

# *Performance Audit Report*

## *Review of Walsh Bay*

---

**State Library of New South Wales cataloguing-in publication data**

New South Wales. Audit Office.

Performance audit report : review of Walsh Bay / [The Audit Office of New South Wales]

0731389107

1. Letting of contracts - New South Wales - Auditing.
2. Public contracts - New South Wales - Auditing.
3. Walsh Bay (N.S.W.)
4. Waterfronts - New South Wales - Walsh Bay - Planning - Auditing.
5. Wharves - New South Wales - Walsh Bay- Planning - Auditing. I. Title: Review of Walsh Bay.

352.5709944

© Copyright reserved by The Audit Office of New South Wales 1998. All rights reserved. No part of this publication may be reproduced without prior consent of The Audit Office of New South Wales.

---

# Contents

<b>EXECUTIVE SUMMARY</b>	<b>1</b>
EXECUTIVE SUMMARY	2
SUMMARY OF RECOMMENDATIONS	5
RESPONSE FROM THE NSW DEPARTMENT OF PUBLIC WORKS AND SERVICES	6
<b>1. INTRODUCTION</b>	<b>9</b>
1.1 THE AUDIT	10
1.2 AUDIT APPROACH	10
1.3 THE GOVERNMENT'S OBJECTIVES	11
1.4 COST OF AUDIT	12
1.5 ACKNOWLEDGMENTS	12
<b>2. CHRONOLOGY OF EVENTS</b>	<b>13</b>
2.1 CHRONOLOGY	14
2.2 AUDIT CONCERNS	23
<b>3. DISPOSAL STRATEGY</b>	<b>25</b>
3.1 DETERIORATION OF THE WHARVES	26
3.2 STRATEGY ADOPTED	27
3.3 CONSEQUENCES OF THE STRATEGY ADOPTED	31
3.4 CONCLUSION	37
<b>4. BIDDING PROCESS</b>	<b>39</b>
4.1 REQUIREMENTS FOR EFFECTIVE COMPETITION	40
4.2 OPPORTUNITY FOR PRIVATE SECTOR PROPOSALS	41
4.3 INCLUSION OF OBJECTIVES IN THE CALLS	42
4.4 IDENTIFICATION OF CRITERIA FOR WALSH BAY	44
4.5 ASSESSMENT OF BIDS	49
4.6 CONCLUSION	52
<b>5. EXCLUSIVE NEGOTIATION PERIOD</b>	<b>55</b>
5.1 GUARDING AGAINST THE LOSS OF COMPETITION	56
5.2 NEGOTIATIONS STRATEGY OR PLAN	57
5.3 BENCHMARK STUDIES	58
5.4 INFORMATION ON SITE CONDITIONS	60
5.5 LEAVING THE DOOR OPEN TO OTHER BIDDERS	62
5.6 CONCLUDING THE AGREEMENT AS QUICKLY AS POSSIBLE	67
5.7 CONCLUSION	71
<b>6. PLANNING AND APPROVAL PROCESS</b>	<b>73</b>
6.1 AGREED (1997) PROPOSAL	74
6.2 DUAP REQUIRES MAJOR CHANGES	74
6.3 BALANCING HERITAGE PRESERVATION AND COMMERCIAL VIABILITY	75
6.4 ASSESSMENTS BY VARIOUS PARTIES	78
6.5 RIGHT TO TERMINATE IF NO APPROVAL	81
6.6 CONCLUSION	83
<b>7. ASSESSING VALUE FOR MONEY</b>	<b>85</b>
7.1 APPROACH TO ASSESSMENT	86
7.2 FINAL PROPOSAL	86
7.3 COMPARISON OF TERMS OF 1997 PROPOSAL AGAINST THE ORIGINAL OFFER	89
7.4 PROBITY	93
7.5 VALUE FOR MONEY	98
7.6 CONCLUSION	100

---

# **Executive Summary**

---

## Executive Summary

This reports on a performance audit on the latest attempts to preserve and redevelop Walsh Bay. These started in 1994 and are, at the time of writing, continuing.

### **Walsh Bay - Heritage Asset**

Walsh Bay is an important part of Sydney's maritime and urban heritage. This was officially recognised in 1988 with its own permanent conservation order (PCO) and regional environmental plan (REP). These place major constraints on any redevelopment in order to ensure the retention of the site's heritage significance.

### **Lack of Maintenance**

But the heritage significance did not carry with it a requirement, or at least an obligation, that the heritage asset be maintained and preserved for future use. Whilst recent amendments to the NSW Heritage Act make it compulsory to maintain a heritage asset, that was not the case at the time the PCO was placed on Walsh Bay. Nevertheless, the owners, Maritime Services Board (MSB), were warned in 1986 that the rate of decay was increasing with age.

The MSB had tried to divest itself of the property and offered the site for redevelopment en bloc to the private sector on two previous occasions, in 1988 and 1990. On both occasions the developers finally withdrew their offers because the complexity (and costs) increased and the property market deteriorated.

As a consequence, the site remained unused. It also continued to deteriorate because no significant action was taken to preserve or maintain the area since 1985, when it had been identified as surplus to the MSB's requirements.

### **Deterioration of Walsh Bay**

The lack of maintenance was again reported on in September 1994 when the redevelopment of Walsh Bay was reconsidered. Consultants' reports indicated further deterioration over the elapsed years.

Under the circumstances it is not surprising that, to advance the proposal to develop Walsh Bay in 1994, the then Property Services Group (PSG), which had the task of disposing of surplus Government properties, recommended that a feasibility study and a Master Plan be drawn up before proceeding with the disposal.

### **Option adopted in**

However, the Office of Economic Development ( the body that

**1994**

had taken over the running on the proposal to dispose of the Walsh Bay precinct) in developing options for the Premier did not incorporate PSG's recommendation as part of the submission.

At the same time the then Premier, following a meeting with a consortium concerning a major redevelopment of Walsh Bay, expected that expressions of interest would be called prior to the end of 1994; and following evaluation of those expressions of interest, short-listed proponents would be invited to submit a detailed proposal.

On 10 November 1994, the Government approved the option of calling for an expression of interest for the redevelopment of the Walsh Bay precinct en bloc, without a Master Plan or any further detailed study as to the condition of the precinct, and that the process be managed by PSG.

The closing date for the expression of interest was 2 March 1995. The State election was on 25 March 1995.

**Audit Findings and Opinion**

The decision to seek development of Walsh Bay without a Master Plan and/or detailed study as to the state of the precinct presented significant problems throughout the life of the project. Now, four years later, negotiations still continue on the details of the final scheme. Based on the latest estimates, it will not provide a financial return as was originally expected.

The audit found no evidence to indicate why the former Government wished to expedite Walsh Bay, but it is aware that there was an election due. Many of the problems which have been encountered could have been avoided with more careful and more extensive consideration at the start, particularly in the light of PSG's recommendations.

In addition to the above, the audit also identified the following major concerns:

- the selection process to determine the preferred proponent
- the ability to depart from existing guidelines when those are perceived not to be applicable

- the consequences of exclusive negotiation over an extended period
- lack of apparent fairness in handling the competing proposals for the redevelopment of Walsh Bay
- the consequences of the Government's agreeing to a project which was still subject to strategic development consent by another arm of the Government.
- the consequences of the major changes required by DUAP not being identified as major concerns during the period of exclusive negotiation
- the lack of evidence to determine the 'value for money' aspects of the development project.

### **Value for Money**

The Government approved the several, sometimes competing, objectives it set down for the development of Walsh Bay and it is the sum total of attainment against each of the objectives which determines the value or effectiveness of the project.

It is accepted that DPWS have made strenuous efforts, including the use of consultants/advisers over a long period, and that audit processes have been put in place. But there is no useful benchmark to assess the sum total. And there was no effective competitive pressure to provide assurance that the executed project agreement (which is in any event being renegotiated) is an efficient result. Accordingly, The Audit Office cannot be assured that taxpayers will receive value for money in the redevelopment of Walsh Bay, notwithstanding DPWS's efforts.

## Summary of Recommendations

### **Development Agreement**

The Government should ensure that when it enters into a development agreement, there is either:-

1. a masterplan or equivalent document approved by the consent authority before it enters into the agreement, and compliance with this document should constitute part of any agreement  
or
2. the agreement should recognise that development approval is a normal risk associated with the development process which is borne by the developer and not the government, and this should be adhered to.

There is a need for a revised procedure that will allow interim advice to be provided by a consent authority, especially in complex, divisive projects, in order to avoid undue effort, time and resources being expended on a proposal which clearly will not be approved.

### **Competition**

Guidelines should require that proponents be retained in competition as long as possible (eg Olympic Stadium and Melbourne Docklands).

Guidelines should require the first and second preferred proponents be identified (and be publicly advised) and that, should negotiations fail with the first proponent, the Government consider negotiating with the second proponent.

### **Accountability**

The development of projects and disposal of assets should follow Government guidelines. Where there are no appropriate guidelines available or where there is an intention to depart from existing guidelines, the proposed action should be subject to a detailed explanation and subject to approval by the Government.

## **Response from the NSW Department of Public Works and Services**

*The opportunity to respond to the performance audit report, “Review of Walsh Bay” is appreciated. The report identifies a number of important and valid considerations for Government when embarking on large, complex projects such as Walsh Bay. However, it also makes several assertions and reaches some findings which are not accepted.*

*I agree with the recommendations you have made with respect to the use of development agreements and the need for masterplanning. With respect to this issue, the need for a revised procedure to provide interim advice by consent authorities is urgently required.*

*A fundamental assumption underpinning the report seems to be that a prescriptive tendering process based on a comprehensive brief or tender documentation, specific selection criteria and a competitive environment throughout are essential prerequisites for fairness and value for money. DPWS does not agree. It is not considered appropriate for all major asset sales, developments and infrastructure projects. In New South Wales and other states as well as overseas, there is an increasing trend toward cooperative partnering alliances between Government and the private sector. The Royal Commission into Productivity in the Building Industry strongly recommended this partnering approach.*

*The NSW Government supports the greater involvement of the private sector in the project development process which thereby captures the benefits of innovation in the delivery of superior outcomes in terms of urban design, economics, community benefit and of course value for money. Adoption of a prescriptive process would effectively shut out the creativity and experience of the private sector in terms of concept development and delivery strategy. That these contemporary approaches create new challenges for public sector probity and accountability standards is not contested. DPWS would welcome the Audit Office’s assistance in working through these challenges to help ensure the public sector is not denied the clear benefits available.*

*In respect to the application of guidelines and the competitive position of proponents the report states: ‘guidelines should require proponents to remain in competition for as long as possible.’ In the circumstances of Walsh Bay, maintaining a competitive position would have resulted in an expensive, time consuming, uncertain and therefore unrealistic competitive bidding environment. My Department’s conduct in following a competitive selection then progressing from that point based upon professional advice, fairness and practicality is not only an appropriate but also a responsible approach.*

*The process adopted by my Department was in accordance with*

*Government guidelines and policies relating to tendering and the assessment of tenders as applicable to Walsh Bay. On a number of occasions my Department sought advice from appropriate authorities in respect of this issue, including ICAC, the Crown Solicitor and eminent senior counsel. Moreover, my Department's actions have been in accordance with the Government policy which requires agencies to consult ICAC on process for projects such as the Walsh Bay redevelopment. Under these circumstances, suggestions of possible lack of fairness are not agreed.*

*Your report comments in respect of a number of Government guidelines that: 'as these documents are no more than guidelines they do not by themselves assure the public of fairness in an undertaking.' My Department recognised this issue and sought additional legal and probity advice to ensure fairness was achieved.*

*The report also fails to determine whether or not value for money has been achieved. Throughout the expression of interest and detailed call process the Government has used recognised private and public sector experts to select the preferred proponent. In progressing the negotiations, internationally recognised construction, property, financial and legal consultants have provided advice to Government at every step to ensure the best available outcome for Government.*

*Finally, it is my strong belief that the Walsh Bay redevelopment will generate considerable benefits for the people of NSW and result in a precinct of world-class standing.*

*Yours sincerely  
(signed)  
Dick Persson  
Director-General*

*Date: 7 December 1998*

# 1. Introduction

---

## **1.1 The Audit**

Walsh Bay covers nearly eight hectares of land and seven hectares over water close to the Harbour Bridge. It represents an important part of the Sydney's maritime and urban heritage. In 1995, for the second time, the Government invited private companies to submit bids for the redevelopment of the whole site.

On 23 February 1998 the Auditor-General received a request from the Shadow Minister for Urban Affairs and Planning to review the Government's handling of the Walsh Bay tender.

After preliminary investigations, including discussions with DPWS and ICAC, the Auditor-General agreed to the audit. Its aim is to establish whether the process employed in the most recent redevelopment attempt has been efficiently and effectively handled, in compliance with government guidelines, particularly as regards obtaining value for the site.

## **1.2 Audit Approach**

The audit approach commences with gaining an understanding of the government's objectives for the redevelopment. It then focuses on the Government's prior knowledge of the state of its heritage buildings, the cost/feasibility of preserving them, and the state of the market.

The audit is then concerned to understand the factors which had a strategic bearing on Walsh Bay and to establish what options were considered by the Government before deciding on the method of disposal, whether there was any pressure to carry out the disposal to a demanding timetable, and whether there was a pre-sale valuation of the site.

Government guidelines highlight that achievement of best value depends on fair and effective competition. Accordingly, as an indication that competitive forces were effectively employed during the process, the audit is interested in whether key information was provided on an equal basis to proponents, whether the objectives of the project were effectively communicated to proponents, whether the government had criteria for evaluating bids by reference to these objectives, and whether the criteria had been applied.

Because the process involved negotiation with a preferred bidder, the audit was concerned to establish how the government could ensure that the final terms of the agreement would be no less favourable to the State than those which any other bidder could have offered.

Finally the audit examines the process of obtaining planning approval for the redevelopment.

### 1.3 The Government's Objectives

The starting point of the audit is the objectives for the disposal and redevelopment of Walsh Bay. These objectives, which emphasised both preservation and commercial viability, were outlined in the Call for Proposals from private sector developers:

- *to provide an integrated prestige development which preserves and enhances the character, heritage and cultural significance of the area*
- *introduce a mix of attractive and innovative adaptive re-uses which complements the existing historic and diverse nature of the Walsh Bay area and the local environs*
- *promote traditional maritime uses and facilities for cruise and charter boats*
- *promote increased enjoyment and public accessibility to Sydney Harbour and the foreshore*
- *address public and private transportation requirements for the Walsh Bay area and its environs in an innovative way*
- *ensure the redevelopment is compatible with the commercial shipping and navigation requirements of Sydney Harbour*
- *provide a commercially viable project which secures the preservation and renewal of the area including the heritage wharves and stores*
- *provide a substantial level of redevelopment by the end of 1999 placing priority upon the wharf substructures and decks.*
- *ensure the successful management of the development for the term of the Lease*
- *promote economic development and job opportunities in the state of New South Wales*

Source: DPWS, Walsh Bay Call for Detailed Proposals, September 1995 p1.

The call included a requirement that *Proposals are to contain offers providing a maximum commercial return to the Government.*

This was consistent with Government statements during previous attempts to redevelop the site:

*The redevelopment will be carried out by private enterprise at no cost to the taxpayer ...*

Source: Minister for Public Works and Ports, MSB Invitation to Register Interest in Walsh Bay, 1986

There has always been an expectation that Walsh Bay would be redeveloped at no cost to the taxpayer, in part because of valuable Government property rights which are part of the redevelopment proposals.

However, the latest proposal requires a significant Government contribution if it is to go ahead. To understand how this has come about, the next chapter outlines the history of redevelopment efforts at Walsh Bay.

## 1.4 Cost of Audit

The total cost of the audit is as follows:

Direct salaries costs	\$95,400
Overhead charges	40,900
Printing (estimate)	6,000
Miscellaneous	1,200
<b>Total costs</b>	<b>\$143,500</b>

## 1.5 Acknowledgments

The Audit Office would like extend its appreciation to the Department of Public Works and Services for the way they have advanced the course of the audit and the assistance provided to audit staff. The Office also wishes to acknowledge the cooperation it has received from the Office of Marine Administration, DUAP, Treasury, State Forests and the Ministry for the Arts, and ICAC.

## **2. Chronology of Events**

---

## 2.1 Chronology

The chronology covers the period 1994 to 1998, with some reference to earlier events of significance.

### Walsh Bay Development Site

#### Early Use

The area was, together with The Rocks, the location of the early settlements of Sydney with fortifications, windmills and anchorage for large vessels. The present wharves, which were constructed between 1906 and 1922, were used until the 1970s.

The area has since been little used and its wharves and warehouses are in a poor state of repair.

### Early Attempts to Redevelop Walsh Bay

#### 1980s

In the early eighties the Maritime Services Board planned to demolish the old timber wharves and replace them with modern container handling wharves.

But the Government reversed this plan during the mid eighties and decided to restore and revitalise Walsh Bay:

*The historic wharves and their neighbouring bond stores will be restored and revitalised as a unique harbourside community offering world-class commercial, residential and cultural facilities within walking distance of the City of Sydney, the Opera House and many other attractions.*

Source: Minister for Public Works and Ports, MSB Invitation to Register Interest in Walsh Bay, 1986

#### Avoiding the Costs

The Maritime Services Board had become aware of the high cost of preserving the wharves at Walsh Bay from consultant studies in 1986. It wished to avoid the costs associated with preserving these and the rest of the heritage buildings in the area.

Maritime Services Board focussed on finding a developer that could use the Board's adjacent land holdings to subsidise the preservation of the wharves. The Board's architectural consultants advised in 1986, and subsequently others supported the view, that this was commercially feasible.

The Government, on the advice of the Maritime Services Board, never expected that it would need to contribute funds to the Walsh Bay project.

**Conservation Objectives**

In 1987 the Walsh Bay redevelopment area had been made subject to a Permanent Conservation Order made under the Heritage Act. This sought to preserve the heritage buildings and to limit both the scale of building and the scale of commercial development, which were to be in keeping with the historical character of the area. Under such an Order, the approval of the Heritage Council is required for any work which affects the heritage significance of any identified item.

**Mix of Uses**

By 1989 a mix of uses for the Walsh Bay site was envisaged by the Department of Planning and the Council of the City of Sydney, which jointly set out policies to guide the growth of the area.

*A mix of residential, commercial, cultural and leisure/entertainment uses is considered appropriate for the Walsh Bay sites. The capacity of the area to accommodate increased traffic is limited and a mix of uses which spreads the time in which people enter and leave the area is most appropriate. Such a wide mix of uses will create diversity and interest and encourage a broad cross section of the community to visit the area.*

Source: Department of Planning, Walsh Bay Regional Environmental Study 1989, p5

A Regional Environmental Plan was established to provide a more general framework for redevelopment of the area and to consolidate planning consent responsibilities. It set out the general conservation objectives for the redevelopment:

1. *to allow an appropriate range of uses to encourage the adaptive re-use of existing structures while not required for commercial port uses;*
2. *to ensure that development is consistent with the heritage significance, the scale, the built form and the materials of existing structures in the zone and adjoining areas;*
3. *to ensure that development is compatible with and does not detract from the financial, commercial and retail functions of the existing city central business district and the Sydney Cove Redevelopment Area; and*
4. *to ensure that development is compatible with and does not adversely impact on the residential amenity and function of the adjoining areas.*

Source: Department of Planning, Sydney Regional Environmental Plan No.16 - Walsh Bay sec 12 (3), 9 June 1989

### **Failed Attempts**

At this time, the Government sought bids from the private sector. The ensuing tender process was won by a consortium headed by CRI Limited, which offered an up-front payment of over \$70 million. Following the downturn in the property market and an ICAC inquiry, CRI withdrew from the project in mid 1990. The underbidder Ipoh Garden was then given the opportunity to undertake the project. However, Ipoh ultimately declined the offer in late 1991.

### **1992 Sydney Cove Authority Offer**

In 1992 the Sydney Cove Authority offered to purchase the site from the MSB for some \$50m and to redevelop it progressively, in the same way it was developing Sydney Cove. This offer was not supported by the then Minister for Planning and did not progress.

### **Present Attempt**

As detailed below, late in 1994 the Government again sought proposals from the private sector. Early in 1996 the Government commenced negotiations with Walsh Bay Properties. A project delivery agreement was finally reached late in 1997.

### **October 1994**

On 6 October 1994 the then Premier met with a private consortium interested in the redevelopment of Walsh Bay. The outcome was summarised in a minute sent to the then Deputy Premier, Minister for Public Works and Minister for Ports:

*I recently met with a consortium proposing a major redevelopment of Walsh Bay.*

*... Walsh Bay provides the Government with an excellent opportunity to redevelop the site to a high standard, thereby enhancing Sydney's image as we move towards Year 2000....*

*I am very keen to progress the redevelopment of Walsh Bay as quickly as possible. This will be through a public tender process, with Expressions of Interest inviting the private sector to submit preliminary proposals to be issued later this year. My Office of Economic Development will chair a working group to consider the major inter-agency issues and coordinate the process in consultation with the MSB.*

*I have asked that the Capital Works Committee of Cabinet consider the matter at its next meeting on 10 November.*

Source: Premier's minute dated 27 October, 1994

The Office of Economic Development (OED) provided the Premier with three options for calling expressions of interest:

1. *a registration of interest which seeks only basic concepts for the site and details of potential proponents. This could be done by the end of October but would require a special Capital Works Committee meeting....*
2. *a call for expressions of interest which provides a reasonable level of detail. This could be done by the end of November. In parallel with the development of the call document, OED would convene a working party of relevant agencies to develop options for consideration by Cabinet on the major "whole of government" issues so that they could be resolved prior to the call. There is a risk that not all issues can be thoroughly investigated and resolved prior to issuing the call...*
3. *announce the Government's intention to redevelop Walsh Bay and the establishment of the working group to fully develop the range of issues and options involved. This would mean that a detailed call for expressions of interest would be made in February 1995. This would allow for a full evaluation of financial returns on different options for site disposal.*

*Option 1 is not recommended. Both options 2 and 3 are viable.*

### **Premier's Decision**

Option 2 was agreed by the Premier on 18 October 1994. The option was developed further by the OED and an inter-agency working group in an Issues Paper for the Government. On 10 November 1994, the Government agreed to an expression of interest / tender process to be managed by the then Property Services Group within an initial budget of \$500,000 for consultants and other costs.

Except for the lease for the Aboriginal Cultural Centre, further leases of Walsh Bay were suspended.

The Property Services Group was also to commission independent studies to determine net benefits to Government of different strategies in light of the Government's preference (but not requirement) for mixed uses and a single development proposal.

Further to the issue of a call for expressions of interest, the Department of Transport was to examine transport issues, the ICAC was to be consulted, independent financial and probity advisers were to be appointed and the call documentation was to be reviewed by the Capital Works Unit of the Premiers Department and by Treasury.

The Cabinet asked to review the matter when the expression of interest stage was completed.

### **Expressions of Interest**

The Call for Expression of Interest was issued on 9 December 1994. It envisaged the following timetable:

*The aim of the Government is to have the redevelopment operating before 2000. Indicative key dates to achieve this are:*

- *2 March 1995 closing date for lodging Expressions of Interest*
- *May 1995 completion of evaluation of Expressions of Interest*
- *July 1995 issue tender to Shortlisted Registrants*
- *December 1995 tenders close and deposits lodged*
- *March 1996 completion of evaluation of tenders and preferred tenderer enters into exclusive negotiation*

Source: Property Services Group, Walsh Bay - Call for Expressions of Interest, December 1994 p4

A panel was established in February 1995 to assess the Expressions of Interest and report to the Government. Submissions closed on 2 March 1995.

Based on Sydney Regional Environment Plan No. 16 (SREP 16) and the earlier consideration of the Government, the planning objectives were incorporated in PSG's 1994 Request for Expressions of Interest and later, with minor modification, incorporated in the Call for Detailed Proposals.

Five expressions of interest were received:

- Staged Developments Australia (SDA)
- Ipoh Garden Developments
- Leighton Properties
- CRI
- Walsh Bay Properties.

**March 1995**

The NSW state election was held and a new Government was appointed.

The assessment panel recommended that three be invited to submit more detailed proposals, on the basis that their initial proposals were broadly acceptable. The Government, on 10 May 1995, accepted that recommendation and approved the issue of invitations to three proponents; CRI, Staged Developments Australia and Walsh Bay Properties.

**Detailed Proposals**

**September 1995**

The call for detailed proposals to the three organisations was issued by DPWS in September 1995. The closing date was 30 November 1995. This was the key “competitive” stage in the process. Out of it would come a preferred proponent with which DPWS would enter into exclusive negotiations for the development rights.

All three organisations responded by the deadline. All responses proposed a mix of activities, including housing, commercial offices, hotels, retail, restaurants, entertainment and cultural facilities, car parking, maritime and waterfront uses.

All proponents proposed residential use of the wharves.

The panel was re-convened and a detailed assessment followed. It concluded in February 1996, as follows:

*The Panel unanimously determined that the proposal from Walsh Bay Properties demonstrated the highest level of achievement of the government’s objectives ...*

Source: Walsh Bay Assessment Panel Report, February 1996 p(iii)

DPWS recommended that the Government adopt the Panel's recommendations. It also recommended that, in the event a Development Agreement with Walsh Bay Properties was not entered into, DPWS would reconsider the remaining two proposals and make a recommendation to the Government regarding the new preferred proponent.

### **Selection of Walsh Bay Properties**

#### **February 1996**

On 21 February 1996 the Government approved the selection of Walsh Bay Properties, a consortium comprising Transfield and Jose de la Vega, as the preferred proponent to redevelop Walsh Bay. The Government also authorised DPWS to enter into exclusive negotiations with Walsh Bay Properties to reach an agreement, expected to take 4 months to June 1996, which would be subject to the Government's further approval. These negotiations proceeded in parallel with DPWS discussions with DUAP, the Heritage Council, the Government Architect, the Sydney City Council, ICAC and Treasury.

In July 1996 the interest of Mr Jose de la Vega in Walsh Bay Properties was acquired by Mirvac Pty Ltd. Walsh Bay Properties thus became a joint venture between Mirvac and Transfield.

### **Proposal Revised to Demolish Wharves 2/3 and 8/9**

#### **July - December 1996**

From July 1996 to December 1996, and in the absence of a final agreement, Walsh Bay Properties conducted further site investigations into the extent of the dilapidation of the wharves, shore shed structures, bond stores and the remainder of the site. The level of dilapidation and deterioration discovered by Walsh Bay Properties and verified by consultants for DPWS exceeded the expectations of both Walsh Bay Properties and DPWS. As a result, the November 1995 proposal accepted by the Government was considered uncommercial and undeliverable by Walsh Bay Properties. This led the developers to revise their proposal to include the demolition of wharves 2/3 and 8/9. As the developer's proposal was not considered acceptable, there was an impasse.

### **Intervention Using French Architect**

**January 1997**

**Robert Scheme**

In January 1997, at the suggestion of the Government Architect, an internationally recognised expert in the adaptive reuse of heritage buildings, Mr Philippe Robert, was engaged by DPWS to try to find a proposal more acceptable to all sides. Following intensive consultation with all stakeholders, Mr Robert put forward a new proposal to break the impasse. Walsh Bay Properties, the Heritage Council and all relevant stakeholders agreed that, in outline at least, it offered an acceptable basis for further development. The ‘Robert Scheme’ only required the demolition of one wharf (this time, the single storey structure known as wharves 6/7) and its replacement with residential apartments. Robert also envisaged the creation of a promenade on the land edge of the wharves which separates them from the shore sheds.

### **Proposal Revised**

**October 1997**

Walsh Bay Properties developed this into a plan. It included 302 apartments and 92 serviced apartments, a 59 room hotel, around 30,000 sq m of commercial and retail space, a 50 berth marina, 8,650 sq m of arts and cultural space and a 1,000 seat theatre.

Following negotiation between Walsh Bay Properties and DPWS, it was agreed that the Government should contribute to the cost of a number of items including the theatre, the promenade, fitting out and site remediation. Most of these had not been included in the original proposal from Walsh Bay Properties.

### **Development Agreement Approved**

**October 1997**

The Government approved the final offer on 1 October 1997. DPWS finally signed the Project Delivery Agreement with Walsh Bay Properties on 22 October 1997, a year and four months after the initial June 1996 target.

**Master Plan**

A Master Plan application was immediately submitted to DUAP by Walsh Bay Properties. The target program attached to the Agreement was based on the assumption that the Master Plan would be approved by mid March 1998.

Following advertisement in newspapers during November 1997, DUAP and the Minister received 68 submissions from the public, many of which opposed the extent of demolition.

At its meeting on 5 February 1998, the Heritage Council approved the key elements of Walsh Bay Properties' Master Plan for Walsh Bay and resolved to advise the Director-General of DUAP accordingly.

On 16 February 1998 DPWS received advice that the Central Sydney Planning Committee supported WBP's Stage 1 Masterplan development application for the redevelopment of Walsh Bay.

However, as DUAP later explained:

*As detailed assessment progressed in DUAP it became evident that the proposal fell some way short of meeting what the REP required for consent to be given. This led to a series of discussions between the Director General of DUAP and Walsh Bay Properties during June 1998 about the changes the Director General would need if the proposal were to gain consent under the REP .... Following this the Director General met with the Heritage Council on July 23rd 1998 when the Heritage Council decided that the amended proposal fell within the scope of its previous decision.*

Source: DUAP 18 August 1998

DUAP argued that the development had to retain enough heritage structure to show the complete loading and unloading system; so some shoresheds had to be retained. Whilst shoresheds had scored amongst the highest on heritage significance, they were built above the seawall which was seen as the source of the white ant problem.

### **Proposal Revised**

As a result of the issues raised by DUAP, Walsh Bay Properties submitted a series of revisions to the Master Plan, involving major changes to the project.

## **August 1998**

On 21 August 1998 the Premier announced planning consent to a proposal significantly modified from that approved in October 1997. This required the retention of the shoresheds associated with wharves 2/3 and 4/5 and a reduction in the height and bulk of buildings in the Towns Place area. In effect, the bay's eastern side would keep its historic configuration, with wharves 2/3 and 4/5 remaining intact and joined together. This would require Walsh Bay Properties to build residential units within the old shoreshed structures and to reduce the planned promenade by almost half.

The Master Plan had taken 10 months to approve, almost three times as long as was originally indicated. DPWS were faced with major changes to the project, the need for new negotiations and a new submission to Government.

## **2.2 Audit Concerns**

The Audit Office has a number of concerns with that process and with events that followed. These concerns are examined in the following chapters, which follow the process from its inception until final planning approval was given by the Government:

### **Disposal Strategy**

- the impact of the Permanent Conservation Order on Walsh Bay (also in later chapters)
- the failure of the former Maritime Services Board to undertake maintenance to prevent deterioration of a declared heritage asset
- the limited appreciation and consideration, when calling for expressions of interest, of the state of the site and its value
- the basis of the expectation that redevelopment could be achieved at no cost to the taxpayer
- the urgency to re-start the project late in 1994 without further studies
- the basis of the preference to dispose of the site in a single line and the impact of this on the level of competition
- the absence of a master plan, initially to provide a basis on which to call for competitive proposals

### **Bidding Process**

- aspects of the bidding process which limited its transparency, although this would not likely have changed the result

### **Exclusive Negotiation Period**

- the consequences of negotiating exclusively with Walsh Bay Properties over more than two years

### **Development Consent**

- the consequences of the Government agreeing to a project which was still subject to strategic development consent by another arm of the Government
- the consequences of the major changes required by DUAP not being identified as major concerns during the period of exclusive negotiation

### **Value for Money**

- the inability of The Audit Office to obtain assurance that the taxpayer is actually receiving value for money.

### **3. Disposal Strategy**

---

### 3.1 Deterioration of the Wharves

#### Conservation Order

Walsh Bay constituted a very large urban area adjacent to Sydney's central business district. The site had been recognised as an important heritage asset and made subject to a Permanent Conservation Order. Hence, its redevelopment was strategically important to the City of Sydney and to the Government.

#### Mounting Deterioration

Notwithstanding these considerations, the Walsh Bay site had not been maintained since the mid-eighties. The former Maritime Services Board (MSB) had ceased all maintenance on the wharves, although there were signs of mounting deterioration. For example:

In 1986 the MSB commissioned a report from consultants to examine the cost of repairing the piles of wharves 6/7 and 8/9, prior to putting the site on the market. The report warned that the rate of decay of the piles was increasing with age.

*...as borers find most difficulty in penetrating the heartwood of the pile. Once penetrated, however, the resistance of the inner core of the tree is far lower and degradation is rapid.*

Source: Consultant, Report on Timber Piled Substructures for MSB, June 1986 p15

The 1986 report estimated the cost of a 100 year pile repair and replacement at \$17m for wharf 6/7, \$13m for wharf 8/9 and \$7.5m for the cross wharves.

A 1990 report to the MSB by the Property Services Group similarly indicated an amount of \$20m would be required to repair the wharf piles in the near term:

*A total cost for fees, infrastructure and wharf pile repair would be in excess of \$55 million, or \$37 million without pile repair.*

Source: PSG report to MSB, Walsh Bay Redevelopment Strategy, December 1990 p5

#### Failure to Maintain

It may be that MSB did not see the site as being part of its core business and thought that it would soon be sold. The delays in the sale process were not foreseen. Nevertheless, the failure to maintain the site, which had been the subject of a Permanent Conservation Order since 1987, was unfortunate, at least. As will be outlined later in this report, it added to the complexity of the development process.

## Heritage Requirements

The fact that Permanent Conservation Orders have not ensured that heritage assets be maintained and do not guarantee that a heritage asset will be preserved, also contributed to the lack of maintenance. The Department of Public Works sought to address this weakness in 1993 when it introduced guidelines for maintenance of heritage assets.

More recently the Government has proposed changes to the Heritage Act to strengthen maintenance arrangements further for heritage assets:

- provision will be made for the Heritage Council to issue orders requiring minimal maintenance works, short of full restoration
- the term 'Permanent Conservation Orders' will be dropped and relevant assets will instead be transferred to a 'State Heritage Register'.

### 3.2 Strategy Adopted

For a site of acknowledged heritage significance which was known to have suffered significant deterioration, it would have been expected that a considerable degree of preparation might have been carried out before embarking on a development proposal.

There was some up-to-date information on Walsh Bay, because MSB had commissioned and received in September 1994 a feasibility report from PSG concerning the redevelopment of the site. This report, gave a clear indication of the risks at Walsh Bay and the increasing complexity of the problems. It reinforced the case for detailed preparation prior to the call for development proposals, rather than for short-cuts.

*The level of repair of the vacant shore buildings and wharves has worsened since 1990 and is now the subject of public comment. The most noticeable physical deterioration is in the wharves and wharf sheds which have always represented an unknown cost and maintenance risk. The cost of repiling the wharves (\$18m in 1990) has always been understood to be too expensive to undertake without either very strong market demand or capital offsets offered to investors and developers to reuse the structures*

Source: Property Services Group, Walsh Bay Future Directions 1994 p22

A 1994 consultant report for DPWS had reported high levels of termite damage evident in Bond Store No.3. This included beams and floor boards eaten out by termites.

*State Forests of NSW were requested to inspect the building to visually stress grade the structural timbers within the building to observe the extent of termite infestation and to provide their recommended method of termite eradication.*

*The extent of active termite infestation was far greater than we had expected and the damage extended over a greater area of the building than expected.*

Source: Consultant's Report to Public Works Dept, September 1994 p2

### **Master Plan**

To address these risks, PSG had recommended in 1994 that a Master Development Plan be first prepared and adopted by MSB, to:

- *provide information, direction and guidance and confidence to private sector participants and the wider community, including local residents, for the successful redevelopment of an important foreshore area of Central Sydney*
- *remove any unreasonable obligation or future dependency by the private and government sectors upon each other and especially the singular dependency by government upon one purchaser/developer to achieve a successful redevelopment of Walsh Bay.*

Source: Walsh Bay Future Directions, Property Services Group, September 1994, p4

PSG had also recommended that this be supported by the necessary studies:

### **Technical Studies**

*The Property Services Group recommends that significant technical, engineering and market related studies need to be undertaken, together with renewed community consultation, prior to a disposal and redevelopment strategy being finalised.*

Source: Walsh Bay Future Directions, Property Services Group, September 1994, p6

## Planning Amendments

PSG also suggested some amendments to the planning and heritage controls on the site to provide a more realistic framework for the commercial development proposed.

- *A revision of Permanent Conservation Order No. 559 should be undertaken to insure heritage controls are realistic and appropriate.*
- *Present goals documented for Walsh Bay are too vague and would give rise to conflict between developers and government.*
- *Consideration should be made as to the demolition of the vacant wharves in any redevelopment of the area in conjunction with heritage controls.*

Source: Property Services Group, Walsh Bay Future Directions 1994 pp23, 33, 34

Neither DUAP nor the Heritage Council were informed. MSB did not dispute the validity of these recommendations when it considered them on 29 September 1994. However it decided not to pursue redevelopment, accepting the argument of its Executive that:

*The preparation of the Master Plan is estimated to cost up to \$400,000 with supervision by the PSG.*

*Under current arrangements, the Walsh Bay project is not part of MSB core business. Furthermore, as the MSB does not generally retain the proceeds from the disposal of surplus properties, it would be unreasonable to expect the MSB to fund such extensive and costly studies.*

Source: MSB Executive Submission to MSB Board 29/9/94

It would seem, however, that notwithstanding the concerns expressed beforehand, the decisions made over the three-month period late in 1994 by the former Government effectively established the disposal framework for the current redevelopment of Walsh Bay. The major elements were:

- a preference to sell the site en bloc to a single developer
- to sell it by competitive tender
- to place management responsibility for the tender process with PSG, rather than with the site's owner (MSB)
- to expedite the sale process and finish development by 2000

- to undertake limited further technical studies before the tender itself and to leave the responsibility for assessing structural condition and redevelopment potential with the tenderers/developers, along with responsibility for obtaining approval to a Development Application.

The then Premier had already indicated his wish that the project be expedited, and had given the agencies only a fortnight in which to prepare the advice to Cabinet.

In a letter to the private consortium, the Premier had indicated that the project would proceed within a matter of weeks.

*I would expect that expressions of interest would be called prior to the end of the year. Following the evaluation of the expressions of interest, short-listed proponents would be invited to submit a detailed proposal.*

*Details on the decision-making process including firm time frames will be in the call for expressions of interest document.*

**Source: Letter from Premier dated 18 October 1994**

When the Office of Economic Development took the lead on the redevelopment of Walsh Bay in October 1994, it called for the PSG's report to MSB. Following discussions with MSB officers, and in view of the need to expedite the project, it was decided that the *extensive and costly studies* would not be undertaken.

Not all were in agreement, as shown by the views of The Sydney Cove Authority - an organisation well experienced in this type of development.

*The Authority's view is that large overall schemes may not provide the best solution for sensitive areas such as Walsh Bay. The Authority's experience is that individually packaged sites, released on a carefully staged basis may provide a more sensitive solution and a better financial return. Additionally, these sites should form part of a detailed plan for the area which goes beyond the existing REP. Greater market competition can be expected from the release of individual sites, because they are within the experience, expertise and capacity of a greater number of developers, and therefore greater returns over the life of the whole*

*project.*

Source: Sydney Cove Authority, Letter to PSG dated 25 November 1994

### 3.3 Consequences of the Strategy Adopted

For PSG and then DPWS, the redevelopment of Walsh Bay presented unusual difficulties. Deteriorating conditions, uncertain feasibility and tight timescales were compounded by the legacy of earlier failures.

The Government decided not to call for the background studies or to prepare a master plan to inform the competitive process. With the twin goals of completing the redevelopment before 2000 and minimising the up-front cost to government, the emphasis was on expediting the project and leaving such work, and such cost, to the private sector.

The strategy adopted sought to expedite the redevelopment and place the major risks with the private sector. But the lack of appreciation of the conditions on the site, including the costs of preservation and their impact on land use and commercial feasibility, placed the PSG and later DPWS in a poor position for subsequent decision-making and negotiation.

#### No value for the Site

Without this knowledge, there was no reliable benchmark value for the site against which to assess bids, or to manage expectations. The Office of Economic Development offered an “indicative value” in 1994 in the range of \$45-\$50m. But this appears to have been based on historic information, not on any recent study.

Indeed, PSG felt any estimate of value derived from previous attempts to dispose of Walsh Bay would be unreliable, commenting:

*When the original [1986] tender was called, planning and design guidelines were flexible statements of intent to address specific goals. Accordingly, this generalisation, and in many cases dated knowledge, together with a lack of performance standards, hinders any detailed consideration of either the individual worth of the site as a whole or alternatively of individual sites which may be considered viable.*

Source: Walsh Bay Future Directions PSG 1994, p11

This left the pressure of competition through the tender process to deliver a realistic “value” for the site. (Although the limited knowledge reduced the effectiveness of the competitive process too, as we shall see in the next chapters).

**Limited Competition**

The Government had expressed preference in 1994 for disposal of the holdings in a single line.

If it had directed that the site be redeveloped in individual parcels, it would have provided the opportunity for many medium sized developers to bid for elements of the work. But without a master plan to coordinate this process, the risk was that the site would simply be fragmented into numerous parcels without regard to the Government’s overall objectives. With few developers capable of undertaking a project and risks of such magnitude, the preference for disposal as a single line reduced the potential level of competition.

**Failure to Maintain Heritage at Walsh Bay**

It has been argued that MSB’s interests, and those of its successors, are in managing ports, not in taking a long-term role in managing non-maritime waterside land uses (especially when there was no financial advantage for MSB in promoting the disposal of surplus waterside assets).

To a large extent, the failure to maintain the heritage properties at Walsh Bay over the last twenty years rests on the Government’s failure to put management arrangements in place geared towards future, rather than past, uses.

This is not for lack of alternative models. In 1992 the Sydney Cove Authority (SCA) proposed to the MSB the merits of transferring to it responsibility for the redevelopment of Walsh Bay, arguing:

- *there are many parallels between The Rocks area and Walsh Bay in terms of their residential, commercial, retail and tourism potential. Walsh Bay is part of The Rocks Conservation Area on the Register of the National Estate;*
- *passing responsibility to SCA is consistent with the Authority’s existing core business of conserving the heritage of The Rocks and its main functions relating to development, property management, regulation and marketing;*
- *the transfer would provide the M.S.B. with a commercial price for its asset ...*

- *it would facilitate the integration of Walsh Bay and The Rocks from an urban planning and administrative (management) perspective*

Source: Sydney Cove Authority, Letter to MSB dated 23 September 1992

But the then Government did not agree.

### **No Single Set of Guidelines**

The Government's objectives for the disposal and redevelopment of Walsh Bay are evidence that the project involved considerably more than a disposal of surplus property.

Aside from disposal (of land and wharves), the project also contained elements of procurement (eg theatre, museums) and infrastructure (eg public spaces and walkways). No one set of guidelines covered all these elements, although the private sector participation in the provision of public infrastructure guidelines were stated to have been "generally followed".

The audit found that the government has published considerable guidance in this area. As Walsh Bay is a complex project - involving elements of disposal, procurement and the provision of infrastructure - several guidance documents appeared relevant. These include guidelines for:

- disposal of property assets
- private sector provision of public infrastructure

### **Property Asset Disposal Guidelines**

The Issues paper provided to the Capital Works Committee at its meeting on 10 November 1994 stated:

*The redevelopment of Walsh Bay is not subject to the Government's private infrastructure policy. The Asset Disposal Guidelines would apply to this disposal of property. However, this proposal represents more than simple land disposal and should address a range of additional matters, including financial analysis on the returns to Government.(p2)*

Source: Office of Economic Development, *Redevelopment of Walsh Bay - Issues Paper*, November 1994 p2

Whilst there are no specific guidelines that would apply to the disposal of Walsh Bay, nevertheless, the Government has published two directly relevant documents that would have provided guidance. These are the Property Asset Management Guidelines and the Procurement and Disposal Guidelines. The first applies specifically to the management and disposal of surplus Government property, including those of heritage

significance. The second focuses on the tendering and contracting aspects of procurement and disposal.

**Guidelines for Private Sector Participation in the Provision of Public Infrastructure**

*The focus of these guidelines is on the creation of new infrastructure assets through private sector financing and controlling ownership. Financing and ownership normally distinguish the types of projects covered by these guidelines from other forms of ‘contracting out’ to the private sector. It is these elements which the Government is seeking in a packaged solution for public infrastructure which usually would include design, construction, operation and maintenance.*

*The principal features of projects to be considered under these guidelines are:*

- (i) a service normally provided to the public by the Government, that involves the creation of an asset through financing and controlling ownership by the private sector; and*
- (ii) where there is a contribution by government either through capital works, risk sharing, revenue diversion or other support mechanisms*

**Source: NSW Government, Private Sector Participation in the Provision of Public Infrastructure 1995 sec 1 (I)**

In April 1995 DPWS advised the Government:

*The Call for Expressions of Interest follows the process described in “Guidelines and Principles for Private Sector Participation in the Provision of Public Infrastructure February 1995” as prepared by Office of Economic Development - NSW Premiers Department.*

**Source: DPWS, Report & Recommendation to Capital Works Committee, April 1995. p5**

On 17 May 1995 the Director General of the Premier’s Department confirmed that the tender call should generally follow the process outlined in the Government’s *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*.

In February 1996 DPWS again assured the Government:

*The Detailed Call generally followed the process outlined in “Guidelines and Principles for Private Sector Participation in the Provision of Public Infrastructure February 1995”.*

Source: DPWS, Report & Recommendation to Budget Committee, February 1996. p4

**Approach Adopted by DPWS**

DPWS had the difficult job of managing the project in these circumstances. To ensure that the redevelopment process would not again fail, DPWS was left with little alternative but to adopt a flexible approach in the tender process and in subsequent negotiations. As was later explained:

*Given the previous difficulties experienced by the Government in attempting to procure the redevelopment of the Walsh Bay site, and the difficulty the Government was then experiencing in respect of the Woolloomooloo Bay Finger Wharf redevelopment, allowing the successful proponent sufficient flexibility was considered of critical importance. Accordingly, the objectives were kept very broad to allow the maximum possible degree of flexibility to enable a successful outcome to be achieved in accordance with the Government’s stated objectives.*

Source: DPWS letter to ICAC dated 28 February 1997

**Preparatory Stage**

The Guidelines for Private Sector Participation in the Provision of Public Infrastructure state:

*The preparatory stage in the process is of critical importance. It will establish the need for the project, the costs and benefits of the project, the inherent risks and how they should be allocated, the nature and extent of Government support likely to be required, and the likely market reaction to a Call for Proposals.*

*Unless the agency promoting the project has undertaken sufficient preparatory work, there is a high probability that subsequent evaluation of proposals received from the private sector will lead to a range of complex issues which could impede the selection process.*

Source: NSW Government, Private Sector Participation in the Provision of Public Infrastructure 1995 sec 1 Guidelines for Private Sector Participation in the Provision of Public Infrastructure, NSW, p4

DPWS's redevelopment of government holdings at Parramatta, on a scale and with heritage significance similar to that of Walsh Bay, demonstrates the careful preparation and the degree of oversight necessary.

#### **Redevelopment of Parramatta Heritage Institutions**

The 30 hectare site has 89 assets of heritage significance including Parramatta Gaol, Cumberland Hospital buildings, Kamballa and the Norma Parker Correctional Centre.

Government objectives include:

- Provide a coordinated government response to the Parramatta Centre Regional Environmental Plan.
- Ensure the enhancement and preservation of Parramatta's significant heritage assets through their adaptive reuse and through the provision of commercial opportunities.
- Provide an opportunity for the private sector to partner with government to create the best possible solutions for the redevelopment and use of the heritage precincts.

Government approved measures include:

- a whole-of government strategy for the redevelopment and management
- a Steering Committee
- initial funding of \$0.5 m for the conservation, heritage and financial studies.

Source: DPWS Briefing Note, February 1998

In the redevelopment of Pymont Bay, which had only recently been completed by PSG, the use of a Master Plan was fully utilised.

### **Redevelopment of Pyrmont Bay Starting with a Master Plan**

The land around Pyrmont Bay is owned by the NSW Government and managed by the Government's City West Development Corporation.

A Master Plan for Pyrmont Bay was prepared by the Property Services Group for City West to provide guidance to developers on the type, scale and form of development which would be acceptable in each location in the development area.

There are seven major components linked together and to the surrounding area by a Foreshore Road, a Light Rail Transport System and a Pedestrian Cyclist Network.

The Plan proposes:

- 2.2 hectares of public parkland
- a casino/hotel/entertainment centre
- commercial offices
- a residential precinct
- continued use of the Overseas Terminal at wharf 13
- facilities for boat moorings
- public access to the waterfront for its full length.

### **3.4 Conclusion**

The audit found no evidence to indicate why the former Government wished to expedite Walsh Bay, but it is aware that there was a major election due. Otherwise it is difficult to understand, particularly in the light of the deterioration of the wharves and the consequences that could arise from it, why the disposal of Walsh Bay proceeded as it did, without a Master Plan and with the entire precinct being sold en bloc. As history shows, the lack of adequate consideration and preparation caused considerable problems and could have been avoided. Had the PSG recommendations been adopted, these problems would not have occurred.

In addition, The Audit Office has the following concerns:

- the limited appreciation and consideration of the state of the site and its value, without which there was no reliable benchmark value for the site against which to assess bids, or to manage expectations
- the limited appreciation of the consequences of the Permanent Conservation Order on Walsh Bay, which would cause major difficulties for the process as explained later
- the lack of a researched basis for the expectation that redevelopment could be achieved at no cost to the taxpayer
- the rush to re-start the project late in 1994 and the consequential rejection of recommendations for further studies
- the decision to dispose of the site in a single line, despite few developers being capable of undertaking a project and risks of such magnitude, and the impact of this on the level of competition
- the absence of a master plan, initially to provide a basis on which to call for competitive proposals, and later to provide direction and confidence to both the private sector and the wider community, including local residents

The Audit Office also has a major concern with the failure of the former Maritime Services Board to provide even minimum levels of maintenance to prevent deterioration of a declared heritage asset. This has been costly and contributed to the loss of heritage assets. Greater attention to the guidelines for maintenance of heritage assets is necessary to ensure this type of neglect does not occur again. Proposed changes to the Heritage Act should help strengthen these arrangements.

With general guidelines and specific studies at Walsh Bay all recommending a more managed approach and greater preparatory work before proceeding to the market, it is difficult to understand why a decision to proceed so rapidly was taken. There is little by way of justification and little discussion of the merits of the alternative approaches possible.

The approach which was followed by DPWS and its impact on achieving value for money at Walsh Bay, is the subject of the remainder of the report. The next chapter examines the competitive process. Chapter 5 examines the period of negotiation with the preferred proponent. Chapter 6 examines the planning and approval process within which the Walsh Bay proposals have travelled. Chapter 7 endeavours to draw conclusions on value for money.

## **4. Bidding Process**

---

## 4.1 Requirements for Effective Competition

Government guidelines issued in 1995 highlight the tenet that achievement of best value depends on effective competition.

The Property Asset Management Guidelines, Asset Disposal Guidelines and the Guidelines on Private Sector Participation in the Provision of Public Infrastructure were seen to apply to the redevelopment of Walsh Bay. All offer similar advice in this regard.

*For disposal by tender, Government agencies should prepare the tender documents and comply with any applicable State Government or internal tendering guidelines. ...*

*Criteria for selection of the successful purchaser should be established and specified before any marketing begins. Such criteria should also be clearly identified in the marketing of the property and consistently and fairly applied in the assessment process.*

Source: Property Services Group, Property Asset Management Guidelines, 1991 p25

*The information made available to bidders ...should facilitate the achievement of best value and fair and effective competition*

*Information for tenders should include*

- *the specification of need*
- *selection criteria*
- *....*

*Bids should be assessed in a consistent fashion against pre-determined criteria.*

*Selection criteria should have been advised to bidders during the invitation processes. The same criteria must be applied during the assessment of bids.*

Source: NSW Government, Procurement and Disposal Guidelines, 1995 p21,26

*A competitive bidding process will apply in all instances of privately financed infrastructure, unless otherwise agreed by the Budget Committee. The process will comprise a Call for Proposals stage, from which a short list will be identified and an invitation issued to submit a Detailed Call for Proposals.*

*The Call document will need to address:*

- *the objectives of the proposal to be expressed in terms of the essential output specifications and performance based requirements, without identifying specific solutions*
- *the criteria for evaluating proposals.*

**Source: NSW Government, Private Sector Participation in the Provision of Public Infrastructure 1995 sec 2, 4 (1)**

Accordingly, as an indication that competitive forces were effectively employed during the process, the audit considered:

- the extent to which opportunity was extended to the private sector to submit proposals
- whether the objectives of the project were effectively communicated to proponents
- whether the government had criteria for evaluating bids by reference to these objectives, and
- whether the criteria had been applied.

## **4.2 Opportunity for Private Sector Proposals**

Based on advice from the Property Services Group, Government had decided *that it has a preference for ... disposal of the holdings in a single line, but will consider proposals for the redevelopment of individual parcels.*

As indicated earlier, the latter would have provided the opportunity for many medium sized developers to submit proposals for elements of the development. But without a master plan to coordinate this process, the risk was that the site would simply be fragmented into numerous parcels without regard to the project's overall objectives.

The Call for Expressions of Interest document stated:

*The Government of New South Wales seeks Expressions of Interest for the redevelopment of the whole Walsh Bay area by one developer ....*

*... If no suitable Expression of Interest is received for the redevelopment of the whole area, the Government may abandon the process and decide to call for expressions of interest for individual parcels.*

Source: PSG, Walsh Bay Call for Expressions of Interest, December 1994 p2

In the event, the Government felt that suitable Expressions of Interest were received for redevelopment of the whole area and therefore proposals for individual parcels were not considered.

But the main driver for the Government offering the site in one line was the fact that large parts of the project, for example wharves 2/3, wharves 6/7 and wharves 8/9, were simply unprofitable on their own and needed to be incorporated into a larger project so that the preservation of these parts could be funded by the more profitable parts of the project.

### **4.3 Inclusion of Objectives in the Calls**

The audit has found that the Government's planning objectives were clearly reflected in the documentation available to proponents.

The planning objectives in Sydney Regional Environment Plan (REP) 16 were incorporated in PSG's 1994 Request for Expressions of Interest and later, with minor modification, incorporated in the Call for Detailed Proposals. The objectives for the project were as follows:

- *to provide an integrated prestige development which preserves and enhances the character, heritage and cultural significance of the area*
- *introduce a mix of attractive and innovative adaptive re-uses which complements the existing historic and diverse nature of the Walsh Bay area and the local environs*
- *promote traditional maritime uses and facilities for cruise and charter boats*

- *promote increased enjoyment and public accessibility to Sydney Harbour and the foreshore*
- *address public and private transportation requirements for the Walsh Bay area and its environs in an innovative way*
- *ensure the redevelopment is compatible with the commercial shipping and navigation requirements of Sydney Harbour*
- *provide a commercially viable project which secures the preservation and renewal of the area including the heritage wharves and stores*
- *provide a substantial level of redevelopment by the end of 1999 placing priority upon the wharf substructures and decks.*
- *ensure the successful management of the development for the term of the Lease*
- *promote economic development and job opportunities in the state of New South Wales.*

Source: DPWS, Walsh Bay Call for Detailed Proposals, September 1995 p1.

The call included a requirement that *Proposals are to contain offers providing a maximum commercial return to the Government.* Combined with the objective, *to provide commercially viable quality preservation of the area including the heritage wharves and stores,* this suggests that the Government believed there would not be a need to make trade-offs between preservation and the commercial return. And the proponents' initial responses to the call tended to confirm that full preservation was commercially feasible. It was only later, after a preferred proponent had been granted exclusive negotiation rights, that commercial constraints prevented that objective being achieved.

Because there was no explicit ranking amongst the 10 objectives, proponents were left to their own judgement over, for example, the balance of cultural vs foreshore access vs boat facilities included in their proposal. So was the independent assessment panel, which had been set up to evaluate the bids.

### **Independent Panel**

The panel included a representative of DPWS but was drawn mainly from the private sector - including backgrounds in property, tourism, architecture and commercial financing. It was assisted by consultants and received advice from the Government Architect.

The independent panel were left with responsibility for determining the relative importance of the Government's objectives and resolving any inherent conflicts. The panel was not requested to confirm the way it proposed to handle and/or resolve any conflict that may have arisen between the Government's objectives for the disposal of Walsh Bay.

It is considered that this should have been not have been left to the Panel. The Audit Office considers that there should have been either clearer directives for the panel to work with or the Panel should have been requested to have their procedures confirmed.

#### **Cultural Facilities**

The call also attached a list of opportunities for new cultural facilities, provided by the Ministry for the Arts. Examples included:

- a 1200 seat music recital hall
- a 1000 seat drama theatre
- a 2000 seat lyric theatre

Source: DPWS, Call for Detailed Proposals, September 1995, Attach. 15

#### **4.4 Identification of Criteria for Walsh Bay**

Assessment criteria are used to judge how well a project's objectives will be met. According to government guidelines, the following generic criteria are likely to be included for each infrastructure project.

- *experience in successfully designing, constructing and financing major projects*
- *experience and capacity to undertake the particular project*
- *financial capacity to meet the likely contractual obligations associated with the project*
- *design, construction, financing and operational resources available to the proponent*
- *the proposed approach and evidence of addressing all areas, eg design, construct, operate and maintain*
- *innovation in approach and satisfying specifications, technical feasibility and quality*
- *net economic, social and environmental benefits*
- *viability, likely risk to be assumed by Government and likely Government contribution*

- *other benefits, including community benefits, local industry participation, technology transfer and other Government programs*

Source: NSW Government, **Private Sector Participation in the Provision of Public Infrastructure 1995 sec 4 (I)**

The December 1994 Call for Expressions of Interest included a set of criteria for assessing the proposals received.

The 1995 Call for Detailed Proposals referred to generally assessing bids against the Government's objectives.

*Proposals will generally be assessed on the extent to which the Proposal meets the Government's objectives set out in Part A3 and the matters set out in Parts D and E.*

Source: DPWS, **Call for Detailed Proposals, September 1995, Part F**

But it did not explain how this was to be done. DPWS did not publish selection criteria for assessing the detailed proposals from the three short-listed proponents. Nor did it publish the way in which the Government's objectives would be weighted or ranked in the process of selection.

At the time of preparing the Call document, legal difficulties in offering projects of this nature included the following:

- a major piece of litigation relating to the original tender for the redevelopment of the Finger Wharf at Woolloomooloo Bay had been awarded against the former MSB (damages of only \$1 were awarded but significant legal costs were incurred in defending the matter)
- proceedings relating to the subsequent tender for the redevelopment of the Finger Wharf were under way. Both the former Minister and senior officers of the former MSB were being sued personally in these proceedings, which have involved substantial cost to Government.

The major area of concern in both cases was in relation to the selection process. It was to limit such risk of litigation at Walsh Bay, that criteria were excluded from the call.

ICAC expressed concern:

*However, the Commission would argue that, where there was an increased risk of litigation, it is even more important to have clearly defined assessment criteria and procedures and a commitment to act upon them.*

*... these preferences can only be, and should be, spelt out in the assessment criteria so tenderers may make informed decisions ....*

**Source: ICAC letter to Minister for Public Works and Services dated 30 August 1995.**

The Audit Office has previously advocated the same principle. (See 'Sale of the State Office Block', October 1996, page 26.) Without detailed criteria with the weightings which would be used in the assessment process, tenderers or proponents are unable with any confidence to develop the optimal proposal.

However, following further discussion, ICAC informed DPWS in the following terms:

*As to the other major concern, the absence of specific assessment criteria, the Commission appreciates the complexity of the particular project in question and the diversity of the likely outcomes. The Department indicated that assessment of the proposals would be based on the Government objectives set out in Part A of the call document together with the requirements outlined in Parts D and E. It agreed to make appropriate amendments to Part F2 to reflect this approach. The conclusions reached in the discussions and the consequential amendments made responds satisfactorily to the Commission's advice on this issue.*

**Source: ICAC letter to Minister for Public Works and Services dated 31 August 1995.**

DPWS have advised that they viewed the second letter as a form of consent to their not advising proponents of specific assessment criteria.

DPWS also point out that their actions were in line with the Government's Code of Tendering, which states that the weighting of selection criteria should not be disclosed to tenderers.

Instead, proponents were advised only that they would be assessed on the extent to which their Proposals met the Government's objectives.

With no criteria, the assessment panel proceeded to establish a set of selection criteria with which to score each proposal directly against the Call objectives. Each criteria was related to the information requested in Part E, *Content of Proposal*, of the Call for Detailed Proposals. The following table shows the criteria which the panel established.

<b>Criteria Developed and Applied by the Independent Assessment Panel</b>	
<b>Objectives</b>	<b>Panel Criteria</b>
<i>to provide an integrated prestige development which preserves and enhances the character, heritage and cultural significance of the area</i>	<ul style="list-style-type: none"> <li>• design excellence in integrated urban development</li> <li>• design excellence in architecture</li> <li>• cultural significance</li> </ul>
<i>introduce a mix of attractive and innovative adaptive re-uses which complements the existing historic and diverse nature of the Walsh Bay area and the local environs</i>	<ul style="list-style-type: none"> <li>• mix of use</li> <li>• complement historic character</li> <li>• production of environmental benefits</li> </ul>
<i>promote traditional maritime uses and facilities for cruise and charter boats</i>	<ul style="list-style-type: none"> <li>• maritime character</li> <li>• provision of facilities for cruise and charter boats</li> <li>• traditional maritime industry</li> </ul>
<i>promote increased enjoyment and public accessibility to Sydney Harbour and the foreshore</i>	<ul style="list-style-type: none"> <li>• public access</li> <li>• enhancement of foreshore linkages to city</li> <li>• linkages to other waterside activities</li> </ul>
<i>address public and private transportation requirements for the Walsh Bay area and its environs in an innovative way</i>	<ul style="list-style-type: none"> <li>• encouragement of public transport</li> <li>• connection with Central Sydney and the Rocks</li> <li>• car parking</li> <li>• contribution to transport issues generally and water based links</li> </ul>
<i>ensure the redevelopment is compatible with the commercial shipping and navigation requirements of Sydney Harbour</i>	<ul style="list-style-type: none"> <li>• access to DH3 and emergency response centre</li> <li>• uses of (wharves) 8/9 to be compatible with emergency response centre</li> <li>• activities between wharves and at wharf ends to be compatible with main commercial channel</li> </ul>
<i>provide a commercially viable project which secures the preservation and renewal of the area including the heritage wharves and stores</i>	<ul style="list-style-type: none"> <li>• adequate financial capacity</li> <li>• realistic income and expenditure levels</li> <li>• viability and bankability of proposed financial structure</li> <li>• recognition, recital and allocation of risks</li> <li>• financial offer to Government</li> </ul>
<i>provide a substantial level of redevelopment by the end of 1999 placing priority upon the wharf substructures and decks.</i>	<ul style="list-style-type: none"> <li>• program for the wharf substructure and decks</li> <li>• record of delivery of comparable projects</li> <li>• experience, particularly of wharf/water, of team</li> <li>• dependence on progress sales to sustain continuation</li> <li>• level of guarantee, penalty, remedy for failure</li> </ul>
<i>ensure the successful management of the development for the term of the Lease</i>	<ul style="list-style-type: none"> <li>• viability of long term management plan</li> <li>• structure of management body for ongoing maintenance</li> <li>• levels of fees and charges for ongoing maintenance</li> <li>• realism of estimates and resources involved in long term maintenance</li> </ul>
<i>promote economic development and job opportunities in the state of New South Wales.</i>	<ul style="list-style-type: none"> <li>• employment generation in construction / development phase</li> <li>• economic activity generated by completed development</li> </ul>

This approach left the establishment of criteria and the judgement on the relative importance of objectives to the independent assessment panel, rather than to the principal agency. It also had a number of implications for the process later.

Adherence to the guidelines is important to allow bids to be tailored to government priorities and to ensure transparency and accountability in the final decision.

The lack of published criteria might provide the Government with greater legal flexibility, but it also meant a lack of transparency. The basis on which competitive bids were to be assessed was not specified beforehand and remained ambiguous to the tenderers, who might have been able to tailor their proposals more closely to government priorities with such knowledge.

The independent panel was left with the task of prioritising and weighting these objectives, some of which were in competition with each other. The panel proceeded to evaluate the bids received in a consistent manner against its interpretation of the Government's requirements.

**Audit  
Observation**

The selection criteria and weightings should have been made public. Otherwise tenderers are not able to devise the response which they believe best meets the Government's objectives. In the interests of fairness and transparency, Government agencies should have these aspects clearly agreed at the outset of major projects, rather than adopting legal methods of avoiding these issues.

#### **4.5 Assessment of Bids**

The three short-listed organisations all responded by the deadline. All responses proposed a mix of activities, including housing, commercial offices, hotels, retail, restaurants, entertainment and cultural facilities, car parking, maritime and waterfront uses.

All proponents proposed residential use of the wharves.

<b>Proposed Use of Wharves 1995 By Short Listed Bidders</b>			
	<b>Wharves 2/3</b>	<b>Wharves 6/7</b>	<b>Wharves 8/9</b>
WBP	residential	Maritime Museum, retail and ferry wharf	hotel and residential
Prop. B	residential and restaurant	residential and retail	residential, commercial and retail
Prop. C	residential	hotel	Lyric theatre and residential

The panel proceeded in a methodical fashion. It first assigned a relative weighting to each of the Government's planning objectives, as follows:

<b>Weightings Used by the Panel</b>	
<b>Objectives Used as Assessment Criteria for Detailed Proposals</b>	<b>Weighting</b>
<b>Design Objectives</b>	
Integrated prestige	15%
Mix/adaptive	10%
Public access	10%
	<b>35%</b>
<b>Delivery, Risk &amp; Benefit Objectives</b>	
Traditional maritime	5%
Transport	10%
Commercial shipping	5%
Viable project	20%
Substantial completion	10%
Management	10%
State development	5%
	<b>65%</b>
<b>Total</b>	<b>100%</b>

Source: Panel Chairman's minute to Panel Members dated 21 November 1995 and attachment.

Each proponent was then assigned a raw score against each objective ranging from 1 (inadequate) to 5 (excellent). The raw scores were then weighted to account for the relative importance of the objectives and a summary score calculated.

**Scores**

The scoring system, weightings, and nomination of ‘design’ objectives were set out in a minute dated 21 November 1995 from the Panel Chairman to All Panel Members.

Descriptions of the scores were set out in section 4 of the Assessment Panel’s February 1996 report to Government.

Overall, the panel scored the three proponents as follows: Proposal A achieved 76% of the possible weighted scores while proposal B achieved 61.5% and proposal C 57%.

The Panel Chairman had cautioned the panel about relying too much on a scoring system:

*... the arithmetical outcome of our scoring system, both preliminary and final, is not the sole and ultimate determinant of our advice to Government. It is a guide and a discipline to ensure we have examined every aspect of every Proposal in a deliberate and structured manner. The Panel will always be cognisant that in projects of this size and complexity that the ‘whole’ can be greater (or lesser) than the ‘sum of the parts’.*

Source: Panel Chairman’s minute to Panel Members dated 21 November 1995

Whilst the scoring system was not the sole determinant, it is instructive in the light of subsequent redesigns, to break down the total scores against those objectives that related broadly to the ‘design’ (35%) and those objectives that related broadly to the ‘delivery, risks and benefits’ (65%). It was the ‘design’ element of the winning proposal that set it apart significantly from the others, not the ‘delivery, risks and benefits’.

<b>Relative Achievement Against ‘Design’ Objectives/Criteria (35%)</b>		
<b>WBP</b>	<b>Proponent B</b>	<b>Proponent C</b>
94%	60%	57%

<b>Relative Achievement Against ‘Delivery Risk and Benefits’ Objectives/Criteria (65%)</b>		
<b>WBP</b>	<b>Proponent B</b>	<b>Proponent C</b>
66%	62%	58%

It is also worth noting that the financial offer to Government did not carry a significant weight in the scoring. It was only one of 5 sub criteria within the objective ‘commercially viable project’, which objective was weighted at 20% in total. Moreover, the panel emphasised that all financial estimates were considered preliminary.

**Preferred Proponent**

On 12 February 1996 the panel recommended that Walsh Bay Properties be nominated as the preferred proponent for the redevelopment of Walsh Bay.

The preferred proponent recommended by the panel had a total ‘score’ significantly higher than the other two.

The independent Assessment Panel’s report on the call for detailed proposals did not identify the criteria it devised, the weightings it adopted or the scores it assigned to the proposals it assessed. Nor were these confirmed by DPWS or the Government.

However, given the subsequent redesigns and later focus on the financial offer, it is worth noting that:

- it was on the ‘design’ objectives, the area that has changed so much since the assessment, that the winning proponent was scored significantly higher than the others
- all proponents had residential development of the wharves as a significant component of their proposals, even though DPWS with new knowledge now believes this is not commercially viable
- the financial offer formed only a small component (less than 5%) of the assessment score.

At this stage, there was no binding commitment to a scheme and no scheme as such was recommended to the Government for approval.

## **4.6 Conclusion**

The Audit Office’s major concern with the bidding process is with aspects which limited its transparency even though the result may not likely have been different in the initial selection of Walsh Bay Properties.

Whilst it is accepted that DPWS followed legal advice and that ICAC finally acceded to that process, The Audit Office considers it lacked transparency and provided a poor reference against which to assess proposals. By not publishing the way in which the Government's objectives would be weighted or ranked and not publishing the selection criteria, there is the possibility that the Government is deprived of the economic benefits that could be achieved by the proposals being more closely aligned with Government's priorities.

This decision limited the transparency of the selection process and provided a poor reference against which later to assess the various revised proposals to redevelop Walsh Bay.

Instead, proponents were advised only that they would be assessed on the extent to which their proposals met the Government's objectives. The basis on which competitive bids would be assessed was not specified beforehand and remained ambiguous to the proponents, who might have been able to tailor their proposals more closely to government priorities with such knowledge.

The independent panel was left with the task of establishing its own criteria and prioritising and weighting these objectives, some of which were in competition with each other. The panel did a creditable job and evaluated the bids received in a consistent manner against its interpretation of the Government's requirements.

The panel's report did not identify the criteria it devised, the weightings it adopted or the scores it assigned to the proposals it assessed. Nor were these confirmed by DPWS or the Government. This was all the more unfortunate as some aspects have changed in relative importance over the life of the project.

## **5. Exclusive Negotiation Period**

---

## 5.1 Guarding Against the Loss of Competition

The Government's approval in 1996 to enter into an exclusive negotiation with one proponent introduced some additional difficulties into an already complex process.

The Exclusive Negotiation Agreement of 21 February 1996 provided for a period of 120 days in which to negotiate and settle the terms of the Development Agreement and have it executed.

The subsequent Development Agreement would set out the obligations and responsibilities of the Developer through to the completion of the construction phase, and the Government's obligations to grant the lease for a term of 99 years. (This was later replaced by a Project Delivery Agreement, which accomplished the same thing.)

DPWS had stressed to the Minister the importance of securing the Development Agreement as quickly as possible. It advised the Minister that it was most important:

*... that we insist upon completion of the Development Agreement. While it remains uncompleted, prospective equity partners and WBP will continually seek concessions on the argument that these are needed to conclude agreement with the equity partner. A completed Agreement will give the Government a final position and enable Walsh Bay Properties to conduct their negotiations with an equity partner for a known and fixed project.*

Source: DPWS Advice to Minister dated 16 July 1996

As it happened, the Development Agreement was never signed and its replacement, the Project Delivery Agreement, was not signed till more than a year later.

In view of the above, the audit was concerned to establish what safeguards had been adopted to ensure that in terms of the final agreement the project's objectives had been achieved and competitive pressures had been maintained.

These were considered in terms of:

- **negotiations strategy or plan**
- **benchmark studies**, based on a thorough evaluation of the potential of the redevelopment

- **information on site conditions**, to minimise the risk of bidders later using new information as a reason to seek concessions
- **leaving the door open to other bidders** so that they could be invited to re-enter the negotiations, should circumstance arise
- **concluding the agreement as quickly as possible**, consistent with a satisfactory outcome.

These issues are explored in the following sections.

## 5.2 Negotiations Strategy or Plan

DPWS had issued guidelines for the management of the agreement negotiation with a preferred proponent within an exclusive dealings period.

*Prior to commencing negotiations a strategy or plan must be prepared which includes the following:*

- *the scope of the issues which are to be resolved ...*
- *the negotiating limits based on the Business Case model ...*
- *a programme with the milestones to be achieved ..*

Source: DPWS, Infrastructure Partnerships Implementation Guidelines, 1996 sec B4

As the Department's own guidelines suggest, a negotiating strategy or plan, with approved minimum bargaining positions before commencement, would set parameters and limits within which the DPWS negotiating team could confidently operate. This would be particularly useful, given that the Government's decision had left such flexibility in relation to the proposal.

### Audit Observation

Whilst DPWS had no single document covering this, the essential elements of a strategy were present as follows:

- the program for the negotiation strategy was set out in the Exclusive Negotiation Agreement in that the negotiation was to be concluded within a four month period; once the Exclusive Negotiation Agreement was signed, the first meeting was held with Walsh Bay Properties to agree a detailed procedure and detailed program for the negotiations
- the scope of issues to be resolved was the negotiation and

tailoring of the draft Development Agreement

- the bottom line for negotiating limits was the Walsh Bay Properties proposal.

### **5.3 Benchmark Studies**

Walsh Bay was considered by DPWS to be a unique project because of its heritage value, its scale and its funding. Finding other sites to benchmark it against would always have been difficult.

*Walsh Bay, because of its waterside buildings and unique timber wharves is not a development opportunity in the same sense as the southern part of The Rocks or parts of Pyrmont. The value to the Government and the community is in maintaining and reinforcing an important historical and cultural area, increasing its richness and diversity while finding new uses for the wharves and avoiding very major maintenance costs.*

Source: Walsh Bay Call for Detailed Proposals Assessment Panel Report, February 1996 p(ii)

Similar projects nearby - City West and Darling Harbour - were seen to provide little guidance, having been more directly managed and partially funded by government. The Woolloomooloo finger wharf was on a smaller scale, lacking shore sheds, bond stores and extensive termite infestation.

A thorough evaluation by DPWS of the potential of the redevelopment at Walsh Bay would have provided an independent basis for DPWS's negotiation. However this was not feasible, because it depended on having a site Master Plan and defined mix of uses, which in turn were being left to the developers to formulate. Nor were the bids from other proponents likely to offer much assistance, with differing schemes using different assumptions and containing information in different packages.

The Property Services Group did commission consultants to undertake an 'indicative' market assessment of the disposal of Walsh Bay in December 1994. The consultants indicated that a return to Government could range from \$7.5m to \$15.5m. But the consultant cautioned that this indicative assessment would be affected by:

- market values
- the 'Development Control Plan'
- restoration costs
- the structural condition of the wharves
- the flexibility of the consent authorities towards changes to the PCO and REP.

**Source:** Consultant's Report to DPWS dated December 1994

Information on these matters improved during the process, mostly through studies commissioned by Walsh Bay Properties. DPWS also made extensive use of consultants, to review Walsh Bay Properties' market estimates, cost estimates and financial projections.

The extent and impact of this new information is indicated by the results seen on the wharves.

In February 1997, consultants to DPWS reviewed and endorsed the results of a report by Walsh Bay Properties into alternative structural solutions and uses for wharf 2/3. The report confirmed that commercial re-use of the existing wharves in themselves was never likely to be a viable proposition. The only option to show a net return from the wharf involved demolishing that wharf and constructing an all new modern residential structure in its place. Alternatively, if the wharf was to be retained, the option which minimised the potential loss from it was that of a residential complex with a new substructure. The results are summarised in the following table.

<b>Alternative Returns from the Development of Wharf 2/3 (expressed as \$ per sq. metre)</b>									
	<b>Restore existing timber structure (no structural guarantee)</b>			<b>New substructure. Retain existing timber superstructure (no guarantee)</b>			<b>All new modern structure</b>		
	<b>Cost</b>	<b>Rev</b>	<b>Net</b>	<b>Cost</b>	<b>Rev</b>	<b>Net</b>	<b>Cost</b>	<b>Rev</b>	<b>Net</b>
Residential	5133	2175	-2958	5574	4875	-699	4631	6625	1994
Commercial	4541	2083	-2458	5037	3159	-1878	4468	3562	-906
Hotel	n/a	n/a	n/a	9898	4242	-5656	9055	6061	-2994
Retail	7869	1502	-6367	8705	2188	-6517	7738	3128	-4610
Exhibition	5407	1137	-4270	n/a	n/a	n/a	n/a	n/a	n/a
Industrial	4170	917	-3253	n/a	n/a	n/a	n/a	n/a	n/a

Source: Consultant's Report to DPWS dated 3 February 1997

DPWS's financial and property consultants were asked to review and endeavour to replicate Walsh Bay Properties' financial model. DPWS appear to have been satisfied to accept statements by their consultants that costs appeared 'realistic' or 'reasonable' and that that might include results that would vary up to 10% from what the actual might be.

#### **Audit Observation**

DPWS did its best, in the absence of any useful benchmark studies. But major areas of uncertainty remained inherent in the project, ranging from assumptions as to the condition of the wharves to assessments of the marketability of the end result.

### **5.4 Information on Site Conditions**

Despite recommendations by the Property Services Group, studies of the condition of the wharves were not undertaken before the competitive process started. And such studies were not completed by the time the competitive process ended, despite comments in government guidelines, such as:

*The information provided to bidders should enable them to make a sound assessment of the risks involved if they win the contract.*

Source: NSW Government, Procurement and Disposal Guidelines, 1995 p22

The former Government's decision as to the process of offering the site in October 1994 left responsibility (and cost) for this to the bidders.

*The Government does not make any representation or give any warranty as to the condition, state of repair or structural adequacy of any structure in the area. The structures are in varying states of dilapidation and refurbishment. Costs for some structures may be significant.*

*Structures must be accepted by the preferred tenderer in an "as is" condition. Expressions of Interest should have regard to the condition, structural adequacy and future maintenance of structures.*

Source: PSG, Call for Expressions of Interest, December 1994 sec 2.6

The bidders were reluctant to undertake detailed studies (later felt to be necessary) until after the competitive stage of the process was over.

This was despite the fact that some key studies later undertaken for Walsh Bay Properties on infestation by State Forests Inspectors were neither costly nor time consuming.

State Forests Timber Inspectors would have been available to do similar work for others at the start of the process, if requested. However, the agency was not contacted by any other short-listed proponent, nor was it contacted by DPWS.

When Walsh Bay Properties did discover the extent of infestation of the structures in 1996, after it had become the preferred tenderer with exclusive negotiating rights, it sought major revisions to its proposal. These were entertained by DPWS despite the warnings contained in the call documents that this risk lay with the bidders.

ICAC commented on this in its advice to DPWS on 24 March 1997.

*The government made no representation nor gave any warranty as to the state of the structures on the Walsh Bay site. In light of this it could be argued that the condition of the wharves is a commercial risk accepted by all proponents who responded to the Call and as such the Government should not bear the consequences of any discovery that increases the risk to the developer. In other words, any new WBP proposal arising out of the condition of the wharves should not reduce the return to government, financial or otherwise, provided for in the original proposal.*

Source: ICAC letter to DPWS dated 24 March 1997

However, DPWS was concerned that this would cause the preferred proponent to abandon the project. In September 1997 DPWS reported to the Government:

*Whilst the site was offered to the market on a 'take it as you find it basis', the extent of dilapidation, termite infestation and engineering constraints discovered by WBP impacted significantly upon their ability to deliver the project as originally proposed to government.*

*.... Accordingly, owing to the worse than anticipated dilapidated state of the wharves, store sheds and other buildings the original proposal by WBP became uncommercial and undeliverable.*

Source: DPWS Walsh Bay Report & Recommendation, September 1997 pp4,5

**Audit  
Observation**

Due to the decision to offer the site without undertaking further studies, the information available regarding the conditions of the site was limited. More extensive knowledge would have provided a better platform for later negotiation.

## **5.5 Leaving the Door Open to Other Bidders**

Allowing other bidders to re-enter the negotiations if the preferred bidder sought significant concessions, is another important safeguard.

The assessment panel did not recommend alternatives to the preferred bidder. This does not appear to be because the other bidders were unacceptable, but rather because the panel had not been specifically asked to nominate a second or third proponent and it did not do so.

DPWS was faced with the position that it had entered into an Exclusive Negotiating Agreement with Walsh Bay Properties. In that agreement the Government had granted to Walsh Bay Properties the exclusive right to negotiate. Further, the Government had promised to act in good faith and use its best endeavours to expeditiously negotiate and agree a Development Agreement.

But the Government's agreement to proceed to exclusive negotiation with Walsh Bay Properties did expect that, if negotiations stalled, the other two bidders would be reconsidered.

*... in the event that a development agreement is not entered into with Walsh Bay Properties Pty Limited DPWS reconsider the remaining two proposals and make a recommendation to Government regarding the new Preferred Proponent.*

**Source: DPWS Walsh Bay Report & Recommendation September 1997**

In July 1996 the interest of Mr Jose de la Vega in the Walsh Bay Properties was acquired by Mirvac Pty Ltd. It is thus not clear to what extent the approval was granted to proceed with negotiations with the entity called Walsh Bay Properties or with those who stood behind the consortium.

By late 1996, in the light of the new knowledge about infestations, Walsh Bay Properties had prepared a revised proposal that entailed demolition of two of the three wharves intended for conservation. This directly diminished the consistency of its offer with the Government's objectives. Whilst the assessment panel had rated Walsh Bay Properties' original proposal as satisfactory or better in relation to each of the Government's ten objectives, DPWS's consultants advised that the revised proposal only partially satisfied three of the ten objectives:

- commercially viable quality preservation
- innovative adaptive reuses
- promote public accessibility

**Source: Consultants report to DPWS 22 January 1997**

Under the terms of the Government's approval, DPWS might have been expected to seek Government authority to approach the other proponents. It did not do so arguing that, with the discovery of the extent of dilapidation of the wharves and the length of the negotiation, the other bidders would not have been able to do any better than Walsh Bay Properties.

The intervention of Phillippe Robert followed. The revised proposal Walsh Bay Properties made, based on the Robert scheme, again looked quite different to the proposal originally submitted.

The changes included:

- an increase in the extent of development to include Shore Sheds 4/5
- the replacement of Wharves 6/7 with a new residential structure
- the proposed use of Wharves 2/3 for arts and public purposes in place of residential use
- the creation of a broad public promenade along the length of the shore line

DPWS was aware that failure to return to the Government and seek authority to approach the other proponents could attract criticism. In a briefing note it advised the Minister that the Government might attract criticism and complaints to the extent that:

- there has been a departure from the rules;
- it is unfair to the unsuccessful proponents;
- the Project should be re-tendered; or
- the unsuccessful proponents should be reimbursed for their costs.

Despite this, DPWS recommended that Walsh Bay Properties should continue as the preferred proponent, pointing to the likelihood of compensation costs which Walsh Bay Properties might claim if it did not:

*Nevertheless, it is recommended that Government continue to work with WBP to enter into a Development Agreement. This recommendation is based on the following considerations:*

- *WBP has argued that it had to change its Proposal because of the extent of the problems with the wharf structures particularly the dilapidation and termite infestation. They argued it was not feasible for any proponent to fully identify these problems before putting in a proposal and the Government would be in a similar position with any other proponent, namely that once the extent of the problems had been discovered, their proposal would have to change.*
- *the proposal being considered by WBP still appears to be the best solution for the site.*
- *the technical skills of Transfield and the developer skills of Mirvac plus their combined financial strength mean that WBP is in a stronger position than any other party to be able to carry out this difficult project.*
- *the planning constraints on the site of a restriction on commercial to only 30% of the overall development means that residential is the only available viable use.*

*WBP has made a very substantial financial commitment to this project and has already expended over \$7 million. If the Government was to refuse to exhaust the possibilities of entering into a development agreement with them, it seems highly likely that WBP would seek compensation from the Government for all their costs.*

**Source: DPWS Briefing Note dated 7 February 1997**

It may be argued that this would have been an opportune time for the Government to reconsider the approach to develop Walsh Bay.

## **A Dilemma**

DPWS have explained their dilemma as follows:

*DPWS was always conscious of the very difficult judgement call that had to be made at a number of stages during the process. That dilemma was balancing fairness to Walsh Bay Properties against fairness to the other proponents.*

*... DPWS had formed the view that it was not possible to go back to the other proponents at this stage as:*

- *Due to the changed circumstances that had arisen DPWS*

*had received legal advice that going back to the other 2 proponents was not a viable option. The process would have had to be terminated and a new process commenced. In other words neither of the other 2 proponents could have been held to their offers given the changed circumstances.*

- *Government would have been in breach of its obligations to Walsh Bay Properties. They would have had to terminate the Exclusive Negotiation Agreement.*
- *Walsh Bay Properties would have suffered significant damages. ...*
- *... the impact on the project and the Government's ability to offer such projects in the future. ...*
- *A new process would have a significant number of disadvantages including cost, lost time and the tainting of the project referred to above. ...*

*DPWS was required to balance this lack of fairness to Walsh Bay Properties against fairness to the unsuccessful proponents as well as taking into account the requirements of Government. After much careful deliberation, consultation with consultants and detailed consultation with ICAC, DPWS came down on the side of proceeding with Walsh Bay Properties. DPWS was mindful of the fact that the cost to the taxpayer of such litigation / compensation payment would have been high with no guarantee of any positive outcome. ie. any development actually taking place.*

**Source:** Advice from DPWS dated 22 October 1998

**Audit  
Observation**

Whilst DPWS was left in a difficult position, in view of the extent of the changes in the proposal and in the consortium itself, it is perhaps somewhat surprising that no greater consideration was given to reconsidering the approach to the development. It would seem that many of the original reasons for the development (finishing before 2000, no cost to taxpayers, and now a substantial departure from the design in the proposal selected) were no longer compelling and persuasive reasons to continue in the same manner.

## **5.6 Concluding the Agreement as Quickly as Possible**

As advised in the Call document, the Exclusive Negotiation Agreement provided for a period of 120 days in which to negotiate and settle the terms of the Development Agreement and have it executed.

Whilst the Government reserved the right to extend this period, Walsh Bay Properties were allowed nine extensions of time - increasing the exclusive negotiation period from 120 days to 600 days.

The delay of one year in securing a project delivery agreement has been attributed by DPWS and Walsh Bay Properties to the discovery of new information on the structural condition of the wharves and structures and its impact on the commercial viability of the original proposal. The reasons are summarised below.

<b>The Stages in Reaching a Project Delivery Agreement</b>		
<b>Date</b>	<b>Action</b>	<b>Reason</b>
21 February 1996	Budget Committee authorises Minister to enter agreement	
11 March 1996	Exclusive Negotiation Agreement signed with WBP for 120 days to 9 July 1996	
8 July 1996	Agreement extended to 24 July 1996	WBP required discussions with DUAP regarding their Master Plan
17 July 1996	Agreement extended to 30 July 1996	
30 July 1996	Agreement extended to 30 August 1996	The Development Agreement had been agreed at this stage, but WBP wished to finalise negotiations with their preferred equity partner (Mirvac) prior to signing the Development Agreement.
29 August 1996	Agreement extended to 31 October 1996	Mirvac required further due diligence to be completed prior to entering a joint equity partnership with WBP.
31 October 1996	Agreement extended to 28 February 1997	Discovery of high dilapidation and infestation levels and need for further discussions with Heritage Council and DUAP.
27 February 1997	Agreement extended to 30 June 1997	Following Robert's visit in February 1997, WBP required more time to redesign their proposal to conform with the Robert proposal
27 June 1997	Agreement extended to 31 July 1997	WBP revised offer was only submitted on 28 May 1997. Further clarification was required in a number of areas.
23 August 1997	Agreement extended to 25 September 1997	Inclusion of Bond 3 in the development area. Resolution of arts uses and existing leaseholders.
29 September 1997	Agreement extended to 30 October 1997	WBP requested extension to finalise the Project Delivery Agreement
22 October 1997	Project Delivery Agreement signed	

**Note: the Project Delivery Agreement superseded the Development Agreement**

That this could be accommodated within the existing Government approval can be attributed to the particular wording of the approval and its interpretation by DPWS.

DPWS drafted an acceptance for the Government which allowed the proponent significant latitude to change the content of their proposal, so long as the terms of the proponent's original proposal were not reduced overall.

*.....subject to it being made clear that the nominated proponent's proposal represents the minimum terms acceptable to Government and that the benefits to Government are to be maximised in the negotiation phase.*

**Source: Letter from Cabinet Office dated 18 March 1996, as contained in DPWS Walsh Bay Report & Recommendation September 1997**

There was no statement at the time elaborating what the terms were.

This was unusual. Government guidelines indicate that the Budget Committee would normally have expected to approve a detailed proposal, (based on a development):

*The agency's Evaluation Committee will undertake a full assessment of the detailed proposals submitted by the short-listed proponents and recommend a preferred tenderer. Subject to endorsement by the responsible Minister, the assessment and recommendations will be submitted to the Budget Committee for determination.*

*Should there be any significant variations from the detailed proposal approved by the Budget Committee, the negotiated agreement should be referred back to the Committee for consideration and, if favourable, final endorsement.*

**Source: Guidelines and Principles for Private Sector Participation in the Provision of Public Infrastructure, sec 6, February, 1995.**

Later documents show that DPWS understood the terms to be the value of the monetary offer to Government and the extent of achievement of the ten objectives outlined in the Call document.

*I have been requested to provide ... key non-negotiable issues for the Minister's office.*

*The following issues must be rejected so as to maintain the value of the monetary offer of \$45.361m to Government, the ten objectives outlined in the original Call and the satisfactory ongoing management of the precinct post-completion.*

Source: DPWS minute dated 18 June 1997

**Audit Observation**

It is accepted that each time in the negotiation a change was proposed by Walsh Bay Properties, the change was scrutinised by DPWS and its consultants. Nevertheless, there is an argument that changes to the selected proposal should have been referred back to the assessment panel. The panel would have been asked to assess the changed proposal against its original criteria, to determine if it was still superior to those proposals submitted by other proponents. This was not done.

As a consequence, it would seem that Walsh Bay Properties was able to reshape their proposed development without further assessment, so long as the terms were acceptable to DPWS in light of its views of the importance of the objectives and the monetary offer.

Following the period of competitive tendering, which had been completed by February 1996, negotiations continued for more than two years. The competitive period became further removed in time.

DPWS' reluctance to re-open discussions with other bidders was partly motivated by its desire to achieve an outcome. It believed that further postponement of development decisions could severely reduce the viability of development and thus further reduce the prospects of meeting the Government's objectives.

DPWS was also aware that WBP had invested a substantial amount of money in the project by early 1997. This was seen to be a significant commitment considering that, at that time, there was no government approval for the proposal. The Government also had spent over \$3m with no certain result.

## **5.7 Conclusion**

DPWS did its best to negotiate, in the absence of any useful benchmark studies. But major areas of uncertainty remained inherent in the project, ranging from assumptions as to the condition of the wharves to assessments of the marketability of the end result.

Negotiating exclusively with a single proponent for such a long period - more than two years - raises concern about the process.

Guidelines should require that proponents be retained in competition as long as possible. (eg Olympic Stadium and Melbourne Docklands.)

At the least, competitive tension would have been improved if a choice of both the first and second preferred proponents had been made, with an option of negotiating with the second proponent if that were appropriate.

Over a long period, DPWS did not return to the Budget Committee when Walsh Bay Properties submitted significant variations to their original proposal, although DPWS did keep their Minister informed of progress.

If the changes had been marginal, it would have been appropriate to continue to negotiate directly with Walsh Bay Properties. As the changes were substantial, it is perhaps somewhat surprising that no greater consideration was given to devise some alternative approach to developing and possibly funding elements of the site.

As Walsh Bay Properties discovered evidence of extensive infestation of the structures, major revisions to the development proposal were acceded to by DPWS- despite the fact that the call documents contained contrary statements and no additional assurances had been provided by the Government. DPWS accepted Walsh Bay Properties' arguments, supported by its consultants, that Walsh Bay Properties still offered the best prospect for the site. It continued negotiating with Walsh Bay Properties and did not approach other bidders. DPWS was mindful of the fact that the cost to the taxpayer of litigation / compensation payment would have been high with no guarantee of any positive outcome.

Despite assistance from consultants, negotiating tension was necessarily reduced by allowing the preferred bidder to vary the proposed development significantly, and the time period to be extended many times, without going back to the market.

The latest proposals involve the demolition of a wharf and funding of a promenade that would not likely have been accepted earlier, when assessing the proposals of other proponents.

## **6. Planning and Approval Process**

---

## 6.1 Agreed (1997) Proposal

On 23 October 1997 the Minister announced that an agreement had finally been signed between the Government and the partners in Walsh Bay Properties.

### Mixed Uses

Walsh Bay Properties final 1997 proposal was an amended proposal that arose out of the Robert visit. It provided a mixed use development of around 100,000 sq m of net useable area. This included 302 apartments and 92 serviced apartments, a 59 room hotel, around 30,000 sq m of commercial and retail space, a 50 berth marina, 8,650 sq m of arts and cultural space and a 1,000 seat theatre. Walsh Bay Property's development would involve restoration and improvements to the existing wharves, restoration of some of the heritage buildings, refurbishment of the cliff top walk and re-instatement of significant items of heritage. The development's features would include the theatre, the arts and cultural space, a new harbourside promenade, restaurants and retail, a supermarket, a ferry terminal, public artwork, heritage style street furniture, a children's playground, a park, trees and landscaping.

(Source: Consultant's Report to DPWS dated September 1997)

It had been agreed that the Government would contribute to the cost of a number of items including the theatre, the promenade, fitting out and site remediation.

On the other hand, most of the shore sheds and Wharves 6/7 would be demolished.

## 6.2 DUAP Requires Major Changes

DUAP, the consenting authority to determine the conditions under which the proposal could proceed, did not agree to the development as submitted. After several months of assessment, it stipulated certain conditions that were not previously contemplated.

Details of DUAP's consent were announced by the Premier on 21 August 1998. The consent required the retention of the shoredowns associated with wharves 2/3 and 4/5 and a reduction in the height and bulk of buildings in the Towns Place area. In effect, the bay's eastern side would keep its historic configuration, with wharves 2/3 and 4/5 remaining intact and joined together. This would require the building of residential units within the old shoredown structures and a reduction of the planned promenade by almost half.

The Master Plan had taken 10 months to approve, almost three times as long as was originally indicated. More importantly, however, it had undergone reasonably significant changes, which affected both the design and the extent to which it was initially judged to achieve the Government's objectives.

The audit wished to understand how it was that such major changes could be required, so late in the process, to a proposal that the Government had already agreed to; and why Government had chosen to enter a development agreement which was in turn dependant on assumptions about the outcome of the independent planning assessment.

### **6.3 Balancing Heritage Preservation and Commercial Viability**

#### **Conservation Objectives**

It would appear that DUAP placed relatively more emphasis on the quantity of items to be preserved than had DPWS or WBP, or ultimately even had the Heritage Council. The REP which binds the DUAP decision maker requires that any redevelopment should be consistent with conservation objectives:

*Except as otherwise provided by this plan, the consent authority shall not grant consent to an application to carry out development on land to which this plan applies unless it is of the opinion that the carrying out of the development is generally consistent with the aims of this plan and the objectives of the zone within which the development is proposed to be carried out.*

Source: Department of Planning, Sydney Regional Environmental Plan No.16 - Walsh Bay sec 12 (3)

The aims of the plan emphasised adaptive re-use, whilst preserving the heritage significance of the area:

- a) *to allow an appropriate range of uses to encourage the adaptive re-use of existing structures while not required for commercial port uses;*
- b) *to identify and protect the heritage significance of the area by establishing a conservation zone and providing appropriate controls for adaptive re-use, demolition and alteration;*
- c) *to ensure that development is compatible with the scale and character of existing built structures in the area;*
- d) *to control the use of the waterways between the wharves to ensure that any activities associated with any development are compatible with the commercial shipping and navigational requirements in Sydney Harbour.*

The objectives of the conservation zone are:

1. *to allow an appropriate range of uses to encourage the adaptive re-use of existing structures while not required for commercial port uses;*
2. *to ensure that development is consistent with the heritage significance, the scale, the built form and the materials of existing structures in the zone and adjoining areas;*
3. *to ensure that development is compatible with and does not detract from the financial, commercial and retail functions of the existing city central business district and the Sydney Cove Redevelopment Area; and*
4. *to ensure that development is compatible with and does not adversely impact on the residential amenity and function of the adjoining areas.*

Source: Department of Planning, Sydney Regional Environmental Plan No.16 - Walsh Bay

### **Balancing with Commercial Viability**

The principle difficulty at Walsh Bay had been to achieve the balance between heritage preservation and commercial viability.

The plan had included the following statement:

*The permissible land uses in Walsh Bay should enable an economically viable adaptive re-use of the wharves, shore sheds and bond stores while also ensuring the maintenance of the special and historic character of the area.*

Source: Department of Planning, Sydney Regional Environmental Plan No.16 - Walsh Bay

The Director-General had summarised the difficulty of the situation as follows:

*The balance between what can be preserved and what must go to pay for the heritage benefits is extremely difficult to strike. There is clearly a large cost in refurbishing structures such as those at Walsh Bay to rectify the termite infestation, preserve important heritage items, whilst returning to Government cultural benefits, and allowing the developer a reasonable profit margin. It is quite clear from public and media debates that strongly opposing views are held by different sections of our community. However, I believe there is widespread community agreement that this area cannot be left to mark time for much longer. I believe that some form of redevelopment of this precinct is overdue, and no doubt, time is of the essence.*

Source: Director-General DUAP's Commentary on the Walsh Bay Decision, 21 August 1998

### **Preservation not Mandatory**

DUAP have further explained that preservation was not mandatory and need not be applied to all parts of the development, despite a public perception that it was.

*A PCO by its very name, does raise expectations of preservation, but under the legislation that provides for the making of PCOs, the Heritage Council can make a decision in the overall interest of conservation that results in part of the item being removed. In the past, parts of PCOs have been revoked to allow items to be demolished. The word "mandatory" was included in the conservation guidelines but their status is that they are only one of a number of matters to be taken into account when the consent authority makes a decision.*

*Today the known extent of decay (especially white-ant damage) means that to secure a viable development (particularly when the government is seeking public benefits as well) means some demolition is warranted to allow a new building which will contribute to the scheme's financial viability.*

Source: DUAP 18 August 1998

Relevant to this decision was the previous decision-making on the finger wharf at Woolloomooloo. It too was subject to a PCO. It too was the subject of a tender process which failed, in 1990, to attract a final satisfactory bid. However in that case the Minister called for a Commission of Inquiry which recommended revocation of the PCO (subsequently accepted by the Minister) on the grounds that:

*... in the circumstances here [Woolloomooloo] the heritage significance of the Finger Wharf is not such as to warrant the high financial cost to the public which is likely to be incurred in retention and necessary conservation work”*

**An Inquiry pursuant to Section 52 of the Heritage Act 1977 concerning The Woolloomooloo Finger Wharf, Commissioners of Inquiry for Environment and Planning (William Simpson) July 1990, Overview Report, p6.**

The Heritage Council had to consider a series of amended applications over several meetings as a result of changes made to the proposal. The Heritage Council did agree to demolition at Walsh Bay believing there was no commercial alternative and fearing there would be no development at all with continued deterioration of the wharves. The way was cleared to demolish a pier and other parts of the structures, particularly when interpreted as parts of a bigger building.

#### **6.4 Assessments by Various Parties**

At various stages during the Walsh Bay development process, proposals had been assessed by the bid assessment panel, by DPWS, by WBP, the Heritage Council and DUAP. Whilst these assessments had been carried out for different reasons, nevertheless, they commented on and inevitably influenced the outcome (and as such the achievement of the Government’s objectives) quite significantly. And to some extent they interpreted the same Government objectives from their own points of view, with the consequence that there were significant over-laps and different results.

#### **Heritage Aspects**

For example, DUAP explained that there are no common rules with which to assess a proposal against the planning requirements:

*There are no hard and fast rules. The consent authority must judge the proposal on its merits against the provisions of the REP.*

**Source: DUAP 18 August 1998**

On the other hand, there seems to be little agreement between DUAP and the Heritage Council on making the trade-off. DUAP refused demolition of the shoredowns for the Robert scheme, based on heritage grounds, even though the Heritage Council had already agreed to it.

*They are both working under different pieces of legislation. The Heritage Council decision is independent yet critical to the consent under the REP because the Heritage Act voids any consent to the extent that it is inconsistent with the Heritage Council decision. In the event there has been an iterative process; Heritage Council decision; Director-General reaching a view that would approve the development with changes; Heritage Council considering its position in relation to the Director General's position.*

Source: DUAP 18 August 1998

Whilst the Heritage Council and DUAP are independent and must work under their respective legislation, the fact that they both can arrive at different results can cause confusion and lead to a lack of clear direction for development.

## Guidance

Despite the complexity of this process, and despite the fact that major changes were being called for two to three years after the selection of the proposal of Walsh Bay Properties, DUAP did not believe it could have provided more guidance earlier to the bidders, the assessment panel for Walsh Bay bids or DPWS on the relative weighting of commercial viability and preservation (and other objectives) in the REP.

*.... a merit decision can only be made after full details of the application have been assessed. This cannot be reduced to a precise formula before the comprehensive assessment has been made. Developers are prone to make changes as they develop a proposal towards the point of submitting a tender for evaluation and then again as they refine the proposal for a formal development application. Although one can offer generalised observations at the beginning of the process, it is neither possible nor appropriate to prejudge the issues.*

Source: DUAP 18 August 1998

When the proponent sought some certainty of an approval before proceeding with the Robert scheme, DUAP advised that the Master Plan be submitted and that no judgement could be made until the views of the public and the Heritage Council had been obtained.

The delays could possibly have been reduced, if the acceptability of the Phillippe Robert scheme had been established with a Master Plan early in 1997:

*At the time of the Robert discussions the proponent was advised the best way to test the proposal was to submit it. At that stage it would not be appropriate to prejudge an eventual decision. The proponents were cautioned that it would be essential to fully address the requirements of the REP and demonstrate consistency with it and the design guidelines - or argue clearly to support inconsistencies. In the end, the application fell short in these matters, which is what led the Director-General to contemplate refusal.*

Source: DUAP 18 August 1998

It was left to DPWS and WBP to assess the latest proposals against the objectives of the REP, which in turn were mirrored by the objectives of the calls for proposals. But there is no evidence that this was properly done. The scheme moved from concept to reality in a very short space of time.

DPWS point to many meetings involving DUAP and their surprise when DUAP refused to approve the proposal developed from the Robert scheme.

*DUAP participated in many meetings with Government and Walsh Bay Properties and other parties over many months while the Robert scheme evolved.*

*It was our understanding (and that of WBP) that during the process, if DUAP had fundamental problems with the scheme DUAP would be providing input or at least raising concerns. DPWS were extremely surprised when the approval finally issued to learn that DUAP in fact had fundamental problems with the scheme which only emerged at that point.*

Source: Advice from DPWS dated 26 October 1998

**Audit Observation** It is accepted that under the consent system DUAP, the consent authority cannot provide its consent until it receives the final proposal.

Nevertheless, there is a need to establish better and more cooperative arrangements that will eliminate the amount of uncertainty that was experienced in this instance. It would have been beneficial if DUAP had sufficiently identified its concerns, so as to avoid the major changes that were eventually necessitated by their final review. There is a need for a revised procedure that will allow interim advice to be provided by a consent authority, especially in complex, divisive projects, in order to avoid undue effort, time and resources being expended on a proposal which clearly will not be approved.

## 6.5 Right to Terminate if No Approval

The project delivery agreement between the Government and WBP allowed WBP the right to terminate the agreement if it was unable to obtain certain strategic development consents

### Option to Terminate

*If the Contractor has not obtained the Council's Consent and the Master Plan Approval and the Heritage Approval for the Master Plan Application on or before the date being 9 months after the date of this agreement ... the Contractor may serve a Notice of Intention to Terminate ...*

Source: Walsh Bay Project Delivery Agreement, 1997 sec3.7(e)

DPWS explained the inclusion of this provision, as follows:

*Without a master plan at the start of the project, it was always recognised that obtaining development approvals was a very significant risk factor for the developer.*

*The risk was considered so serious by Walsh Bay Properties that in the negotiations they insisted on a right to terminate the PDA if they were unable to obtain certain strategic consents.*

*It was recognised by Government that you cannot force a developer to undertake an unprofitable project. This had been the Government's experience on Walsh Bay when offered the first time around and the Woolloomooloo Finger Wharf project. After lengthy negotiations with WBP, the Government agreed to enter into a Project Delivery Agreement with WBP in October 1997 that was subject to WBP obtaining certain key development approvals. In other words WBP had the opportunity to withdraw from the project without further*

*financial penalty if approvals could not be obtained within certain agreed time frames.*

Source: Advice from DPWS dated 26 October 1998

In the 1989 ICAC enquiry on earlier attempts to redevelop Walsh Bay, the Director of Planning commented as follows on the unsatisfactory position faced by the consent authority in such cases:

**Difficulties for  
DUAP**

*It has become apparent that the Government tendering process and negotiations over Walsh Bay leave significant problems for the planning process in general, and the Director's consent role in this case.*

*In January 1989, the Government signed a contract with CRI subject to conditions. It now appears that if any conditions are to be on the development consent which are unsatisfactory to CRI, the position is that CRI can get out of the tender commitments. The Director is then put in the position that if any conditions are attached to the consent the possibility emerges of the Government losing the project. It would appear to me that this position is completely untenable.*

Source: Report on Investigation into the Walsh Bay Redevelopment Project, ICAC, October 1990 p20.

DUAP has confirmed that nothing has been done since 1990 to address this problem. DUAP was left in a similar position in its consent role on the current proposal.

DUAP considers, and the audit agrees, that there is a danger in the Government agreeing to a project which is still subject to strategic development consent by another arm of the Government.

*When Government sponsors proposals it needs to ensure that the two roles (represented by DPWS and DUAP) are kept quite separate. There should be no agreements with developers that rely on assumptions about the outcome of the independent planning assessment. The alternative is to have special legislation that makes the process transparent and removes the ambiguity of government being both sponsor and judge.*

Source: DUAP 18 August 1998

## **6.6 Conclusion**

The audit's major concern is with the consequences of the Government agreeing to a project which was still subject to strategic development consent by another arm of the Government.

This left DUAP in the same difficult position as its predecessors in 1989 (and indeed as DUAP was in respect to the Eastern Distributor). Its view of its statutory responsibilities was not necessarily going to be consistent with its Government's objectives.

Nor did DUAP agree with the Heritage Council. Whilst the Heritage Council and DUAP must each work under their own legislation, there ought to be room for greater consultation and cooperation between these agencies so as to provide a clearer direction for development.

It would have been beneficial if DUAP had sufficiently identified its concerns, so as to avoid the major changes that were eventually necessitated by their final review.

As it happened, the efforts to achieve an outcome with the negotiated agreement were set aside when DUAP did not accept all of the elements of that agreement. And although the project now has strategic developmental consent, the project agreement has to be renegotiated.

Many of the problems could have been eliminated had there been greater consideration at the start of the project. A great deal of risk in relation to the development approval process would have been avoided and the negotiations with WBP for the PDA would have been much simpler and would have been concluded much sooner.

Experience from this process and from others - such as the Eastern Distributor - suggests that there are too many risks in leaving DUAP strategic development consents till last. This is particularly so where the proposal is complex, sensitive and divisive.

## **7. Assessing Value for Money**

---

## **7.1 Approach to Assessment**

As outlined earlier, the value in this project was seen as the extent of attainment of the Government's ten objectives plus the financial offer.

The changing circumstances, the absence of a comparable benchmark and the relatively long period of exclusive negotiation in this process are such that it is difficult to compare the value for money of the final outcome with initial expectations. Even less useful would be any comparison which focused solely on the financial arrangements.

Instead, as outlined in the Introduction (Chapter 1), the audit has sought to examine and comment on those aspects of the preparation, selection, negotiation and strategic development consent, which would be expected to provide re-assurance that value for money could be expected from the process followed.

This chapter commences with an examination of the 1997 proposal, which had been agreed to and submitted to DUAP, then discusses probity. It finishes with an overall conclusion, considering the process as a whole, as to whether value for money has been achieved.

## **7.2 Final Proposal**

At the time of the audit report, Walsh Bay Properties were still developing a final proposal and the final outcome for the Government was not known. Walsh Bay Properties' 1997 proposal had not been approved by DUAP in the form submitted. In view of the significant changes required by DUAP, it was being modified to re-instate the shore sheds for wharves 2/3 and 4/5. These had been planned for demolition under the scheme devised by Phillippe Robert.

The audit focussed on the proposal which the Government had agreed to in 1997, commencing with an examination of the risks to which the Government was exposed.

### **Allocation of Risk**

Risks arise because of limited knowledge, experience or information and uncertainty about the future. There were many risks inherent in the redevelopment of Walsh Bay, which could impact on the returns to both parties - the proponent and the Government.

The Project Delivery Agreement had been prepared to reflect the

following allocation of risk which had been adopted in relation to the redevelopment of Walsh Bay:

<b>Risks Borne by Proponent</b>	<b>Risks Borne by Government</b>
<ul style="list-style-type: none"> <li>• financing risk</li>   <li>• market risk</li> <li>• construction risk</li> <li>• development and building approvals</li> <li>• condition of structures after occupation</li> </ul>	<ul style="list-style-type: none"> <li>• project not proceeding for commercial reasons</li> <li>• strategic development consent refused and project terminated or renegotiated</li>   <li>• site decontamination</li> <li>• sales tax indemnity</li>   <li>• condition of structures prior to occupation</li> </ul>

Source: Based on consultant advice to DPWS dated 16 September 1997

If risk is allocated to a party who cannot control it, there is usually a price to be paid.

*A general principle of risk management is that risks should be the responsibility of those best able to control them. Equally, reward should be commensurate with accepting risk responsibility.*

Source: NSW Public Works, Capital Works Risk Management Guidelines 1993 p18

Major risks here lie with the proponent. This includes the major uncertainties associated with the conditions and with obtaining development approval on a heritage site. It is to be expected that any developer would seek a high rate of return from the project in recognition of this level of risk.

A major risk for the Government is that, if development consent is refused, the project can be terminated. Additionally, if there is a major downturn in market conditions, such that the project is not viable, as in the case of the previous tenders, the proponent need not proceed with subsequent stages.

## Staging

All three short-listed proponents had proposed staging the development.

The Project Delivery Agreement with Walsh Bay Properties outlined 12 stages as follows:

Stages	Description
1	Wharves 6/7
2	Wharves 8/9
3	Towns Place North
4	Towns Place
5	Theatre
6	Bond Store 4 East Apartments
7	Pottinger Street
8	Towns Place East
9	Pier 2/3
10	Shore Sheds 2/3 and 4/5
11	Bond Store 1
12	Bond Store 2

The Government bears a risk that all the stages of the project may not be completed. Under the terms of the 1997 Project Delivery Agreement, stages may be deferred if:

- development approvals cannot be obtained
- the proponent can demonstrate a stage is no longer commercially viable.

To offset this in part, performance bonds were put in place to assist the completion of work on wharves 2/3, the theatre and the promenade, should the proponent withdraw from the project after the first stage (construction of a new residential apartment block on wharves 6/7).

*... once the first stage, (the construction of a new residential apartment block on wharves 6/7), is completed Government will receive a \$14 million performance bond to secure completion of the Theatre ... If after the first stage is completed Walsh Bay Properties do not continue with the Project, Government would be able to construct and complete the Theatre stage (by use of the \$14 million performance bond plus the amount to be paid by the Government for the Theatre of \$8.3 million) and the \$3 million overall performance bond, but would not have any further funds to complete wharves 2/3. Once the Theatre is completed the*

*Government receives a further \$10 million performance bond in respect of wharves 2/3. Whilst this does not represent the full value of the work to be carried out in this area, it plus the \$3 million bond would be sufficient to put the site in a holding condition and re-tender the remainder of the development.*

Source: Consultant advice to DPWS dated 16 September 1997

However, the outcome is not assured. To a large extent, Walsh Bay Properties can implement stages of the project at its discretion, dependent on its assessment of commercial risk.

### **Assessing Merits**

In assessing the merits of the 1997 outcome, the audit was concerned to identify:

- how the terms of the 1997 offer, after conclusion of the negotiating period, were assessed and how they compared to those of Walsh Bay Properties' original offer
- the probity of the process.

The audit was then concerned to establish whether the process as a whole had assured value for money.

### **7.3 Comparison of Terms of 1997 Proposal Against the Original Offer**

The original offer by Walsh Bay Properties had been assessed in detail in terms of the ten objectives outlined in the original call document and the monetary offer to Government. The 1997 offer was not assessed in the same manner and so there is no direct comparison available. However, there were obvious differences in relation to the objectives of adaptive re-use, public access, the financial offer to the Government and timing.

### **Adaptive re-use**

The key difference associated with the 1997 offer was the absence of any firm plans to re-use the wharves.

- Wharves 6/7 would be demolished and replaced with a purpose-built block of residential units, which would be effectively closed off to the public.
- Wharves 2/3 would be repaired and set aside for unspecified cultural purposes.
- Wharves 8/9 would most likely receive the same treatment.

This would likely have rated poorly in terms of the objective of adaptive re-use, against which Walsh Bay Properties had originally been rated as excellent:

*introduce a mix of attractive and innovative adaptive re-uses which complements the existing historic and diverse nature of the Walsh Bay area and the local environs*

Source: DPWS, Walsh Bay Call for Detailed Proposals, September 1995 p1

### **Public Access**

The effective closure of wharves 6/7 to the public may also have rated unsatisfactory in terms of the objective of public access.

*promote increased enjoyment and public accessibility to Sydney Harbour and the foreshore*

Source: DPWS, Walsh Bay Call for Detailed Proposals, September 1995 p1

The loss of access to wharf 6/7 was offset by the increased access of the new public promenade which was to be funded by the Government. How these variations would have been viewed by the original assessment panel is unclear. It may not have been considered favourably, if it had been presented on the basis that it be funded by Government. On the other hand, it could have been seen favourably, as it was seen by others as a significant benefit.

### **Financial Offer**

The value of the financial offer was analysed by DPWS and its consultants in detail. The following table shows that the net benefit to Government declined - reflecting the recognised cost of the deterioration of the remaining two wharves and the requirements of introducing the Robert Scheme.

<b>The Changing Value of the Financial Offer</b>			
<b>1995 Offer and Negotiations<sup>1</sup></b>		<b>1997 Offer and Negotiations</b>	
<b>Benefits</b>	<b>\$m</b>	<b>Benefits<sup>2</sup></b>	<b>\$m</b>
Cash	10.00	Cash	10.00
Gifts including Theatre, Maritime Museum, Park	30.446	Gifts including Theatre and Restaurant Wharf 2/3 and art uses	27.30
		Upgraded Scope	33.90
			14.60
<b>Anticipated Profit Share</b>	13.20		
<b>Total</b>	53.646		85.80
<b>Less</b>		<b>Less<sup>3</sup></b>	
Contribution to Theatre	8.30	Contribution to Pier 2/3 and promenade	20.746
		Site remediation	2.798
		Bridge to Pier 1 (linked project)	0.977
		Bond 4 theatre and restaurant	11.640
		Bridge to Pier 4/5	0.800
		Bond 3 Archives (linked project)	9.680
		DPWS costs	0.600
		<b>Total</b>	47.241
<b>Net Benefits</b>	45.34	<b>Net Benefits</b>	38.56

**Note:** Excludes a contingent sales tax liability on the Government of \$4.1M which DPWS have advised may not come to pass.

The table shows the Government contribution is expected to be \$47M. This is only offset by recognising the majority of this expenditure as additional 'cultural gifts' - see in particular the inclusion of Wharf 2/3 and art uses at \$33.9M and Upgraded Scope at \$14.6M.

The original financial offers of the other proponents had indicated similarly positive results for the Government. After detailed proposals had been submitted, the expected results of the competing financial offers to Government had been assessed by consultants for the Assessment Panel as follows:

<sup>1</sup> Source: DPWS Walsh Bay Report & Recommendation, September 1997 p10

<sup>2</sup> Source: App. B, C&L Financial Report, 24 Sept 1997

<sup>3</sup> Source: Table 1, C&L Financial Impact Statement, 17 Sept 1997

<b>A Comparison of Original (1995) Financial Offers</b>			
	<b>NPV of Payments to Government</b>	<b>Value of Gifts in Base Offer</b>	<b>Net Benefits</b>
	<i>\$m</i>	<i>\$m</i>	<i>\$m</i>
WBP	\$19.2	\$30	\$49.2
Proponent B	\$20.2	nil	\$20.2
Proponent C	nil	\$41.1	\$41.1

Source: Consultant Report to Panel on Objective 7, January 1996

As each proponent had relied to some extent on residential re-use of the wharves, the emerging information over the period would have placed strain on all their offers. Whilst it appears probable that all financial offers would have decreased, the extent in the case of the other bidders is unknown.

#### **Avoidable Costs**

Of increased importance now, however, is that by proceeding with the project the Government avoids wharf repairs and maintenance that have been estimated by DPWS to cost \$31M over the next twenty years.

#### **Timing**

For reasons already discussed, the objective of completing *a substantial level of redevelopment by the end of 1999* appears unlikely to be attained.

#### **Balancing Objectives**

Overall it is the sum total of attainment against each of the Government's objectives which results in the 'value' of the project. In particular, the commercially viable objectives have to be balanced against objectives of preservation and government return. This was inevitable under the current arrangements if any development at all was to happen (and so if any preservation at all was to happen). Whether that balance is appropriate cannot be judged by The Audit Office. It is appropriately a political decision - particularly in relation to the value of heritage.

A major factor in the financial results from the disposal of Walsh Bay has been the poor condition of the site - particularly the deteriorating state of the wharves. Emerging information on this aspect prompted considerable re-design and re-negotiation, and finally the demolition of one of the three wharves in the project.

## 7.4 Probity

Conscious of the need for probity, the Government had on 10 November 1994 directed that a probity auditor be engaged and that ICAC be consulted.

### Probity Auditor

ICAC provides the following description of the use of probity auditors:

*Agencies use probity auditors to verify that the processes followed are consistent with government regulations, guidelines and best practice principle... If probity requirements have not been met, the probity auditor identifies the reasons and provides a written report.*

Source: ICAC, Probity Auditing Guidelines, December 1996 p2

The audit found that the statements of the probity auditor had often been used to justify the adoption of the approach used by DPWS. However, contrary to ICAC guidance, such departures from standard practice had not been specifically justified with reasons and with reference to relevant government guidelines.

Despite these shortcomings, DPWS took considerable comfort from the oversight of the process by its probity auditor and by ICAC.

*The process followed has been continually overseen by an independent probity auditor and, significantly, has been reviewed on several occasions by the ICAC to ensure the appropriateness of the Government's actions.*

Source: DPWS letter to SMH dated 19 February 1998, published 24 February 1998

Whilst to ensure the appropriateness of the Government's actions may be too wide an interpretation of the role of a probity auditor, the form of advice provided to DPWS could have been interpreted in this way. The following examples illustrate this.

- The probity advice, provided to DPWS by its probity auditor, fully supported the prolonged exclusive negotiation with Walsh Bay Properties.

*The probity auditor is of the view that negotiations should proceed to the point that (they) are exhausted in accordance with the Budget Committee's direction.*

Source: DPWS Briefing Note dated 29 July 1996

- The probity auditor responded to probity concerns by

providing advice, such as:

*The question of compliance with a Call depends upon the stage of the process at which the question is considered ... Compliance is not relevant for something which is impossible to implement or unacceptable on statutory grounds.*

*The proposed deviations from original intentions have been forced upon the developer (and hence the managers of the negotiation process) by the discovery of information relative to the project which was not made available to any of the proponents preparing proposals.*

*Nevertheless, throughout this process, the developer has re-affirmed the intention to meet the Government's objectives for the redevelopment and the intention to provide the promised benefits (worth c.\$M45) to Government.*

*The above process has been quite fluid and indeterminate. No action has ensued which would allow the question of compliance to be determined.*

**Source: Probity Advice to DPWS, 1996**

- When DPWS submitted to the Budget Committee a completely revised Walsh Bay Properties' proposal, based on the Robert scheme, the probity auditor provided unequivocal support.

*To the extent that the current proposal is seen to be different from previous expectations is not to appreciate that the Robert solution has become the basis for the proponent's Base Case financial offer to the government. The judgement criteria is, and has been, the achievement of the Government's ten objectives for the redevelopment of Walsh Bay.*

*During my observations of the extensive and highly complex negotiations involved in the Exclusive Negotiation phase, I am of the opinion that DPWS, on behalf of the government, has used its best endeavours to be fair and impartial and to adhere to the approach accepted by ICAC with the view of obtaining the best value for the government.*

**Source: Probity Auditor's Report, DPWS Walsh Bay Report & Recommendation, September 1997**

The audit would agree with earlier ICAC advice to DPWS of its concerns in relation to the engagement, role, and function of the probity auditor. For example:

*... does not seem to have had a very robust approach to the probity issues that have arisen*  
*...seems to be providing policy opinion rather than probity advice*  
*... reports lack detail and adequate analysis of the issues and are often difficult to comprehend*

Source: ICAC letter to DPWS dated 16 April 1997

The audit notes advice from DPWS that these issues have since been dealt with.

## ICAC

ICAC frequently advises government agencies on how to reduce the likelihood of corrupt conduct.

ICAC did provide DPWS with advice in relation to the probity of its processes and made a number of observations. For example:

*On the basis of the documentation examined and the meetings held, the Commission is satisfied that probity considerations have generally been addressed and that there is no impediment to the exclusive negotiation agreement phase proceeding.*

Source: ICAC letter to DPWS dated 24 March 1997

By this, it was explained to the audit, ICAC meant that it had no grounds to delay proceedings, because there was no evidence of corrupt conduct.

Although DPWS consulted extensively with ICAC during this period, ICAC later rejected the notion that it might have ‘signed-off’ on the negotiations.

*It (ICAC) has never been part of any negotiations ... The value received as a result of the negotiations is not, of itself, a matter for ICAC, although value for the government may be one for the Auditor General.*

Source: ICAC letter to SMH dated 9 March 1998

## Fairness

But there are other types of conduct, which may lead to complaints in relation to process and probity, which fall outside of ICAC’s remit. Poor administration, waste, discrimination and unfairness are examples of such conduct.

The audit was also concerned with the issue of the apparent

fairness (or lack of it) of the process. The fairness to other proponents by DPWS in acceding to changes in relation to the original proposal can be questioned.

Increasingly 'Calls for Proposals' are replacing the traditional tender process for major government projects. As the new process involves information being presented to government in different forms and packages, accompanied by long periods of exclusive negotiation, there is increased need for strict probity and procedural fairness.

The Government has published a number of relevant documents including the *Property Asset Management Guidelines*, *Procurement and Disposal Guidelines*, *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*, and 'Code of Tendering' and the 'Code of Practice' for the *Construction Industry*. But as these documents are no more than guidelines, they do not by themselves assure the public of fairness in an undertaking.

**Guidelines Not Mandatory**

DPWS received advice from the Crown Solicitor which indicated:

*There is certainly no legal necessity for the guidelines to be followed: after all they are, as their name indicates, only guidelines and therefore can be accepted or rejected ...*

*There is no obligation on the Government to accord natural justice or procedural fairness.*

(Since that advice was provided, a case which is part heard, before a single judge of the Federal Court, suggests that the Government might indeed have an obligation to treat proponents fairly (Australian Air Services versus Hughes 146ALR1).)

**US Federal Acquisition Regulations System**

By way of comparison, the US Federal Acquisition Regulations System is far more comprehensive than the NSW guidelines. It consists of a single set of documents with 51 parts, which carry the status of regulations not guidelines.

Importantly, the requirements of contract officers in terms of fairness, revisions, and adherence to the regulations are carefully spelt out.

*Contracting officers shall*

*... ensure that contractors receive impartial, **fair, and equitable** treatment.*

*When either before or after receipt of proposals, the Government **changes, relaxes, increases, or otherwise modifies** its requirements, the contracting officer shall issue a written amendment to the solicitation.*

*Individual **deviations** affect only one contracting action, and ... may be authorized by agency heads or their designees. The justification and agency approval shall be documented in the contract file. (FARS pt 1.403)*

Source: US Federal Acquisition Regulations System

## **Establishing Accountability**

The NSW Government has no such comprehensive regulatory framework. This creates a number of problems, which have been the subject of other reviews. Most significant in relation to this audit is that, although the Government possesses a number of guidelines and codes of practice, it lacks a means of holding its contract officers and management accountable for adherence to those guidelines and codes. This facilitates deviations, as observed in the case of Walsh Bay, and exposes the Government to complaints of corruption and loss of value for money.

There is now a growing tendency for the Courts to consider fairness in the Government's dealings with tenders (146ALR1). Notwithstanding such legal tendencies, there is presumably at least an ethical obligation of Government to deal efficiently with tenders and taxpayers resources.

In the case of large complex projects such as Walsh Bay, it is recommended that a framework of accountability be established as follows:

- agencies should be required to specify to Government the guidelines and codes which will be followed
- deviations from the nominated guidelines and codes should not be permitted unless previously justified by the agency head and approved by the Government
- the responsibilities and limits of contract officers and agency heads should be clearly specified.

## 7.5 Value for Money

Reference was made earlier to Government guidelines which highlight the tenet that achievement of best value depends on effective competition.

DPWS has expressed confidence that value for money has been achieved.

*DPWS has endeavoured throughout the delivery process to ensure that value for money was achieved. DPWS is confident that value for money has (been) achieved. If best value for money is deemed to be achieved through a competitive process between tenderers until a selection is made, then the process approved at the commencement of this project did not allow this to happen. Rather, a preferred proponent selected competitively who then entered into an Exclusive Negotiation Agreement was the process determined to be followed. Throughout that negotiation, reference was made to the Government's stated ten (10) objectives for the redevelopment of Walsh Bay.*

*To this end DPWS engaged pre-eminent consultants/advisers in project management, property and real estate, finance, quantity surveying and cost consultancy and law to thoroughly investigate and advise on all aspects of the project and attended negotiations.*

*DPWS has also ensured that appropriate and effective audit processes are in place to monitor expenditures and revenues associated with the delivery of the project. This will guarantee that the benefits are of the specified quality and delivered on time.*

**Source: Letter from DPWS dated 29 October 1998**

The Audit Office accepts that DPWS made strenuous efforts including the use of consultants/advisers, particularly during the long periods of change and negotiation that characterised this project.

ICAC has provided advice on the importance of open competition:

*Obtaining value for money is enhanced when there is open competition and the market is tested regularly. Processes that are intended to attract responses from the marketplace (for example, expressions of interest, calls for proposals and tendering) may lead to poor outcomes for a project if not conducted appropriately. Impartial, open and competitive processes are an important stepping stone in achieving value for money.*

Source: ICAC, Probity Auditing Guidelines, December 1996 p13

In trying to reach a conclusion about value for money, the audit has the following concerns about the extent of competition and the ability to demonstrate value for money.

- With criteria not specified beforehand it would have been very difficult for the proponents to respond with any degree of precision.
- The result of the competitive process was a single proponent but not a final proposal.
- DPWS drafted an acceptance for the Government which allowed the proponent significant latitude to change the content of their proposal, so long as the terms of the proponent's original proposal were not reduced overall.
- The revised proposal in 1996 to demolish the wharves diminished the terms of the Walsh Bay Properties offer in relation to key government objectives relating to adaptive re-use and renewal. By the terms of the original approval, DPWS would have been expected immediately to return to the Government and seek authority to approach the other proponents. This it did not do.
- DPWS did not go back to the market either with the Robert scheme. It allowed Walsh Bay Properties to prepare and submit a new proposal and revised bid - without any competition.
- The Government finally in 1997 adopted a proposal involving the demolition of a wharf and funding of a promenade that it would not likely have adopted earlier, when assessing the proposals of other proponents.

## **7.6 Conclusion**

Given these concerns, The Audit Office considers that there has been an apparent lack of competitive pressure in the shaping of the final proposals for Walsh Bay.

Whether the objectives could all have been achieved, either in 1996 or now, is less clear. Certainly all involved earlier gave the impression that they could. The Audit Office is concerned that this impression was unrealistic; based on incomplete information on the likely costs involved in restoration of the site and on its revenue potential given the planning and physical constraints.

It is accepted that DPWS have made strenuous efforts, including the use of consultants/advisers over a long period, and that audit processes have been put in place. However, the nature and handling of this project from the outset has been such that The Audit Office cannot be assured that value for money is being achieved, notwithstanding DPWS's efforts.

## Performance Audit Reports

---

Agency or Issue Examined	Title of Performance Audit Report or Publication	Date Tabled in Parliament or Published
Department of Housing	<i>Public Housing Construction: Selected Management Matters</i>	5 December 1991
Police Service, Department of Corrective Services, Ambulance Service, Fire Brigades and Others	<i>Training and Development for the State's Disciplined Services: Stream 1 - Training Facilities</i>	24 September 1992
Public Servant Housing	<i>Rental and Management Aspects of Public Servant Housing</i>	28 September 1992
Police Service	<i>Air Travel Arrangements</i>	8 December 1992
Fraud Control	<i>Fraud Control Strategies</i>	15 June 1993
HomeFund Program	<i>The Special Audit of the HomeFund Program</i>	17 September 1993
State Rail Authority	<i>Countrylink: A Review of Costs, Fare Levels, Concession Fares and CSO Arrangements</i>	10 December 1993
Ambulance Service, Fire Brigades	<i>Training and Development for the State's Disciplined Services: Stream 2 - Skills Maintenance Training</i>	13 December 1993
Fraud Control	<i>Fraud Control: Developing an Effective Strategy (Better Practice Guide jointly published with the Office of Public Management, Premier's Department)</i>	30 March 1994
Aboriginal Land Council	<i>Statutory Investments and Business Enterprises</i>	31 August 1994
Aboriginal Land Claims	<i>Aboriginal Land Claims</i>	31 August 1994
Children's Services	<i>Preschool and Long Day Care</i>	10 October 1994
Roads and Traffic Authority	<i>Private Participation in the Provision of Public Infrastructure (Accounting Treatments; Sydney Harbour Tunnel; M4 Tollway; M5 Tollway)</i>	17 October 1994
Sydney Olympics 2000	<i>Review of Estimates</i>	18 November 1994
State Bank	<i>Special Audit Report: Proposed Sale of the State Bank of New South Wales</i>	13 January 1995
Roads and Traffic Authority	<i>The M2 Motorway</i>	31 January 1995
Department of Courts	<i>Management of the Courts:</i>	5 April 1995

Agency or Issue Examined	Title of Performance Audit Report or Publication	Date Tabled in Parliament or Published
Administration	<i>A Preliminary Report</i>	
Joint Operations in the Education Sector	<i>A Review of Establishment, Management and Effectiveness Issues (including a Guide to Better Practice)</i>	13 September 1995
Department of School Education	<i>Effective Utilisation of School Facilities</i>	29 September 1995
Luna Park	<i>Luna Park</i>	12 October 1995
Government Advertising	<i>Government Advertising</i>	23 November 1995
Performance Auditing In NSW	<i>Implementation of Recommendations; and Improving Follow-Up Mechanisms</i>	6 December 1995
Ethnic Affairs Commission	<i>Administration of Grants (including a Guide To Better Practice)</i>	7 December 1995
Department of Health	<i>Same Day Admissions</i>	12 December 1995
Environment Protection Authority	<i>Management and Regulation of Contaminated Sites: A Preliminary Report</i>	18 December 1995
State Rail Authority of NSW	<i>Internal Control</i>	14 May 1996
Building Services Corporation	<i>Inquiry into Outstanding Grievances</i>	9 August 1996
Newcastle Port Corporation	<i>Protected Disclosure</i>	19 September 1996
Ambulance Service of New South Wales	<i>Charging and Revenue Collection (including a Guide to Better Practice in Debtors Administration)</i>	26 September 1996
Department of Public Works and Services	<i>Sale of the State Office Block</i>	17 October 1996
State Rail Authority	<i>Tangara Contract Finalisation</i>	19 November 1996
NSW Fire Brigades	<i>Fire Prevention</i>	5 December 1996
State Rail	<i>Accountability and Internal Review Arrangements at State Rail</i>	19 December 1996
Corporate Credit Cards	<i>The Corporate Credit Card (including Guidelines for the Internal Control of the Corporate Credit Card)</i>	23 January 1997
NSW Health Department	<i>Medical Specialists: Rights of Private Practice Arrangements</i>	12 March 1997
NSW Agriculture	<i>Review of NSW Agriculture</i>	27 March 1997

<b>Agency or Issue Examined</b>	<b>Title of Performance Audit Report or Publication</b>	<b>Date Tabled in Parliament or Published</b>
Redundancy Arrangements	<i>Redundancy Arrangements</i>	17 April 1997
NSW Health Department	<i>Immunisation in New South Wales</i>	12 June 1997
Corporate Governance	<i>Corporate Governance Volume 1 : In Principle Volume 2 : In Practice</i>	17 June 1997
Department of Community Services and Ageing and Disability Department	<i>Large Residential Centres for People with a Disability in New South Wales</i>	26 June 1997
The Law Society Council of NSW, the Bar Council, the Legal Services Commissioner	<i>A Review of Activities Funded by the Statutory Interest Account</i>	30 June 1997
Roads and Traffic Authority	<i>Review of Eastern Distributor</i>	31 July 1997
Department of Public Works and Services	<i>1999-2000 Millennium Date Rollover: Preparedness of the NSW Public Sector</i>	8 December 1997
Sydney Showground, Moore Park Trust	<i>Lease to Fox Studios Australia</i>	8 December 1997
Department of Public Works and Services	<i>Government Office Accommodation</i>	11 December 1997
Department of Housing	<i>Redevelopment Proposal for East Fairfield (Villawood) Estate</i>	29 January 1998
NSW Police Service	<i>Police Response to Calls for Assistance</i>	10 March 1998
Fraud Control	<i>Status Report on the Implementation of Fraud Control Strategies</i>	25 March 1998
Corporate Governance	<i>On Board: guide to better practice for public sector governing and advisory boards (jointly published with Premier's Department)</i>	7 April 1998
Casino Surveillance	<i>Casino Surveillance as undertaken by the Director of Casino Surveillance and the Casino Control Authority</i>	10 June 1998
Office of State Revenue	<i>The Levying and Collection of Land Tax</i>	5 August 1998
NSW Public Sector	<i>Management of Sickness Absence NSW Public Sector Volume 1: Executive Briefing Volume 2: The Survey - Detailed Findings</i>	27 August 1998
NSW Police Service	<i>Police Response to Fraud</i>	14 October 1998

---

<b>Agency or Issue Examined</b>	<b>Title of Performance Audit Report or Publication</b>	<b>Date Tabled in Parliament or Published</b>
Hospital Emergency Departments	<i>Planning Statewide Services</i>	21 October 1998
NSW Public Sector	<i>Follow-up of Performance Audits: 1995 - 1997</i>	17 November 1998
NSW Health	<i>Management of Research: Infrastructure Grants Program - A Case Study</i>	25 November 1998
Rural Fire Service	<i>The Coordination of Bushfire Fighting Activities</i>	2 December 1998
Walsh Bay	<i>Review of Walsh Bay</i>	December 1998

---



NSW Government



**THE AUDIT OFFICE MISSION**

**Auditing in the State's Interest**

**For further information please contact:**

**The Audit Office of New South Wales**

**Street Address**

Level 11  
234 Sussex Street  
SYDNEY NSW 2000  
Australia

**Postal Address**

GPO Box 12  
SYDNEY NSW 2001  
Australia

Telephone (02) 9285 0155  
Facsimile (02) 9285 0100  
Internet <http://www.audit.nsw.gov.au>  
e-mail [mail@audit.nsw.gov.au](mailto:mail@audit.nsw.gov.au)

Office Hours: 9.00am - 5.00pm Monday to Friday

Contact Officer: Tom Jambrich  
Assistant Auditor-General  
+612 9285 0051

**To purchase this Report please contact:**

**The NSW Government Information Service**

**Retail Shops**

*Sydney CBD*

Ground Floor  
Goodsell Building  
Chifley Square  
Cnr Elizabeth & Hunter Sts  
SYDNEY NSW 2000

*Parramatta CBD*

Ground Floor  
Ferguson Centre  
130 George Street  
PARRAMATTA NSW 2150

**Telephone and Facsimile Orders**

Telephone

Callers from Sydney metropolitan area 9743 7200  
Callers from other locations within NSW 1800 46 3955  
Callers from interstate (02) 9743 7200

Facsimile (02) 9743 7124