



PERFORMANCE AUDIT

14 DECEMBER 2023

Procurement of services for the Park'nPay app

NEW SOUTH WALES AUDITOR-GENERAL'S REPORT

THE ROLE OF THE AUDITOR-GENERAL

The roles and responsibilities of the Auditor-General, and hence the Audit Office, are set out in the *Government Sector Audit Act 1983* and the *Local Government Act 1993*.

We conduct financial or 'attest' audits of state public sector and local government entities' financial statements. We also audit the Consolidated State Financial Statements, a consolidation of all state public sector agencies' financial statements.

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Following a financial audit the Audit Office issues a variety of reports to entities and reports periodically to Parliament. In combination, these reports give opinions on the truth and fairness of financial statements, and comment on entity internal controls and governance, and compliance with certain laws, regulations and government directives. They may comment on financial prudence, probity and waste, and recommend operational improvements.

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As well as financial and performance audits, the Auditor-General carries out special reviews, compliance engagements and audits requested under section 27B(3) of the *Government Sector Audit Act 1983*, and section 421E of the *Local Government Act 1993*.

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In accordance with section 38EC of the *Government Sector Audit Act 1983*, I present a report titled '**Procurement of services for the Park'nPay app**'.

A handwritten signature in black ink, appearing to read 'Margaret Crawford'.

Margaret Crawford PSM
Auditor-General for New South Wales
14 December 2023



RECONCILIATION COMMITMENT STATEMENT

The Audit Office of New South Wales pay our respect and recognise Aboriginal people as the traditional custodians of the land in NSW.

We recognise that Aboriginal people, as custodians, have a spiritual, social and cultural connection with their lands and waters, and have made and continue to make a rich, unique and lasting contribution to the State. We are committed to continue learning about Aboriginal and Torres Strait Islander peoples' history and culture.

We honour and thank the traditional owners of the land on which our office is located, the Gadigal people of the Eora nation, and the traditional owners of the lands on which our staff live and work. We pay our respects to their Elders past and present, and to the next generation of leaders.

contents

Procurement of services for the Park'nPay app

Section one – Procurement of services for the Park'nPay app

Executive summary	1
Introduction	8
Selection of the direct negotiation procurement strategy	12
Contract negotiation, execution and management	25

Section two – Appendices

Appendix one – Response from auditee	34
Appendix two – Key requirements of the department's procurement manual	36
Appendix three – About the audit	37
Appendix four– Performance auditing	39

Section one

Procurement of services for
the Park'nPay app

Executive summary

On 27 February 2019 the then Minister for Finance, Services and Property announced the commencement of a Park'nPay app trial in The Rocks precinct of Sydney.

The app was intended to enable users to locate and pay for parking remotely, using their smart mobile device such as a phone or tablet, rather than needing to physically be at a parking meter.

In July 2019, following a direct negotiation procurement conducted by the then Department of Finance, Services and Innovation, a contract was executed with Duncan Solutions for an estimated value of \$1,260,600 over three-years, with three single-year options to extend. The contract required Duncan Solutions to provide development services to link the Park'nPay app to its Parking Enterprise Management System platform and to provide ongoing software support services.

This audit assessed whether the department complied with the procurement obligations that applied at the time it procured these services from Duncan Solutions.

This audit focussed on the department's processes and decision-making relating to:

- the direct negotiation with Duncan Solutions at the exclusion of any other potential supplier
- the negotiation, execution and management of the contract with Duncan Solutions.

As this audit focusses on the department's procurement and contract management processes, it does not comment on the activities of Duncan Solutions. The detailed audit objective, criteria and audit approach are in Appendix three.

The auditee is the Department of Customer Service. As a result of machinery of government changes, the Department of Finance, Services, and Innovation became the Department of Customer Service from 1 July 2019. To avoid confusion, this report simply uses 'the department' to refer to either. Where the report refers to the Minister, it relates to the former Minister in office at the time.

Conclusion

The department failed to establish the grounds for entering a direct negotiation procurement strategy for services for the Park'nPay app. It rushed a decision to trial the app in The Rocks, without considering how this might affect its procurement requirements.

As part of a direct negotiation process, the department was required to, but did not:

- undertake a comprehensive analysis of the market and all relevant factors to demonstrate that a competitive process does not need to be conducted
- conduct a risk assessment for the procurement approach
- follow the internal delegation process, including obtaining approval of the department's delegate and endorsement of the Chief Procurement Officer.

There is no evidence that the procurement to support Park'nPay represented value for money. Despite it being required by legislation, as well as mandatory NSW Government policy, the department did not consider how to ensure value for money, nor demonstrate an adequate understanding of what is meant by value for money in this case.

The department issued no tender or expression of interest documents against which any proposal could be assessed, and it had no tender evaluation plan, committee, or criteria. Without any objective standards against which the supplier's proposal could be assessed, it was not possible for the department to determine if value for money was achieved, and no value for money has been demonstrated.

The department failed to implement key probity requirements. There was no effective management of conflicts of interest. Key decisions were not documented. There was a lack of clarity, transparency, and oversight of the relationship between the Minister's office and staff in the department.

No conflict of interest declarations were made by staff until almost one year after the direct negotiations commenced and even then they were not made by all members of the negotiation team and key decision-makers.

The department did not document the reasons for its decisions or minute key meetings, such as when, why and by whom the decision was made to transform the procurement from a 'trial' to a contract of up to six years duration. The department had no policies guiding the interactions between the Minister, the Minister's office and staff in the department (including contractors) in relation to this initiative, resulting in blurred and uncertain roles, responsibilities, and accountabilities.

The department initially sought to withhold information from the Audit Office pertaining to Park'nPay. When questions were raised through external scrutiny, there was little evidence of genuine inquiry or review into its practices to ensure improvement and compliance.

The department deliberately sought to withhold information from the Audit Office of NSW when initial inquiries were lawfully made about the Park'nPay project in the context of the audit of the department's financial statements in May 2021.

There is also limited evidence to demonstrate the department has reviewed the decisions and practices around the Park'nPay project, despite receiving internal legal advice at the time that questioned the characterisation of the procurement as a 'pilot', and external scrutiny via the NSW Parliament's Budget Estimates Committee hearings. This indicates a risk that opportunities to review and improve the department's procurement practices based on learnings from this process have been missed.

1. Key findings

The department failed to consider its procurement obligations before selecting The Rocks as the trial location for the Park'nPay app

The department's decision to trial the Park'nPay app in The Rocks was rushed and expedient. After the Minister's Chief of Staff had emailed the department on 21 January 2019 about the Minister's inability to use paid parking in Lane Cove National Park, it took the department less than 48 hours to effectively decide that a parking app would be trialled in The Rocks. Other locations were not considered.

In making this decision, the department failed to give any regard to whether it might compromise its obligations under legislation or the NSW Government Procurement Policy Framework.

The department failed to obtain proper approval before commencing direct negotiations with Duncan Solutions

The department's procurement manual stated that a briefing note must be prepared for the delegate approving the direct negotiation procurement strategy before market engagement. Additionally, if the proposed procurement is valued over \$1 million, the endorsement of the department's Chief Procurement Officer is required or of the relevant category manager if the procurement is above \$150,000 and below \$1 million. The department did not prepare such a briefing note or obtain such approval and endorsement through other means.

However, by at least 8 February 2019, communications within the department and between the department and Minister or the Minister's office or the supplier indicated a clear intention by the department to directly negotiate with Duncan Solutions. By 14 February 2019, negotiations had commenced.

The department failed to ensure value for money either at key stages throughout the procurement process or overall

Ensuring value for money in procurement is one of the legislative obligations imposed on NSW government agencies by the *Public Works and Procurement Act 1912*.

The department could not demonstrate that it considered whether or how the direct negotiation strategy achieved value for money. The audit found no evidence that the department had considered how value for money would be achieved either through adopting a direct negotiation procurement strategy, when conducting negotiations with Duncan Solutions, or in exercising the optional contract extensions in July 2022 and July 2023. There is no evidence that the rushed and expedient direct negotiations with Duncan Solutions achieved value for money.

The department did not adequately demonstrate that extending the contract would deliver value for money

It is a statutory obligation for the department to ensure that it achieves value for money in its procurement. As discussed in this report, value for money is more than the initial price of the good or service procured. Value for money must be considered for the whole period over which the goods or services are being used. The NSW Government Procurement Policy Framework expressly provides that agencies:

... must only exercise extension options where it can be demonstrated the contract will continue to deliver value for money.

The department advised us that it achieved value for money by negotiating a nine per cent reduction in the price of the software support for the first contract extension. It further advised that it relied on internal subject matter experts in determining that this was value for money.

However, this assessment of value for money was limited to price, which is in itself limited as there was no value for money assessment for the initial contract. It did not take into account any other benefits, costs and risks over the life of the contract extension that could be considered beyond this.

We found that the drafting of clauses 12.9(a) and 12.9(b) of the department's procurement manual leaves doubt as to whether, when exercising options to extend contracts, value for money needs to be considered alongside the requirement to demonstrate the ongoing business need for the contract. The department has advised that in the case of extending term options, the requirements of both clauses, including assessing whether the contract continues to provide value for money, apply. This should be made clearer in the procurement manual.

The department failed to document key decisions or discussions about the procurement, breaching departmental and statutory requirements

Key decisions and discussions not documented by the department included:

- the 7 February 2019 meeting between the Minister, the Minister's staff, Duncan Solutions and department staff to discuss '... contemporary and future solutions for parking payments, parking availability and pricing information'
- the 14 February 2019 meeting between department staff and Duncan Solutions on scope, timeline and budget
- meetings between department staff and Duncan Solutions on 20 February 2019, 26 February 2019, 24 June 2019 and 12 August 2019 to discuss various iterations of the proposal and contract
- the basis for the contract with Duncan Solutions going from an envisaged 'trial' to a contract with a potential maximum duration of six years.

The department's failure to make and retain adequate records concerning key decisions is a breach of the department and its officers' obligations under *the State Records Act 1998*.

By allowing a contractor to approve the payment of invoices, the department did not comply with the *Government Sector Finance Act 2018*, meaning that payments were not properly authorised

The audit team sought evidence to identify who approved payment on a sample of five Duncan Solutions invoices for services provided under the Park'nPay contract, dating from 17 July 2019 to 1 November 2021. The payments made against these invoices added to approximately \$150,000.

On the sample of invoices provided, the person approving payment was shown as the Project Manager for the Park'nPay project. This person was employed under contract through a labour hire company as a contingent worker and was therefore not an officer authorised to commit or incur expenditure of public money under the *Government Sector Finance Act 2018*.

The ineligibility of contingent workers to exercise delegated functions of public servants is also outlined in the Public Service Commission's *Contingent Workforce Management Guidelines*.

An external probity audit commissioned by the department concluded that probity was 'reasonably observed' despite significant non-compliance with procurement requirements

The department engaged an external probity auditor in early December 2019, around five months after the contract had been executed and almost a year after negotiations had commenced with Duncan Solutions.

The final report of the external probity auditor found that the department had:

...demonstrated that the probity principles were reasonably observed during the course of the single source negotiations with Duncan Solutions, noting the lessons learnt below.

The 'lessons' referred to in the external probity auditor's conclusion were substantial. These included that no negotiation plan or evaluation report had been prepared, nor had any consideration been given to how value for money would be achieved. These are material and significant deviations from probity requirements set out in various procurement governance sources for the NSW public sector.

In response to questions from local councils, as well as during NSW Parliament Budget Estimates Committee hearings, the department asserted that the external probity auditor had validated its direct negotiation procurement strategy. On these occasions, the department did not disclose the 'lessons' that had also been identified.

The department lacked accountability and transparency in its interaction with the Minister and the Minister's office, resulting in an improper blurring of the line between executive government and the public service

Accountability and transparency in procurement requires clarity in roles and responsibility for procurement decisions, internal controls to support those responsibilities, and the capacity to ensure that decisions are capable of being exposed to scrutiny. As explained by the ICAC, these principles require agency decision-makers to be answerable to their own management for the decisions they make, as well as to:

... a range of internal and external stakeholders (which can extend to institutions such as the Procurement Board, NSW Parliament, the courts, the NSW Ombudsman or the Commission) and the general public.¹

The department demonstrated ineffective management of contracted staff involved in the procurement. It allowed a mid-level contracted staff member to continuously email and engage with the Minister directly on matters relating to the procurement and implementation of the app, without any wider visibility, accountability, or oversight. This was not effectively managed by employees of the department, including the contracted staff member's supervisor and it exposed the department to risks that the contracted staff member was providing advice and receiving direction from the Minister and Minister's office without accountability or appropriate 'guardrails' to work within.

The department had no policy or protocol guiding interactions between the Minister, the Minister's office and staff of the department in relation to this initiative. This resulted in an obvious and improper blurring of roles between the executive government and the public service.

The Public Service Commission's *Behaving Ethically - A guide for NSW public sector employees* provides guidance on interactions between Ministers and their office and department employees. The guide includes a section on building effective relationships with the Minister's office. This includes at the earliest opportunity for the department to establish the Minister's expectations and document these in a clear statement of protocols.

The department initially sought to limit the provision of information about Park'nPay to the Audit Office and has not yet satisfactorily explained the rationale for this

The Auditor-General met with the department's Secretary on 31 May 2021 to discuss audits on foot and possible topics for future audits, including Park'nPay.

Representatives from the Audit Office's financial audit branch emailed the department on 31 May 2021, requesting information relating to the financial impact of the Park'nPay app, and responsibility for its design and procurement. The audit of the department's financial statements was in progress at that time.

The Park'nPay app contract project manager forwarded the request to the NSW Government Chief Information and Digital Officer (GCIDO), referring to the Audit Office's request, and including the incorrect statement that 'this was triggered by the Parking Summit held by Stuart Norman from Parking Australia and the Labour [sic] Party last week'.

In the meantime, some limited information was provided to the Audit Office in response to specific queries made in the context of the financial audit.

In an email dated 2 June 2021, the GCIDO instructed his staff to 'cease providing this information until the AO provides a clear scope of work – not random email requests'.

¹ ICAC (2018) *Direct Negotiations: Guidelines for managing risks*, page 14.

At the time, the GCIDO's direction was not communicated to the Audit Office, which only became aware of it when raised at the August 2022 NSW Parliament Budget Estimates Committee hearings.

We note that the information requested by the Audit Office on 31 May 2021 was not random, and it was made lawfully as part of the audit of the department's financial statements. It is concerning that deliberate action was taken to restrict the provision of information lawfully requested by the Audit Office.

During the Budget Estimates Committee hearing on 30 August 2022, the GCIDO was asked:

The Audit Office has made several inquiries regarding Park'nPay. In an email dated 1 June 2021 you instructed the department to pause all communications with the Audit Office until a formal process was established. What was that formal process?

The GCIDO advised he would take the question on notice. When responses to questions taken on notice were provided by the department to the Budget Estimates Committee on 26 September 2022, the response did not directly answer the question asked.

There is little evidence that the department has reviewed procurement decisions and processes related to Park'nPay - despite internal legal advice that raised questions about the procurement approach, and external scrutiny via the NSW Parliament

The department advised that since October 2019, its Procurement Policy has been strengthened to ensure value for money in all procurement engagements, and that a suite of training programs has been rolled out to support compliance. The department further advised that the procurement team has undergone a restructure which has resulted in an expanded and more capable team to deliver advice and ensure compliance with policy.

However, in answers to questions taken on notice during the NSW Parliament Budget Estimates Committee hearings in August 2022, the department reiterated its justification for the characterisation of the procurement as a trial - contrary to its own legal advice, and stated that 'throughout this process [to procure the Park'nPay app], the appropriate approvals and documentation was completed in line with departmental guidelines as outlined in the probity report'. This suggests that there has been a lack of genuine consideration as to whether its practices to procure services to support the Park'nPay app were appropriate and compliant and raises questions as to whether learnings from the procurement have informed improvements to current practice.

2. Recommendations

By 30 June 2024, the Department of Customer Service should:

1. ensure that employees, contractors and secondees understand and fulfil their legislative and mandatory policy obligations to make and retain complete and accurate records, particularly regarding decisions to commit or expend public money
2. ensure adequate awareness and capability in, and accountability for, the exercise of financial delegations and procurement processes among:
 - staff with financial delegations
 - department staff involved in procuring goods and services
 - department staff involved in the processing of payments and claims relating to procurement
3. review its systems and processes to ensure that only staff with appropriate delegations under the *Government Sector Finance Act 2018* are committing or approving the spending of public money
4. amend the department's procurement manual to ensure consistency with the contract extension provisions of the NSW Government Procurement Policy Framework, particularly regarding the need to ensure value for money in procurement
5. prepare protocols or procedures to guide the interactions between staff of the department (including contractors), a Minister and the staff of a Minister's office, including by taking into account guidance prepared by the New South Wales Public Service Commission on ethical behaviour among public servants
6. ensure that people managers within the department understand their responsibilities regarding the management and oversight of contingent workers, including by taking into account guidance produced by the New South Wales Public Service Commission on the management of contingent workers.

1. Introduction

1.1 Background

What is the Park'nPay app?

In 2019, the former NSW Government launched Park'nPay, a free app, with the intention of improving the vehicle parking experience for residents across NSW. Park'nPay was intended to allow users to locate and pay for parking using their smart device, such as a phone or tablet, rather than needing to be physically at the parking meter. Parking inspectors can check if payment has been made by searching vehicle number plate details.

The app was launched by the then Department of Finance, Services and Innovation² (the department) in October 2019. The department directly sourced back-end services to support the app from a private company, Reino International Pty Limited, trading as Duncan Solutions.

Timeline and overview of the agreement between the department and Duncan Solutions

On the weekend of 19-20 January 2019, the then Minister for Finance, Services and Property (the Minister) posted to the social media site LinkedIn. In that post, he stated that he had been unable to use his smartwatch to pay for parking at parking meters in the Lane Cove National Park.

The next day, 21 January 2019, the Minister's Chief of Staff emailed the NSW Government Chief Information and Digital Officer (GCIDO) about the post, highlighting that it had generated '...a lot of discussion and some interesting suggestions'. The GCIDO was asked to think about convening an 'ideation session' to consider '...how we best respond to and explore the suggestions made'.

Within 48 hours, the department decided to trial an app in The Rocks precinct of Sydney. The Rocks was initially proposed by the then Secretary of the department on the basis that the NSW Government owned a number of parking meters at the site. The contracted parking meter service provider for those parking meters was Duncan Solutions.

On 30 January, Duncan Solutions wrote to the Minister's office about the Minister's post on LinkedIn. On 7 February 2019, a meeting was held between Duncan Solutions, the Minister, his staff, and one or more staff of the department. Subsequently, the department entered into a direct negotiation strategy (that is, with no competing suppliers) with Duncan Solutions for the provision of technology services to support the app.

Duncan Solutions provided an initial proposal for an agreement to support the development and roll-out of a parking app on 18 February 2019. It submitted revised proposals on 20 February 2019 and 26 February 2019.

On 27 February 2019, the Minister announced in a media appearance that a trial of Park'nPay (as it was now called) would be proceeding in The Rocks.

The caretaker period for the 2019 NSW State election commenced three days later on 1 March 2019.

² The Department of Finance, Services and Innovation became the Department of Customer Service in subsequent machinery of government changes.

In July 2019, following direct negotiation, the department executed a contract with Duncan Solutions for an estimated value of \$1,260,600 over three-years. The contract required Duncan Solutions to provide development services to link the Park'nPay app to its Parking Enterprise Management System platform and to provide ongoing software support services. The contract included three additional single-year options to extend the contract. These extensions were exercised by the department (now the Department of Customer Service) in July 2022 and then again in July 2023.

The area within the department responsible for development of the app and driving the engagement of Duncan Solutions was the Government Technology Platforms Branch, overseen by an Executive Director. A Director had responsibility for the Park'nPay project. The Branch was part of the Digital.NSW division of the department, which was headed by the GCIDO.

Government policies on procurement by public sector agencies

Public Works and Procurement Act 1912

Under section 176 of the *Public Works and Procurement Act 1912*, agencies are required to exercise their procurement functions in accordance with:

- any policies and directions of the NSW Procurement Board (the board)
- the terms of their accreditation
- the principles of probity and fairness.

Agencies are also required to achieve value for money in the exercise of their procurement functions.

NSW Procurement Policy Framework for Government Agencies

The *NSW Procurement Policy Framework for Government Agencies* (July 2015) (the NSW Government Procurement Policy Framework), developed by the board, applied up until July 2019 and covered the initial procurement process of the direct sourced contract with Duncan Solutions.

This document sets out the policy and operating framework for NSW public sector procurement. It provides a single source of guidance on the rules for procurement. The NSW Government Procurement Policy Framework also sets out mandatory requirements that must be followed by all agencies, either because of legislative obligations, or where mandated at a policy level by government, the board or other government authorities such as NSW Treasury.

Agencies need to ensure that their internal policies and controls are consistent with any obligations under the NSW Government Procurement Policy Framework.

Principles that apply to market engagement include:

- the selected method should achieve value for money
- the process is fair and transparent, and
- agencies are to ensure maximum competition from the market.

The NSW Government Procurement Policy Framework provided that agencies may at times seek to undertake a 'complex' method of market engagement. This includes direct negotiations (also called 'sole sourcing'), such as the procurement undertaken by the department with Duncan Solutions for the Park'nPay app.

Under the NSW Government Procurement Policy Framework, prior to adopting a 'complex' method of market engagement, agencies must:

- ensure the procurement strategy addresses in detail the justification and suitability of the selected procurement method. In the case of direct negotiations/sole sourcing arrangements, a comprehensive analysis of the market and all relevant factors should be undertaken to demonstrate that a competitive process does not need to be conducted
- conduct a risk assessment for the procurement, including an assessment and treatment of procurement process risk arising from the use of the procurement method
- follow internal delegation process, which will ordinarily involve obtaining approval of the agency's Chief Procurement Officer, or a more senior person, depending on the nature or value of the procurement.

ICAC guidelines on direct negotiations

The NSW Government Procurement Policy Framework included other obligations and good practice that applied. This included the guidelines set out by the Independent Commission Against Corruption (ICAC) in its publication *Direct Negotiations: Guidelines for Managing Risks* ('the ICAC guidelines').

The ICAC articulates its view on direct negotiations in these terms:

As a general rule, direct negotiations should be avoided unless they clearly fall within the government's legislative and policy framework and/or the risk of corrupt conduct has been managed in accordance with these guidelines. Agency policies, procedures and customs should discourage the use of direct negotiations and impose strict obligations on officers who seek exemptions.

The ICAC guidelines also note that:

The closed nature of direct negotiations can create opportunities for dishonest and partial conduct and is more likely to lead to allegations and perceptions of corrupt conduct.

Direct negotiations can also be detrimental to the public interest; for example, by undermining the potential for government to realise the full value of public assets.

The ICAC guidelines set out five probity principles to be followed during negotiations. These are:

- Fairness
- Impartiality
- Accountability
- Transparency
- Value for money.

NSW Government Market Approaches Guide

The NSW Government Procurement Policy Framework also references the NSW Government Market Approaches Guide, prepared by the department, as further guidance on market engagement methods. The guide sets out principles and provides high-level advice on key elements of the different methods available to agencies to approach the market.

The guide also provides additional advice on direct negotiation, noting that:

...such an approach requires high-level authorisation and should only be used in clear and unambiguous circumstances that indicate such direct negotiation will result in the best value for money outcome for government.

The department's policies and procedures for direct negotiation

Procurement Manual for Goods and Services

The department's policies and procedures for procurement through direct negotiation reflect the government policies as outlined in the NSW Government Procurement Policy Framework. These are incorporated in the Procurement Manual for Goods and Services. Key requirements in the manual are referenced where applicable in this report and shown in Appendix two.

The manual also lists the roles and responsibilities of department staff, from the Secretary, Deputy Secretaries, Chief Procurement Officer to managers of business units, as well as delegations.

For procurements involving direct negotiations, the manual specifies the following:

- direct negotiations must comply with the ICAC publication -Guidelines for managing risk
- if above \$1 million, endorsement must be sought from the Chief Procurement Officer before the department delegate approves the procurement (strategy).

2. Selection of the direct negotiation procurement strategy

2.1 Selection of a trial site and its impact on procurement strategy

The department did not actively consider paid parking sites other than The Rocks to test the Park'nPay app, and failed to consider the procurement implications of proceeding with one site and one supplier

The department did not establish in detail the justification and suitability of the direct negotiation approach, including by conducting any analysis of the market. This includes analysis of whether there was a range of sites where the Park'nPay app could be applied.

The NSW Government Procurement Policy Framework that applied in 2019 required that agencies must:

...ensure that the procurement strategy addresses in detail the justification and suitability of the selected procurement method. In the case of direct negotiations/sole sourcing arrangements, a comprehensive analysis of the market and all relevant factors should be undertaken to demonstrate that a competitive process does not need to be conducted.

The option of using parking meters owned by Property NSW (then under the department) was first raised by the Secretary of the department on 22 January 2019. This was in response to an email sent one day earlier (21 January 2019) by the Minister's Chief of Staff regarding the Minister's social media post on the weekend of 19-20 January 2019.

The department advised that the reference to the NSW Procurement Policy Framework was not relevant in this instance as it was at the department's discretion to choose a site for the pilot. The department advised that this choice was not linked to the selection of the vendor.

The rationale given by the department for the decision to run a 'trial' in The Rocks was that Property NSW, had installed parking meters in The Rocks. Most parking meters in The Rocks were operated by Place Management NSW (then part of Property NSW). As such, the department considered that it was simpler to reach an agreement with them to participate as opposed to negotiating with a local council to do the same. In total, there were 32 meters in The Rocks and an additional small number of metered parking spaces in Pyrmont and Darling Harbour.

During Budget Estimates Committee hearings on 30 August 2022, the GCIDO said:

The Rocks was chosen because in that area the Government owned the parking meters, so it was a good opportunity to trial the solution.

Not considered at the time was a view put to the audit by a senior member of the negotiating team that The Rocks was a 'fringe' location that did not 'create a use case of citizen benefit'.

Evidence was submitted by the department to the NSW Parliament's Budget Estimates Committee that the '...Department considered several different locations for the trial'. Noting the above comments and the evidence provided to the Parliament, the audit team requested evidence in support of several different locations being considered. The department has provided no evidence to this audit that any other locations were considered before The Rocks was selected.

The location for the initial trial was effectively selected within 48–72 hours of the Minister not being able to pay for parking in Lane Cove National Park, and without any consideration of other options or of the implications of that decision.

The audit was not provided any evidence that the department considered whether this decision would have any consequential impact on its obligations under procurement legislation or mandatory procurement policy, which ultimately did occur.

As a result, the department has not provided a robust justification for selecting The Rocks as a trial site. Its reasons for doing so were subsequently not consistently applied, and it conducted minimal analysis or scoping of the project to inform this decision. This in turn led to the decision to pursue a poorly justified direct negotiation procurement to deliver the Park'nPay app.

The department initially only included The Rocks in its trial because of the 'simplicity' of using meters it owned, but later added parking meters owned by Liverpool City Council, which contradicted this premise

It was not until June 2019, after the Minister met with senior officials from Liverpool City Council, that the idea of including that council in the trial was discussed. The department advised this audit that, 'after an attack on a parking Ranger in Liverpool in April 2019, the Mayor of Liverpool sought immediate steps to improve the parking experience in the council and requested to join the pilot for Park'nPay'.

Liverpool City Council was subsequently included in the trial, which commenced after the contract with Duncan Solutions was signed in July 2019.

As noted above, the department advised us that the reason for selecting The Rocks was that the site was owned by a government entity, and it was simpler to reach an agreement to participate as opposed to negotiating with a local council to do the same.

However, the department also advised that, in regard to the later decision to include Liverpool City Council in the initial trial, it was 'simple to reach an agreement with the [Liverpool City] Council to participate, and for that reason a decision was made to expand the pilot into Liverpool [City] Council'. The department did not explain why it was any more or less simple to include Liverpool City Council in the initial trial than any other council or authority, which raises questions about the validity of its initial decision to trial the app in The Rocks.

The initial decision to trial the app in The Rocks was justified on the basis that the metered parking was owned by the NSW government. However, the absence of NSW government owned or controlled parking meters in the Liverpool LGA was not an impediment to that council being included in the trial.

The department made no assessment of risks potentially posed by the decision to directly negotiate with Duncan Solutions or with any other supplier

Prior to adopting a direct negotiation strategy, the department did not conduct a risk assessment of that procurement method.

The version of the NSW Government Procurement Policy Framework applying at the time required that before entering into 'complex market engagement methods' (which is defined as including direct negotiations) agencies must, among other things:

...conduct a risk assessment for the procurement, including an assessment and treatment of procurement process risk arising from the use of the procurement method.

The ICAC guidelines offer guidance on the sort of matters that might be addressed by such a risk assessment, including:

- ensuring that reasoning (for the direct negotiation) is supported by evidence and is not based on mere assertion
- applying reasoning before the decision and not as post-hoc device
- considering other approaches and explaining why they are not appropriate
- publishing a notice of intent to enter into direct negotiations
- documenting the decision-making process, including evidence of research, discussions and communications with the senior officers.

In interviews conducted during the audit, a view was put to the audit team that no risk assessment was required because the engagement was only a pilot or trial. As discussed later, there is no source of procurement governance for the NSW public sector that supports this interpretation.

The department's procurement decision included no consideration of other prospective suppliers

Having committed to The Rocks for the initial trial, there was no meaningful assessment by the department of other potential vendors who may have represented better outcomes, particularly for achieving value for money in regard to the payment processing services component of the contract.

The ICAC guidelines explain that:

In the context of direct negotiations, fairness requires having regard to all potential parties to the transaction, including any parties that are being excluded by the decision to enter into direct negotiations.

The department's position, including that stated at the Budget Estimates Committee hearings, was that the app is technology agnostic, and so open to other vendors. However, this view does not explain why only one vendor was selected without a competitive process to receive public funds under a procurement contract.

The potential role of other suppliers was raised in an email from the department's Director responsible for the project to the department's Project Manager on 18 February 2019, when it is noted that:

Given [that] Duncan [Solutions] doesn't have full coverage of NSW parking meters, we should also look to see who the other players are.

This email was sent after Duncan Solutions had already submitted its initial proposal earlier the same day.

The earliest response to this suggestion appears to have been dated 24 April 2019 and is comprised of a one-page summary of NSW government and local government paid parking sites. Vendors for each site are identified as either Duncan Solutions or 'competitor'. The list draws a distinction between 'payment' and 'enforcement' supplier for each parking site. In some instances, Duncan Solutions is identified as both the payment and enforcement supplier, while for other sites an unnamed 'competitor' fills one or both roles. A later version of the list identifies the market participants by name, though this list is dated 1 December 2019, almost five months after the contract with Duncan Solutions was executed.

Little consideration was subsequently given by the department to other market participants and potential suppliers. There is no evidence that the department ever contemplated inviting the other competitors to submit proposals for any part of procurement for the Park'nPay app.

2.2 The department's response to Minister's priorities

The urgency to progress the Park'nPay app was a result of the Minister wanting to make an announcement prior to caretaker conventions commencing for 2019 NSW State election

Contemporaneous emails obtained and interviews conducted for this audit confirm that the Minister wanted to make an announcement of a Park'nPay trial before the commencement of caretaker conventions on 1 March 2019 in advance of the NSW State election held on 23 March 2019.

The Minister's social media post was made on the weekend of 19-20 January 2019.

The next day, the Minister's Chief of Staff emailed the GCIDO about the post, highlighting that it had generated '...a lot of discussion and some interesting suggestions'. The GCIDO was asked to think about convening an 'ideation session' to consider '...how we best respond to and explore the suggestions made'.

In the 27 working days between when the Minister made his social media post through to a trial being announced on 27 February 2019:

- The Rocks was chosen as the location for the trial
- a development team within the department worked extended hours, including over a weekend, to develop a demonstration version of the app
- the Minister met with Duncan Solutions
- department staff met with Duncan Solutions to discuss 'scope, timelines, and budget'
- the department negotiated and executed a non-disclosure agreement with Duncan Solutions
- Duncan Solutions prepared and submitted a proposal to the department (18 February 2019) to support 'Park Check', with at least two subsequent revised proposals on 21 February 2019 and 26 February 2019.

At no point during this activity was the decision to adopt a direct negotiation procurement strategy clearly articulated, justified, or approved by the delegate and endorsed by the Chief Procurement Officer as required by procurement rules, including legislation and guidelines.

The proposals submitted by Duncan Solutions to this point were for between two and three-years minimum duration and costed between \$1 million to \$1.1 million.

On 27 February 2019, the Minister held a media event to display a demonstration version of what the parking app might look like. Later that same day the department's Executive Director with overall responsibility for the project gave instruction to 'go slow on this until after the election as we have no confirmed funding stream to support and will be regrouping to decide next steps'.

The caretaker period for the NSW election commenced two days later, on 1 March 2019. In addition to the formal caretaker conventions, there are other established practices that apply in the lead up to the election. Many of these are directed towards protecting the political neutrality of the public service and ensuring that public resources are not misused for party political purposes.

2.3 The department's selection of Duncan Solutions for direct negotiations

A consequence of deciding to run a 'trial' in The Rocks, the department needed to directly negotiate with Duncan Solutions to access its Parking Enterprise Management System

Duncan Solutions had the contract with Property NSW to manage the metered parking at The Rocks through its Parking Enterprise Management System (PEMS).

Having made the decision to use The Rocks as the trial site, the department was, by necessity, required to engage with Duncan Solutions to access its PEMS for purposes such as monitoring for vacant parking spots and determining the tariff that applied at any specific time.

It is less clear, and was apparently never considered by the department, whether it was also unavoidably necessary to directly negotiate with Duncan Solutions to facilitate payment processing, or whether that separate service could have been provided by a third-party.

There is no evidence that the department considered whether the self-imposed obligation to directly negotiate with Duncan Solutions was consistent with legislation, mandatory government policy, the department's own procurement requirements, or established good practice including the guidelines for direct negotiation established by the ICAC.

The procurement was incorrectly characterised as a 'trial' for which procurement requirements did not apply

At various times during 2019, some attempts were made within the department, including by the CGIDO, to justify the decision to directly negotiate with Duncan Solutions on the basis that the arrangement was just a trial, not a procurement. This view was also repeated in at least two instances to this audit.

The ICAC guidelines on managing risks in direct negotiations do provide that direct negotiations may be justified where an agency is seeking to 'pilot innovative solutions through a short-term proof-of-concept contract with a supplier'.

However, this justification only applied where procurement was in accordance with the NSW Procurement Board's *Board Direction 2016-05, Procurement Innovation Scheme*. This Direction was superseded on 1 May 2019, when the NSW Government's *Small and Medium Enterprise and Regional Procurement Policy* came into effect. This policy provides that:

Accredited agencies may directly engage an SME on a short-term contract valued up to \$1 million to do proof-of-concept testing or outcomes-based trials. Agencies may use any appropriate procurement method, including direct negotiation, to award a contract following a successful test or trial, subject to procurement rules.

Duncan Solutions may have met the definition of a small or medium enterprise, though the department provided no evidence that this was ever considered.

By the time the three-year contract (with three annual contract extension options) was executed for an amount of approximately \$1.26 million, it was over the \$1 million maximum threshold. Regardless of contract value, the department was still required to comply with procurement rules, such as a detailed justification of the choice to direct negotiate, and an understanding of how it would achieve value for money.

The first time the department's Legal Branch was consulted regarding this procurement was on a draft contract with Duncan Solutions on 14 June 2019 - over four months after Duncan Solutions met with the Minister. The advice provided by the Legal Branch did not countenance whether or not the engagement was 'just a trial', instead noting that:

Given the absence of any tendering process, there are significant procurement process compliance issues to be managed, particularly in relation to selection of Duncan [Solutions] above any other suppliers in the market, other parking providers and the suppliers of parking payment machines which the proposed system will bypass.

The Legal Branch did address this issue in its review of the external probity auditor's report in January 2020, noting that:

The project has been categorised as a pilot rather than a procurement which does not reflect the procurement approach/commercial framework.

There was no validation of the market share figure used by the department to justify direct negotiation with Duncan Solutions

Duncan Solutions was a significant provider of parking management services in NSW, and this was used as a justification for the decision to directly negotiate.

The ICAC guidelines on managing risks in direct negotiations note that:

When it is beyond doubt that there is only one counterparty that can meet an agency's well-defined needs, direct negotiations can be justified. Where there is any doubt, or the agency has assumed rather than demonstrated that there is no competition, it should test the market.

Evidence received by this audit, as well as evidence submitted by the department to the Budget Estimates Committee, sought to partly justify the decision to directly negotiate with Duncan Solutions on the basis that it was the market leader in parking meter management across the NSW government and local government sectors. There are various references to Duncan Solutions holding between 50% and 85% of this market, though a figure of 70% was commonly used by various sources.

The source of this market share figure is unclear, though it may have been provided by the supplier itself.

The ICAC guidelines also note that:

Public officials have, at times, made (or been persuaded by) false claims about the existence of monopolies... in order to create the appearance of conformance with the Commission's guidance. Often, this conduct is driven by laziness, lack of imagination or poor planning but sometimes the behaviour is corrupt.

It is also unclear whether the market share refers to the number of councils with metered parking that use Duncan Solutions, or the number of individual parking meters. In this regard, it should be noted that two large councils, Willoughby City and City of Parramatta, have a comparatively large number of meters and did not use Duncan Solutions as their parking meter service provider.

The department gave no consideration to whether the direct negotiation procurement strategy would ensure value for money

There is no evidence that value for money was considered a priority by the department, nor that it was achieved. The department could not demonstrate that it considered whether the direct negotiation strategy would achieve value for money.

Ensuring value for money in procurement is one of the legislative obligations imposed on agencies by the *Public Works and Procurement Act 1912*. This obligation then flows down through:

- the NSW Government's Procurement Policy Framework
- the ICAC guidelines on managing risk in direct negotiations
- the NSW Government's *Small and Medium Enterprise and Regional Procurement Policy*
- the NSW Government's *Market Approaches Guide*, which was produced by the department
- the department's procurement manual.

Neither this audit nor the external probity auditor engaged by the department obtained evidence that the department had considered how value for money would be achieved either through a direct negotiation procurement strategy (when conducting its negotiations with Duncan Solutions), or in exercising the optional contract extensions in July 2022 and July 2023.

The department demonstrated a limited understanding of 'value for money'

The NSW Government Procurement Policy Framework (as it applied when the relevant procurement decisions were made) required that agencies take into the account the NSW Procurement Board's statement on value for money.

This statement was provided at the time by the Procurement Board to help procurement decision-makers to '...make informed and supportable decisions on what constitutes 'value for money'.'

The statement explained that value for money:

...is the difference between the total benefit derived from a good or service against its total cost, when assessed over the period the goods or services are to be used.

It set out a range of benefits, costs and risks that should be considered beyond simply the initial price. These benefits, costs and risks were categorised under three types:

- up-front
- after-purchase
- fitness-of-purpose.

Despite the statement being expressly referred to in the NSW Government Procurement Policy Framework, the department did not demonstrate that it had an adequate understanding of the meaning of value for money.

There was some negotiation by the department on price when the procurement was first arranged, and again when the optional extension was first exercised. However, both negotiations were limited, ad hoc, and focused solely on the price at that point in time, without regard to the full range of matters that should be considered when determining value for money.

In submission to this audit, the department contended that because it conducted these limited and ad hoc negotiations over price, this ensured that it achieved value for money. However, without an understanding of how value for money is determined, and without having established any form of benchmark or evaluative criteria, the department cannot establish, and has not established, that it achieved value for money.

The department conducted a direct negotiation procurement strategy without approval from the delegate or the Chief Procurement Officer

The department's procurement manual stated that a briefing note must be endorsed by the delegate approving the selected market engagement process for a procurement. Additionally, if the proposed procurement is by direct negotiation, the endorsement of the Chief Procurement Officer is required if the procurement is valued over \$1 million, or the relevant category manager if the procurement is above \$150,000 and below \$1 million.

This approach is consistent with the NSW Government Procurement Policy Framework in relation to direct negotiation procurement.

By at least 8 February 2019, various communications within the department and between the department and Minister or the Minister's office or the supplier evidence a clear intention by the department to directly negotiate with Duncan Solutions. We note, for example:

- On 8 February 2019, the department's Project Manager emailed the Minister stating: 'I am meeting Duncan [Solutions] next week to come up with a high-level scope and plan'.
- On 12 February 2019, the Minister's office, on behalf of the Minister, asked the GCIDO whether funding was available for a trial using Duncan Solutions, which led to discussions within the department about how to source this funding.
- On 14 February 2019, the department met with Duncan Solutions to discuss 'scope, timeline, and budget'.
- On 14 February 2019, the department commenced negotiating a non-disclosure agreement with Duncan Solutions, and the Project Manager expressed in an email that 'I look forward to the proposal for parking app.'
- On 18 February 2019, Duncan Solutions submitted its first proposal. This was revised on 21 February 2019 following a meeting between it and the department on 20 February 2019, and further revised on 26 February 2019 following further discussions with the Department.
- On 21 February 2019, there was an email exchange within the department regarding the terms included in the proposal submitted by Duncan Solutions, but it did not question whether the detailed justification for the direct negotiation procurement had been established.

A briefing note was finally endorsed by the delegate on 31 May 2019, approving funding to engage with Duncan Solutions. The briefing note does not reference the selection of a direct negotiation procurement strategy.

The direct negotiation procurement strategy was also never accompanied by a completed departmental Direct Negotiation Checklist, which would have required the approval of the delegate and the Chief Procurement Officer.

It is unclear when the decision was approved to move from a short-term 'trial' to a six-year contract with Duncan Solutions

On 24 May 2019, there was an email exchange between senior department staff about how the engagement of Duncan Solutions might be funded.

The CGIDO emailed the department's Chief Finance Officer:

... we have an election commitment for Park N Pay that from what we understand does not have a funding source.

The material part of this is we need to sign a contract with Duncan (who own the parking meters) for work on providing us with info (apis) to the meters.

The contract is for ~\$400K.

The Chief Financial Officer replied that both operating and capital funds were available to potentially fund the project.

On 31 May 2019, the CGIDO, as delegate, approved a briefing note to engage Duncan Solutions for \$400,000 plus GST for that financial year. The briefing note included that:

The project is currently unfunded however requires significant investment and resources to meet publicly announced guidelines.

It is unclear why this brief said that the project was unfunded, given the email from the Chief Financial Officer on 24 May 2019.

However, if the project was unfunded, then the approval is inconsistent with the department's procurement manual, which specifies that:

Before any engagement, business units must confirm with the Division Finance Directors that budget is available and approved for any proposed procurement activity.

A later briefing note was endorsed by the delegate (the GCIDO) on 17 July 2019 giving approval to enter into a contract with Duncan Solutions for up to six-years (three years were optional single-year extensions) at an estimated cost of \$1,260,600 (for the first three years). It is unclear when the decision was made, and by whom, to increase the length and cost of the contract. This is discussed further in the next chapter. The briefing note did not provide a cost estimate for the full six-years, though we note that for the first optional year extension (from July 2022) the cost was \$522,720 for that year.

The full potential cost of the contract with Duncan Solutions was never formally approved or funded

The department's Direct Negotiations Checklist provided a series of principles governing decisions about direct negotiations, including that:

The whole-of-life costs and benefits of the transaction should be the agency's primary consideration.

Neither the briefing note on 31 May 2019 (giving approval to commit funds) nor the briefing note on 17 July 2019 (giving approval to enter into a contract) reflected the full potential cost of the contract if each of the three single-year extension options were exercised. At the time of this audit, the first and second optional year contract extensions had both been exercised in July 2022 and then again in July 2023.

2.4 The department's retrospective probity audit

The department gave no consideration to the potential impact on the market of the direct negotiation procurement strategy until it was raised by an industry representative in November 2019

The issue of other market competitors was not given any material consideration until after the industry body, Parking Australia (an industry group for parking management companies), raised a number of concerns with the Minister in November 2019 and December 2019 regarding the process accompanying the Park'nPay app. This was around 10 months after discussions had first commenced to directly negotiate with Duncan Solutions, and four months after the contract with Duncan Solutions had been executed.

The NSW Government Procurement Policy Framework that applied at the time of the procurement decision noted that:

Government procurement that improves competition within markets leads to greater efficiency and encourages innovation within those markets.

The NSW Government's *Market Engagement Guide* similarly notes that decisions about preferred procurement strategies should consider '...the impact on competition of different approaches (both short and long term)'.

The department failed to consider what, if any, effect its direct negotiation procurement strategy would have on competition in the market, either in the long or short term. Instead, it explicitly took the view that it was beneficial to engage the dominant market participant because it was the dominant market participant.

In its representations made in November 2019 and December 2019, Parking Australia expressed concerns about:

- a perceived lack of industry consultation by the government
- the government providing a service via the app that was perceived to be in competition with commercial products
- a lack of transparency around the process by which the app was developed.

The department engaged an external probity auditor following concerns raised by the parking industry and only after it was suggested by the Minister's Chief of Staff

The NSW Procurement Board provides that a probity auditor:

...works independently of a project team and is engaged to verify that processes followed during a procurement/sale are consistent with government regulations and best practice principles, *primarily after the fact*.
[emphasis added]

The Procurement Board draws a distinction between the retrospective role of the probity *auditor*, and the role of a probity *advisor* who acts as part of a procurement project team and provides contemporaneous probity advice and solutions over the course of the transaction.

The department engaged an external probity auditor around five months after the contract had been executed and almost a year after negotiations had commenced with Duncan Solutions. The catalyst for this decision to engage a probity auditor was the meeting between Parking Australia and the Minister on 4 December 2019. Following this meeting, the Minister's Chief of Staff emailed the department on 5 December 2019:

I think it would be useful to review the tender process for The Rocks and Liverpool trials and, in addition, to seek probity advice on the best way of expanding the product into more LGA, while still allowing competition among the exist providers in the market.

For unspecified reasons, it was requested that this external probity review be concluded before Christmas 2019.

Having determined on 5 December 2019 to engage an external probity auditor, one was first contacted by the department on 9 December 2019 and engaged on 11 December 2019. Emails suggest that a primary reason why that external probity auditor was engaged without a competitive process was because it could commence the review immediately. A second prospective probity auditor could not commence until the following week. The Audit Office notes that the haste with which this process was required to be undertaken created the risk of an ineffective probity process.

The first draft 'probity health check' was provided to the department by the external probity auditor on 18 December 2019. The probity auditor reported that it had:

...identified a number of areas where further information is required or can be recorded in DCS [department] records, in order to demonstrate that the principles of probity have been met and the requirements outlined in the above framework have been adhered to.

The probity auditor sought additional information to form its assessment, including:

- a copy of legal advice that the department's Legal Branch had purportedly provided to support the decision to direct negotiate
- any independent advice that had been obtained for the purpose of assessing value for money, such as benchmarking information
- an assessment framework for how the proposal was assessed
- an assessment report
- conflict of interest and confidentiality declarations.

Other than addressing the conflict of interest and confidentiality matters, this audit team was not provided evidence that any substantive supplementary information was provided to the probity auditor before it formed its final report.

The conclusion in the external probity audit report is difficult to reconcile with its own objectives, which raises the question of the adequacy of the review

The external probity audit report found that the department had 'reasonably observed' probity principles, notwithstanding significant deviations from probity requirements.

The final report of the external probity auditor found that the department had:

...demonstrated that the probity principles were reasonably observed during the course of the single source negotiations with Duncan Solutions, noting the lessons learnt below.

The 'lessons' referred to in the external probity auditor's conclusion were substantial. These included that no negotiation plan or evaluation report had been prepared, nor had any consideration been given to how value for money would be achieved. As set out throughout this report, these are material deviations from probity requirements for the NSW public sector. In the Audit Office's view, many of these 'lessons' are more properly characterised as significant non-compliance with legislative and mandatory policy obligations.

Notwithstanding the significant issues raised in the external probity audit report, its existence was subsequently relied on by the department to assuage concerns expressed by some councils about whether the direct negotiation procurement strategy had raised probity issues. In one such case, a council was told by email that:

The result of the probity check was [that] procurement guidelines were followed and [the] result was a pass from a probity perspective.

The probity report was also referred to in evidence given to the NSW Parliament's Budget Estimates Committee. For example, during questioning on 30 August 2022, the GCIDO said that:

We sole sourced Duncan [Solutions] through that process for a trial and... [the probity auditor] have confirmed that was the proper process to do and we followed probity rules and had probity advice that was provided to you on notice.

This appears to be a selective and expansive interpretation of the findings of the external probity audit report, the scope of which does not appear to include assessing whether sole sourcing (direct negotiation) was the proper process for the procurement of services to support a trial of the Park'nPay app.

The Minister's staff followed the status of the external probity report very closely, requesting regular updates from the department, and relied upon the probity report to seek to extend the Park'nPay app to other LGAs.

2.5 Accountability and transparency

The conduct of procurement activities requires adequate accountability and transparency

Accountability and transparency in procurement entails there being:

- clarity in roles and responsibility for procurement decisions
- internal controls to support those responsibilities and
- the capacity to ensure that decisions are capable of being exposed to scrutiny, including through adequate record keeping and ability to engage with activities such as audits.

The department's *Code of Ethics and Conduct* (the code of conduct) also listed core values required of its employees, including acting professionally with honesty, consistency and impartiality and providing transparency to enable public scrutiny. The code of conduct also requires people managers to inform their direct reports about the performance standards expected of them, objectively assess their performance against these standards, and take corrective action where unacceptable behaviour or practices were identified.

The NSW Public Service Commission has issued guidance on interactions between Ministers, their staff, and department employees. This guide was initially published in 2014 and applied at the times considered in this audit. The guide includes a section on building effective relationships with the Minister's office, and this includes at the earliest opportunity for the department to establish the Minister's expectations and document these in a clear statement of protocols. Such a statement may include:

- level of seniority of department officers with right of sign off on advice to the Minister
- key contacts in the department and their responsibilities
- agreed channels for requests for information or briefings
- sign-off rules for Ministerial correspondence
- copies of the Ethical Framework and agency specific codes of conduct and ethics.

The guide notes that interactions with the Minister's office may often be verbal and agencies need to remind their staff of the need to maintain good records of such communications.

The NSW Public Service Commission also currently (at September 2023) publishes advice for public service senior executives regarding their interactions with Ministers. This includes that:

Senior executives have a duty to respond promptly and professionally to requests for advice or information in ways that are consistent with the relevant agency policies or procedures.

This advice does not extend to non-senior executive staff and was not published on the Public Service Commission website when the decisions to engage Duncan Solutions were made in the first half of 2019.

The department's procurement process lacked adequate accountability and transparency

There was no policy or protocol guiding interactions between the Minister, the Minister's office and staff of the department in relation to Park'nPay. This resulted in the blurring of roles between the executive government and the public service. At one point, this led to the Secretary of the department raising concerns with the GCIDO that the Park'nPay project team was not building technology in accordance with the NSW Government's Digital Design System, cautioning that the Government Technology Platforms Branch cannot be the 'personal little skunk works on the side' for the Minister's office.

The department was not effective in ensuring that the Minister or his staff understood the governance requirements for public sector procurement. When the Minister's office communicated the Minister's question about whether funds were available to specifically engage Duncan Solutions for a trial of the proposed app, the department failed to explain that procurement rules would apply to any such commitment of funds.

The department demonstrated ineffective management of contract staff involved in this procurement. A mid-level contracted staff member was able to continuously email the Minister directly and engage with him in other ways, without any internal visibility, accountability, or oversight. This included the contracted staff member providing the Minister with unsanctioned 'progress reports', including to explicitly criticise directions and decisions made by more senior public servants within the department. This concern was heightened given the number of contract staff engaged in Digital.NSW at the time.

Such improper interaction by the contracted staff member with the Minister was noted by managers. The Director advised that, at times, there was 'cowboy behaviour', while also advising the contracted staff member was counselled, but 'because he was a contractor, it was hard'. This is despite the clear obligation in the department's Code of Ethics and Conduct for managers to address instances of unacceptable behaviour by staff members (including contractors). Moreover, the department and its officers should have been acutely aware of the importance of the proper oversight and management of contract project managers given the findings of the ICAC 'Operation Yarrow' investigation into procurement practices in DFSI, published in January 2019.³

Record keeping was manifestly inadequate for this project, including failing to document meetings and discussions between the supplier and the department, and decisions that were made as a result of these meetings.

The recollection and evidence provided by some key department staff during the conduct of this audit differed materially from what was evidenced in email exchanges and other documents reviewed by the audit team.

³ Recommendation 15 of this investigation was that:

'That DFSI informs staff involved in the management or governance of projects of the risks associated with contracted project managers and the consequent need to manage these project managers carefully'

https://www.icac.nsw.gov.au/ArticleDocuments/831/Investigation-into-the-conduct-of-a-department-of-finance-services-and-innovation-ict-project-manager_operation-yarrow.pdf.aspx

The department initially sought to limit the provision of information about Park'nPay to the Audit Office and has not yet satisfactorily explained the rationale for this

The Auditor-General met with the department's Secretary on 31 May 2021 to discuss audits on foot and topics under consideration for the future work program, including Park'nPay.

Representatives from the Audit Office's financial audit branch emailed the department on 31 May 2021, requesting information relating to the financial impact of the Park'nPay app, and responsibility for its design and procurement. The audit of the department's financial statements was in progress at that time.

The Park'nPay app contract project manager forwarded the request to the NSW Government Chief Information and Digital Officer (GCIDO), referring to the Audit Office's request, and including the incorrect statement that 'this was triggered by the Parking Summit held by Stuart Norman from Parking Australia and the Labour (sic) Party last week'.

In the meantime, some limited information was provided to the Audit Office in response to specific queries made in the context of the financial audit.

In an email dated 2 June 2021, the GCIDO instructed his staff to 'cease providing this information until the AO provides a clear scope of work – not random email requests'.

The GCIDO's direction was not communicated to the Audit Office, which only became aware of it when raised at the August 2022 Budget Estimates Committee hearings.

We note that the information requested by the Audit Office on 31 May 2021 was not random, and it was made lawfully as part of the audit of the department's financial statements. It is concerning that deliberate action was taken to restrict the provision of information lawfully requested by the Audit Office. Direct actions that seek to instruct the public service to restrict the provision of information lawfully requested should not be normalised nor considered appropriate.

During the Budget Estimates Committee hearing on 30 August 2022, the GCIDO was asked:

The Audit Office has made several inquiries regarding Park'nPay. In an email dated 1 June 2021 you instructed the department to pause all communications with the Audit Office until a formal process was established. What was that formal process?

The GCIDO advised he would take the question on notice. When responses to questions on notice were provided by the department to the committee on 26 September 2022, the response did not directly answer the question asked.

There is little evidence that the department has reviewed procurement decisions and processes related to Park'nPay - despite internal legal advice that raised questions about the procurement approach, and external scrutiny via the NSW Parliament

The department advised that since October 2019, its Procurement Policy has been strengthened to ensure value for money in all procurement engagements, and that a suite of training programs has been rolled out to support compliance. The department further advised that the procurement team has undergone a restructure which has resulted in an expanded and more capable team to deliver advice and ensure compliance with policy.

However, in answers to questions taken on notice during the NSW Parliament Budget Estimates Committee sessions in August 2022 the department reiterated its justification for the characterisation of the procurement as a trial - contrary to its own legal advice, and states that 'throughout this process [to procure the Park'nPay app], the appropriate approvals and documentation was completed in line with departmental guidelines as outlined in the probity report.' This suggests that there has been a lack of genuine consideration as to whether its practices to procure Park'nPay were appropriate and compliant and raises questions as to whether learnings from the procurement have informed improvements to current practice.

3. Contract negotiation, execution and management

3.1 Contract negotiations

The department did not prepare a detailed request for proposal

The NSW Government's *Market Approaches Guide*, which was developed by the department and applies to all NSW Government agencies, sets out an approach that '...is designed to elicit a detailed response on a specific proposal or idea for a business solution'.

In any procurement, a proposal submitted by a prospective vendor should be in response to a request for proposal prepared by the procuring agency. Such a request will ordinarily include such matters as the intended benefits to be delivered by the supplier, a scope of works, timeframes, evaluation criteria, disclosure of information and requirements for such things as how the supplier will manage any conflicts of interest or delivery risks.

Duncan Solutions provided its first proposal to the department on 18 February 2019. Amended proposals were submitted on 21 February 2019 and 26 February 2019.

The department could not provide evidence that a formal request for tender or call for expression of interest was ever issued to Duncan Solutions. Accordingly, it is unclear what Duncan Solutions was responding to with its proposals on 18, 21 and 26 February 2019.

The department did not keep records of meetings with the supplier that may have affected the scope of the procurement

It is possible that some form of proposed scope for the procurement was discussed in two meetings held with Duncan Solutions. The first meeting included the Minister, his staff, and the department's Project Manager on 7 February 2019.

Prior to the meeting, on 30 January 2019, the Minister's private secretary had emailed the Project Manager to ask that a brief be prepared for the Minister. Evidence provided to the Budget Estimates Committee on 30 August 2022 was that the department 'made a recommendation to the Minister's office on 7 February 2019 for [the department] to progress a digital parking pilot at The Rocks'. It is assumed by this audit that the briefing note requested by the Minister's office, in whatever form it was provided, included the recommendation referred to in Budget Estimates.

However, the department could not provide a copy of any document that would conventionally be considered a ministerial briefing note nor, in turn, evidence of the recommendation that was purportedly made to the Minister.

Instead, the audit team was provided with images of what a parking app might look like, as well as a PowerPoint presentation relating to a different proposal. We were advised that these materials constituted the briefing provided to the Minister for the meeting on 7 February 2019.

It is clear that the department did not provide the Minister with a detailed brief that performed such functions as canvassing options, detailing risks, or formally presenting recommendations. Moreover, the department could not provide meeting notes from this meeting with the Minister, the department, and Duncan Solutions on 7 February 2019.

Following the meeting on 7 February 2019, Duncan Solutions emailed the Minister stating:

As discussed, we will arrange a time to meet next week with [the Project Manager] and [the Director] to progress a plan for this project (scope, timelines and budget).

On 8 February, the Project Manager emailed the Minister and his Chief of Staff, explaining:

I am meeting Duncan Technologies next week to come up with a high-level scope and plan.

The meeting between department staff and Duncan Solutions went ahead on 14 February 2019. The department could not provide the audit team with a record of discussions that took place. The Project Manager also noted in the email to the Minister and Chief of Staff that the project was dependent on obtaining '...go ahead and a funding source'. It is unclear why discussions were being held on scope and plan before approval to direct source had been obtained, including confirmation that funding was available.

The audit team did obtain evidence in the form of a meeting invitation that the Project Manager and Director met with Duncan Solutions on 20 February 2019, two days after it had submitted its first proposal. The purpose of this meeting was described to the audit team by the Director as being about 'understanding the ecosystem', even though the process had already progressed to the supplier providing a proposal on 18 February 2019. The Project Manager and Director also met with the supplier on 26 February 2019. This resulted in the revised co-funding proposal submitted on 26 February 2019. The scope of the final amended proposal was substantively the same as what was reflected in the contract awarded to Duncan Solutions in July 2019.

The department could not provide comprehensive records of what was discussed at the meetings with the supplier on 20 February 2019 or 26 February 2019.

The department's failure to make and retain adequate records concerning key decisions is inconsistent with the department and its officers' obligations under the *State Records Act 1998*, in particular, section 12(1) that requires:

Each public office must make and keep full and accurate records of the activities of the office.

The department did not prepare a negotiation plan or tender evaluation plan

The department did not develop a negotiation plan or an evaluation plan, the application of which would have been hampered by the department also not having prepared evaluation criteria as part of a request for tender.

The department's procurement manual sets out obligations to establish a tender evaluation committee and tender evaluation plan. The manual says that an evaluation plan:

...sets out how the evaluation is to be conducted. It aligns with the Evaluation Criteria described in the Conditions; explains how each criterion will be assessed; and provides for probity, fairness and how value for money will be assessed. It must be explicit about what will be done, how it will be done, when it will be done and who is responsible for doing it.

This approach is also supported by the ICAC.

In the case of direct negotiations, the department's procurement manual states that such procurements must comply with ICAC guidelines for managing risk in direct negotiations, which include the obligation to develop negotiation and tender evaluation plans.

As the department did not prepare a request for tender or similar, it is unclear what criteria, outcomes or benefits it was expecting the Duncan Solution's proposal to meet. It is also unclear how the proposal from Duncan Solutions was objectively assessed.

While there was some initial exchange of emails between around 20 February 2019 and 26 February 2019 that resulted in Duncan Solutions twice submitting a revised version of its proposal, there is no evidence that the department's evaluation of the proposals, nor any subsequent negotiations, were informed by any specific criteria or strategy.

The department had no approach to determine how value for money would be ensured

Ensuring value for money in procurement is one of the explicit legislative obligations imposed on agencies by the *Public Works and Procurement Act 1912*.

This obligation then flows down through:

- the NSW Government Procurement Policy Framework
- the ICAC's guide on managing risk in direct negotiations
- the NSW Government's *Small and Medium Enterprise and Regional Procurement Policy*
- the NSW Government's *Market Approaches Guide*
- the department's procurement manual.

The department could not demonstrate that it had an approach to ensure that it would achieve value for money through its negotiations with Duncan Solutions.

The department did negotiate a reduction in fees for the optional year extension exercised in July 2022. The negotiation team included the department's Chief Procurement Officer. However, because value for money was never determined when the contract was first executed, it is impossible to say whether the subsequent reduction in price reflected value for money.

The department did not obtain conflict of interest declarations from the negotiation teams prior to commencement of negotiations

Under the department's procurement manual, management of conflict of interest (real or perceived) must include:

- requiring all employees to comply with the department's Code of Conduct for Employees
- seeking formal declarations from individuals involved in the procurement process and sign the Procurement Code of Conduct Declaration before evaluation commences stating they do not have a conflict of interest with any responding party.

On 6 January 2020, six staff members of the department, including the Project Manager and Director provided conflict of interest declaration by emails, each of them stating that:

In addition to my annual conflict of interest declaration via MyCareer I can additionally state for Park'NPay that I hereby declare that, to the best of my knowledge, my current private and financial interests including taxation affairs do not conflict with my duties as a member of the Project Contract Negotiation Team for the Park'nPay project; and my independence and objectivity in dealing with this procurement has not been or is not likely to be compromised.

These conflict of interest declarations were almost six months after the contract was executed, and almost a year after negotiations had commenced with Duncan Solutions.

These declarations were only made in response to enquiries from the external probity auditor in December 2019.

The audit team was not provided with evidence that other key staff within the department provided conflict of interest declarations. This included the responsible Executive Officer, Executive Director, and the delegate, each of whom played a role by, respectively, preparing, endorsing, and authorising the two key briefing notes regarding the decisions to approve funding and then engage Duncan Solutions.

The ICAC guidelines for managing risk in direct negotiations also advise that in addition to the agency negotiation team providing conflict of interest declarations, written conflict of interest declaration should be submitted by the counterparty to procurement negotiations. The department did not seek such declarations.

The department's Legal Branch obtained an independence and conflict of interest declaration from an external law firm before its engagement in June 2019 to assist in the preparation of the contract with Duncan Solutions.

The department did not prepare a plan demonstrating desegregated accountabilities as recommended by ICAC

The ICAC guidelines on managing risk in direct negotiations recommend that certain duties be segregated to ensure accountability and that no individual has end-to-end control over the process, primarily to separate the role of the negotiating team from the role of decision-makers.

This is another matter that should have been included in a negotiation plan, but it was not.

3.2 Contract execution

The department could not provide documents on how the agreement with Duncan Solutions tripled in length and cost

In the previous chapter, it was noted that the delegate endorsed a briefing note on 31 May 2019 approving funding of \$400,000 to be paid to Duncan Solutions for one-year.

Negotiations were then held with Duncan Solutions to settle the final terms and conditions for its engagement. The contract was executed on 16 July 2019.

A briefing note was prepared for the GCIDO (as delegate), to give approval to enter into an agreement with Duncan Solutions. The approval was for the engagement of Duncan Solutions for three years at a total estimated minimum cost of \$1,260,600 '...depending on actual support volumes'.

The audit was provided with an unsigned and undated copy of this briefing note. The only record of its approval is on the department's e-approval system, where an electronic note has been added: 'Advised that [the GCIDO] has approved and signed the physical briefs'. This note is dated 17 July 2019, so it is unknown whether the brief was endorsed before the contract was executed.

Among other things, the brief stated that the 31 May 2019 brief had sought \$678,000 for a one-year contract. As noted in the previous chapter, the 31 May 2019 brief and contemporaneous email had actually referred to the cost as \$400,000 for one-year.

The July 2019 briefing note also stated that:

...throughout the negotiations with Duncan Solutions conducted by HWL Ebsworth Lawyers on behalf of DCS Legal, parties have agreed that a three (3) year contract would provide mutual benefit and be more efficient.

On 22 January 2020, the department's Legal Branch advised Government Technology Platforms Branch that commercial negotiations were conducted by Government Technology Platforms Branch and that HWL Ebsworth Lawyers did not conduct negotiations on behalf of the Branch. Legal Branch also noted the three-year contract was a commercial decision made by Government Technology Platforms Branch and was not a legal recommendation.

The department could not provide evidence to document when or why the decision had been made to revise the initial proposed engagement from one-year to three-years (with three optional years), or that the original authority to conduct negotiations with Duncan Solutions for a \$400,000 one-year contract had been varied.

The department's Government Technology Platforms Branch did not seek appropriate and timely procurement advice

The Government Technology Platforms Branch failed to consult with the department's Chief Procurement Officer before adopting a direct negotiation procurement strategy. The department's procurement manual prescribes that any direct negotiation procurement over \$1 million must be endorsed by the Chief Procurement Officer. The Chief Procurement Officer was only consulted after the contract had been executed and only in regard to the possibility of exercising the extension options.

The negotiation team did consult with the office of the NSW Government's Chief Procurement Officer in July 2019, though this was only in regard to questions about local councils' procurement obligations under the *Local Government Act 1993*.

The negotiation team also consulted with the department's Legal Branch, though not until June 2019, well after the direct negotiation had commenced with the provider. In its advice, the Legal Branch noted that:

Given the absence of any tendering process, there are significant procurement process compliance issues to be managed, particularly in relation to selection of Duncan [Solutions] above any other suppliers in the market, other parking providers and the suppliers of parking payment machines which the proposed system will bypass.

The Legal Branch also requested further information from Government Technology Platforms Branch about how the direct negotiation procurement strategy had been justified and approved.

On 17 December 2019, the Legal Branch reiterated this advice in its consideration of an application under the *Government Information (Public Access) Act 2009* (GIPA). The Director, Legal, noted that:

We have not received any documentation of the procurement process for this project and approval of that process from you/your team to date, other than BN 00278-2019, discussed below.

Staff from Government Technology Platforms Branch replied to this by providing an extract from the *Market Approaches Guide* on managing direct negotiations.

Special circumstances may warrant entering into direct negotiations with a single selected service provider, without any prior competitive tendering process. ...Such an approach requires high-level authorisation and should only be used in clear and unambiguous circumstances that indicate such direct negotiation will result in the best value for money outcome for Government. Refer to ICAC's Direct negotiations - guidelines for managing risks in direct negotiations for further information.

The extract was offered as justification for the decision to adopt the direct negotiation procurement strategy. This is despite high-level authorisation not being provided, nor any value for money assessment being made.

Related emails show that this justification was derived retrospectively in response to the GIPA request. An email exchange between the Director, Project Manager, and Executive Officer on 16 December 2019 show attempts to source the 'right' extract from the ICAC's guidelines document, with none of the individuals initially able to identify text that provided the desired retrospective justification. This same extract was provided to the external probity auditor, misleadingly conveying the impression that the direct negotiation procurement had been informed by the ICAC advice.

This research should have been undertaken before the direct negotiation procurement strategy was adopted and not almost a year later. Earlier consultation with the department's procurement and legal functions may also have permitted the procurement to have progressed in a more compliant manner that would have better met the department's obligations.

Government Technology Platforms Branch incorrectly characterised legal advice in a key approval document for the procurement

Prior to the delegate executing the contract on 16 July 2019, Government Technology Platforms Branch submitted a briefing note seeking the GCIDO's approval (as the delegate) to award the contract to Duncan Solutions. This briefing note had been prepared by the Executive Officer for the Branch and approved by the relevant Director and Executive Director.

That briefing note included the text that:

On the advice of DCS Legal, Government Technology Platforms (GTP) has undertaken direct sourcing from Duncan Solutions rather than open tender...

This text was wrong. The department's Legal Branch never advised Government Technology Platforms Branch to undertake a direct sourcing procurement. As discussed above, the actual advice provided by Legal Branch on 20 June 2019 was that:

Given the absence of any tendering process, there are significant procurement process compliance issues to be managed...

The Legal Branch also advised Government Technology Platforms Branch that if the latter were to pursue a direct negotiation procurement, then it would need to provide further justification for that decision.

The department's Legal Branch was never consulted about the July 2019 briefing note before it was endorsed by the delegate and before the contract was executed.

On 17 December 2019, the Legal Branch asked Government Technology Platforms Branch to correct the record regarding the incorrect July 2019 briefing note and the contrary legal advice that it had provided on 20 June 2019. In response, an email correction was subsequently sent by the Director to the GCIDO on 7 January 2020 stating that '...there is a need for greater clarification' about the July 2019 briefing note.

Also on 17 December 2019, though before the Legal Branch had requested that the record be corrected, Government Technology Platforms Branch provided the uncorrected version of the July 2019 briefing note to the external probity auditor who had been engaged to review the procurement arrangements for Duncan Solutions.

The external probity auditor subsequently relied on the uncorrected July 2019 briefing note in preparing their draft probity audit report.

On 7 January 2020, Legal Branch requested that Government Technology Platforms Branch brief the external probity auditor about the error in the July 2019 briefing note. This was apparently not done until after the external probity audit submitted its draft report to Government Technology Platforms Branch on 16 January 2020. A revised version of the report was submitted by the external probity auditor the following day.

The external probity auditor's report was provided to Legal Branch on 20 January 2020. Legal Branch noted that the revised probity report still did not accurately reflect its previous advice.

The final report of the external probity auditor was submitted on 28 January 2020. This report did not comment on:

- the material error that had been included in the July 2019 briefing note, including whether the delegate had been fully and accurately informed when making the decision to execute a contract with Duncan Solutions
- the substance of the advice provided by Legal Branch on 20 June 2020.

Government Technology Platforms Branch could not explain to the audit team how this fundamental mistake was included in a key briefing note. Evidence obtained by this audit is that some key decision-makers shared the view that 'engagement with Legal slowed things'. This view would be consistent with the general haste with which the procurement was undertaken.

3.3 Contract management

The department did not develop a contract management plan for the Duncan Solutions contract

The department's procurement manual says that:

Effective contract management is essential so that the benefits gained through a sourcing exercise are not lost throughout the life of the procurement arrangement. Proactive and sound contract management will ensure compliance to contracted pricing and sources of supply and thereby eliminate maverick spending.

The department's procurement manual also recommends the development of a contract management plan if either or both of the below apply:

- the contract management risk profile is deemed high or medium
- the spend is above \$1 million.

Such plans should contain all the key information about how the contract should be managed, assist in managing the risks of the purchase and provide an audit trail of documentation to support and justify contract management decisions during the life of the contract.

The department was not able to provide a copy of a contract management plan, despite the Duncan Solutions contract meeting both the risk and value criteria.

The department did not adequately demonstrate that extending the contract would deliver value for money

It is a statutory obligation for the department to ensure that it achieves value for money in its procurement. As discussed in this report, value for money is more than the initial price of the good or service procured. Value for money must be considered for the whole period over which the goods or services are being used. *The NSW Government Procurement Policy Framework expressly provides that agencies:*

... must only exercise extension options where it can be demonstrated the contract will continue to deliver value for money.

The contract with Duncan Solutions includes options for three single-year extensions beyond its initial three-year term which may be exercised by the department. The contract is silent on the circumstances that would initiate exercising such an option. Guidance on such decisions would normally be provided in a contract management plan, however such a plan was not developed.

The option clause has been exercised twice, in July 2022 and July 2023. On both occasions, briefing notes were approved by the delegate, GCIDO.

The department's procurement manual provides two clauses (12.9(a) and 12.9(b)) that relate to extending a contract. Clause 12.9(a) sets out various matters that must be taken into account 'at the end of a contract' when taking into account whether to extend a contract or not. These matters include asking whether the contract continues to provide value for money.

Clause 12.9(b) refers to the exercise of 'extended term options' in a contract and states that these options:

...can be utilised at any time if the services are still needed and there is an approved budget.

The department advised that it achieved value for money by negotiating a nine per cent reduction in the price of the software support for the first contract extension. These negotiations included the department's Chief Procurement Officer.

The department also advised in determining value for money it relied on internal subject matter experts. The department was not able to produce documentation evidencing the deliberation of the subject matter experts. Value for money was limited to the initial contract price. It did not take into account the full range of benefits, costs and risks that should be considered beyond this.

Moreover, as there was no assessment of value for money for the original term of the contract, it is impossible to say whether a reduction of nine per cent represented value for money. In contrast, benchmarking attached to both briefing notes to the delegate seeking approval for the contract extensions suggests that the department's own customer payments platform was capable of providing payment processing at potentially much less cost than provided under the contract with Duncan Solutions.

We found that the drafting of clauses 12.9(a) and 12.9(b) of the department's procurement manual leaves doubt as to whether, when exercising options to extend contracts, value for money needs to be considered alongside the requirement to demonstrate the ongoing business need for the contract. The department has advised that in the case of extending term options, the requirements of both clauses, including assessing whether the contract continues to provide value for money, apply. This should be made clearer in the procurement manual.

The department did not comply with the *Government Sector Finance Act 2018* in having a contingent worker approve contract payments to Duncan Solutions

The audit sought advice from the department regarding the approval of eight invoices that had been submitted for payment by Duncan Solutions between July 2019 and November 2021.

Of these eight, seven were approved for payment by a contingent worker employed through a labour hire firm. This person was employed under a contingent worker's contract, and was therefore not an officer authorised to commit or incur expenditure of public money under the *Government Sector Finance Act 2018*.

This issue is addressed in the NSW Public Service Commission's publication *Contingent Workforce Management Guidelines*. These guidelines explain that if a contingent worker is involved in activities that would normally require the exercise of delegated functions, agencies need to make arrangements to appoint appropriate agency employees to exercise those delegations.

The department did not comply with the *Government Information (Public Access) Act 2009* in publishing details of the contract with Duncan Solutions

The *Government Information (Public Access) Act 2009* requires government agencies to publish information on their contract register for contracts valued over \$150,000 within 45 working days after such a contract becomes effective.

The department failed to meet the required time for the publication of the contract with Duncan Solutions. The contract details were entered on its contracts register on 26 November 2019, over four months after the contract was executed in mid-July 2019.

When the department exercised the first option to extend the contract with Duncan Solutions for one extra year, it complied with the *Government Information (Public Access) Act 2009* and posted the amended contract details within the 45 working day limit.

Section two

Appendices

Appendix one - Response from auditee

Department of Customer Service
Office of the Secretary



Our reference: COR-05216-2023
Your reference: D/PA6722
Date: 24/11/23

By email: mail@audit.nsw.gov.au

Ms Margaret Crawford
Auditor-General for New South Wales

Cc

Re: D/PA6722 Performance Audit – Procurement of services for the Park'nPay app

Dear Auditor-General,

Thank you for the opportunity to provide a formal response on behalf of the Department of Customer Service (DCS) to be incorporated into the published report.

I acknowledge the findings and accept the recommendations in the report. I note that the majority of the events that are the focus of this Audit occurred in 2019, including awarding the 3 year plus 3 x 1 years extension options contract to Duncan Solution that took place in July of that year.

Since 2019, DCS has commissioned three external reviews of procurement practices. In April 2021 an independent review was conducted of broad procurement practices in DCS, covering functions, frameworks, opportunities for automation, supplier management, data governance and technology solutions. A further independent Practice v Policy review was completed in November 2021 focusing more deeply on roles and responsibilities, opportunities for automation and technology solutions. Many of the recommendations from these reviews have been implemented or are in the process of being implemented. One of those recommendations was to restructure the procurement team to improve delivery capability and capacity, which occurred in the first quarter of 2022.

In April 2023, DCS commissioned a third independent review into contract management, with a focus on improving maturity in this area. DCS is currently working through the recommendations of this review. An internal Procurement Compliance and Governance audit has also commenced to review DCS procurement practices for compliance with internal policies and procedures and value for money.

Noting that this is my final week as Secretary and the report is not due to be tabled in Parliament until 20 December, I have handed the report over to the incoming Secretary, Mr Graeme Head AO.

Throughout my four years in this role, the DCS team has continued to strive to improve processes and compliance. As part of my handover to Mr Head AO, I have suggested that in light of your findings, it may be timely to assess how well DCS has implemented recommendations from the earlier reviews.

Should you have any questions please contact Audrey Maag, A/Executive Director, Office of the Secretary, at

Sincerely,

A handwritten signature in black ink, appearing to read 'Emma Hogan', with a stylized flourish at the end.

Emma Hogan
Secretary

McKell Building
2-24 Rawson Place, Sydney NSW 2000

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Appendix two – Key requirements of the department's procurement manual

Key requirements included in the department's procurement manual as it applied during the procurement of services from Duncan Solutions for the Park'nPay app are set out below.

1. To conduct complex procurement activities, staff must have relevant qualifications or engage a qualified person to assist with the procurement. The department's Corporate Procurement can conduct complex procurement.
2. In the sourcing phase, ensure the method chosen will achieve value for money and is fair and transparent. The Marketing Approaches Guide provides useful guidance to identify the potential right approach to market.
3. For estimated spend over \$1 million, the business unit is responsible for completing the procurement plan and risk assessment and providing it to the department's Chief Procurement Officer for endorsement.
4. Before market engagement commences, a briefing note with the proposed approach to market (including single source) approved by the appropriate delegate must be completed.
5. Requirements must be developed to provide enough detail for the potential supplier to clearly understand what is needed in terms of performance levels, timing and quality.
6. An evaluation plan prepared, setting out how evaluation is to be conducted.
7. An evaluation committee established of people with necessary skills and knowledge, and who are free from any conflict of interest. Each voting member to sign the Procurement Code of Conduct Declaration. [for a direct negotiation, the committee would be termed as the negotiation team].
8. Before contract award, a briefing note making a recommendation and approved by the appropriate delegate must be completed.
9. Contracts over \$150,000 must be disclosed on the department's Procurement Contracts Hub.
10. Prepare a contract management plan for contracts of high risk or over \$1 million containing all the key information on how the contract should be managed. This to assist in managing the risks of the purchase, and provide an audit trail of documentation to support and justify contract management decisions.
11. All department staff must keep accurate and complete records of all matters relating to planning, sourcing and contract management.

Appendix three – About the audit

Audit objective

This audit assessed whether the processes used by the Department of Customer Service (the department) to directly negotiate to procure the services of Duncan Solutions relating to the Park'nPay app complied with relevant government policies and requirements that applied at the time.

Audit scope and focus

In doing so, the audit focussed on the process adopted by the department in:

- deciding to adopt a directly negotiation procurement strategy
- negotiating, awarding and managing the contract with Duncan Solutions.

Audit criteria

We addressed the audit objective with the following criteria:

1. The department complied with relevant requirements, including under the NSW Procurement Policy Framework for NSW Government Agencies before deciding to undertake a direct negotiation procurement strategy.
 - a) The decision was supported by a procurement strategy that addressed in detail the justification for and suitability of the selected procurement method, including a comprehensive analysis of the market and all relevant factors to demonstrate that a competitive process was not needed.
 - b) The decision was supported by a risk assessment for the procurement strategy.
 - c) The decision was supported by an assessment of how the selected method would achieve value for money.
 - d) The decision complied with the department's internal delegations and policies.
2. The department complied with relevant requirements, including under the NSW Procurement Policy Framework for NSW Government Agencies for engaging the service provider.
 - a) The engagement complied with a tender evaluation plan, including how value for money would be determined.
 - b) The engagement complied with a probity plan, including how potential conflict of interest and confidentiality would be managed.
 - c) The engagement complied with a contract management plan, including extending the contract to a fourth year.
 - d) The engagement complied with the *Government Information (Public Access) Act 2009*.
 - e) The engagement complied with the department's internal delegations and policies.

Audit exclusions

The audit did not:

- question the merits of Government policy objectives
- assess the performance and effectiveness of the Park'nPay app
- assess whether the services provided by Duncan Solutions represented value for money
- assess whether the contract with Duncan Solutions affected competitiveness or contestability in the payment process market.

However, we have commented on these issues where they affected our findings to provided context.

Audit approach

Our procedures included:

1. Interviewing:
 - a) key personnel from the department associated with the selection of the direct negotiation procurement strategy for services relating to the Park'nPay app
 - b) key personnel from the department associated with the procurement of services from Duncan Solutions relating to the Park'nPay app.
2. Examining:
 - a) documentation provided by the department for the selection of the direct negotiation procurement strategy for services relating to the Park'nPay app
 - b) documentation provided by the department for the procurement of services from Duncan Solutions relating to the Park'nPay app.

The audit approach was complemented by quality assurance processes within the Audit Office to ensure compliance with professional standards.

Audit methodology

Our performance audit methodology is designed to satisfy Australian Auditing Standard ASAE 3500 Performance Engagements and other professional standards. The standards require the audit team to comply with relevant ethical requirements and plan and perform the audit to obtain reasonable assurance and draw a conclusion on the audit objective. Our processes have also been designed to comply with requirements specified in the *Government Sector Audit Act 1983* and the *Local Government Act 1993*.

Acknowledgements

We gratefully acknowledge the cooperation and assistance provided by staff from the Department of Customer Service.

Audit cost

The cost of the audit was \$270,000.

Appendix four – Performance auditing

What are performance audits?

Performance audits assess whether the activities of State or local government entities are being carried out effectively, economically, efficiently and in compliance with relevant laws.

The activities examined by a performance audit may include a government program, all or part of an audited entity, or more than one entity. They can also consider particular issues which affect the whole public sector and/or the whole local government sector. They cannot question the merits of government policy objectives.

The Auditor-General's mandate to undertake audits is set out in the *Government Sector Audit Act 1983* for state government entities, and in the *Local Government Act 1993* for local government entities. This mandate includes audit of non-government sector entities where these entities have received money or other resources, (whether directly or indirectly) from or on behalf of a government entity for a particular purpose (follow-the-dollar).

Why do we conduct performance audits?

Performance audits provide independent assurance to the NSW Parliament and the public.

Through their recommendations, performance audits seek to improve the value for money the community receives from government services.

Performance audits are selected at the discretion of the Auditor-General who seeks input from parliamentarians, State and local government entities, other interested stakeholders and Audit Office research.

How are performance audits selected?

When selecting and scoping topics, we aim to choose topics that reflect the interests of parliament in holding the government to account. Performance audits are selected at the discretion of the Auditor-General based on our own research, suggestions from the public, and consultation with parliamentarians, agency heads and key government stakeholders. Our three-year performance audit program is published on the website and is reviewed annually to ensure it continues to address significant issues of interest to parliament, aligns with government priorities, and reflects contemporary thinking on public sector management. Our program is sufficiently flexible to allow us to respond readily to any emerging issues.

What happens during the phases of a performance audit?

Performance audits have three key phases: planning, fieldwork and report writing.

During the planning phase, the audit team develops an understanding of the audit topic and responsible entities and defines the objective and scope of the audit.

The planning phase also identifies the audit criteria. These are standards of performance against which the audited entity, program or activities are assessed. Criteria may be based on relevant legislation, internal policies and procedures, industry standards, best practice, government targets, benchmarks or published guidelines.

During the fieldwork phase, audit teams will require access to books, records, or any documentation that are deemed necessary in the conduct of the audit, including confidential information which is either Cabinet information within the meaning of the *Government Information (Public Access) Act 2009*, or information that could be subject to a claim of privilege by the State or a public official in a court of law. Confidential information will not be disclosed, unless authorised by the Auditor-General.

At the completion of fieldwork, the audit team meets with management representatives to discuss all significant matters arising out of the audit. Following this, a draft performance audit report is prepared.

The audit team then meets with management representatives to check that facts presented in the draft report are accurate and to seek input in developing practical recommendations on areas of improvement.

A final report is then provided to the accountable authority of the audited entity(ies) who will be invited to formally respond to the report. If the audit includes a follow-the-dollar component, the final report will also be provided to the governing body of the relevant entity. The report presented to the NSW Parliament includes any response from the accountable authority of the audited entity. The relevant Minister and the Treasurer are also provided with a copy of the final report for State Government entities. For local government entities, the Secretary of the Department of Planning and Environment, the Minister for Local Government and other responsible Ministers will also be provided with a copy of the report. In performance audits that involve multiple entities, there may be responses from more than one audited entity or from a nominated coordinating entity.

Who checks to see if recommendations have been implemented?

After the report is presented to the NSW Parliament, it is usual for the entity's Audit and Risk Committee / Audit Risk and Improvement Committee to monitor progress with the implementation of recommendations.

In addition, it is the practice of NSW Parliament's Public Accounts Committee to conduct reviews or hold inquiries into matters raised in performance audit reports. The reviews and inquiries are usually held 12 months after the report received by the NSW Parliament. These reports are available on the NSW Parliament website.

Who audits the auditors?

Our performance audits are subject to internal and external quality reviews against relevant Australian standards.

The Public Accounts Committee appoints an independent reviewer to report on compliance with auditing practices and standards every four years. The reviewer's report is presented to the NSW Parliament and available on its website.

Periodic peer reviews by other Audit Offices test our activities against relevant standards and better practice.

Each audit is subject to internal review prior to its release.

Who pays for performance audits?

No fee is charged to entities for performance audits. Our performance audit services are funded by the NSW Parliament.

Further information and copies of reports

For further information, including copies of performance audit reports and a list of audits currently in-progress, please see our website www.audit.nsw.gov.au or contact us on 02 9275 7100.

OUR VISION

Our insights inform and challenge government to improve outcomes for citizens.

OUR PURPOSE

To help Parliament hold government accountable for its use of public resources.

OUR VALUES

Pride in purpose
Curious and open-minded
Valuing people
Contagious integrity
Courage (even when it's uncomfortable)

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