(1)(e)–(f) of the *IC Act*.¹
- [4] In April 2018, representatives of the Department sought the Commission's assistance to progress the matter as they were experiencing difficulty in doing so. The Department had previously addressed a complaint received in September 2017 about procurement processes relating to the requests for a tender commenced in May 2017.
- [5] On 30 April 2018, the Commission determined to conduct an own-motion investigation into possible misconduct by the manager and any related matters, on the basis that:
- the alleged misconduct was serious in nature, potentially amounting to a criminal offence; involved significant amounts of public money; and appeared to have been ongoing over a period of time;
 - the Commission's coercive powers may have assisted in overcoming the obstacles to the Department's ED 5 investigation; and
 - the Department sought assistance in dealing with the matter.

¹ The information contained in the complaint was used in the investigation to assist to identify key issues and to inform the sequence of events. The information is not sworn evidence.

1.2. Allegations

[6] It was alleged that the manager had either provided or attempted to provide a financial gain to his friend² through the provision of consultancies for the production of education resources for the Department. The resources involved were a series of interactive digital resources; an online learning hub; and various multi-media projects produced over the period 2016-2018. Together they amounted to a significant amount of public money (\$2,658,370.25), made up as follows:

- interactive digital resources – total value: \$139,770.25;
- an Online Learning Hub – total value: \$547,500;
- multi-media projects undertaken from 2016-2018 through direct sourcing from the friend's company – total value: approximately \$1.1m; and
- further multi-media projects put out for tender from March 2017 – total value: \$871,100.

[7] In doing so, it was alleged that the manager had:

- breached the State Service Code of Conduct as provided in sections 9(1), (5), (8), (11), (13) and (14) of the *State Service Act 2000*; and
- performed his functions or exercised his powers as a public officer in a way that is dishonest or improper as provided in s 4(1) of the *IC Act*.

2. The investigation

2.1. Relevant policies and procedures

[8] The manager was, at the time of the issues investigated, a public officer appointed under *State Service Act 2000* (Tas) ('State Service Act'). Consequently he was subject to the Code of Conduct contained in s 9 of that Act. However, he was not a 'designated public officer', as that term is defined in s 6 of the *IC Act*. The *IC Act* requires the Commission to focus on matters of misconduct by designated public officers, whilst misconduct by more junior officers may be referred to the relevant organisation for action.

² The friend is not a public officer for the purposes of the State Service Act and is not the subject of this investigation. The friend denies any suggestion that he has been dishonest or acted unlawfully in his dealings with the manager.

- [9] Some Treasurer's Instructions (TIs) were also relevant to this matter at the time. TIs are State Service-wide policies issued by the Treasurer. Treasurer's Instructions are issued under the authority of the *Financial Management and Audit Act 1990* (Tas) and must be complied with by the entire State Service.³ Treasurer's Instructions relevant to this matter include:
- a. Treasurer's Instruction No 1101: Procurement Principles: goods and services – part of this TI is the State Service 'Procurement Code of Conduct';
 - b. Treasurer's Instruction No 1104: Valuing Procurements: goods and services;
 - c. Treasurer's Instruction No 1105: Goods and Services procurement valued at \$50 000 or less (excluding GST);
 - d. Treasurer's Instruction No 1106: Goods and Services procurement valued at more than \$50,000 but less than \$250,000;
 - e. Treasurer's Instruction No 1107: Goods and Services procurement valued at \$250,000 and over; and
 - f. Treasurer's Instruction 1119: Buy Local Policy: goods and services.
- [10] The Department of Treasury and Finance has also released guidelines to assist agencies in complying with the TI conflict of interest record keeping obligations: *Recording Conflict of Interest Declarations - Guidelines for Agencies* (October 2009).⁴
- [11] Also of relevance is an *Infostream Department Notice* (circulated internally by the Department in June 2014) containing information regarding changes to Government purchasing rules and their impact upon the Department. This included a recommendation that purchasers 'seek written quotes from multiple suppliers to compare prices and obtain the best value for money' when considering approaching a single supplier where the good or service is expected to be up to \$50,000.

2.2. Investigative process

- [12] The investigation involved the use of the Commission's coercive powers, including four notices to produce records,⁵ five notices to attend and give evidence⁶ and one notice to produce information.⁷ Information was also provided without notice by the manager, the friend and other witnesses.

³ Treasurer's Instruction No. 105 – Compliance, cl 1.

⁴ Available from <www.purchasing.tas.gov.au/buying-for-government/purchasing-framework/purchasing-policies-processes-and-procedures/conflict-of-interest-and-declarations>.

⁵ *IC Act* s 47(1)(c).

⁶ *IC Act* s 47(1)(b).

⁷ *IC Act* s 47(1)(a).

- [13] The Commission gratefully acknowledges the assistance of the Victorian Independent Broad-based Anti-corruption Commission in dealing with technical issues relating to digital hardware and software.

PART B – Evidence & analysis

3. The nature of the relationship between the manager and the friend

- [14] The alleged misconduct in this matter is based on the assumed friendship of the manager and the friend. The manager described their relationship as follows:

We went to school together, went to high school together, didn't go to college together, he went to a different college so we lost a bit of contact there, started university together, he went off to art school so I think he was there for four years and did a PhD so we've certainly been in touch and I would describe us as friends over a long period of time but there's been lengths of time where we haven't seen each other for potentially up to 12 months during that time. But as I said, as I have here, I'd describe us as friends over a long period.

- [15] The friend confirmed that he and the manager had known each other since High School and that he considered them to be 'good friends'.
- [16] The information viewed by the Commission as part of the investigation, including numerous emails and text messages, indicate that the two of them were close friends and associated regularly outside of work.
- [17] The manager and the friend have had a professional relationship since December 2014 when the friend was first awarded a filming contract for the Department.

4. Company 1

- [18] Company 1 was established on 20 May 2015. At that time the three Directors were the friend, Person A and Person B.
- [19] Prior to the establishment of the company the friend had produced a number of films for the Department. This was done at the instigation of the manager by directly appointing the friend based on the manager's knowledge of the friend's expertise.

- [20] According to Person B, the manager's appointment to his role in early 2015 provided an opportunity for further film production work to be undertaken. On the basis of that future work opportunity, the friend had approached Person B (and later Person A) to form Company 1.
- [21] The friend denies that he saw the manager's appointment as an 'opportunity' or that he ever 'secured a guarantee' of work from the manager. He submits that he and Person B had been discussing the idea of forming a company 'well before 2015', that he had worked closely with Person A 'from 2010 on various projects' and that the 'creation of [Company 1] was not, as alleged, a dishonest or nefarious means to exploit an 'opportunity' for financial gain'.
- [22] As discussed later in this report, the friend eventually resigned from Company 1 to form a new company (Company 2) with another individual, Person C, as a result of a disagreement about how a particular project should be managed and the fact that Persons A and B declined the friend's request for Person C to become a director of Company 1. It is acknowledged that there may be potential for any ill-feeling generated as a result of this split to influence evidence given by the parties involved. However, all evidence has been given under oath or affirmation at the direction of the investigator.

5. Interactive digital resources project

5.1. Evidence

- [23] On 22 May 2015 Company 1 issued 16 invoices to the Department relating to the interactive digital resources project. All 16 invoices were each just below \$10,000, ranging from \$8,317 to \$9,954.75 for a total of \$139,770.25. Work for the project commenced in July 2015, continuing through to early 2016. Some of the work involved the conduct of filmed interviews with various people.
- [24] In this context it is noted that the TI 1105 *Goods and Services procurement valued at \$50 000 or less*, as it applied at that time, required quotes to be sought in relation to procurements over \$50,000. Separately, TI 1101 *Procurement Principles: goods and services* required that, in any procurement, the process must ensure: value for money; open and effective competition; and compliance with the ethical standards and code of conduct contained within the TI.
- [25] However, the Infostream Department Notice circulated in 2014 stated the following:

Where the value of the good or service is expected to be up to \$50,000, you may approach a single supplier (this was previously \$10,000). It is recommended that you seek written quotes from multiple suppliers to compare prices and obtain the best value for money;

- [26] Person A said that she attended a meeting with the manager where he specifically instructed that the project be divided into invoices less than \$10,000 each and that the money needed to be spent quickly, given the looming end of the financial year. Person B also recalled understanding that the project needed to be broken into amounts of less than \$10,000 in order to avoid the manager having to obtain further quotes.
- [27] The friend said that, to his knowledge, the quotes he provided ‘allowed [the manager] to source with us rather than have to go out to quote or to tender’ and that ‘it made good business sense to do that’. However, in response to a later similar question regarding whether he was directed to keep the quotes under \$10,000, the friend said, ‘Not that I recall, no’.
- [28] The manager has denied that he has made any statements or directions relating to Company 1 keeping the quotes under \$10,000.

5.2. Analysis

- [29] The interactive digital resources project was conceived by the manager and other officers in the Department in conjunction with the friend. It did not involve any competitive procurement process, and there was no consideration given to the possibility of the project being undertaken by anyone other than the friend’s company. The manager was under pressure to get the allocated funds spent quickly and the friend had proved successful in previous work of a similar nature.
- [30] This method did not therefore appear to have involved any testing of the market or measurement of value for money as required by the Department’s Infostream Notice. Similarly, it did not satisfy the requirements of TI 1101 to pursue value for money or to encourage competitive offers. This is particularly relevant given the total value of the interactive digital resources project.
- [31] The manager’s claim that the twelve interviews undertaken by Company 1 were not part of a larger project is made on the basis that the use for those videos was yet to be ascertained.

- [32] All invoices for the interviews and other tasks share the same date (22 May 2015) – this was two days after Company 1 had been established. The timing of these events lends weight to the suggestion from the Commission’s earlier complaint and the evidence of both Person A and Person B that Company 1 was initially created to facilitate the contracting of the friend’s company to undertake this project. The friend denies this is the case but has conceded that the company provided a means to ensure there was greater ability to meet the manager’s broader vision.
- [33] The nature of this invoicing process is indicative of a single procurement activity related to producing the interviews and other tasks. Whether or not the interviews themselves were to be put to the same use is not relevant to the question of whether they ought to have been treated as a single procurement or twelve separate ones.
- [34] No additional evidence beyond the manager’s and the friend’s statements has been identified to support a proposition that the interviews or associated contracts were legitimately separate projects.
- [35] Given this, it is considered appropriate to treat the project as a single procurement activity. This project therefore had a total value of \$139,770.25 putting it within the scope of TI 1106 and the requirement to seek at least three written quotes.
- [36] Irrespective of the total amount, the Procurement Code of Conduct contained in TI 1101 requires a ‘buyer’ to:
- complete a conflict of interest declaration and take steps to avoid involvement in any procurement activity where **any conflict of interest (actual or perceived)** may arise. (Emphasis added)*
- [37] The Department of Treasury and Finance has released guidelines to assist State Service agencies to comply with their record-keeping obligations under TI 1101: *Recording Conflict of Interest Declarations - Guidelines for Agencies* (dated October 2009).
- [38] The guidelines stipulate that ‘the actual identification of a conflict of interest is each individual employee’s responsibility’.
- [39] In response to a question about whether he had received training on conflicts of interest, the manager said: ‘No. I didn’t have any training in anything’.
- [40] The manager has given evidence that he and the friend have been ‘friends over a long period’. The information viewed by the Commission as part of the investigation, including numerous emails and text messages, indicate that the two of them were close friends and associated regularly outside of work. The language and subject matter of the emails and texts is casual and familiar.

[41] Yet the manager did not consider that his friendship with the friend created a conflict of interest. This view is based upon how he believed his relationship with the friend ‘would’ affect his decision-making. In the Commission’s view it is flawed, particularly in relation to a conflict perceived by another party. Treasurer’s Instruction 1101 is predicated on whether ‘any conflict of interest (actual or perceived) may arise’. The State Service Code of Conduct required the manager to ‘take reasonable steps to avoid any conflict of interest’ [emphasis added]. The manager has not met these requirements.

[42] It is not apparent how the manager could be satisfied as to the availability of ‘a better tender or quote’ if he did not plan to test the market.

5.3. Findings

On the basis of the evidence available to the Commission:

- The interactive digital project should properly have been considered to be a single project with a total value of \$139,770.25.
- The manager has failed to comply with Treasurer’s Instruction 1106 by failing to seek three written quotes for the interactive digital project.
- The manager’s friendship with the friend amounted to an actual conflict of interest for the purposes of awarding contracts for the interactive digital project.
- The manager has failed to comply with Treasurer’s Instructions 1101 by failing to declare his friendship with the friend as a conflict of interest.
- The manager has failed to comply with the State Service Code of Conduct by failing to disclose and take reasonable steps to avoid a conflict of interest based upon his friendship with the friend.

6. Online Learning Hub

6.1. Tender Specification

Evidence

- [43] The Online Learning Hub was conceived by the manager as a way of providing an accessible platform for learning and education material, including the videos being produced by the friend.
- [44] The manager was first introduced to Person A by the friend, who also later introduced him to Person C. In August 2015, the manager engaged Person A and Person C as consultants to develop the specifications for a tender to create the Online Learning Hub.
- [45] According to a timeline of events provided by Person A, the first meeting of this project occurred on 20 August 2015 and involved the manager and two other Department officers.
- [46] The tender specification process also involved a meeting between the manager and two different departmental officers on 20 October 2015. Along with the manager, these two officers formed the evaluation panel for the tender.
- [47] A review of the final draft tender documentation was conducted on 8 November 2015. The tender was publicly advertised on 21 November 2015, with the manager as the contact officer, and closed on 9 December 2015.

Analysis

- [48] The engagement of consultants to assist in developing a tender specification is not an unusual or inherently problematic practice. Consultants have particular expertise that can help a client translate a vision into the detail required for the final product. This is particularly useful when such consultants have no intention or capacity to compete for the tender.
- [49] The manager was introduced to both Person A and Person C by the friend. By this time, Person A was a director of Company 1, along with the friend. Person A noted that her engagement was as an individual, not as an employee of Company 1.
- [50] The tender specification included provision for developing further multimedia resources of the same nature as the interactive digital resources that Company 1 was producing for the Department at that time.

- [51] Person A's and Person B's evidence is that the manager and the friend were in regular contact with one another around the time of the tender. The manager and the friend both stated at interview that they could not recall what communication they had during that period and the friend later submitted that he denied having contact with the manager.
- [52] Person A made particular reference to a meeting on 26 November 2015, in response to the suggestion that the manager and the friend colluded regarding aspects of Company 1's tender submission, including the price. Person A sent a text message to the manager on that day which refers to the friend's 'numbers'. This message appears to indicate a level of communication between the manager and Company 1, including discussion about prices.
- [53] On the basis of these circumstances, it is probable that the manager would have known at the time of developing the tender specifications that the people he had engaged to assist him were likely to compete for it. Company 1 had been formed in May 2015, with at least an initial purpose of providing a platform for this tender.
- [54] In doing so the manager created a significant conflict in terms of open and fair competition once the tender was advertised, given that Company 1 could potentially have an advantage over its competitors. This placed even greater emphasis on the requirement for the manager to appropriately manage his existing conflict arising from his friendship with the friend.

6.2. The tender process

Evidence

- [55] The tender was publicly advertised on 21 November 2015 with the manager as the contact officer, and closed on 9 December 2015.
- [56] The investigation obtained evidence suggesting that the manager had relied upon Person A and Person C in formulating and responding to questions from other potential tenderers about the tender; had colluded with the friend during the tender process; and had influenced the other tender panel members in relation to the price submitted by Company 1.
- [57] Evaluation of the tender was undertaken by the manager, and two other panel members. In the process of evaluating the 11 tenders received, it appears that four applicants were shortlisted, one of which was Company 1. A tender evaluation spreadsheet notes the following prices for each tender:

[Tenderer 1] \$215,000

[Tenderer 2] \$232,000

[Tenderer 3] \$215,000

[Company 1] \$547,500

[58] Five evaluation criteria were considered, with the following weighting:

- 1. Tenderer's capability and capacity to fulfil the Department's requirements, including technical and management competence, financial viability, relevant skills, experience and availability of staff – 20%.*
- 2. Suitability experienced key personnel, which preferably should be locally based – 10%.*
- 3. Innovative and creative solutions in response to the specification – 50%.*
- 4. Local SME Industry Impact Statement – 10%.*

Whole of life costs, including on-going maintenance, support & running costs – 10%.

[59] The evaluation report contains a table outlining the scores for each tender against each criterion, except Criterion 5. Section 3.2 of the evaluation report summarises the 'Value for money' considerations, and in relation to Company 1 states:

[Company 1] have presented a sound case, clearly describing initial and ongoing costs. They have described how they will customise a CMS to suit the needs of AES and their content and exactly what ongoing costs will be. This is the clearest description and poses the least risk for the Department and the greatest value for money.

[60] On 2 February 2016 the manager sent an email to the two other members of the tender evaluation panel:

Hi ...,

Finally, the report is ready for your perusal, if you can remember what it was all about! On advice, I retrospectively established some shortlisting criteria as it makes the report more watertight for appeals. Let me know if you have an[y] concerns. I am told that if you send an email in support of the evaluation report this will suffice in lieu of a signature.

[61] On 4 February 2016 one member responded with the following:

Hey ...

This looks good, the only thing I question would be [Company 1]'s score of 7 around price, they were considerably higher than [Tenderer 1] etc and I wonder if this needs to come down a little? I [may] have missed something here ...

Other than that I am really happy, exciting!

[62] The manager replied with:

Hi ...,

Thanks for the feedback and thanks for picking that up. That table has been removed as it was not meant to be there! The spreadsheet attached is sufficient and more accurate. The price score is calculated automatically in the spreadsheet relative to the other submissions. I've attached the revised report.

It is exciting!

If you could both confirm that you are happy with the report I will send it off to procurement. Thanks to you both for all you[r] valuable help with this.

[63] On 26 February 2016 a letter providing 'Interim Advice of Successful Tender' was sent to the friend on behalf of Company 1. The manager was subsequently involved in negotiating contract details in relation to the Online Learning Hub with Company 1.

Analysis

[64] The manager's reliance on Person A and Person C to be able to respond to a question from a potential tenderer is problematic in that the Department was not in possession of the complete tender specification at the time of advertising it. It suggests a high reliance on people who the manager should have known were going to submit for the tender. Further, it was not appropriate for the request to be communicated to a competitor.

[65] The manager and the friend both denied at interview having contact about the tender with any Company 1 personnel while the tender was open. However, Person A said that the manager called her during the meeting she was having with the friend and Person B on 26 November, 'indicating, again, the amounts, the ballpark amount, which I don't know if he was phoning other people to tell them, I don't know'. In his procedural fairness submission, the manager specifically denied that this call occurred. Person A's text to the manager later that day indicates a level of discussion about the tender; this was supported by evidence given by Person B, who said that the manager and the friend were communicating regularly during the tender period.

- [66] The explanations by the manager and the friend do not plausibly address the language used in an email between them. The email was sent after a meeting between Company 1 personnel to discuss their submission and the manager's subsequent call to clarify the proposed budget. The opening sentence of the email, 'Points to support argument to withdraw tender', is not suggestive of the introduction for the first time of the idea to withdraw the tender and presents as the continuation of discussion on the topic. It suggests an intention to avoid any process associated with open competition.
- [67] As it transpired, Company 1's tender price was more than double that of its competitors. While there is no evidence that the manager was aware of the price on the competing submissions, it is probable that, given the other three submissions were in the same ballpark and Person A's statement that the friend's proposed budget was not 'making sense re what [the manager] and I've discussed', the manager had proposed an initial budget and this may have been known to all of the parties.
- [68] The manager made a written declaration to his supervisor about his private interest which may have intruded upon the tender process, but it does not identify to whom the declaration relates or the extent of the relationship, or their role in the tender submissions. It only serves as an acknowledgement of his responsibilities and obligations under the *State Service Act*. There is no formal declaration to the panel of his association with the friend.
- [69] The manager suggested to the investigation that he could 'remain completely objective throughout the process', but this is of limited value given that he offers no basis on which to support the statement. Similarly, the purported means to manage the conflict – by forming a tender evaluation panel with him as Chair – fails to mitigate any specific conflict of interest, given that it is a standard form of evaluating tenders in any case. The manager noted at interview that his intention had been to convene an evaluation panel independently of the conflict of interest, and thus the suggestion that establishing such a panel was a means to manage a conflict of interest is without substance.
- [70] The evaluation report does not contain sufficient detail of the value for money considerations purported to have been made during the evaluation process. In particular, the report's comments about the Company 1 submission only relate to the clarity of Company 1's costs, rather than analysing the extent to which those costs relate to achieving value for money.
- [71] Given that Company 1's submitted price was more than double that of its competitors, it is considered that this criterion should have been fully explored and a sound justification made as to why such a price disparity was acceptable.

6.3. Joint Venture and creation of Company 2

Evidence

- [72] Shortly after the awarding of the interactive digital project contract to Company 1, issues arose in relation to the structure of the company and the friend's view that Person C should become a part of it.
- [73] The friend resigned as a director of Company 1 on 29 March 2016. Company 2 was established by the friend and Person C on 1 April 2016, apparently without the knowledge of Person A or Person B. The investigation obtained evidence that the manager and the friend then worked together to ensure the involvement of the friend and Person C in the future work, at first by proposing a joint venture between the members of Company 1 and Company 2.
- [74] By early May 2016 the joint venture negotiations appear to have not progressed, and it was around this time that the negotiation process began to break down.
- [75] The last communication between Company 1 and the manager in relation to the contract negotiation occurred on 6 May 2016. After seeking legal advice, the manager elected to terminate the contract with Company 1.

Analysis

- [76] Evidence from Person A and Person B is that in early 2016 they became aware of the extent of the manager's and the friend's friendship and became concerned about the amount of contact each was having with the other in relation to the work issues.
- [77] It would appear, however, that the catalyst for Company 1 splitting was the friend's insistence that Person C become a director, and Person A's and Person B's refusal of that proposal. The friend initially proposed that he would be a director on both companies but ultimately resigned from Company 1.
- [78] The manager appears to have liaised closely with Company 2 throughout April 2016 and the tone of his communications indicates that by this time he was becoming actively involved in negotiations between the companies. It is clear that the manager's view – supported by legal advice from the Office of the Crown Solicitor but based on instructions from the manager – was that Person C was integral to the awarding of the contract to Company 1 and that any failure to include him and the friend in the project represented a significant departure from the original proposal, and thus grounds to discontinue to contract.

- [79] The manager's actions evidence his motivation to ensure that the friend and Person C would be involved in the work for the department into the future. In particular, the manager repeatedly cited the need for key personnel in the tender specification as requiring the involvement of the friend and Person C in the project.
- [80] By removing the departmental IT employee from the negotiation process in April 2016 and taking on that responsibility himself, the manager compounded the conflict of interest that existed at that time. This reduced the extent to which objective views could be incorporated into the handling of the tender process by the manager.
- [81] As negotiations with Company 1 broke down in May 2016, the manager steadily increased pressure on Company 1 to contract with Company 2. In doing so, the manager continued to rely on the 'key personnel' clause within the RFT documentation. He believed that Company 1 was becoming a risk to the project and the Department, based upon Person A and Person B's deteriorating relationship with the friend.
- [82] The manager has provided no justification for why the friend and Person C's involvement was essential to the project. His assertion that excluding Company 2 would amount to 'a significant alteration to the tender submission' does not appear to be supported by Person A and Person B's evidence, or by the fact that the Online Learning Hub was eventually created by an entirely different company. Both factors support the proposition that Company 2's skills were replaceable, and not critical to Company 1's capacity to undertake the project.

6.4. Request for quotation

Evidence

- [83] On 11 May 2016 the manager initiated a request for quotation ('RFQ') process for the Online Learning Hub. He sent formal approaches to Company 2, and two other companies that had previously also submitted for the tender for the interactive digital project, which had been subsequently awarded to Company 1.
- [84] At around this time, the manager and another member of the panel established to assess the RFQ both completed *Confidentiality and Conflict of Interest Declarations*. The declarations are dated '23 December 2015' (the date of the earlier tender for the interactive digital project) and reference that tender in the opening paragraph. Neither of the declarations refer to personal relationships or interests, and only reference the signatory's awareness of their responsibilities under the *State Service Act*.

[85] The Department received quotations for the Online Learning Hub from Company 2 and another company, costed at \$244,994 and \$181,700 respectively. According to the associated Evaluation Report, the third invited company declined to submit a quote.

[86] The evaluation criteria and weightings were as follows:

1. *Tenderer's capability and capacity to fulfil the department's requirements, including availability of staff and suitably experienced key personnel – 20%.*
2. *Innovative and creative solutions in response to the specification – 50%*
3. *Local SME Industry Impact Statement – 10%.*

Whole of life costs, including on-going maintenance, support & running costs – 20%.

[87] The Evaluation Report recommended that the quote from Company 2 be accepted, and this recommendation was sent to the Department's Procurement Review Committee (PRC).

[88] The PRC met on 3 June 2016 and rejected the recommendation that the contract be awarded to Company 2. The meeting minutes note the following:

Although the Conflict of Interest was declared by the Chair of the Panel, there was a perceived risk that a conflict of interest still existed.

Although the value of the RFQ was expected to be under the \$250k threshold, when the whole of life costs (over 10 years) were considered, the value was in excess of \$380,000 therefore the use of a RFQ was inconsistent with TI's.

The project procurement was therefore non-compliant.

The PRC endorsed that:

PRC recommends that the project be returned and redesigned to be offered through an open tender process on the Tenders website.

PRC recommends that the General Manager, Tertiary and Equity chair the new tender evaluation panel to remove the perceived Conflict of Interest.

PRC was not satisfied that value for money has been established.

PRC recommends the submission be returned as non-compliant.

Analysis

- [89] The TIs provide no specific guidance on how a government buyer is to select businesses from which to seek quotations, other than requiring that at least two be Tasmanian where local capability exists.
- [90] It is noteworthy, however, that in seeking three quotations from businesses involved in the previous tender process, the manager did not select the three highest ranked tenderers to provide quotations. Rather the two selected tenderers had been ranked third and fifth respectively. Additionally, one of the two submissions had not been previously shortlisted and the other had tendered in conjunction with another company (who were not approached in this RFQ).
- [91] Given the above, the manager's approach presents as having had the purpose of ensuring that Company 2 would be competing against less competitive businesses. Coupled with the fact that Company 2 had been provided with documentation relevant to the process ahead of time, the RFQ process as conducted by the manager conferred advantages to Company 2 over its competitors. This is in contravention of TI 1101 which requires that the 'purchasing process is impartial, open and encourages competitive offers'.
- [92] Further, convening a panel with one other member, who was not herself a member of the same unit, gave the manager near total control in relation to evaluating undefined criteria such as 'innovation' and responses to the needs of the Department. This situation made it easy for the manager to justify the consistently high scores given to Company 2 in this process.
- [93] It is also noted that, in this case – where Company 2's price was not as significantly higher than its competitor as Company 1's was in the previous tender process – Criterion 5 (relating to whole of life costs) was weighted at 20% instead of 10%.
- [94] As with the previous tender process, the manager's assertion that he would not be conflicted by his friendship with the friend (and possibly by this stage with Person C) lacks substance and plausibility. The panel of two was not an 'independent panel' as suggested by the manager at interview and would not have provided adequate safeguard against the manager's friendship with the friend, even though he had alerted the other panel member to this.
- [95] The Department's *Confidentiality and Conflict of Interest Declaration* completed by the manager provides no confidence that he was either declaring or managing his conflict arising from his relationship with the friend. While the PRC noted that a 'Conflict of Interest was declared by the Chair of the Panel, [and] there was a perceived risk that a conflict of interest still existed' the Committee should have been aware that the declaration made by the manager amounted to little.

[96] The analysis relating to the management of the manager's conflict of interest and the requirements of TI 1101 provided above in interactive digital resources project are also relevant to this process. The process implemented by the manager appears to have not:

- avoided a situation which may impinge, or might be deemed to impinge, on impartiality;
- been conducted without favour or prejudice and to maximise value in all transactions;
- promoted fair and open competition and seek value for money for the Government; and
- taken sufficient steps to avoid involvement in any procurement activity where any conflict of interest (actual or perceived) may arise.

[97] It was, however, ultimately the intervention of the PRC that prevented this conflicted process from being finalised, and PRC recommended that an independent person chair any subsequent panel.

[98] The PRC also noted that, while the initial value of the RFQ was under the \$250,000 threshold in TI 1107, the actual value (incorporating whole of life costs over 10 years) was in excess of \$380,000; consequently 'the use of a RFQ was inconsistent with TIs'.

6.5. Findings

On the basis of the evidence available to the Commission:

- **The manager engaged Person A and Person C to develop the specifications for Online Learning Hub at a time when he would have been aware that they, through Company 1, would be submitting a tender for that project.**
- **The manager declared a conflict of interest arising from his friendship with one of the tenderers (the friend) and as Convenor of the Evaluation Panel for the Online Learning Hub to his then supervisor. However, the declaration was inadequate as it did not identify who he was friends with, the nature of that friendship or the extent to which the friend's company had been advantaged throughout the tender process.**
- **In conflict with his evidence to the investigation, the manager communicated with Company 1 about the tender during the tender period, and specifically with Person A on 26 November 2015.**

- **The Confidentiality and Conflict of Interest Declaration completed by the manager for both the tender and the subsequent Request for Quote process was inadequate, as it did not declare his relationship with the friend.**

7. Direct Sourcing from Company 2

7.1. Multimedia Projects

2016 Invoices

[99] Company 2 was created on 1 April 2016. On the same day, it provided ten quotes to the manager for multimedia projects. The ten quoted projects ranged in price from \$42,300 to \$49,650.

[100] Most of the projects related to an email the manager had sent to the friend and Person C on 30 March 2016:

Hi ...,

I have literally punched these out in 20 minutes and I am sure we could expand on them (and will need to). They are a starting point for discussion and to get the ball rolling on getting some quotes in next week. Bear in mind, we need two milestones for each resource before mid-May and a final payment of 10% that can be anytime.

[101] Attached to the manager's email were summaries of some of the projects. Each summary contains within it the following statement:

Budget:

- *\$30-50k*

[102] Neither the manager nor the friend agreed that the direction to keep the prices at that level was for the purposes of avoiding the requirement to seek three written quotes. The manager said that he saw them 'as individual projects, pure and simple, like a book that they'll be produced at different times, they'll be finished, put on the [Online Learning Centre] as separate entities involving different interviewees about a different topic'. He said that in his mind they were separate projects.

- [103] The manager said that, given he had previously declared his relationship with the friend (in the previous tender and the subsequent RFQ process), and he felt his supervisor was aware of this, he did not need to manage any conflict of interest any further. He confirmed that he was the decision-maker in relation to the quotes.
- [104] He said that he sourced directly from Company 2 as, following the earlier processes, they 'were found to be the best people through the local and national and international market for the job'.
- [105] The quotes have dates ranging from 1-30 March 2016 and a combined value of \$471,665. The manager accepted all of the quotes on the same day that they were submitted.
- [106] On 4 April 2016, Company 2 issued invoices for Stage 1 of the ten projects above, totalling \$141,499.50.
- [107] On 19 April 2016, Company 2 issued invoices for Stage 2 of the projects, totalling \$306,582.25.
- [108] Also on 19 April 2016, Company 2 quoted for another project, for \$48,900. On that same day, the manager accepted the quote and Company 2 issued an invoice of \$19,560 for Stage 1, plus an additional invoice of \$5,000 for technical support to the website.
- [109] The following day, 20 April 2016, Company 2 provided four quotes ranging from \$45,700 to \$48,700. Again on the same day, the manager accepted the quotes and Company 2 issued four invoices for Stage 1 totalling \$75,720.
- [110] On 27 April 2016, Company 2 provided two further quotes, of \$47,600 and \$48,980. The manager accepted the two quotes the following day, and on 29 April 2016 Company 2 issued two invoices for Stage 1, totalling \$38,632.
- [111] This meant that in its first month of existence, Company 2 was paid \$586,993.75 by the Department.
- [112] On 12 May 2016 Company 2 provided three further quotes ranging from \$48,150 to \$49,750. Later that day, Company 2 issued invoices for Stage 1 of the three projects, a total of \$58,660, and invoices for Stage 2 of several earlier projects, totalling \$184,129. Additionally, the friend (rather than Company 2) issued an invoice of \$2,925 for out of pocket expenses.
- [113] Finally, on 12 May 2016, the manager provided an 'Asset Proposal' document regarding another project to Company 2. A quote of \$49,500 was provided later the same day.

- [114] Over the succeeding months, Company 2 issued other invoices which (together with some penalty payments) made a total payment of \$889,198.02 (excluding GST) to Company 2 in the 2016 calendar year.
- [115] It also brought the monies paid to the friend (as a sole trader) and his companies (either Company 1 or Company 2) to a total of \$1,062,728.27 (excl GST).⁸

2017 Invoices

- [116] On 1 March 2017, Company 2 issued two invoices for new projects. These covered Stages 1 and 2, totalling \$92,150.
- [117] On 10 April 2017, Company 2 issued invoices for a further five projects totalling \$38,955. Two additional invoices were issued by Company 2 on 22 May 2017, to a total of \$13,830.
- [118] On 30 June 2017, four late invoice payment penalty fees of \$233.30 were provided by the Department.
- [119] Finally, an invoice of \$5,815 was issued for equipment hire, mileage and catering on 23 August 2017.
- [120] These invoices totalled \$150,983.30 for 2017.

2018 Invoices

- [121] On 31 January 2018, Company 2 issued two invoices which together totalled \$4,874.11.
- [122] A further invoice for design and component updates was issued on 27 March 2018 for \$3,937.50.
- [123] On 26 April 2018, two invoices for Stage 2 of two projects were issued for a total \$53,295.
- [124] These invoices made a total of \$62,106.61 for 2018.

⁸ This does not include a further payment of \$12,812 which was paid to Company 1 on 29 November 2016 for two other projects. It is understood that the portion of payment to the friend for his involvement in those projects was covered by his invoice of 12 May 2016, and which is included in the total of \$1,062,728.27.

7.2. Treasurer's Instructions exemption

- [125] On 11 October 2016, following the PRC's rejection of the RFQ process for the Online Learning Hub, the manager sent an email to another departmental officer containing a draft briefing note to the Secretary that sought an exemption from the operation of the Treasurer's Instructions, to enable the direct sourcing of services from Company 2.
- [126] The total value of the proposed work was approximately \$1 million over three years.
- [127] Subsequently, the manager emailed the document to a Deputy Secretary in the Department. In the email he stated that he had 'developed the attached document in collaboration with another departmental officer' and that 'Procurement ... have viewed and supported this document'.
- [128] The request to be exempted from the Treasurer's Instructions was considered at the PRC meeting of 17 November 2016, and rejected.

7.3. Analysis

- [129] The first of the projects for which Company 2 provided quotes was discussed in a meeting on 24 March 2016. The friend said that it was only this project that was discussed at that meeting and that neither he, Person A nor Person B were aware at that time of any further projects.
- [130] However, by 30 March 2016, the manager provided the friend and Person C – now directors of Company 2 – with an extended list of new work, and the friend responded with quotes the next day. The timing of the exchange suggests that the manager had liaised with the friend separately, likely with the knowledge that the friend would shortly be creating his own company (which also occurred on 1 April 2016).
- [131] The timing of these events also suggests that an agreement had already been reached before Company 2 had been created, that it would be the provider of the production services, further indicating that there was no intent to test the market for these projects. The projects were all directly sourced from Company 2.
- [132] These inferences are denied by the friend. The balance of evidence and timing of the distribution of the briefs by the manager and the friend's response suggests that the inferences are reasonable but the Commission makes no formal finding on this issue.

Value of projects being below \$50,000

- [133] The manager had forwarded briefs for the work with an indicative value of \$30,000–50,000. The manager was able to specify the prices without needing to explicitly state that it was for the purpose of avoiding a quotation process (as required by TI 1106), and the friend was also familiar with applicable tendering thresholds.
- [134] The manager said that he did not direct Company 2 to submit quotes at less than \$50,000 but the project briefs show otherwise. The friend indicated that he understood the brief to require the projects to be under \$50,000. All of the relevant projects were quoted at less than \$50,000 (ranging from \$42,300 to \$49,750), eventually totalling \$889,198.02 for the 2016 calendar year.
- [135] The manager argued that Company 2 had proven technical ability (as a result of the previous tender process) and that this was not otherwise available in Tasmania nor elsewhere. He said that, to a certain extent, the projects followed a template and thus the costs would be fairly consistent. This latter point is considered reasonable but the sheer volume of the projects suggests that the market should have been tested in order to ensure that the 'template' price was acceptable. There may have been other suitable companies that could do the work but which had not applied for the interactive digital project, including those located outside of Tasmania.
- [136] The fact that the majority of the quotes were accepted either immediately or within hours of them being received weighs against a suggestion that they were subjected to scrutiny as to whether or not they offered value for money.
- [137] The evidence indicates it is probable that the value of the individual projects was established on the basis of them falling below the threshold of \$50,000 set by TI 1106, and thus enabled the services to be directly sourced from Company 2. This would contravene TI 1104 *Valuing Procurements: goods and services* cll 4–5, which requires:

A procurement must not be divided into separate parts for the purpose of avoiding any procurement threshold.

An agency must not use a particular method for estimating the value of a procurement for the purpose of avoiding the application of any procurement threshold.

- [138] The direct sourcing results in a failure to genuinely test the market for the services supplied by Company 2.
- [139] As per the earlier procurements, there is no evidence that the manager complied with the overarching and mandatory declaration of interest requirements of TI 1101.

Disaggregation of a bigger project

[140] Clause 3 of TI 1104 also requires that:

(3) *Where a procurement is to be conducted in multiple parts with contracts to be awarded at the same time or over a given period to one or more suppliers, the calculation of the estimated value must be based on the estimated total maximum value of all the contracts to be awarded over the entire duration of the procurement. (Emphasis added)*

[141] In relation to the 21 projects awarded to Company 2 in 2016, the timeframe over which the briefs were prepared and the contracts awarded was quite short: 30 March to 12 May 2016 (with 10 quotes being submitted and approved on 1 April 2016 alone). All the quotes submitted during this period by Company 2 were approved by the manager on the same day as submission. This likely satisfies clause 3 of TI 1104 that the contracts 'be awarded at the same time or over a given period to one or more suppliers'.

[142] The total of all the contracts awarded over the duration of 2016 was \$889,198.02.

[143] Separately, Treasurer's Instruction 1119 *Buy Local Policy: goods and services* requires that (at clause 4):

Agencies must ensure that the planning process and specification for any procurement process does not disadvantage local SME suppliers and, except as provided in clauses 5 and 6 below, must disaggregate all substantial procurement opportunities unless an exemption is approved by the Head of Agency.⁹

For the purposes of this clause, substantial means any combined contract value of \$250 000 or more. Below this level, disaggregation is at the discretion of the Head of Agency

[144] In relation to disaggregation of the projects, the manager had previously stated:

I did not split up the procurement of one service into 42 in order to avoid complying with the Treasurer's Instruction No 1107;

The production of each of the 42 media products was a separate and discrete project because each product related to a different subject matter, involving different people and the timing of its production depended on a number of different variables;

⁹ 'Local SME suppliers' are Australian and New Zealand businesses employing less than 200 people.

[145] This response suggests that the manager never turned his mind to the concept of disaggregation as set out in TI 1119. Even if he had, the fact that the service was provided only by Company 2 indicates that the intent of any disaggregation under TI 1119 – to not disadvantage local SME suppliers – would not, in any event, have been achieved.

[146] The Minutes of the PRC (when considering the manager's request for an exemption under TI 1114) record that,

The PRC views this procurement as one process, not a series of smaller one off procurements and, as this is the case, it should go to open tender.

[147] Each project has a specific title, and the content appears to be relatively unique to each project. It is probable that different subject matter experts would have been engaged for each topic. It appears to have been possible for the production of certain projects to overtake others as they progressed, suggesting that although they may have run concurrently to one another, each project operated to a distinct schedule.

[148] There is, however, evidence tending toward the commonality of the projects. The manager's email of 30 March 2016 provided summaries for eight projects, which he had 'punched ... out in 20 minutes'. Quotes for the first 10 projects were all provided by Company 2 and accepted by the manager on 1 April 2016, over the course of two hours. Similarly, the first 10 projects were invoiced together in a single email on 4 April 2016.

[149] The timing of these events is relevant in that the act of procuring these resources occurred at the same time. They did not require individual discussions or negotiations.

[150] As previously noted in relation to the interactive digital project, the ultimate use of the projects, including their specific subject matter, is not of itself evidence suggestive of distinct projects; the projects share a style and purpose of acting as educational resources on the Online Learning Hub. The difference in topics in this context presents as, for example, the difference between chapters in a text book.

[151] Considering all factors together, the procurement activity presents essentially as a single occurrence. Little, if any, evidence points to individual projects being treated differently to the other in the manner in which they were envisaged, procured, produced and utilised.

[152] The pricing of each of the projects at just under \$50,000 is also evidence that supports the conclusion that the resources were only split in order to avoid procurement thresholds rather than any genuine difference from one project to the next.

7.4. Findings

On the basis of the evidence available to the Commission:

- The manager did not undertake any genuine testing of the market in order to ensure that the Department obtained value for money in procuring services directly from Company 2, as required under TI 1101.
- The manager sought to avoid relevant procurement thresholds provided in TI 1106 by providing contract briefs that capped each respective contract at \$50,000.
- The 21 contracts provided to Company 2 in the calendar year of 2016 were reasonably to be considered as one combined project and should have been subject to the processes outlined in TI 1107.
- The manager failed to declare or manage a conflict of interest associated with his procurement of services from Company 2, as required under TI 1101.

8. 2017 Multimedia project tenders

8.1. Background

[153] In March 2017, the manager began drafting tender specifications for four further multimedia projects. The manager was not a member of the evaluation panels for these projects, but provided some support to them.

[154] Arrangements had earlier been made to engage a probity advisor from KPMG to assist the process. This followed the PRC recommendation (arising from the earlier request for an exemption under TI 1114) that ‘for any future work on this project ... a probity advisor is involved in the process from the beginning’.

[155] After a series of amendments, a departmental officer provided the Request for Tender (RFT) document to the probity advisor on 13 April 2017.

[156] Two days later advance notice of the four tenders was listed on the Tasmanian Government Tenders website.

8.2. Probity plans

[157] The Department prepared a Tender Evaluation and Probity Plan ('Probity Plan') for each of the four tenders. The Probity Plans contain detailed information about the evaluation process and note the probity advisor's engagement 'to provide overview and advice in relation to the probity aspects of the project'.

[158] In relation to conflicts of interest, cl 3.1 of the Probity Plans state:

Probity and Confidentiality Agreement and Conflict of Interest Declaration

Members of the Evaluation Committee, advisors and other staff directly involved in the tender and evaluation processes must sign a Confidentiality and Conflict of Interest Declaration prior to the commencement of their first meeting. Members need to declare any relationships or connections they currently have, or previously had, to tenderers or their employees. Throughout the RFT process members of the Evaluation Committee or advisors to the Committee cannot accept offers of gifts, meals etc from any interested party and/or prospective tenderer. Furthermore, members of the Evaluation Committee and advisors will be expected to declare the existence of any real or perceived conflict of interest as soon as they become aware of it.

8.3. The Four Requests for Tender (RFTs)

Evidence

[159] Four RFTs were undertaken, with the first advertised publicly on 6 May 2017. Only the first RFT warrants any substantial comment.

[160] In the case of the first RFT, the probity advisor stated that she was aware there had been a complaint about a perceived conflict of interest between 'the manager and one of the likely proponents tendering for the projects', and more particularly the 'claims of a conflict between the manager and [the friend]'.

[161] However, the manager was consulted during the assessment process for the first RFT. As the 'client' for the product to be obtained through the tender, this was not unreasonable and it was endorsed by the probity advisor.

[162] A Tender Assessment Matrix completed by the panel contains scores for each submission against the qualitative (non-price) criteria before and after the manager's input. The criteria and the original scores (out of 10) for the top four submissions are as follows:

Criterion 1: A proven ability to work with diverse cultural groups (particularly the Tasmanian Aboriginal Community) and historians – 20%.

Criterion 2: A proven ability to work collaboratively with experts, especially educators, to develop resource – 20%.

Criterion 3: Evidence of the creation of innovative and engaging multimedia materials, along with details of the personnel who will be delivering the project, and their relevant experience in this area – 30%.

Criterion 4: Local SME Industry Impact Statement – 10%.

Criterion 5: Price – 20%.

Tenderer	Criterion 1	Criterion 2	Criterion 3	Criterion 4	Rank
[Tenderer 1]	10	9	6	10	1
[Tenderer 2]	7	9	9	4	2
Company 2	7	8	5	10	3
[Tenderer 4]	6	6	8	3	4

[163] Following the manager's input the scores became:

Tenderer	Criterion 1	Criterion 2	Criterion 3	Criterion 4	Rank
Company 2	7	8	8	10	1
[Tenderer 1]	10	9	5	10	2
[Tenderer 4]	6	6	8	3	3
[Tenderer 2]	7	9	6	4	4

[164] Essentially, the scores for Criterion 3 changed following the manager's input, with Company 2 increasing three points and two other tenderers decreasing. This resulted in Company 2 rising from the third-ranked submission to the highest ranking.

[165] The Evaluation Report ultimately recommended that the tender be awarded to Company 2 for a price of \$215,200, and Company 2 issued invoices for Stages 1 and 2 of this project on 10 November 2017 and 24 May 2018 respectively, for \$44,000 and \$55,000.

[166] In the case of the second RFT, seven tenders were received. The evaluation report recommended that Company 2 be awarded the tender at a price of \$218,600, and Stage 1 was invoiced by Company 2 on 19 January 2018 for \$44,000 and Stage 2 on 24 May 2018 for \$55,000.

- [167] For the third RFT, two evaluation matrices were prepared. One version of the evaluation matrix calculates one tenderer's overall score as 8.45 where the other version has it as 7.62. This results in a difference in that tenderer's ranking from second to fifth in the respective evaluation reports associated with each matrix.
- [168] The lower score appears to be the result of an error in a formula contained within the evaluation matrix, but it is unknown which score was ultimately used in finalising the evaluation process.
- [169] However, both evaluation reports recommended that the tender be awarded to Company 2 at a price of \$219,200, and Company 2 invoiced for Stage 1 of the project on 10 November 2017 for \$44,000 and Stage 2 on 24 May 2018 for \$55,000.
- [170] The final RFT evaluation report recommended that the tender for this fourth project be awarded to Company 2 for a price of \$218,100.

Analysis

- [171] The investigation found no evidence that, when he was consulted about the first RFT, the manager manipulated the responses improperly to favour the friend or Company 2. The nature of the queries and the panel chair's lack of detailed knowledge about the technical requirements and end-product, and the advice from the probity advisor, suggests that it was appropriate for her to seek input from the manager.
- [172] However, the manager's likely knowledge of the identity of the respective applicants had real potential to create a bias towards any favoured applicant. It emphasises the need for the evaluation panel to have been aware of the manager's personal relationship with the friend.
- [173] Whilst some evaluation panel members may have been aware of the relationship between the manager and the friend, there was no formal declaration of interest made by the manager. This is notwithstanding the requirement for the manager to declare any relationship under both the Probity Brief prepared by KPMG and the Probity Plans prepared by the Department.

[174] The probity advisor's role included checking that the relevant conflict of interest declaration was made, but she was unable to provide any copy of a declaration by the manager or the panel. The probity advisor did, however, provide a copy of the template form which was the same as that used by the manager in the earlier procurement process. This 'declaration' would not have assisted in any event, given its limitation to statements of awareness of the signatory's statutory obligations, and it does not appear to provide assurance of the probity of the process.

[175] Considering the evidence, it is clear that the manager's input into Criterion 3 for the assessment of the first RFT had considerable weight with the evaluation panel. However, the panel made its own decision, based on all of the information it had before it.

8.4. Findings

On the basis of the evidence available to the Commission:

- **The process established to manage and evaluate the four tenders was in accordance with acceptable probity standards.**
- **The manager did not declare his conflict of interest arising from his friendship with the friend when providing advice to the tender evaluation panel for the four tenders, as required by the Probity Brief and the Probity Plan prepared by the Department. This resulted in his relationship with the friend not being fully declared to the evaluation panel.**
- **While the manager's involvement in the review of creative responses as part of the evaluation of the first RFT was appropriate from a technical perspective, and was at the request of the tender evaluation panel and endorsed by the independent probity adviser, his failure to declare his relationship with the friend meant that this conflict of interest could not be properly considered and managed by the evaluation panel.**

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