

QUEENSLAND HEALTH PAYROLL COMMISSION OF INQUIRY
SUBMISSIONS OF COUNSEL ASSISTING

Introduction

1. These submissions concern “*the adequacy and integrity of the procurement ... process*” (Terms of Reference, cl 3(a)).
2. The procurement process commenced in about mid 2007, at which time the State resolved to ask the market about the possible provision of services, by way of what was ultimately a Request for Information (‘RFI’), Request for Proposal (‘RFP’) and an Invitation to Offer (‘ITO’). The commencement of the process is marked by one of the contractors engaged by the State, Mr Terry Burns, opening discussions with potential vendors about the nature of the State’s requirements for procurement and what that vendor might contribute to the options under consideration.
3. That preparatory process culminated in a ‘closed’ tender conducted between 12 September 2007 and 23 October 2007. Three companies submitted responses: IBM Australia Limited was successful. The parties entered into a contract on 5 December 2007.
4. The Commission heard evidence from 26 witnesses over 17 days. Statements of an additional eight witnesses were tendered. The procurement process and its adequacy or integrity were not within the scope of the Auditor-General’s report¹ or any other prior review.
5. As the Commission’s focus was on events which occurred approximately six years ago, and witnesses did not always have a complete recollection of these events, the best source of evidence before the Commission with respect to the procurement process was contemporaneous documentary evidence, including emails, notes of meetings, presentations and tender submissions.

¹ Exhibit 2

6. The evidence shows the procurement process to have been inadequate and to lack integrity: more particularly, it was irregular and attended by a number of material inadequacies. One irregularity was an unjustified sense of urgency. The State changed course from a “Shared Services Initiative” managed internally to one to be externally managed by a prime contractor in a matter of a few months; it rushed the preparation of the ITO; the evaluation period was too brief (11 business days), and those in charge within the State were content to appoint an outsider (of whom they knew almost nothing) as their chief advisor on these matters and permit him to direct the course not only of the procurement, but the course of State initiatives which shaped it.
7. The evidence demonstrated deficiencies in the managerial control imposed on, and maintained over, not only Mr Burns, but in ensuring that the whole procurement process was regular and fair. Responsibility for this falls to senior public servants – principally Mr Bradley and Ms Perrott. The evidence also revealed inappropriate contact by Mr Burns with IBM, contact which is in marked contrast to his treatment of other companies, being Accenture Australia Holdings Pty Ltd (‘Accenture’) and Logica CMG Pty Ltd (‘Logica’) who were competing for the same work. Associated with that was a misuse by IBM of information which it ought not to have had, information which was, respectively, prima facie, confidential to the State and to Accenture.

The Procurement Process

8. CorpTech, the technology service provider for the State Government, organised and managed the procurement process. It was established in 2003 under the Shared Services Initiative to provide specialist information and communication technology (‘ICT’) support for corporate services across the Queensland Government. CorpTech then formed part of Treasury.
9. The tender comprised three stages (not always described using the same terminology):

- a. **the RFI.** It issued to 11 external service providers² in the form of an undated letter from Ms Maree Blakeney of CorpTech, sent on about 2 July 2007³. RFI proposals were to be forwarded electronically to Mr Burns, by 12 July 2007⁴;
- b. **a subsequent RFP.** It issued (by email) from Mr Burns on 25 July 2007 to IBM, Logica, Accenture and SAP Australia Pty Ltd ('SAP')⁵. There was significant divergence in the content and length of the responses received from Accenture⁶, IBM⁷, SAP⁸ and Logica⁹;
- c. **the ITO.** It issued on 12 September 2007¹⁰. Responses were provided to CorpTech on 8 October 2007 from IBM¹¹, Accenture¹², Logica¹³. SAP declined the opportunity to do so¹⁴.

10. The Evaluation Report was completed on 23 October 2007¹⁵. IBM ranked highest, following which exclusive contract negotiations took place¹⁶.

The engagement of Mr Burns: his suitability for the role, and the scope of his engagement

11. Mr Burns was engaged to act as 'facilitator' for the Tender process. He was not a public servant, but an external contractor engaged initially through Information Professionals, and subsequently through Arena Organisational Consultants (Arena). He ultimately contracted directly with CorpTech.

² Arena Organisational Consultants, Accenture Australia Holdings Pty Ltd, Ascend Business Solutions Pty Ltd, Bearing Point Australia Pty Ltd, IBM Australia Ltd, Impart Corporation Pty Ltd, Logica CMG Pty Ltd, Pendragon System Consultants, and SAP Australia Pty Ltd, KPMG and SMS

³ Transcript 2-11:48

⁴ TB1 - Vol 6, Item 6.1.1-6.1.9, p 1-18

⁵ TB1 - Vol 6, Item 6.3.7, p 53-54

⁶ TB1 - Vol 7, Item 6.5.3

⁷ TB1 - Vol 8, Item 6.7.2

⁸ TB1 - Vol 7, Item 6.4.9

⁹ TB1 - Vol 7, Item 6.6.1

¹⁰ TB1 - Vol 32, Item 32, p 1-80

¹¹ TB1 - Vol 14 and 15, Item 15

¹² TB1 - Vol 17 and 18, Item 17

¹³ TB1 - Vol 16, Item 16

¹⁴ Transcript 15-121: 34; Exhibit 49, paragraph 40; TB1 – Vol 10, Item 22, p 207

¹⁵ TB1 - Vol 22, Item 19

¹⁶ TB1 – Vol 34, Item 35.66, p 707 to 710

12. There is no doubt he had considerable experience and expertise in this field:
- a. his career in IT began with IBM in South Africa as a trainee systems engineer¹⁷;
 - b. he worked for IBM in South Africa for 13 years¹⁸;
 - c. he rose to the position of branch manager and described himself as IBM's 'top man in the Cape' and was awarded two IBM international marketing awards¹⁹;
 - d. in 2006, Mr Burns had completed a SAP implementation for the Fonterra organisation in New Zealand. This project involved the use of IBM as a Prime Contractor.
13. Clarity was never insisted upon by the State in its contractual arrangements with Mr Burns. This was one factor in his acquiring greater authority and influence than he, on any view, ought to have had.
14. He had been recruited 'off the street' by Mark Nicholls of Information Professionals and recommended by him to Gary Uhlmann of Arena. Mr Burns had never before ever worked in Queensland, or in Australia. He had never worked for Government.
15. Mr Nicholls (having not known Mr Burns previously) sensibly placed a number of qualifications on his recommendation of Mr Burns to Geoff Waite of CorpTech, the main one being that Mr Burns be closely supervised²⁰.

¹⁷ TBI - Vol 2, Item 3.1, p 13

¹⁸ Exhibit 46, paragraph 4

¹⁹ TBI - Vol 2, Item 3.1, p 13

²⁰ Transcript 7-12:14

16. Mr Burns was engaged to assist with a five day 'snap-shot review' of the Shared Services Initiative being conducted by Arena²¹. This review was commissioned by Mr Waite and presented on 18 April 2007. It involved just five days of analysis.
17. The key recommendation of the 'snapshot review' was that an Operation Programme Director (or Solution Design Authority Director) be appointed.
18. Very soon after completion of the snap-shot review, Mr Burns was engaged (through Information Professionals) to conduct a five week review of the Shared Services Initiative. Again, the contractual basis for this is absent. It is, accordingly, difficult to know the scope of the engagement. What is clear, however, is that Mr Burns had very quickly (in a matter of little more than two weeks and only having participated in one project for the State), obtained the confidence of the most senior Treasury officials: Mr Bradley in particular. It is clear now that Mr Bradley saw Mr Burns as the means by which then existing government policy regarding shared services could be displaced and a new, quicker and cheaper alternative be found and implemented. In reality, however, that involved putting hope over realistic expectation, displacing ordinary governmental control over the formulation of policy of this kind and being ignorant to the inevitable interests which a contractor which in Mr Burns' position would bear: to outsource immediately as much as possible of the work to be undertaken.
19. Mr Nicholls produced a series of invoices²² which suggest that Mr Burns was engaged to conduct the five week review between 31 April 2007 and 1 June 2007. Mr Nicholls requested, and Mr Burns refused, to provide him with a draft report before presenting it to CorpTech²³. The refusal was made on the basis that Mr Bradley had instructed him not to provide it to Mr Nicholls as it was

²¹ TB1 - Vol 1, Item 1.3, p 158

²² TB1 - Vol 32, Item 29, p 15-16

²³ The final version of the report is found in the TB1 - Vol 1, Item 1.4, p 182 - 'Shared Service Initiative Replanning Report' dated May 2007 authored by Terry Burns

confidential²⁴. This is one of the points at which we see Mr Burns having established (and confidently so) a direct line to Mr Bradley.

20. Mr Burns achieved autonomy from those who had introduced him to CorpTech and found him work.
21. *First*, he separated himself from Information Professionals. The Arena Organisational Consultants Policy and Program Office Consultancy for the Shared Services Initiative dated 30 May 2007²⁵ contains an offer of a consultancy arrangement by Gary Uhlmann for Arena Organisational Consultants. The purpose of the new consultancy is described as:

Requirements of the Consultancy

*...to lead a review of the currently defined standard offering and the current proposed solution for all agencies and to verify the current solution direction, definition and the benefits that were previously assumed would be delivered from the solution rollout across government. ... Terry Burns is the nominated consultant for this assignment and he is available to commence the assignment on 1 June 2007. Terry has indicated that he is only prepared to contract through ARENA for this assignment with PPO. ...*²⁶

Mr Burns was subsequently engaged through Arena from 20 May 2007.

22. *Second*, on 17 September 2007, Mr Burns proposed an extension of his consultancy for the Shared Services Initiative²⁷ by through his own company, Cavendish Risk Management Pty Ltd (Cavendish). An agreement between Treasury and Cavendish for the “Provision of Services – Project Director, SSI Program Rebuild” was entered into on 26 September 2007. The Scope of Services contained in Schedule 1 was to²⁸:

²⁴ 14-9:40; Exhibit 24, paragraph 57

²⁵ TB1 -Vol 2, Item 3.1, p 1

²⁶ Ibid. at p 3

²⁷ TB1 - Vol 2, Item 3.3, p 50

²⁸ TB1- Vol 2, Item 3.4, p 79

- a. complete Phase III of the Program Rebuild project and provide expert independent advice to the Executive Director during the transition phase;
- b. negotiate final contracts with Prime Contractor vendor and help establish effective ongoing contract management arrangements;
- c. complete the establishment of the Solution Design Authority covering the mission statement, roles processes and resourcing requirements;
- d. complete establishment of the Strategic Program Management Office covering the mission statement, roles processes and resourcing requirements; and
- e. establish the strategic business needs of all agencies across the sector and plan their inclusion in the overall schedule for Phase I and Phase II of the new program.

The 'key personnel' was 'Terry Burns'²⁹ and the term of contract was "until the Services have been performed in accordance with this Agreement".

23. By these steps, Mr Burns displaced those who had assisted him and he achieved, in a remarkably short time, autonomy in his dealings with Government, dealings which, we have submitted, were with the most senior Treasury officials.
24. Mr Nicholls criticised Mr Burns' conduct. He could not understand how someone unknown to the Government could rise to take instructions directly from the Under Treasurer so quickly. We share that view. Mr Nicholls expressed these concerns to the Deputy Under Treasurer (Mr Ford) in an email of 27 September 2007³⁰:

²⁹ Ibid. p 80

³⁰ TB1 - Vol 32, Item 29, p 22

On utilising Terry in the assignment we performed for Geoff Waite, it was our expectation that we would be supervising his work, and as a result make an informed assessment of him as a professional. As we recruited Terry off the street, after his relocation in Brisbane, he had not previously worked for us, nor do I believe in Brisbane...

Given the circumstances of our assignment, including Geoff Waite's departure from the role, our planned supervision was not able to occur, and as a result we were not provided with any opportunity to supervise or review his work, or assess his capabilities. This matter had previously been discussed with Geoff Waite and Barbara Perrott.

As such, the purpose of this letter is to advise you of your need to ensure that you make your own enquiries as you see fit to satisfy yourself of Terry Burns' suitability for any current or future roles. Please do not rely upon any implied recommendation or endorsement due to his prior engagement by Information Professionals.

25. On 23 November 2007, Mr Ford responded³¹:

I have noted the contents of your letter and fully acknowledge your role and appreciate the importance that Information Professionals places on sound supervision and assessment of practitioners. The practices and standards outlined in your letter also align with CorpTech's requirements regarding the engagement of contractors and professional staff.

26. This is the concern which Mr Nicholls had raised at the outset of the ITO, but the response he received was well after the ITO had finished.
27. Mr Burns was too pervasive in his role. Those who should have maintained authority over him, such as Ms Perrott and Mr Bradley, failed to do so and failed to act appropriately in response to the warnings they received in relation to him. The welcoming, almost naïve, reception which Mr Burns enjoyed is in unexplained contrast to the perfunctory treatment of longstanding relatively senior officials in CorpTech who were encouraged to seek alternative employment or who were perceptive enough to see that, with Mr Burns' engagement and the autonomy he was permitted, their positions were at risk and their roles unnecessary. Mr Bond is one such official. Mr Waite is another (and in whose departure Mr Burns was 'instrumental')³².

³¹ TB1 - Vol 32, Item 29, p 23

³² Transcript 13-81: 14

28. Ms Perrott (who replaced Mr Waite as Executive Director of CorpTech) was warned about Mr Burns' conduct by Mark Nicholls³³ and Darrin Bond³⁴. She largely ignored them. Mr Bond warned Ms Perrott that Mr Burns was interfering in the evaluation process.
29. Consistent with the evidence of Mr Burns' desire to obtain autonomy was Mr Bond's evidence that Mr Burns aggressively told him that he did not have permission to approach Mr Bradley with his concerns³⁵. How a contractor engaged for only a short period of time with no previous government experience came to assert this degree of authority over a senior public servant of 17 years is inexplicable.
30. Those charged with the responsibility of supervising Mr Burns (principally Ms Perrott and Mr Bradley) failed to discharge their obligations and Mr Burns was allowed to conduct himself improperly as a result of this dereliction of managerial duty.

Whether IBM received or misused, or attempted to misuse confidential information during the RFI, RFP or ITO

31. It seems likely (at least) that IBM breached an equitable obligation of confidence not to misuse confidential information of Accenture and the State: in the State's case that information was the vendor proposals and the evaluation of those proposals; in Accenture's, it was the fact that it would offer, as part of its ITO response, a 'not to exceed' price.
32. That information was, in the competitive commercial environment, self-evidently confidential. IBM had acquired it in circumstances which imported an obligation of confidence (and knew of those circumstances). IBM misused that information³⁶.

³³ Transcript 7-36: 27; TB1 - Vol 32, Item 29, p 22

³⁴ Transcript: 2-64:10

³⁵ Transcript: 2-58:20

³⁶ *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415; *Johns v Australian Securities Commission* (1993) 178 CLR 408.

33. IBM's own *Business Conduct Guidelines* ('Guidelines') reflect these equitable obligations. They applied to Messrs Bloomfield, Sullivan, Suprenant, Cameron and Ms Jensen at the time of the 2007 procurement process. Relevantly, those Guidelines state:

"Dear IBMer,

... [These Guidelines] are not just about compliance with the law and general standards of ethics. By establishing these guidelines and giving them the weight of a governing document, we are acknowledging that our choices and actions help define IBM for others. We are ensuring that our relationships –with clients, investors, colleagues and the communities in which we live and work – are built on trust.

In other words, the Business Conduct Guidelines are a tangible example of our values and expressions of each IBMer's personal responsibility to uphold them.

I hardly find it necessary to remind IBMers to "act ethically". I know you feel as strongly as I do that anyone doing otherwise does not belong at IBM".

Prohibitions

In all contact with competitors, do not discuss pricing policy, contract terms, costs... and, of course, any other propriety or confidential information. Discussion of these subjects or collaboration on them with competitors can be illegal. If a competitor raises any of them... you should object, stop the conversation immediately and tell the competitor that under no circumstances will you discuss these matters... In summary, disassociate yourself and IBM from participation in any possibly illegal activity with competitors; confine your communication to what is legal and proper. Finally, report immediately to IBM counsel any incident involving a prohibited subject.

Acquiring and Using Information about Others

...There are, however, limits to the ways that information should be acquired and used, especially information about competitors. No company should use improper means to acquire a competitor's trade secrets or other confidential information... improper solicitation of confidential data from a competitor's employees or from IBM clients is wrong. IBM will not tolerate any form of questionable intelligence-gathering.

Information Owned by Others

...If you receive another party's proprietary information, you must proceed with caution to prevent any accusations that IBM misappropriated or misused information.

Public Sector Procurement

...During the course of a public sector procurement, you should not try to improperly influence the decisions of the client or obtain restricted information about the procurement.

Misuse of Accenture's Information

34. Marcus Salouk, who led Accenture's bid team, gave evidence that he expressed concern to Mr Bradley and Ms Perrott on a number of occasions that Accenture's confidential information relating to its bid was being leaked to IBM. He recalls receiving repeated assurances that CorpTech intended to 'buy off', or contract from, the RFP process and Accenture structured its bid accordingly³⁷. When CorpTech proceeded to a subsequent ITO, Mr Salouk's concerns remained that Accenture's RFP information had been reflected in the ITO and that IBM 'caught up very quickly' between the two processes³⁸. Mr Salouk, however, was not able to point to any specific example of misuse of Accenture's information in the limited time and materials he had available to him³⁹.
35. What emerged from the evidence was lax security arrangements with respect to tender information. During the RFP process, IBM contacted Mr Burns to inform him that a staff member at an Agency mentioned that they had access to an 'evaluation matrix' which listed the strengths and weaknesses of the respective RFP responses⁴⁰. The document was inadvertently stored on an unsecured section of the local area network (LAN). Mr Burns emailed Ms Perrott about this security breach, stating that he had received advice from John Swinson, partner of Mallesons Stephen Jaques, that the four vendors should be formally notified of this lapse⁴¹. However, the Commission located no evidence that the vendors ever received such notification.
36. Exhibit 32 contained a series of emails produced by IBM which became a focus of the Commission hearings. In a cover letter from IBM's solicitors, Ashurst, of 18 March 2013, it was represented that IBM produced these emails voluntarily

³⁷ Transcript 1-58: 43; Exhibit 5, paragraphs 36, 40-42 and 83

³⁸ Exhibit 5, paragraphs 59-61 and 113

³⁹ Transcript 1-65: 41; Exhibit 5, paragraph 132

⁴⁰ TB1 – Vol 33, Item 33.9, p 36

⁴¹ TB1 - Vol 33, Item 33.9, p 36

in a corporate desire to assist the Commission and that they were not required under any request issued to IBM. These emails were, however, caught by Request 3 issued to IBM on 19 February 2013 and should have been produced in response to that request.

37. Page 3 of Exhibit 32 contains an email from Mr Bloomfield to Mr Suprenant of IBM of 3 August 2007. Messrs Bloomfield and Suprenant were engaged in preparing IBM's bid response at the time. Mr Bloomfield forwarded on an email from Simon Porter of Accenture to a 'mutual friend in the industry'. Despite being questioned at some length about the issue, Mr Bloomfield could not recall who sent him this email⁴². Mr Bloomfield's recollection about the source of the email is, in our submission, simply not believable. It was information which would have been of moment to him, and material to a large bid he hoped to secure for IBM. It should be inferred that the source of the information caused Mr Bloomfield discomfort and was responsible for his lack of candour on the subject.
38. Mr Porter was questioned on this issue and stated that he believed he sent this email to Mr Pedler of SAP, as they were considering partnering with SAP for he bid⁴³. Mr Pedler could not recall receiving the email, but said it was likely it came from Mr Porter and the correspondence 'resonated' with him as being typical of the correspondence they would exchange⁴⁴. Mr Pedler was questioned about whether he forwarded the email on to Mr Bloomfield which he denied. In our submission, Mr Pedler is a witness who should be accepted as honest.
39. Mr Porter's conduct, in sending the email, must be called into question. Ms Perrott and Mr Bradley gave evidence that they were concerned that Mr Porter attempted, through a third party, to ascertain Ms Perrott's appetite for price and obtain her feedback from a meeting with Accenture. Ms Perrott stated that it suggested a level of collusion between SAP and Accenture and that the email

⁴² Mr Bloomfield, when questioned on the issue in evidence, provided a list of 14 people who may have sent him the email. None of these people were employees of Accenture: Transcript, 26 March 2013: p 10: 55

⁴³ Transcript 16-12: 1

⁴⁴ Transcript 15-76: 4

evidences an attempt by Accenture to deprive the procurement process from the competitive environment for which CorpTech was hoping⁴⁵. There is no suggestion that Mr Pedler acted in any way on Mr Porter's email, and no evidence of actual collusion between SAP and Accenture was put before the Commission. However, Mr Porter showed questionable judgment and methods of intelligence-gathering in sending his email and his conduct in doing so was inappropriate.

40. Mr Bradley stated that had he known about the circulation of Mr Porter's email, he would have given careful thought to how CorpTech needed to design its ITO process to ensure more appropriate conduct from the tenderers⁴⁶. He would have sought strong undertakings from the tenderers and questioned whether certain individuals should have been allowed to continue in the process on the basis of whether they were ethically appropriate for the role. Mr Bradley, however, referred to Accenture's response when they discovered that an Italian contractor obtained unauthorised access to CorpTech's confidential costing information after the conclusion of the ITO which he provided to Accenture. Accenture immediately brought the issue to the attention of CorpTech and the contractor's engagement was terminated. This must be contrasted with IBM's response when it received similar information, when no action was taken. Mr Bradley stated that he would expect similar strong action by Accenture and IBM in relation to Mr Porter's email⁴⁷.
41. Both Ms Perrott and Mr Bradley gave evidence that, had they known about IBM's conduct in receiving CorpTech's confidential information, and receiving and using Accenture's confidential information, that this may have been grounds for its exclusion from the ITO process and they would have taken advice on the issue⁴⁸. Mr Swinson said that his advice, if asked, would have been that the tender process had been "seriously jeopardised"⁴⁹. The evidence suggests a

⁴⁵ Transcript 16-107:11 and 17-104: 55

⁴⁶ Transcript 17-89: 50

⁴⁷ Transcript 17-90: 1

⁴⁸ Transcript 16-107: 20 and 17-86: 39

⁴⁹ Transcript 19-84: 40-50.

departure from the integrity of the procurement process by both Accenture and IBM.

42. Mr Bloomfield's evidence was that he first learned of Accenture's not-to-exceed budget upon receiving this email⁵⁰. He also learnt through this communication that Accenture proposed a six-month transition time on the project. Ultimately, IBM's proposed price and transition time was almost exactly half that proposed by Accenture in its ITO bid⁵¹.

43. Mr Bloomfield used the confidential information given to him which can be seen in Exhibit 34 – Complex Deal Meeting of 20 August 2007. The author of this document was Mr Bloomfield. Exhibit 34 cites the remaining budget of \$108 million, which is information Mr Bloomfield accepted was provided to him by Mr Burns⁵². It also identifies a risk as being "*CorpTech may look for total not to exceed cap as part of prime contractor agreement with IBM responsible for delivering within cap budget*"⁵³. Mr Bloomfield accepted that the only source of the information that Accenture was going to offer a not-to-exceed price was through Mr Porter's email⁵⁴. Mr Bloomfield accepted that he used this information in a direct way, and that at the time he used the information in Exhibit 34, he knew the information was confidential to Accenture⁵⁵.

44. Mr Bloomfield, never reported Mr Porter's email to his superior, Mr Munro, despite being required to do so⁵⁶. Instead, he forwarded it to his subordinate on the bid team and stated "please keep this to yourself"⁵⁷. This conduct amounted to a misuse of Accenture's confidential information and was in breach of IBM's Guidelines. Jason Cameron, Mr Bloomfield's colleague, gave evidence that the receipt of this information was inappropriate and should have been referred senior management⁵⁸. Mr Cameron conceded that the information in that email

⁵⁰ Transcript 12-48:44

⁵¹ Transcript 12-49:15

⁵² TB1 - Vol 33, Item 35.33, p 424

⁵³ Exhibit 34

⁵⁴ Transcript 12-55:50

⁵⁵ Transcript 12-56:47

⁵⁶ Transcript 12-62:40

⁵⁷ Exhibit 32

⁵⁸ Transcript 11-32: 6; 11-33: 32; and 11-37: 10

should not have been used, as it was confidential information which he expected had been improperly obtained⁵⁹.

Misuse of State Information

45. At page 4 of Exhibit 32 is an email from Cheryl Jensen (nee Bennett) of 22 August 2008 to nine IBM employees, including Mr Bloomfield. Ms Jensen, a Client Executive at IBM, states in the email that she received “intel” from CorpTech which she “thought she should channel” back to the IBM bid team for discussion. Ms Jensen suggested in evidence that by “intel” she meant information, rather than “intelligence” but that evidence can not be accepted⁶⁰.
46. Ms Jensen’s email records facts whose source can only be information confidential to the State:
 - a. Accenture is sitting at scoring of 76%⁶¹;
 - b. IBM were perceived to want to off-shore more than Accenture which is why they have a higher rating at this time⁶²;
 - c. Logica was not considered by CorpTech to be bidding at the time⁶³.
47. Ms Jensen breached equitable obligations of confidence, as well as the IBM Guidelines:
 - a. Ms Jensen accepted this information was not publically available at the time;
 - b. it was information she thought to be of worth to IBM;

⁵⁹ Transcript 11-37:1-13

⁶⁰ Transcript 15-42: 1

⁶¹ TB1 - Vol 6, Item 6.3.18, p 135

⁶² TB1 - Vol 6, Item 6.3.18, p 135

⁶³ TB1 - Vol 10, Item 11.2, p 205

- c. her distribution of it was aimed at potentially yielding for IBM a competitive edge⁶⁴;
 - d. she believed, in sending the email, that it potentially might give IBM a tactical advantage in putting together its bid, help IBM avoid any surprises in the bid process, allow it to anticipate the moves of IBM's competitors and potentially decrease IBM's response time to any queries from CorpTech⁶⁵.
48. Ms Jensen could not recall the source of the intelligence contained in her email. Yet it was, at the time, information which she obviously considered to be of great importance – sufficient to prompt her to send it to nine IBM employees, including some very senior ones. Her lack of candour invites a finding that she obtained the information improperly. Ms Jensen also stated that the information in her email was mere “gossip or innuendo”⁶⁶. That cannot be correct. The information is, in part at least, precise data.
49. We invite an inference that this information was sourced by improper means or conduct on her part.
50. Finally, Mr Bloomfield gave evidence that he believed Ms Bennett was reprimanded by her supervisor for sending the email, following a discussion between him and Mr Pagura (to whom Ms Jensen reported)⁶⁷. She, however, had no recollection of this (albeit accepting that she would clearly recall being professionally disciplined, had she been⁶⁸). Mr Bloomfield's evidence on this issue should not be accepted. It is inconsistent with his own demonstrated treatment of information confidential to Accenture. There is no reason to consider that he would have treated any differently, information which was confidential to the State, if it were thought by him to assist IBM's bid. It follows that, acting as he had, he is very unlikely to have chastised an employee

⁶⁴ Transcript 15-43:44

⁶⁵ Transcript 15-43:44

⁶⁶ Transcript 15-49:50; 15-50: 1

⁶⁷ Transcript 12-65: 38

⁶⁸ Transcript 15-49: 1

for obtaining information of a helpful kind, even if he knew it had been obtained improperly.

51. At page 5 of Exhibit 32 is an email from Joseph Sullivan of IBM to Messrs Bloomfield and Cameron of 29 August 2007 which states:

“As I told Jason this morning I have been unable to locate any of the vendor proposals on the G drive. One of the government guys who told me he had looked through them all said that they have all been removed along with quite a few other directories that were with them. So looks like we were just a little bit too late”.

52. Mr Cameron, when questioned, agreed that the statement ‘*so it looks like we were just a little bit too late*’ suggested that Mr Sullivan was looking at or seeking to find the vendor proposals from the RFP on the G-Drive⁶⁹.
53. Mr Cameron, Mr Sullivan and a number of IBM contractors were given CorpTech email addresses and access to the G-Drive during the time they were engaged to work in CorpTech. Mr Bloomfield denied instructing Mr Sullivan to conduct a search of the G-Drive⁷⁰. (Mr Sullivan currently resides in the United Kingdom and was not available to give evidence at the hearings). However, his email invites an inference that:
- a. Mr Sullivan improperly searched the CorpTech G-Drive for confidential vendor *proposals* (the plural is used, so the proposal cannot only be that of IBM); and
 - b. one of the IBM ‘*government guys*’, or public sector consultants engaged into CorpTech, of which there were many at the time, reviewed all of the confidential vendor RFP proposals.

Mr Atzeni

54. Damon Atzeni, an employee of Queensland Health, who sat on the Evaluation Panel had a series of one-on-one meetings and communications with Mr

⁶⁹ Transcript 11-27: 40

⁷⁰ Transcript 12-76: 55

Cameron of IBM throughout 2007⁷¹. Mr Atzeni gave evidence that he had a personal preference for IBM to assist with the Queensland Health payroll roll-out, rather than Accenture⁷². This, Mr Atzeni stated, was based on his concerns about the flawed Department of Housing rollout which Accenture had conducted⁷³. Mr Atzeni conceded, however, that he had a close proximity to IBM in 2007 which may have led to a perception that he should have reconsidered sitting on the Evaluation Panel of the ITO. This, however, did not occur to him at the time of the tender evaluations⁷⁴.

55. It is of no consequence that IBM obtained and used CorpTech's confidential information prior to the commencement of the ITO. The timing of its use does not detract from the inherent confidence of this information or justify its misuse by IBM.

Mr Burns exhibited partiality in favour of IBM

56. Mr Burns, at no stage, declared a conflict of interest. On the one conflict of interest form he signed in relation to the RFP evaluation, under "conflict", it stated "None"⁷⁵, despite his having worked for IBM for some considerable period and held a very senior position for some of that time.
57. A contemporaneous email of Mr Bloomfield's (to be given weight for that reason alone) shows that⁷⁶:
- a. IBM received assistance from Mr Burns which was close to "coaching" (to use his word) about how IBM should structure its bid;
 - b. IBM received an invitation from Mr Burns to attend a "dry run" for its presentation of 7 August 2007;

⁷¹ Transcript 9-72: 19; Exhibit 29, paragraphs 24-41

⁷² Transcript 9-50: 30

⁷³ Exhibit 29, paragraph 13

⁷⁴ Exhibit 29, paragraph 45; Transcript 9-73: 1 and 9-86: 1

⁷⁵ TB1 -Vol 9, Item 9.19, page 19

⁷⁶ TB1 - Vol 27, Item 25.5, page 230

- c. Mr Burns intimated to IBM that it was 'on the right track with their thinking';
 - d. Mr Burns encouraged IBM to be 'innovative'.
58. Mr Burns also revealed that CorpTech's budget for the project was \$108 million. This was done in the context of Mr Bloomfield knowing that Mr Burns was a 'long time IBMer'.
59. The timing of a meeting on 2 May 2007 between Mr Burns and IBM is important:
- a. Mr Nicholls said that discussions with a potential supplier at this stage (a time when Mr Burns was just week into a review and only a few weeks in the country) would be premature and he (Mr Burns) 'would not have been in a position to even know what CorpTech's problem was at that stage'⁷⁷;
 - b. Mr Goddard's evidence was to the same effect. He was working with Mr Burns on the same project and sharing the same office, but expressed surprise that Mr Burns was conducting these meetings (he had no knowledge of them) and could not see how they would have related to the tasks then being undertaken⁷⁸;
 - c. Mr Nicholls too said that any meeting of 2 May 2007 between Mr Burns and Mr Bloomfield was not within the scope of the five week review that Mr Burns had been engaged by Information Professionals to perform⁷⁹.

⁷⁷ Transcript 7-25: 20
⁷⁸ Transcript 7-112: 30
⁷⁹ Transcript: 7-26: 26

60. There was a marked disparity too in the information which seems to have been made available to IBM, or in the information to which IBM had access when compared the other tenderers:
- a. Mr Duke, Mr Salouk, Ms Griffiths, Mr Porter (of Accenture) and Mr Pedler (of SAP) all said they never treatment of this kind from Mr Burns⁸⁰;
 - b. the Commission interviewed and took statements from Mr Salouk, Mr Porter and Ms Griffiths of Accenture, Mr Pedler of SAP and Mr Duke of Logica⁸¹. Each (other than Ms Griffiths) was made available for oral examination. That evidence speaks for itself: none of these witnesses had any dry-run, no ‘off the record’ meetings, at no stage did Mr Burns coach or almost coach them and Mr Burns never strongly recommended to them the approach they ought to adopt in their ITO response, and he never imparted to them the generally encouraging remarks he made to Mr Bloomfield.
61. On 27 August 2007 John Swinson advised via email that Terry Burns should not meet IBM and Accenture without meeting with Logica as well⁸².
62. IBM representatives also emailed Mr Shaurin Shah, who sat on the Price sub-team on the evaluation panel, during the tender process⁸³ despite the ITO’s specification that all contact from the tenderers during the ITO be made through Maree Blakeney.

Mr Burns intervened in the ITO Evaluation Process

63. Ms Perrott said that Mr Burns’ role in the Evaluation of the ITO was to be an ‘administrator’ only, to provide administrative assistance to the process but not

⁸⁰ Exhibit 7, paragraphs 21 to 30; Exhibit 5, paragraphs 69 to 77; Exhibit 59, paragraph 19; Exhibit 51A paragraphs 9 to 19; and Exhibit 49, paragraphs 20 to 26

⁸¹ Exhibit 5; Exhibit 51A; Exhibit 51B; Exhibit 59; Exhibit 49; Exhibit 7

⁸² Transcript 4-82: 49 and TB1: Vol 10, p 211

⁸³ TB1 Vol 29, p 736; Transcript 5-16: 50

to express an opinion on the tenders or to have a scoring role⁸⁴. Mr Burns was, in effect, to be a ‘stage manager’ – setting up meetings but nothing further⁸⁵.

64. His role, if it were ever this limited, quickly became much more. He did more than advise on process, he actually interfered in the evaluation of tenders:
- a. Mr Mander said that a meeting on 17 October 2007 (in which IBM gave a presentation about WorkBrain) was a ‘game-changer’⁸⁶. This was a reference to IBM having proposed a use of WorkBrain which was unusual, namely as accommodating the awards interpretation function ordinary accomplished in SAP;
 - b. Mr Mander recalled that after the ‘game-changer’ presentation, Mr Burns asked his team to regroup and review their scores⁸⁷. He described the evaluation as being ‘flawed’⁸⁸. Mr Goddard recalls Mr Burns addressing the teams regarding rescoring and IBM went from behind to being in front after that exercise⁸⁹;
 - c. Mr Bond gave evidence that Mr Burns⁹⁰ directed Mr Bond’s team to reconsider their scores after the presentation of 17 October 2007 and Mr Burns said that he did not consider that the teams were properly considering all aspects of the proposals⁹¹;
 - d. Mr Hood, somewhat reluctantly, conceded that a re-evaluation of scores occurred at Mr Burns’ urging⁹².
 - e. Mr Lewis had no recollection of that meeting having occurred, but he accepted that the scores changed so that IBM came to have the higher

⁸⁴ Transcript 17-10: 40

⁸⁵ Transcript 17-10: 51

⁸⁶ Exhibit 25, Paragraph 77

⁸⁷ Transcript 7-51: 55

⁸⁸ Transcript 7-63: 1; Exhibit 25, paragraphs 87 and 88

⁸⁹ Transcript 8-16: 39

⁹⁰ Transcript 2 – 62: 33

⁹¹ Transcript 2 – 63:15

⁹² Transcript 3-47: 1

scoring⁹³. Mr Lewis' lack of recollection about the meeting, despite recalling these other facts (ones which accord Mr Hood's evidence), is simply not believable;

- f. a re-evaluation occurred after Mr Burns urged that consideration be given to the 'fixed price' components of IBM's proposal. Ms Orange recalled receiving direction from Mr Burns and Ms Di Carlo on the assessment of the finance component of the ITO in regards to the remaining budget⁹⁴.

- 65. It only adds to the unsatisfactory nature of this procurement process that final evaluation scores are either not signed at all, or signed by only some of the team members in the case of Functional and Business Teams⁹⁵. The evaluation was conducted with an unnecessary haste and without proper diligence.

Software selection and the proposal by IBM to use WorkBrain

- 66. IBM's proposed use of WorkBrain to fulfil the awards interpretation function was, indeed, innovative. It may have been unwise. It seems to have been, in conjunction with the effect it had on the price IBM proposed, a decisive factor in the tender evaluations. The decision, therefore, to propose the use of WorkBrain in this manner is relevant both to whether the procurement process was adequate (ie whether the proposed solutions offered by tenderers were properly scrutinised) and whether there was pressure from Mr Burns for members of the Evaluation Panel to view this aspect of IBM's tender more favourably than they otherwise would have (a point with which we have dealt in part above).
- 67. As to improper influence, Mr Burns insisted that IBM's proposed use of WorkBrain as the rostering component and awards interpretation engine was an 'innovative' solution. Mr Bond said that Mr Burns indicated that Mr Bond's team had undervalued using WorkBrain as the awards interpretation engine⁹⁶.

⁹³ Transcript 4-50: 23 and 4-53: 1

⁹⁴ Transcript 3 -80: 20

⁹⁵ Transcript 4-85: 1

⁹⁶ Transcript 2 -91: 33

68. There was no proper scrutiny of the adequacy of the proposed software:
- a. Mr Shah stated that Philip Hood sought to obtain references regarding the use of WorkBrain as the awards interpretation engine, and a presentation was given by IBM regarding the same⁹⁷, but the relevant evaluation team was still not satisfied that there had been proper benchmarking or proof of concept;
 - b. Mr Goddard recalled concerns about the integration of WorkBrain which were raised by the Evaluation Panel and Mr Goddard led a workshop to address the risks⁹⁸;
 - c. the reference sites which IBM offered did not live up to what they were represented by IBM to show:
 1. Mr Goddard stated that IBM referred CorpTech to certain 'icon' organisations in Australia such as Qantas which were thinking about using WorkBrain as the awards interpretation engine but they were not using WorkBrain in way proposed by IBM at the time⁹⁹;
 2. Mr Goddard viewed the use of WorkBrain in this way as a risk, rather than as benefit¹⁰⁰;
 3. Mr Burns viewed the WorkBrain integration as an acceleration device and did not have regard to the risks¹⁰¹;
 4. Mr Burns wanted to leave the WorkBrain integration risk as an issue to be dealt with by the contract;
 5. Mr Mander thought it a flaw in the evaluation that there was never a real-time demonstration of WorkBrain and a site visit never occurred¹⁰²;

⁹⁷ Transcript 5-26:10

⁹⁸ Transcript 8-7: 1

⁹⁹ Transcript 8-9: 4

¹⁰⁰ Transcript 8-9: 45

¹⁰¹ Transcript 14-64: 42

6. Mr Mander said that a meeting on 17 October 2007 (in which IBM gave a presentation about WorkBrain) was a 'game-changer'. This was a reference to IBM having proposed a use of WorkBrain which was unusual, namely as accommodating the awards interpretation function ordinarily accomplished in SAP.

69. Ultimately, and because the reference sites had proved unsatisfactory, the issue of WorkBrain's functionality was removed to be a contract consideration.

Probity of the Tender Process

70. The tender process lacked propriety. It did so in several respects.

71. *First*, in a traditional sense, it was improper: there was a disparity of treatment of the tenderers (including in the meetings Mr Burns afforded IBM) as mentioned above, which resulted, necessarily, in unfairness to Logica and Accenture. This disparity we have dealt with above. Parity of treatment is fundamental to fairness in a government competitive tender process.

72. *Second*, it was improper and inadequate for its lack of diligent control and organisation. By this we mean imposing and maintaining strict controls over the roles and responsibilities of those involved in the procurement process. Mr Burns was permitted to accrue to himself far greater control than he had been given initially and far more than it was appropriate for an outsider to have, and one who had no real understanding it seems of the need for strict discipline on himself in his dealings with those conducting the evaluation.

73. *Third*, it was improper and inadequate because there was a lack of clarity - confusion even - about material components of the procurement arrangements:
 - a. for example, it was thought that two probity advisors had been appointed (Messrs Stone and Swinson). Neither in fact had been so

¹⁰² Transcript 7-63: 1; Exhibit 25, paragraphs 87 and 88

appointed or understood themselves to have that role¹⁰³. This is despite the CorpTech's "Significant Purchase Plan"¹⁰⁴ (wrongly) having recorded that "Mr Swinson will continue to provide support to the ... team to monitor, advise and report on the probity of the procurement processes ...". Mr Swinson himself denied having a probity reporting role¹⁰⁵;

- b. Ms Blakeney who was in several respects in control of the tender evaluation process, (and as head of the Legal & Procurement Team) believed John Swinson to be the probity advisor¹⁰⁶;
- c. Mr Goddard believed that probity was being run by someone from the Treasury Legal Services Unit (but that was clearly not so)¹⁰⁷.

74. *Finally*, there were elementary oversights, such as there apparently being no conflict of interest register kept¹⁰⁸ (or which could not be found - a problem in itself that it was not, if it existed, maintained for later reference) and forms signed for the evaluation panel.

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26 April 2013

¹⁰³ Transcript 4-83: 1; 4-84:48 and 8-87: 23
¹⁰⁴ TB1 - Vol 22, Item 22, p 1
¹⁰⁵ Transcript 8-89: 47
¹⁰⁶ Transcript 4-83: 2
¹⁰⁷ Transcript 8-17: 17
¹⁰⁸ Transcript 4-81: 39

