Ombudsman
New South Wales

Investigation into the procurement of an acting executive director at the former NSW Department of Planning and Environment

A special report under section 31 of the Ombudsman Act 1974

19 October 2021

ISBN: 978-1-925885-88-0

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone: (02) 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524

Website: ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au

ABN 76 325 886 267
Level 24, 580 George Street, Sydney NSW 2000
T 02 9286 1000 | **F** 02 9283 2911
Tollfree 1800 451 524
www.ombo.nsw.gov.au

Ombudsman
New South Wales

The Hon Matthew Mason-Cox MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Pursuant to section 31 of the *Ombudsman Act 1974*, I am providing you with a report titled *Investigation into the procurement of an acting executive director at the former NSW Department of Planning and Environment – a special report under section 31 of the Ombudsman Act 1974.*

I draw your attention to the provisions of s 31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make the report public forthwith.

Yours sincerely

Paul Miller
NSW Ombudsman

19 October 2021

Contents

Foreword

My office recently finalised an investigation that examined the conduct of the former Department of Planning and Environment (**DPE**) in procuring the services of a contractor to 'act in' a vacant senior executive role for a period of 11 months.

I have decided that the matters examined in the investigation, and the findings and recommendations made as a result, raise issues of public interest warranting a special report being presented to the Parliament under section 31 of the *Ombudsman Act 1974*. A report of the investigation is attached.

In the report, the name of the contractor has been omitted, as too have other identifying details as far as practicable. It is important to note that the investigation examined the conduct of DPE. We make no adverse comment about any actions of the contractor or the quality of the services they provided.

The Department of Planning, Industry and Environment (**DPIE**), which has taken over the functions of the former DPE, has agreed to implement all of the recommendations in the report.

The investigation

When government departments procure goods and services, they are spending public funds. For this reason, procurement must demonstrate value for money and be conducted in an ethical and transparent manner.

Procurement legislation and other safeguards (such as the NSW Procurement Board's policies and directions) are in place to prevent waste or misuse of public funds and corruption. For example, the NSW Government Procurement Policy Framework mandates that government departments must use whole of government contracts and specified pre-qualification schemes to purchase goods and services, and keep appropriate records of procurement planning, management and decision making.

In the matter we investigated, DPE had engaged the services of a contractor (through a company associated with the contractor) after a vacancy arose in a Band 2 senior executive role.

DPE engaged the contractor's services initially for 6 months under 'emergency procurement' provisions in the *Public Works and Procurement Regulation 2014*. The fact the procurement was ostensibly undertaken as an emergency procurement meant that some of the usual safeguards set out in procurement legislation and Procurement Board policies and directions did not apply.

DPE paid the contractor's company substantially more than a person employed in the role under the *Government Sector Employment Act 2013* (**GSE Act**) would have been entitled to.

Following the initial 6 month period, the engagement was extended for approximately 5 months. This was achieved by interposing a pre-qualified executive recruitment firm between the original company (for whom the contractor worked) and DPE. DPE then contracted with the executive recruitment firm for the services of the contractor as contingent labour hire. This arrangement added additional cost to the previous arrangement.

The cost to DPE for the duration of the engagement was $341,360 (incl. GST) – equivalent to $390,857 per annum. A full-time role at the same band employed under the GSE Act had an allowable salary level of between $261,450 and $328,899 per annum.

We have made findings of wrong conduct by DPE under section 26 of the Ombudsman Act, which are set out in the attached report.

Broader systemic questions

In NSW, the use of contractors and contingent labour hire in the public sector has increased significantly in the last decade from $503 million in 2011–12 to $1.38 billion in 2020–2021.[1]

The Public Service Commission's Contingent Workforce Management Guidelines (the **PSC Guidelines**) emphasise that contingent labour hire should only be used as a short-term solution and should not be engaged on an ongoing basis without a re-evaluation of market conditions, or to avoid undertaking recruitment action.

The guidelines are silent about the engagement of contractors who are not engaged as contingent labour hire.

My investigation raises potentially broader systemic issues for the public sector regarding the use of both contingent labour and other contractors to effectively fill employment roles, especially senior management roles, which would normally need to be filled following a competitive merit-based recruitment under the provisions of the GSE Act.

One of those concerns stems from the fact that contractors and contingent workers (who are not employees of the agency itself) generally cannot be delegated functions under the GSE Act or the Government Sector Finance Act 2018 (**GSF Act**). This means they legally cannot make decisions that would be a routine part of many senior roles, including certain decisions about staffing or spending.

Despite that inability to wield delegated power, the PSC Guidelines suggest that GSE Act roles can be assigned to contingent labour hire workers, as long as the risk of the individual being misrepresented as an actual employee of the agency is minimised. The guidelines state that the engagement period should be monitored because long term engagements may 'exacerbate the risk of lack of clarity about the relationship with the worker.'

However, the PSC Guidelines do not provide guidance on whether it is appropriate for contingent labour hire workers to use the title associated with a GSE Act role – that is, whether they should be held out (internally or externally) as occupying or 'acting in' a particular employment role. Allowing that to happen would seem to heighten the risk of a misunderstanding as to whether they are performing all functions of the role, including functions they cannot legally exercise because those functions require a valid delegation. It would also seem to increase the risk that those contingent workers might purport to exercise such functions.

This risk appears greatest for those who may be held out as acting in executive roles, which would ordinarily have significant staff and financial management responsibilities.

The guidelines do not address the separate question of whether any other form of contractor arrangements (ie, other than a contingent labour arrangement) can and should ever result in a contractor 'acting in' a GSE Act role. As with contingent workers, such contractors are not permitted to exercise delegated functions under the GSE Act or GSF Act.

We have discussed this matter with the Public Service Commissioner. The Commissioner has agreed to consider the issues raised in the report and whether any further action is required.

[1] NSW Treasury, *Contingent Workforce Proactive Release of Information,* available at FY2021-SCM0007-Proactive-Release-of-Information-July-2020-to-June-2021.pdf (nsw.gov.au)

1. Executive summary

This report, made under s 31 of the *Ombudsman Act 1974*, sets out the findings and recommendations of an investigation by the NSW Ombudsman into the conduct of the former NSW Department of Planning and Environment (**DPE**). In preparing this report we have considered submissions from the Department of Planning, Industry and Environment (**DPIE**) and the contractor involved (referred to in this report as '**C**') obtained during the procedural fairness stage of the investigation.

References to the department

In July 2019, machinery of government changes resulted in the creation of a new department known as the Department of Planning, Industry and Environment. DPIE comprises the former DPE and the former Department of Industry (**DoI**). This report examines conduct of DPE that occurred prior to the change. Recommendations to improve practices, however, are directed at DPIE as it is the agency that continues the functions of the former DPE.

In this report, 'DPE' refers to the department prior to July 2019, and references to 'DPIE' generally refer to the department from July 2019 onwards.

1.1 Complaint

Media and ICAC enquiries

In the first week of June 2018, a media outlet contacted DPE with a number of questions about the engagement of C's services as an acting executive director, after having received information from an unnamed source. The media outlet advised DPE that a copy of the material that it had received had also been sent to the NSW Independent Commission Against Corruption (the **ICAC**).

On 14 June 2018, DPE emailed the ICAC about the contact from the media outlet. On 2 July 2018, the ICAC sent DPE a letter asking questions about the engagement of C's services.

Having received DPE's response to those questions, the ICAC decided to take no further action.

Disclosures to us from DPE staff

In March 2019, 2 former senior executive service employees of DPE complained to us about the department allegedly engaging the services of an external contractor, 'C', to perform the role of Executive Director, Governance and Performance without a competitive selection process.

They also said DPE had split up the value of the contracts (known as 'order-splitting') for that engagement to avoid legal limits imposed on purchasing services and had failed to publish details of the contract as required by law. After liaising with the ICAC, we commenced this investigation.

1.2 Key facts and conclusions

C provided services ostensibly in the role of DPE's acting Executive Director, Governance and Performance for 10.5 months, from 16 October 2017 to 2 September 2018.

DPE did not appoint C through an employment contract in that or any other role at DPE. Nor did DPE enter into any contract with C personally.[2]

Rather, DPE entered into a contract with a company that employed C ('**Company A**'). According to Australian Securities & Investment Commission records Company A has one director, C, and 2 shareholders – one of whom is C.

C's services were later extended by DPE entering into a contract with a contingent labour hire firm (the **labour hire firm**), which in turn entered into a contract with Company A, which employed C.

By obtaining the services of C in this way, the employment provisions of the GSE Act did not apply, as the contract was for a service from a company rather than a GSE Act employment contract with an individual.

DPE used 'emergency procurement' provisions to engage Company A. However, filling the role of acting executive director was not an emergency – there was no threat to public health and safety or serious legal or financial risk, and the departure of the previous executive director was not sudden or unforeseen.

The use of emergency procurement provisions meant that the Performance and Management Services (**PMS**) pre-qualification scheme and its built-in safeguards did not apply – such as the dollar limits imposed on appointing base level suppliers. If emergency procurement provisions applied then DPE was also exempt from obligations that normally apply to government agencies when undertaking procurement, such as abiding by the policies and directions of the NSW Procurement Board (**Procurement Board**). The total value of the contracts in this case, according to DPE's procurement records, was $167,696 – over 3 times the limit for base level suppliers, and over 2 times the limit for flow-on engagement of base level suppliers.

DPE did not notify the NSW Procurement Board that an emergency procurement had been authorised, despite being legally required to do so.

In our view, DPE's record keeping was deficient. It did not properly document key decisions – including why emergency procurement provisions were used and why it continued emergency arrangements after an initial 12-week period.

It also did not record why it decided to extend the engagement of C's services for another 5 months and why it did this by contracting with a labour hire firm. Engaging C's services through the labour hire firm involved an increased cost of around $170 per day.

Questions were raised about this matter with DPE by a media outlet and the ICAC. Some of the information DPE provided in response to those enquiries was not accurate.

[2] For this reason, in their submissions to us C objected to the use of the term 'engaged' with respect to themself. They noted, correctly, that DPE had contracted with Company A (the corporate entity) and not with C (the individual). Nevertheless, in its submissions to us, DPIE repeatedly referred to DPE having 'engaged C'. To address C's concern, aside from where we are directly quoting DPIE, we have referred in this report to the engagement of the relevant entity or to the engagement of C's services, rather than the engagement of C.

2. Findings and recommendations

2.1 Ombudsman's findings

Based on the available evidence, my findings are that, under ss 26(1)(a), (b) and (g) of the *Ombudsman Act 1974*, DPE's conduct was contrary to law or unreasonable, unjust, oppressive or improperly discriminatory, or otherwise wrong in the following ways:

1. DPE acted unreasonably in using the emergency procurement provisions to engage Company A, both under the initial contract from 16 October 2017 and its extension from 25 January 2018.
2. DPE acted contrary to law by failing to report to the NSW Procurement Board on the use of emergency procurement provisions in engaging Company A.
3. DPE acted unreasonably by failing to keep full and accurate records of these procurement activities and decisions, in breach of the NSW Procurement Policy Framework.
4. DPE acted unreasonably in extending the engagement of C's services through the labour hire firm, in circumstances where it could not demonstrate that doing so constituted value for money, including by comparison with alternative options for filling the executive director role.
5. DPE was wrong to provide inaccurate information to the ICAC and the media about the engagement of C's services.

Note: the meaning of 'unreasonable'

In its response to our statement of provisional findings and recommendations, DPIE submitted that:

> unreasonable conduct is conduct that no reasonable person would have carried out. In this case, that the arrangement entirely lacks justification or intelligibility, or is arbitrary, capricious or lacking common sense (*Minister for Immigration and Citizenship v Li (2013) 249 CLR 332).* We do not accept that the facts establish the decision was unreasonable.

DPIE's submission is based on a misconception that the term 'unreasonable' in s 26(1)(b) of the Ombudsman Act has the same meaning it bears in administrative law when there is judicial review of the exercise of an administrative discretion.

That is not the case. The term 'unreasonable' in the Ombudsman Act bears its ordinary or dictionary meaning, and that is how it is used in the above findings.

2.2 Recommendations

Under ss 26(2)(a) and (e) of the *Ombudsman Act 1974*, I recommend that DPIE:

1. Retrospectively report the emergency procurement of Company A to the NSW Procurement Board.
2. Provide the Ombudsman with a copy of its updated procurement guidelines, referenced in response to our statement of provisional findings and recommendations, when they are complete.
3. Provide the Ombudsman with a copy of the internal audit that it has conducted of procurement, referred to in the response to our statement of provisional findings and recommendations.
4. Advise us of the steps that it intends to take to address any issues identified in that internal audit.

DPIE has agreed to implement all of the recommendations.

3. Key background

Approval of Company A as a base level supplier on the NSW Government pre-qualification scheme

Company A was incorporated in April 2016. The company was thereafter approved as a NSW Government provider at 'base level' on the government's PMS pre-qualification scheme (previously known as the Easy Access Registration List (**EARL**)). Government departments can use this scheme to hire contractors to provide services up to a value of $50,000 without going through a tender process.

Vacancy in the role of executive director

The role of Executive Director, Governance and Performance was a 'band 2' public sector senior executive role under the GSE Act.

C's predecessor in the role (referred to in this report as '**B**') secured the role in December 2016 through an externally advertised competitive recruitment process. Immediately prior to B's appointment, the role had been substantively vacant and was occupied by a DPE staff member in an acting capacity.

B's time in the role ended on 3 October 2017.

Engagement of Company A for the services of C as 'acting Executive Director'

On 9 October 2017, C (who had until 25 September 2017 been working for DPE as a consultant) submitted an expression of interest to a DPE deputy secretary to act in the role of Executive Director, Governance and Performance for a period of 12 weeks from Monday 16 October 2017 until January 2018. The expression of interest included C's curriculum vitae and a proposal to act in the role full time.

DPE did not advertise a request for expressions of interest for the role. C's proposal stated they were available to act 'under the terms and conditions of the Prequalification Scheme' at a daily rate of $1,760, and that '…the engagement would conclude on Friday 19 January 2018 with an upper limit fee of $105,600.'

C filled in the role of DPE's acting Executive Director, Governance and Performance for 10.5 months, from 16 October 2017 to 2 September 2018.

Manner of engagement

The engagement was initially entered into the DPE internal procurement system as a consultancy.

On 16 October 2017, the Chief Financial and Operating Officer (**CFOO**) entered the following comment on the procurement system: 'Please correct category as contractor. This is not a consultancy and not a fee for service. This is Interim Executive.'

On the following day, the engagement was re-entered as an 'emergency procurement'. The counterparty to the emergency procurement was Company A.

Extensions of engagement

On 25 January 2018, a variation of the purchase order was raised to the value of $73,920, extending C's appointment as executive director to 30 March 2018. The CFOO approved the variation on 14 February 2018.

On 16 February 2018, the awarding of the contract that engaged Company A was published on www.tenders.nsw.gov.au in line with the requirement set out in the *Government Information Public*

Access Act 2009 for disclosure of contracts over $150,000. The disclosed value of the contract was $179,520 (as noted below, payments actually made under the contract would total $167,696.65).

Continuing the engagement as contingent labour through a labour hire firm

On 29 March 2018, a new job was posted on DPE's contractor management system, Fieldglass. The job's start date was 3 April 2018, and the end date was 6 September 2018. The description stated that the job was 'pre-identified C PR $1700 per day'.

From 2 April 2018 until 2 September 2018, payments were made to a labour hire firm for C to act in the role of Executive Director as contingent labour.

Cost of services

The total value of payments made by DPE for C's services, including GST, were:

(a) to Company A for the period from 16 October 2017 to 1 April 2018, $167,696.65.

(b) to the labour hire firm for the period from 2 April 2018 to 2 September 2018, $173,663.89.

Contact from a media outlet regarding C and referral to the ICAC

In the first week of June 2018, a media outlet contacted DPE with questions about the engagement of C's services. The media outlet advised DPE that a copy of material that had been provided to them had also been provided to the ICAC. DPIE provided us with a document summarising DPE's responses to the questions raised by the media outlet.

On 14 June 2018, DPE's Group General Counsel emailed the ICAC about the contact from the media outlet, attaching a copy of the document setting out the questions from the outlet and the responses provided by DPE. On 2 July 2018, the ICAC sent a letter to the general counsel asking a number of questions about the engagement of C's services. On 19 July, the general counsel responded to those questions. The relevant parts of the general counsel's response are set out below at **section 4.6**.

Following receipt of the response from the general counsel, the ICAC wrote to DPE on 10 September 2018, advising that it had decided to take no further action.

4. Conclusions on key issues

4.1 Was engaging C's services an 'emergency' procurement?

Conclusion

The need to engage an external contractor to fill the vacant role of Executive Director, Governance and Performance did not justify an 'emergency' procurement.

There was no emergency – the departure of the incumbent was not sudden or unforeseen. Even if there had been an emergency initially, the 'immediate needs' had passed when DPE extended its engagement of C's services.

There was no 'emergency'

In our view, the need to engage an external contractor to fill the vacant executive director role did not constitute a relevant 'emergency' at any time.

The term 'emergency' is not defined in clause 4 of the *Public Works and Procurement Regulation 2019* which provides for 'procurement for emergencies'. The ICAC publication, Direct Negotiations – Guidelines for managing risks in direct negotiations, states the following about emergency circumstances:

> In situations where a delay would threaten public health and safety, damage the environment or create a serious legal or financial risk to the agency or the government, direct negotiations may be warranted. For example, if a critical supplier unexpectedly fails to deliver goods and services, direct negotiations with an alternative supplier may be necessary. Poor planning or looming deadlines do not constitute emergency circumstances.[3]

The DPE procurement manual[4] defines 'emergency/special case procurement' as:

> [P]rocurement of goods or services that cannot be achieved through normal processes.
>
> Emergency/special case procurement allows the requesting officer, in collaboration with the Chief Procurement Officer, to restrict the quotation/tendering process to certain organisation(s) when:
>
> - a need is too urgent to call for tenders;
> - there is a need for confidentiality;
> - there is an existing contract for a specific (and related) need; or
> - there are fewer than three organisations in the market that can meet the procurement requirements.

More recently, in response to the COVID-19 pandemic, the Procurement Board has published guidance around the emergency procurement provisions. The guidance states:

- If the situation is unforeseen or sudden and requires an urgent response (e.g. current COVID-19 situation) it qualifies as an emergency.
- You can only procure what is necessary to meet the immediate needs of the emergency.
- You don't need to comply with Procurement Board Directions or policies, including the enforceable procurement provisions.

[3] Available at https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications.

[4] DPE Procurement Policy, dated March 2016.

- You don't have to demonstrate value for money, but you must always use government resources efficiently, effectively and economically.
- Keep records! You should record all decisions and approvals including the justification for the emergency procurement. You must report every emergency procurement authorisation to the Procurement Board and disclose contracts ≥$150,000 on eTendering.[5]

As explained further below, our view is that the engagement of C's services did not satisfy any of these guidelines.

The departure of the incumbent was not sudden or unforeseen

C's predecessor in the role of executive director, B, secured the role in December 2016 after an externally advertised recruitment round.

We obtained information from DPIE about the circumstances of B's employment coming to an end, which resulted in the role becoming vacant. We have not investigated those circumstances and otherwise make no comment about them. However, it is apparent from that information that the vacancy, when it occurred, was not sudden or unforeseen.

Moreover, if the role was considered critical and unable to be left vacant for any significant period of time, it is not clear why it could not have been advertised for recruitment under the GSE Act, immediately following B's departure.

B's time in the role ended on 3 October 2017, and C commenced in the role on 16 October 2017.

Even if there had been an emergency, any 'immediate needs' had passed by the time of the extension

Following an initial 12-week engagement of Company A, DPE extended the engagement for another 3 months – again as an 'emergency procurement.' In total, the 'emergency' lasted 6 months.

DPE again took no steps during that time to advertise to fill the vacant executive director role in accordance with the GSE Act.

In its response to questions from the ICAC, DPE explained the further period of the emergency engagement as follows:

> The intention was that [C] would be engaged for an interim period to allow a reassessment of the governance role (both as part of a then current organisational assessment and to explore structural options following [B's] departure) and to allow a recruitment process to be conducted.
>
> 3 months is the most common initial term of contract for an interim executive, at least in the Department's practice. Depending on how events develop the term of interim appointment may later be extended to 6 or 12 months.
>
> The permanent role of ED Governance and Performance was intended to be advertised when the scope and nature of the role was clear. The Department at the time was assessing alternative structural possibilities, with the assistance of an external consultant, and this included possible changes to the scope and shape of and reporting line for the Governance function. While the review was underway (and until the future of the Governance role was clear) it would have been imprudent to recruit to the role on a permanent basis. These factors resulted in [C's] engagement being extended beyond the initial 3-month term.
>
> The outcome of the review is now being put into effect and applicants for the permanent Executive Director Governance role ([C] did not apply) are being assessed.

[5] 'COVID-19 emergency procurement', NSW Government https://buy.nsw.gov.au/buyer-guidance/covid-19-emergency-procurement.

DPIE did not produce any contemporaneous records that showed why DPE decided it was appropriate to extend the period of the 'emergency' after the initial 3 months.

DPIE also did not produce any contemporaneous documents that showed that DPE was considering or reviewing the role of the Executive Director, Governance and Performance, or any documents that showed the outcome of that review.

DPIE advised us that the role of executive director was eventually advertised externally on 6 June 2018 and that it was filled on 22 October 2018.

Even if there had initially been justification for triggering an 'emergency procurement' in October 2017 (which, in our view, there was not), there was no justification for using the emergency provisions to extend the engagement beyond the initial 3 months.

4.2 What was the effect of using the emergency procurement provisions?

Conclusion

By using emergency procurement provisions, DPE was able to avoid the limitations inherent in the Performance and Management Services pre-qualification scheme. It was also exempted from the requirements set out in s 176 of the *Public Works and Procurement Act 1912* for the period of the emergency procurement.

The requirements of the PMS Scheme did not apply

In July 2012, the Department of Finance, Services and Innovation (**DFSI**) established the Easy Access Registration List (**EARL**) to enable applicants to register as suppliers for the provision of low-risk performance and management services valued at up to $50,000. In 2018, the EARL scheme rules were withdrawn and the EARL classification was renamed 'base level qualification'.

Company A was listed on the EARL Scheme and then became a base level supplier under the PMS Scheme. The scheme guidelines published by NSW Treasury state:

> Where the estimated cost of a project is less than or equal to $50,000 excluding GST, an engagement can be made directly from the Scheme by inviting one written quotation from a supplier with base level qualification under the Scheme.
>
> Engagements of Base Suppliers should be undertaken for the provision of services that do not expose Agencies to a high-level of risk, including the risk of exceeding an engagement cost of $50,000 excluding GST. Agencies should use their discretion and consider risk when determining the suitability of engaging a Base Level supplier for work, as these Suppliers have not been assessed as rigorously as Suppliers with Full Prequalification.

The value of the contract with Company A exceeded $50,000

The proposal C put forward to perform (under contract) the role of executive director quoted the sum of $105,600 for 3 months work. This exceeded the amount for which base level suppliers can be retained under the PMS Scheme.

As already noted, following the initial engagement of Company A, the engagement was extended for a further 3 months until the end of March 2018, also as an 'emergency procurement'. Invoices for this second period totalled $63,017.90.

The PMS scheme guidelines do allow for 'flow-on' engagements; however they state:

> Base suppliers should not be engaged for work with a value exceeding $50,000. Flow on engagements should be avoided and Agencies should seek to accurately estimate the value of work before engaging under Base. However if there is a flow on engagement, the total payable to the Base Supplier is not to exceed $75,000. On reaching $75,000 (unless it is a necessary flow-on engagement) the Government Agency must seek a quote for work from another Supplier.

The total cost of the contract to DPE under the emergency procurement provisions was $167,696.65. This was over 3 times the limit for base level suppliers and over 2 times the limit for flow-on engagement of base level suppliers.

The requirements of s 176 of the *Public Works and Procurement Act 1912* did not apply

Clause 4 of the *Public Works and Procurement Regulation 2019* (**the 2019 regulation**) states that s 176 of the *Public Works and Procurement Act 1912* does not apply to emergency procurement. Section 176 sets out the obligations of government agencies in undertaking procurement, including that the agency must comply with:

- policies and directions of the procurement board
- terms of their accreditation by the procurement board
- principles of probity and fairness, and
- the requirement to obtain value for money in procurement.

DPE's use of emergency procurement provisions meant that it was not required to comply with the obligations normally imposed by s 176 of the *Public Works and Procurement Act 1912*.

4.3 Did DPE breach the law by failing to notify the Procurement Board of the 'emergency procurement'?

Conclusion

DPE breached the *Public Works and Procurement Regulation 2014* (**the 2014 regulation**) as it did not notify the NSW Procurement Board, as required by clause 4, that Company A had been engaged to provide C's services in connection with the role of acting executive director between October 2017 and March 2018 as an emergency procurement.

The law requires that emergency procurements must be reported to the Procurement Board

Clause 4 of the *Public Works and Procurement Regulation 2019* sets out the steps government agencies are required to take when undertaking procurement for emergencies. It states that procurement for emergencies must be authorised by a government agency head or another employee nominated by the agency head. It also requires that:

> (2) Every authorisation under this clause must be reported to the Board as soon as possible.

At the time that Company A was engaged by DPE in 2017, the relevant provision was clause 4 of the *Public Works and Procurement Regulation 2014.* Subclause 4(2) of the 2014 regulation was in identical terms to subclause 4(2) set out above.

DPE did not notify the Procurement Board about the procurement

We wrote to the NSW Procurement Board asking whether DPE had notified it of any emergency procurements between October 2017 and September 2018. The board advised us that it had received no notifications from DPE in this timeframe.

DPIE's submission to our statement of provisional findings and recommendations

DPIE submitted, in relation to this finding, that there was no 'corporate decision to apply the emergency procurement provisions'. It advised us that 'this designation occurred…either as a result of the operation of the automated procurement system, or through an administrative error'.

DPIE's full response was:

> The DPE, by its Chief Finance and Operating Officer (CFOO), determined that the procurement should be an "interim executive" engagement and it appears clear that the DPE's intent was to engage [C] through an interim Senior Executive Band (SEB) contract. The arrangement then appears, without DPE making a formal decision or allocation, to have been logged in its procurement system as "emergency or special purpose procurement". Importantly there is no indication that the emergency procurement provisions were actually invoked at any time during the procurement.
>
> This may go some way to explaining why there was no notification to the Procurement Board – the Department did not intend to use the emergency procurement provisions, and did not do so.
>
> Better record keeping, or clearer designation in the procurement system, may have assisted in avoiding this issue, or at least in identifying and rectifying it earlier (see record keeping point below).

> A review of the DPE Procurement System (MyProcure) shows that there is a drop down field titled "Procurement Sub-Category".
>
> When this field is expanded it displays seven options with the sixth option being "Emergency or Special Case Procurement – subject to Secretary or CFOO approval".
>
> At the time, DPE procurement practices, due to budget constraints, were that all procurement required the approval of the Secretary or CFOO. Therefore, one explanation could be that the sixth category was selected within the system to satisfy that requirement.

It is difficult to understand DPIE's submission.

DPIE's claim seems to be that the reason it has not breached the law in failing to report an emergency procurement is because DPE did not intend for C to be engaged by way of an emergency procurement.

DPIE says the intention was rather to engage C's services as an 'interim executive' and 'through an interim Senior Executive Band (**SEB**) contract'.

If by this DPE means that it intended to engage (and thought it was engaging) C on a temporary GSE Act employment contract, then larger questions arise. Why was the engagement made without following any GSE Act recruitment processes? Why did DPE pay Company A instead of paying C through the payroll system? Why did it pay so much more than would have been payable by way of remuneration under a SEB contract? Why did it not provide for taxation and superannuation requirements?

If, on the other hand, DPE is simply saying that the procurement was a procurement (of a contractor), but not an **emergency** procurement then, again, larger questions arise. Why did the procurement exceed the permissible contract value for base level suppliers? Why were multiple quotes from prospective contractors not obtained, either initially or when the engagement was extended?

In either case, if DPIE's submission were to be accepted and we concluded that DPE had not sought to use the emergency procurement pathway, then the potential unlawful conduct involved would be at least as significant as any failure to notify the Procurement Board of an emergency procurement. It may be fortunate for DPIE that its submission in this regard cannot be accepted.

DPIE has not provided cogent evidence to support its assertion. It simply states that 'the DPE's intent was to engage C through an interim Senior Executive Band (SEB) contract', and that the engagement was entered as an emergency procurement due to an administrative error. However, the documentation provided to us by DPIE does not support this explanation.

On 17 October 2017, the entry in DPE's My Procure system was returned by the CFOO. The CFOO commented 'Please correct category as contractor. This is not a consultancy and not a fee for service, this is Interim Executive'.

Following this, the procurement was re-entered as an emergency procurement. On 17 October 2017, the HR Project Lead, Executive Services, Culture and Development emailed the Executive Coordinator to the Deputy Secretary about the CFOO's comment. The email stated:

> Hi [executive coordinator], [redacted] from procurement put it in. [Redacted] is going to resend to [redacted] with a comment that this is a Special emergency backfill.

Records provided to us by DPIE show that the purchase order was then endorsed by the Chief Procurement Officer, an executive director, the Deputy Secretary and the CFOO. None of these staff identified that there was any error in the entry, including the CFOO whose earlier comment had suggested that they thought the arrangement appeared to be, or perhaps should have been, an interim executive appointment.

In January 2018, a request for variation to the purchase order was raised in DPE's procurement system. The extract from DPE's procurement system showing this variation was provided to us by DPIE. The extract clearly shows that the procurement category is 'professional services' and the procurement subcategory is 'emergency or special case procurement', which, as DPIE advised, is a drop-down field. However, under this drop-down field there is another field which notes the 'procurement type'. This appears to be a free text field and the entry is 'special case procurement.'

Under this field there are several other free text fields, including one which is titled 'emergency/special case motivation - clearly detail motivation for special case procurement'. This field was filled out as follows:

> The role requires extensive experience and a wide level of expertise across government. The role requires immediate fulfilment to maintain governance and probity oversight across the agency. This is a high profile area of responsibility.

Further down, there is a field which requires the person completing the entry to 'outline any extenuating circumstances to substantiate the special case.' This was also filled out, albeit stating only that 'an urgent requirement exists to fill this role urgently.'

The entries in the procurement system described above support the view that there was an intention to use the emergency provisions in this case, rather than a data entry error.

That the engagement of C's services was structured as an emergency procurement of a contractor is also consistent with the clear understanding that C demonstrated in their submission to us. C shows no doubt that they were **not** engaged by DPE as an interim executive under a standard SEB contract; indeed they were at pains to point out that they (personally) had not been engaged by DPE at all.[6]

[6] See footnote 2.

4.4 Did DPE breach NSW procurement policies by failing to keep adequate records?

Conclusion

DPE breached NSW procurement policies when it failed to keep adequate records of its decision-making around the hiring and continued engagement of C's services.

The NSW procurement policy and DPE procurement policy require that full and accurate records be kept

In relation to record keeping in procurement, the NSW Procurement Board website states:

1. You must keep full and accurate records.
2. Doing so is a legal obligation but will also help you answer any complaints or requests for public information.
3. You need to keep records of meetings, project documents, working papers and emails.
4. The government owns these records, not you.

DPE's Procurement Policy dated 2 March 2016 requires that the department 'maintain records to a standard that would allow an independent review to verify whether the policy has been followed'.

DPE's Procurement Governance Manual (dated 17 May 2017) states:[7]

> It is important that the procurement process is as transparent as possible, so that all stakeholders have confidence in the outcomes.
>
> Transparency in procurement is achieved by:
>
> - establishing and documenting selection criteria in tender documentation
> - assessing tenders consistently using predetermined evaluation methodologies established before the receipt of tenders (preferably before inviting tenders)
> - documenting the evaluation and selection processes
> - maintaining records of the process followed, including notes of meetings, decisions made, the reasons for those decisions
> - segregating the approval of expenditure and certification / receiving of goods, services or works undertaken by different officers.

As we explain further below, our conclusion is that DPE did not adhere to these recordkeeping requirements.

DPE did not keep adequate records to explain C's ongoing appointment

We issued 2 'notices to produce' to DPIE under s 18 of the *Ombudsman Act 1974*. The first requested copies of any documents held by DPIE relating to the engagement of C's services (either personally or through Company A) to provide services to DPE. The notice specified that it included any contracts of engagement, internal and external communications relating to the engagement of C's services, and any relevant business case or related file notes.

The second s 18 notice requested documents relating to the engagement of the labour hire firm for the services of C.

[7] At section 5.1.4: Transparency.

We did not receive documents from DPIE that recorded any of the following information:

- the meeting that took place in early October 2017 between C, the Executive Director, Executive Development & Services, and a deputy secretary to discuss the opportunity to act in the role of Executive Director
- any appraisal by that deputy secretary of C's expression of interest and suitability for the role of executive director
- why it was considered necessary to engage C's services as a 'special case' or emergency procurement – that is, why it was considered necessary that the role of executive director be filled immediately after the departure of the former executive director, and why it was considered necessary to do this by engaging a contractor rather than a GSE Act term appointment
- why it was appropriate to continue to retain C's services as an emergency procurement between 19 January 2018 and 31 March 2018
- any assessment of the costs and benefits of continuing to retain C's services for the role of acting executive director rather than advertising the role
- why it decided to engage C's services as contingent labour through a labour hire firm from March 2018 to September 2018 at a higher cost, rather than continuing the existing arrangement under which those services were engaged through Company A
- any assessment of the costs and benefit of retaining C's services by way of contingent labour hire rather than advertising the role externally
- any assessment or review of C's performance in the performance of services as acting executive director.

DPIE's response

DPIE noted in its response to the statement of provisional findings and recommendations, that it agreed that records could be improved. DPIE says that it now has a records management team who are focused on improving records management across the department.

4.5 Was extending the engagement value for money?

Conclusion

DPE engaged C's services through a labour hire firm from April 2018 for a further period of 5 months as contingent labour. This was inconsistent with NSW Government procurement objectives and DPE procurement policy, as it did not demonstrate value for money.

NSW Government and DPE procurement policy require that agencies' engagements represent value for money

The NSW Government Procurement Policy Framework for NSW government agencies, issued by the Procurement Board in July 2015, was the relevant policy at the time C's services were obtained. It sets out a number of key objectives for government when procuring goods and services. The first objective is value for money. The framework provides that 'the overarching consideration for government procurement is ensuring best value for money in the procurement of goods, services and construction.' It states that the following provision is mandatory:

> An agency is required to ensure it obtains value for money in relation to the procurement of goods and services (section 176 (2) Public Works and Procurement Act 1912)
>
> The overarching requirement for procurement is value for money. In most procurement activities there are at least three broad types of benefits, costs and risks which need to be considered:
>
> - up-front benefits/costs and risks
> - after-purchase benefits/costs and risks
> - benefits/costs associated with the fitness-for-purpose of the goods or services procured

DPE's Cluster Corporate Shared Services Procurement Manual (dated May 2017) states at 3.1:

> The main aim of procurement is to achieve value for money and government agencies are required to ensure they obtain value for money in the exercise of its functions in relation to the procurement of goods and services.
>
> Value for money is not always the cheapest price. When determining value for money, two key factors should be always considered: Fit for Purpose (non-financial) and Whole of Life Costs (financial).

Obtaining C's services by way of contingent labour added cost to the existing arrangement

When retained under the emergency procurement provisions, Company A was paid $1,760 per day ($1,600 plus GST). In total, the company was paid $167,696.65 for 96 days' work.

When engaging contingent labour, suppliers (such as the labour hire firm engaged in this case) charge a fee to agencies for using the personnel they provide. DPIE provided the invoices that the labour hire firm submitted for C's services as acting executive director. The total amount paid to the labour hire firm was $173,663.89 for 90 days work. This equates to $1929.60 per day – around $170 more per day than under the previous arrangement.

The engagement cost more than recruiting someone to the position

DPE paid Company A $167,696.65 (including GST) for the services of C as acting executive director between 16 October 2017 to 30 March 2018. DPE paid the labour hire firm $173,663.89 (including GST) for the services of C as acting executive director between 2 April 2018 and 2 September 2018. In total,

DPE paid $341,360.54 (including GST) for the 10.5 months that C was in the role. This equates to $390,857 per annum.

The position of executive director was at senior executive band 2 level. A full time role at this level at the time had a salary between $261,450 and $328,899. Even at the upper limit of this range, the salary for 10.5 months would have been $287,786.

DPIE's response

In its submission to us DPIE noted that a number of considerations may have weighed in favour of extending the engagement of C's services. These were, in summary, that there were changes occurring both within the Governance and Performance team and the broader DPE that required stability and continuity in the leadership role. DPIE noted that the records kept 'do not adequately detail the value for money C was providing DPE.'

This response from DPIE does not address the key point made above. DPE continued to have C undertake the role of acting executive director, even though doing so through a recruitment firm cost it more money per day than it had been paying previously. It is hard to conceive of a situation where paying more money for the same service represents value for money.

It also does not explain how incurring a contract cost equivalent to $390,857 for services to perform a GSE Act role in a band where a top salary would be $328,899 was assessed as constituting value for money, particularly in circumstances where:

a. the department had done nothing to 'test the market', for example by seeking to advertise and recruit for the role
b. C was legally incapable of performing many of the functions that a person actually employed in the executive director role would have performed.

In respect to (b), we note that a contractor or contingent worker cannot exercise any of the financial or employment-related delegations of a GSE Act role (see **section 5** for more detail). This means that, although C ostensibly held the role of acting Executive Director, Governance and Performance between October 2017 and September 2018, there were many functions of that role that they would not have been able to perform.

As noted above, Executive Director, Governance and Performance is a band 2 senior executive role. A person at this level would normally undertake a range of administrative and human resources functions that require delegated authority, including:

- dealing with unsatisfactory performance
- dealing with misconduct allegations, including suspending a person from duty
- approving the creation of roles
- employing staff and assigning them to a role
- accepting a staff member's resignation
- terminating temporary employees' employment
- approving salary and increments
- approving leave and overtime.

Band 2 senior executive roles at DPE also held a number of financial delegations during the relevant period, including:

- general delegation to expend money for the services of the Department – up to $1 million
- committing or incurring expenditure on a corporate credit card
- committing or incurring expenditure in making or approving a refund of money or reimbursement
- engaging consultants or contractors
- approving the payment of accounts.

4.6 Did DPE provide accurate information about the hiring of C to a media outlet and the ICAC?

Conclusion

Information DPE provided to a media outlet and the ICAC about the engagement of C's services was not accurate.

DPE advised the media outlet that the Executive Director, Executive Development & Services did not recommend engaging C's services

In its list of questions to DPE, the media outlet asked:

> The recommendation to engage C at the Department of Planning and Environment was made by [redacted] and occurred before a procurement process. TRUE?

DPE responded:

> In relation to the recommendation to engage C there is no corporate recollection of whether a recommendation was made or who by. [the Executive Director, Executive Development & Services] did not make any such recommendation. It is entirely possible that a recommendation was made by someone from either the legal or governance teams as the work C had done was solid.

This advice contradicts information DPE provided to the ICAC. On 19 July 2018, DPE provided a written response to the ICAC. In response to the question 'who elected to approach C for the role of acting ED Governance and Performance?' it responded:

> Following [B's time in the role ending] Deputy Secretary [redacted] considered options for individuals to act in an interim capacity. The options for the short term were limited, and [the deputy secretary] was considering a director from one of the other teams within [their] Division. As this would itself result in a need to backfill, [the deputy secretary] sought input from [redacted] in [their] role of Executive Director, Executive Development & Services.
>
> [The Executive Director, Executive Development & Services] offered the names of two people who may be worthy of consideration – [C] and [redacted], former head of corporate services at the Department of Families and Community Services who was then operating as a consultant.
>
> Deputy Secretary [redacted] chose to meet first with C as [they were] at the time providing consultancy services to the Governance Branch in relation to reviewing the Department's policies. They discussed what was needed on an interim basis and [the deputy secretary] felt that [C] would be suitable for the interim role. [The Executive Director, Executive Development & Services] was of course aware that [C] had previously worked as [redacted], and that they had been doing some work for the Governance team. [The Executive Director, Executive Development & Services] did not and does not have any social or other relationship with [C], and professional interactions between the two were and remain limited.

The advice DPE gave to the media outlet is contradicted by the advice it gave to the ICAC. It is unclear why DPE provided different information to the ICAC and the media outlet.

DPE's advice to the ICAC about the cost of engaging C's services was incorrect

In its letter dated 2 July 2018, the ICAC asked DPE to clarify one component of its advice to the media outlet. That advice was that payments to Company A while C was performing the functions of acting executive director were in line with the cost of a full-time permanent employee. It also asked how DPE

sought to ensure value for money in engaging C's services, given it did not seek quotations from any other vendors.

DPE responded to the ICAC as follows:

> Comparison Contractor Rate v Senior Executive Band 2 Salary
>
> The Department does not accept that a comparison of a full time Executive Director role should be made with C at 5 rather than 4 days. C is a highly experienced public servant who has previously worked at a higher salary band within Transport for NSW, and the work done by [C] in 4 days would be directly comparable with a more junior, less experienced person working for 5 (or indeed more) days.
>
> There are various methodologies for comparing between permanent and contractor remuneration however at its most basic a permanent employee is entitled to 20 paid leave days, 9 paid public holidays in NSW (excluding the bank holiday) and 10 personal leave days. Assuming only 5 personal leave days are used in a year the number of working days per year is determined as 216.
>
> 216 days x $1600 per day= $345,600. This amount is slightly higher but certainly comparable to the top of the relevant band, i.e. $328,899. The more appropriate – actual cost to Government - of C at 4 days per week is $276,480 per annum, toward the lower end of the relevant salary band.

4.6.1.1 The response stated that C was being paid $1,600 per day

In its response to the ICAC's questions, DPE based calculations on a daily rate of $1,600 that did not include GST. However, the actual amount being paid to Company A between 16 October and 30 March 2018 (just under half of the total time of C filled the role) was $1,760 per day. When it sent the response to the ICAC, DPE were contracting C's services by way of a contingent labour contract through the labour hire firm and the cost to DPE was $1,929.60 per day, including GST.

In its response to the ICAC, DPE advised that the ICAC had included GST in its calculations and that this should not be the case, as GST is claimed as an input tax credit. Excluding GST, the cost of C's services (engaged through Company A) during the emergency procurement period was $1,600 per day.

However, while this was the amount DPE paid Company A, the amount paid to the labour hire firm was approximately $1,736.64 (excluding GST) per day. This is a discrepancy of $136.64 per day, or $12,297.60 for the entire engagement with the labour hire firm. DPE did not mention this higher rate in its response to the ICAC.

DPE's response to the ICAC also advised that it calculated the cost of engaging C's services based on a 4-day week. However, the invoices that Company A provided to DPIE showed that between 16 October 2017 and the second week of March 2018, C was working 5 days a week. Between 16 October 2017 and 30 March 2018, C worked 96 days, with a 2-week break over Christmas. Later, when they were retained through the labour hire firm, they worked 90 days between 2 April 2018 and 2 September 2018.

DPIE's response

DPIE provided the following response to our statement of provisional findings and recommendations:

> The contention is not accepted. It does seem that inaccurate information was provided to [a media outlet], but accurate information has at all times been provided to the Commission.
>
> Media inquiries ordinarily contain limited information, often simply a subject matter or allegation, and a response is sought within a short timeframe, ordinarily a matter of hours and sometimes a day or 2. It seems that while the proposed response to [the media outlet] was circulated to the correct individuals, that an inaccuracy in the response did exist.
>
> In the process of responding to ICAC Notice – a process which affords clarity in relation to the information sought and a reasonable timeframe for response - information was obtained by the General Counsel that [the

deputy secretary's] then recollection was that [C's] name was one of the names suggested by [the Executive Director, Executive Development & Services]. This information was provided to the Commission.

DPIE's response refers only to the issue concerning whether the Executive Director, Executive Development & Services was involved in the decision to hire C.

DPIE's response did not deal with the other issue outlined above, namely that the information provided by DPE to the ICAC understated the amount that Company A was being paid per day, and also misrepresented the number of days that C had worked.

5. Systemic issues

Our investigation raises a potentially broader systemic concern, not just for DPIE but for the public sector as a whole: should a person engaged under a contract (whether directly or through an intermediary company) ever be held out, internally or externally, as filling a staff role, especially an executive role, in a public sector agency?

5.1 GSE Act roles in the public sector

The GSE Act, and the regulations and rules made under it, provide a comprehensive statutory framework for the employment of persons in senior executive (as well as non-executive) roles in the public sector.

Under the GSE Act, a 'role' may only be filled by a person who has been employed in a manner that complies with the requirements of that Act.

Some of the relevant requirements include:

- employment to ongoing roles only by externally advertised comparative assessment[8]
- employment to temporary roles of up to 12 months only following suitability assessment[9]
- employment of public service senior executives in prescribed salary grades and bands[10]
- performance management regime.[11]

5.2 Contingent labour

The practice of using contingent labour engaged through specialist labour hire companies, while not expressly provided for in the GSE Act, is also a recognised and common workforce arrangement in public sector agencies.

The NSW Public Service Commission (**PSC**) has issued guidelines on the use of such workers.[12] It notes, among other things, that:

> Agencies use contingent labour to provide capabilities that are otherwise unavailable in the agencies where:
>
> 1. there is clear and current evidence of a low supply of such capabilities in the labour market (often linked to remuneration rates above those offered for roles of equivalent work value in the public sector) and there is a short or longer term need to engage external labour
> 2. the need is so immediate that a short-term solution is needed, pending recruitment action where appropriate
> 3. there is a time limited need for additional resources or specialised knowledge and / or skill that will not be required within the ongoing workforce.

Importantly, the guidelines make it clear that contingent workers are not employees of an agency and do not hold any 'role' under the GSE Act:

> Contingent workers do not have an employment relationship with the Government or with the head of a government sector agency; they provide a service to the agency under a contract between the agency and a contingent labour supplier.

[8] Rule 20, *Government Sector Employment (General) Rules 2014*

[9] Rule 21, *Government Sector Employment (General) Rules 2014*

[10] ss 37 and 40, *Government Sector Employment Act 2013*

[11] s 67, *Government Sector Employment Act 2013*

[12] Public Service Commission, *Contingent Workforce Management Guidelines*, December 2020: available at https://www.psc.nsw.gov.au/sites/default/files/2020-12/Contingent%20workforce%20management%20guidelines%20-%202020_0.pdf

The *Government Sector Employment Act 2013* does not enable functions under that Act to be delegated to a person who is a contingent worker in an agency. Similarly, the Government Sector Finance Act 2018 (GSF Act) allows delegation to a government officer who is a person employed by a GSF Act agency or is a person prescribed by a regulation. The GSF Act does not enable the committing or incurring of expenditure to be delegated to a contingent worker unless they have been prescribed as a government officer by a regulation under the GSF Act.

If a person is engaged on a contingent labour basis in a role that would, because of the nature of the type of work involved, normally include performing delegated functions (eg approving leave requests, purchasing and invoicing), the agency will need to make arrangements for these functions to be performed by an appropriate agency employee who has a delegation to do so.

Managers and human resources need to minimise the potential risk of a contingent worker being judged as an employee of the agency by doing the following:

- ensuring the agency procures contingent labour through the approved contingent workforce pre-qualification scheme
- monitoring the engagement period of the contingent worker as long-term engagements may exacerbate the risk of lack of clarity about the relationship with the worker
- ensuring the contingent labour supplier manages all selection processes and the engagement offer process
- ensuring matters related to rates are discussed only with the contingent labour supplier
- discussing unsatisfactory performance or conduct issues with the supplier.

The current PSC guidance seems to suggest that it is acceptable to assign duties to a contingent worker that correspond to a particular GSE Act role in the agency, provided that the risk of any misperception (whether internally or externally) that the contingent worker is actually employed in that role can be avoided. Avoiding that risk is particularly important to mitigate the associated risk that the contingent worker may purport to exercise GSE Act or other statutory functions that are delegated to that role, but that cannot be exercised by a person who is not a public sector employee.

The PSC guidance does not expressly state whether or not it is appropriate for an agency to confer on a contingent worker a title that corresponds with a particular GSE Act role in the agency. However, it is noted that doing so would seem to heighten the risk that the contingent worker might be misperceived by others (and might misperceive themselves) as holding the delegated employment or financial powers of the role.

5.3 Persons engaged through contracts

What is less clear and is not addressed by any current PSC guidance, is whether it is appropriate for a person who is neither an employee nor a worker under a contingent labour hire contract to ever undertake functions of, or to be held out as filling, a GSE Act role in a public sector agency.

With regard to some of the problems raised by the situation examined in the current investigation, our preliminary view is that such a practice should not be permitted.

As with contingent workers, such contractors are not permitted to exercise functions under the GSE Act or GSF Act and representing them as the holder (even if only 'acting') of a particular GSE Act role is likely to generate a perception that they are exercising such delegated power. This risk is greater for those who are held out as occupying executive roles, which would ordinarily have significant staff and financial management responsibilities.

5.4 Suggestion that guidance be clarified

We have suggested that the PSC consider amending its guidance or issuing supplementary guidance to clarify:

- whether it is appropriate to confer a GSE Act role title on a contingent worker and, if it is, what controls may need to be put in place to address the risk that the worker will thereby be misperceived (or misperceive themselves) as having the employment and financial related delegations associated with that role
- that it is not appropriate that a consultant, contractor or any other person who is not an employee (or, subject to the dot point above, a contingent worker) should be conferred the title of, or otherwise be held out as occupying a GSE Act role even on an 'acting' or 'interim' basis.

6. Supporting information

6.1 Our investigation

In March 2019, we interviewed the 2 former senior executive staff of DPE who had made the original complaints.

In August 2019, we issued a notice of investigation to DPIE under s 16 of the *Ombudsman Act 1974*. We also sent a notice under s 18 of the Act, requiring DPIE to produce documents and provide information that was relevant to the investigation. On 18 September 2019, we received a response to the s 18 notice. On 10 February 2020, we sent a second s 18 notice requiring the provision of further documents and further information. We received the response to this notice on 26 May 2020.

We also made enquiries with the NSW Procurement Board about its role in relation to emergency procurements and the management of complaints about procurement more generally. We issued a s 18 notice to the board on 8 November 2019 and received a response on 21 November 2019.

On 16 December 2020, we provided a copy of a statement of provisional findings and recommendations to DPIE for comment, requesting a response by 21 January 2021. On 12 January 2021, DPIE requested an extension until 5 February 2021 to provide its response. We received DPIE's response on 9 February 2021.

On 18 December 2020, we provided a copy of a statement of provisional findings and recommendations to C for comment as they were mentioned in the report. We noted that the report did not make any adverse comments about C. On 19 December 2020, C provided a response.

6.2 Relevant laws and evidence relating to procurement

Emergency procurements

The Public Works and Procurement Regulation 2014

Clause 4 of the *Public Works and Procurement Regulation 2014* provides:

> **4 Procurement for emergencies**
>
> 1) A government agency head or a government agency employee nominated for the purposes of this clause by the agency head may, in any case of emergency, authorise the procurement of goods and services to a value sufficient to meet that particular emergency.
> 2) Every authorisation under this clause must be reported to the Board as soon as possible.
> 3) Section 176 of the Act does not apply in relation to the procurement of goods and services under this clause.
> 4) This clause does not authorise the procurement of goods and services in excess of those necessary to meet the immediate needs of any emergency.

The role of the NSW Procurement Board

Section 164 of the *Public Works and Procurement Act 1912* established the procurement board.

Section 171 sets out the objectives of the board:

> a) to develop and implement a Government-wide strategic approach to procurement,
> b) to ensure best value for money in the procurement of goods and services by and for government agencies,

c) to improve competition and facilitate access to Government procurement business by the private sector, especially by small and medium enterprises and regional enterprises,
d) to reduce administrative costs for government agencies associated with procurement,
e) to simplify procurement processes while ensuring probity and fairness

Section 172(1) of the Act sets out the functions of the board:

1) The Board has the following functions--
   a) to oversee the procurement of goods and services by and for government agencies,
   b) to develop and implement procurement policies,
   c) to issue directions or policies under section 175 that apply to government agencies,
   d) to monitor compliance by government agencies with the requirements of this Part (including Board directions or policies),
   e) to investigate and deal with complaints about the procurement activities of government agencies,
   f) to develop appropriate procurement and business intelligence systems for use by government agencies,
   g) to collect, analyse and publish data and statistics in relation to the procurement of goods and services by and for government agencies,
   h) such other functions as are conferred or imposed on the Board by or under this or any other Act.

The role of the NSW Procurement Board in relation to emergency procurement

Guidance provided by the NSW Procurement Board

The NSW Procurement Board advised us that the guidance to agencies about the emergency procurement provisions that applied during the relevant period was in the previous NSW Procurement Policy Framework for NSW Government Agencies, July 2015, under the heading 'Policies – Emergencies,' page 17. The Framework states:

> In an emergency situation, the agency head may authorise the procurement of goods and services to a specific value to meet that particular requirement. The authority for the agency head to act in the case of an emergency is provided in clause 4 of the Public Works and Procurement Regulation 2014
>
> It is recommended that in the event of emergency procurement the agency may also wish to:
> - take into account value for money, accountability, and probity, to the extent that they can be applied given the severity and urgency of the incident
> - consider whether to vary, or even reduce, record keeping processes.

The Procurement Board advised us the current guidance provided to agencies about the emergency procurement provisions is in the NSW Procurement Policy Framework. This provides:

- You must obtain approval from the agency head or delegate for emergency procurements. They can approve procurements to a value sufficient to meet the immediate needs of the particular emergency.
- You must report every emergency authorisation to the Procurement Board as soon as possible via nswbuy@treasury.nsw.gov.au.
- You do not have to comply with Procurement Board policies or directions, including the EPP Direction, or the terms of accreditation, for emergency procurements.
- You are encouraged to achieve value for money and comply with this Policy Framework where possible.

The policy also directs readers to the COVID-19 emergency procurement advice at https://buy.nsw.gov.au/buyer-guidance/covid-19-emergency-procurement.

Notifications made to the NSW Procurement Board during the relevant period

The Procurement Board advised that reports on emergency procurements are provided to the board for noting at the next scheduled meeting. Any actions requested by the board are to be noted in the

minutes. The board secretariat will inform the agency about any additional actions requested by the board and ask the agency to report back to the board when completed.

For the period October 2017 to September 2018, no emergency procurements were reported to the board. There were therefore no actions by the board in relation to emergency procurements for this period.

Complaints to the NSW Procurement Board

The Procurement Board has responsibility under the *Public Works and Procurement Act 1912* for managing complaints about government procurements in NSW, including tendering and contracts. Agencies have a responsibility to resolve complaints concerning their procurement actions. Complaints unresolved at the end of this process can be referred to the Procurement Board. In 2017-18 the board received one procurement complaint, about the aspects of the new Business Advisory Services Commercial Framework. The board received no complaints during 2018-19.

Recordkeeping and procurement

Current NSW Procurement Board advice regarding recordkeeping

The NSW Procurement Board has posted advice on recordkeeping on its website as follows:

> Record keeping
>
> You must keep accurate records to comply with both government policy and the law.
>
> What you need to know
>
> - You must keep full and accurate records.
> - Doing so is a legal obligation but will also help you answer any complaints or requests for public information.
> - You need to keep records of meetings, project documents, working papers and emails.
> - The government owns these records, not you.
>
> The State Records Act 1998 outlines the record management responsibilities of all public office. If you work in NSW Government, you must make and keep full and accurate records that document both your operation and administration.
>
> The Act defines a 'record' as any document or source of information you create or receive in the course of official functions.
>
> Accurate record-keeping is important in government
>
> Accurate records are your best defence against legal challenges. They can help you answer complaints, as well as public requests for information. They'll also provide a useful audit trail if any of your decisions are ever reviewed.
>
> It's essential that you always keep accurate records of how you plan and manage any procurement and how you reach your decisions.
>
> Know which records to keep
>
> According to the State Records Act 1998, you must keep records of:
>
> meetings, including details of dates and times, locations, attendees, key discussion points and decisions.
>
> project documents, including briefing notes, approvals, conditions of tenders, plans, reports and contracts should be saved in your business systems.
>
> working papers, including drafts submitted for comment, which can be valuable for explaining significant changes in planning or processes.
>
> emails and letters should be captured in your business systems as, legally, they can be requested at any time.

The government is the ultimate owner of all government records. You don't own these records, even when you create them yourself.

Your agency may also have additional requirements when it comes to making and keeping records[13].

ICAC advice regarding record keeping in procurement

The ICAC also provides advice on record keeping on its web site as follows:

Recordkeeping around procurement is particularly important for accountability, for transparency and – when it is known that records are audited and checked – as a deterrent to corrupt conduct.

The following record keeping practices should be observed by staff involved in procurement:

- determine and record weightings of evaluation criteria prior to advertising/opening a tender
- record in writing meetings and all other contact with tenderers prior to tender selection
- use a tender box that is opened in the presence of at least two officers, with a list of tenders deposited being made upon opening
- require members of tender assessment panels to declare in writing any associations with tenderers (these disclosure documents should be signed and dated by each panel member, counter-signed by the convenor and kept with the tender records)
- if alternative or non-complying tenders/offers are considered, specify the reasons in writing
- record in writing tender panel decisions and the reasons for these decisions
- communicate with all tenderers in writing.[14]

[13] NSW Procurement advice on record keeping available at https://buy.nsw.gov.au/buyer-guidance/before-you-buy/other-considerations/record-keeping

[14] ICAC advice available at https://www.icac.nsw.gov.au/prevention/corruption-prevention-advice-topics/procurement