

Submission  
No 28

**INQUIRY INTO GRANTING OF CONTRACT NUMBER  
OoS17/18-021 BY THE OFFICE OF SPORT**

**Organisation:** Office of Sport  
**Date Received:** 14 September 2021

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## SUBMISSION IN RESPONSE

### INQUIRY BY THE PUBLIC WORKS COMMITTEE INTO THE GRANTING OF CONTRACT NUMBER OOS17/18-021 BY THE OFFICE OF SPORT

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#### A. OVERVIEW

1. The NSW Legislative Council Public Works Committee (**Committee**) is conducting an inquiry (**Inquiry**) into the granting of Contract Number OoS17/18-021 (**Contract**) by the NSW Office of Sport (**OoS**). The Contract relates to an upgrade of the surfaces for Arenas 5 and 6 (**SIEC Arena Upgrade**)<sup>1</sup> at the Sydney International Equestrian Centre (**SIEC**) which was awarded to Barrie Smith Motor Sport Pty Ltd (**BSMS**) on 6 November 2017.

2. The Inquiry was established on 23 June 2021 to report on the following Terms of Reference:

*"(a) the awarding of a contract to Barrie Smith Motor Sports P/L by the Office of Sport to resurface two arenas at the Sydney International Equestrian Centre (SIEC),*

*(b) the role played by the board, CEO and members of Equestrian NSW (ENSW), Equestrian Australia and officials within the Office of Sport, in both the application for funding and the process for selection of the grant by the Office of Sport,*

<sup>1</sup> Arena 5 is also known as the Indoor Arena, while Arena 6 is the associated warmup Outdoor Arena. These terms are used throughout this Submission.

(c) the potential or otherwise for the existence of corrupt conduct and/or conflicts of interest within the Office of Sport, Barrie Smith Motor Sports P/L and ENSW, in the granting of the contract, with reference to the ICAC letter of 1 December 2020 to the Office of Sport,

(d) Office of Sport correspondence to Mr Barrie Smith showing that the original tender specifications were changed from 'importing new material and mixing onsite' at SIEC to 'relocating a surface from another site which had (already) failed' and these contaminated materials were taken from the Wallaby Hill (Robertson) property of Alex Townsend, a NSW Board member,

(e) whether successive ministers for Sport and the Office of Sport failed to report the information in paragraph (d) above to the appropriate authorities for probity investigation,

(f) the engagement of and role played by O'Connor Marsden in the examination of probity issues in regard to the granting of the contract and the failure to examine aspects prior to and following the evaluation and awarding of the contract,

(g) the granting of a peppercorn rent by the Office of Sport to Equestrian NSW for access to and usage of the SIEC site,

(h) options for rectification of any defects or complete replacement of the indoor arena surface to ensure the arena is safe for horse and rider and capable of use for high level competition, and

(i) any other related matters."

3. The OoS provides this Submission to assist the Committee with the Inquiry. The Submission is structured as follows:

- (a) **Part A:** this overview;
- (b) **Part B:** the relevant background and context, including the OoS, its procurement processes as well as its relationship with Equestrian NSW Incorporated (**ENSW**) and the SIEC;
- (c) **Part C:** the procurement process for the SIEC Arena Upgrade;
- (d) **Part D:** the project delivery of the Contract for the SIEC Arena Upgrade; and
- (e) **Part E:** the aftermath to the delivery of the Contract and the SIEC Arena Upgrade, including:
  - (i) the involvement of O'Connor Marsden & Associates Pty Limited (**OCM**) in undertaking a review of the procurement process for the SIEC Arena Upgrade (**OCM Review**) and preparing a report of its findings (**OCM Report**);
  - (ii) the involvement of the Independent Commission Against Corruption (**ICAC**); and
  - (iii) the internal OoS response.

4. The Inquiry is listed for Hearing on 29 November 2021. The OoS welcomes the opportunity to assist the Committee to undertake the Inquiry into this matter.

## B. BACKGROUND

### (a) The Office of Sport (OoS)

5. The OoS is an executive agency under Schedule 1, Part 2 of the *Government Sector Employment Act 2013* (NSW) (**GSE Act**).<sup>2</sup> The OoS was established on 1 July 2014 pursuant

<sup>2</sup> *Government Sector Employment Act 2013* (NSW).

to *Administrative Arrangements (Administrative Change - Miscellaneous Agencies) Order 2014* (NSW)<sup>3</sup> and sits within the Department of Communities and Justice (forming part of the Stronger Communities cluster).<sup>4</sup> The OoS is part of the Sport, Multiculturalism, Seniors and Veterans portfolio with the relevant Minister being The Hon. Natalie Ward, MLC.

6. The OoS is the:

*"lead NSW Government agency for sport and active recreation. The Office of Sport aims to increase the levels of physical activity of the people of NSW by providing the leadership, policies, programs, funding and infrastructure necessary to enable higher rates of participation in sport and active recreation."*<sup>5</sup>

7. The OoS is responsible for *"planning, managing and delivering high quality venues, facilities, sport development and active recreation programs, high performance sport, and sports integrity and safety."*<sup>6</sup>

8. There are four key focus areas outlined in the OoS *"Strategic Plan 2020-24"*, namely:

- (a) Participation;
- (b) Places and Spaces;
- (c) Sector Sustainability; and
- (d) Partnerships and Investment.<sup>7</sup>

9. As part of its focus on Places and Spaces, the OoS plans, coordinates and optimises sport and recreation facilities and infrastructure which are in the public's best interest as well as provide value for money and allow communities to take part in, watch or host sport and community events. This includes managing a broad range of recreation facilities and infrastructure, from community facilities, through to large international venues.<sup>8</sup>

10. The OoS works closely with 94 State Sporting Organisations (**SSOs**) and State Sporting Organisations for people with Disability (**SSODs**). SSOs and SSODs are regarded as the peak administrative and representational bodies for their respective sports in NSW. SSOs and SSODs are key partners to the OoS in the design and delivery of policy, grants design and regulation. SSOs and SSODs vary in size, are often volunteer-based and self-governing and receive funding from various sources, including the OoS (through the Organisation Support Program (**OSP**)). The OoS is responsible for formally recognising SSO and SSODs and providing funding through the Organisation Support Program. Although OoS is involved in the formal recognition of SSOs and SSODs, the OoS neither regulates nor owns these organisations. SSOs such as ENSW are also eligible for other application-based grant

<sup>3</sup> Note that the business units within the Office of Sport were, prior to 1 July 2014, part of the then Department of Education and Communities. See NSW Office of Sport, *'Annual Report 2014/15'* (31 October 2015), <[https://www.sport.nsw.gov.au/sites/default/files/2021-04/cdgs15296\\_-\\_office\\_of\\_sport\\_201415\\_annual\\_report.pdf](https://www.sport.nsw.gov.au/sites/default/files/2021-04/cdgs15296_-_office_of_sport_201415_annual_report.pdf)> (accessed on 18 August 2021) p 2.

<sup>4</sup> NSW Office of Sport, *'Annual Report 2019/2020'* (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 6.

<sup>5</sup> NSW Office of Sport, *'Annual Report 2019/2020'* (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 6.

<sup>6</sup> NSW Office of Sport, *'Agency Information Guide'* (2021), available at <<https://www.sport.nsw.gov.au/agency-information-guide>> (accessed on 6 August 2021).

<sup>7</sup> NSW Office of Sport, *'Strategic Plan: 2020 - 2024'* (February 2020), available at <[https://www.sport.nsw.gov.au/sites/default/files/2021-04/Strategic\\_Plan\\_2020-24.pdf](https://www.sport.nsw.gov.au/sites/default/files/2021-04/Strategic_Plan_2020-24.pdf)> (accessed on 18 August 2021) p 5.

<sup>8</sup> NSW Office of Sport, *'Strategic Plan: 2020 - 2024'* (February 2020), available at <[https://www.sport.nsw.gov.au/sites/default/files/2021-04/Strategic\\_Plan\\_2020-24.pdf](https://www.sport.nsw.gov.au/sites/default/files/2021-04/Strategic_Plan_2020-24.pdf)> (accessed on 18 August 2021) p 7.

programs which are competitive and assessed on merit. Providing funding and support to SSOs and SSODs allows the OoS to work towards achieving its mission of "*building active communities*" and implementing its vision of "*sport and active recreation creating healthier people, connecting communities and making a stronger NSW*".<sup>9</sup>

11. The key values of the OoS are integrity, honesty and trust, service and accountability. In all of its operations, the OoS seeks to be honest and transparent in its actions and decision making; welcomes constructive input; delivers on promises; and takes responsibility for decisions and actions.<sup>10</sup>

#### *Governance & executive structure of the OoS*

12. Prior to 2020 and at the time of the awarding of the Contract for the SIEC Arena Upgrade, the Chief Executive of the OoS was Mr Matt Miller. At the time, the OoS was comprised of four Groups, being:

- (a) Corporate Services;
- (b) Sport and Recreation Services;
- (c) Sport Infrastructure; and
- (d) Sport Development.<sup>11</sup>

13. In the 2017-2018 financial year, the Sports and Recreation Services Group was responsible for Olympic Venues Regulation (such as SIEC), while the Sport Infrastructure Group was responsible for Facilities, Strategy and Planning; Stadia Network Implementation and Asset Management.<sup>12</sup>

14. The current Chief Executive of the OoS is Ms Karen Jones. Ms Jones was initially appointed to the role in an acting capacity in April 2019 following the resignation of the preceding Chief Executive, Mr Miller. Ms Jones was formally appointed to the role in November 2019.<sup>13</sup> Since her appointment, Ms Jones has overseen a substantial restructure of the OoS, which came into effect at the start of 2020. The restructure:

*"reduced the number of Executive Directors and consolidated and brought together areas of the organisation more fitting with the newly created units of Policy and Planning and Regional Delivery. The Chief Executive's Office also took carriage of Corporate Services and HR."*<sup>14</sup>

15. From the beginning of 2020, OoS has been organised into three key Groups, which are:

<sup>9</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 6.

<sup>10</sup> NSW Office of Sport, 'Strategic Plan: 2020 - 2024' (February 2020), available at <[https://www.sport.nsw.gov.au/sites/default/files/2021-04/Strategic\\_Plan\\_2020-24.pdf](https://www.sport.nsw.gov.au/sites/default/files/2021-04/Strategic_Plan_2020-24.pdf)> (accessed on 18 August 2021) p 10.

<sup>11</sup> NSW Office of Sport, 'Annual Report 2018/2019' (2019), available at <[https://www.sport.nsw.gov.au/sites/default/files/2021-04/an2018\\_19\\_annual\\_report\\_oos\\_5.2.20.pdf](https://www.sport.nsw.gov.au/sites/default/files/2021-04/an2018_19_annual_report_oos_5.2.20.pdf)> (accessed on 31 August 2021) p 94.

<sup>12</sup> NSW Office of Sport, 'Annual Report 2017/2018' (2018), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/oos-annual-report-2017-18.pdf>> (accessed on 30 August 2021) p 102.

<sup>13</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 95.

<sup>14</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 95.

- (a) the Office of the Chief Executive, which "*provides services and support across the Office of Sport*";
  - (b) Policy and Planning, which supports NSW communities "*to access inclusive, safe and diverse sport and active recreation activities*", including by: "*[i]dentifying, planning and advocating for sport and active recreation infrastructure needs*"; and
  - (c) Regional Delivery, which involves "*[l]eading sport and active recreation in creating healthier people, connecting regional communities and making a stronger regional NSW*".<sup>15</sup>
16. Ms Celia Murphy joined the OoS in April 2020 as the Executive Director of Policy and Planning and Mr Gary Rake joined the OoS in March 2020 as the Executive Director of Regional Delivery.<sup>16</sup> Mr Rake's Regional Delivery Group is responsible for Asset Management and Operations.<sup>17</sup> The restructure (and in particular, the Chief Executive's Office taking carriage of Corporate Services, which includes Finance and Procurement business unit) has been a key step in the evolution and improvement of the OoS's internal governance structure and its oversight of program delivery.

## (b) Procurement at the OoS

### *Legislative framework for procurement by government agencies*

17. In NSW, government procurement operates within a robust legislative and policy framework, which includes a range of legislation, such as the *Public Works and Procurement Act 1912* (NSW) (**PWP Act**), and policies, such as the NSW Government Procurement Policy Framework (**Procurement Policy Framework**) issued by the NSW Procurement Board.<sup>18</sup>
18. As an "*executive agency*" of the Department of Communities and Justice under Schedule 1, Part 2 of the GSE Act, the OoS is a "*government sector agency*" under both the GSE Act and for the purposes of the PWP Act (which adopts the GSE Act definition).<sup>19</sup>
19. As a "*government sector agency*", the OoS is bound by section 176(1) of the PWP Act which imposes obligations on government agencies to exercise their functions in relation to the procurement of goods and services in accordance with:
- "(a) any policies and directions of the Board that apply to the agency, and
  - (b) the terms of its accreditation (if any) by the Board, and
  - (c) the principles of probity and fairness."
20. The OoS complies with the principles of "Probity and fairness" as set out in the *NSW Government Procurement Policy Framework*,<sup>20</sup> and on the Buy NSW website, which include:<sup>21</sup>

<sup>15</sup> NSW Office of Sport, 'What we do' (2021) available at <<https://www.sport.nsw.gov.au/what-we-do>> (accessed on 17 August 2021).

<sup>16</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 95.

<sup>17</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 96.

<sup>18</sup> NSW Government, 'Procurement Policy Framework 2021' (February 2021) available at <[https://buy.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/958509/210205-Procurement-Policy-Framework\\_v1\\_7.pdf](https://buy.nsw.gov.au/__data/assets/pdf_file/0009/958509/210205-Procurement-Policy-Framework_v1_7.pdf)> (accessed on 17 August 2021).

<sup>19</sup> *Public Works and Procurement Act 1912* (NSW), s 162.

<sup>20</sup> NSW Government, 'NSW Government Procurement Policy Framework' (February 2021) available at <[https://buy.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/958509/210205-Procurement-Policy-Framework\\_v1\\_7.pdf](https://buy.nsw.gov.au/__data/assets/pdf_file/0009/958509/210205-Procurement-Policy-Framework_v1_7.pdf)> (accessed 25 August 2021).

<sup>21</sup> Buy NSW, 'Probity and fairness' (2021) available at <<https://buy.nsw.gov.au/buyer-guidance/source/select-suppliers/probity-and-fairness>> (accessed on 24 August 2021).

- (a) ensuring that procurement procedures are in place that safeguard fair, transparent and ethical practices;
  - (b) compliance with general and procurement-specific obligations under relevant legislation and the code of conduct, gifts and benefits policy and business ethics statement;
  - (c) acting fairly at all times;
  - (d) developing probity and fairness controls;
  - (e) understanding probity procedures;
  - (f) being satisfied that any engaged probity advisors or auditors are independent;
  - (g) preventing corruption; and
  - (h) managing conflicts of interest, both real and perceived.
21. Section 176(2) of the PWP Act prescribes that government agencies must ensure they "*obtain value for money*" in relation to the procurement of goods and services.
22. The Procurement Policy Framework outlines five key objectives for NSW government procurement, being:
- (a) value for money;
  - (b) fair and open competition;
  - (c) easy to do business;
  - (d) innovation; and
  - (e) economic development, social outcomes and sustainability.<sup>22</sup>
23. The Procurement Policy Framework further states that the "*overarching consideration for government procurement is ensuring best value for money in the procurement of goods, services and construction*".<sup>23</sup>
24. The OoS regularly undertakes the procurement of goods and services, information technology, professional services, facilities management / maintenance and capital works, as well as enters into revenue generating leases and licences for facility use.<sup>24</sup>
25. The OoS aims to achieve best value-for-money and compliance with the PWP Act, the Procurement Policy Framework and all other NSW Government procurement policies and guidelines through its own procurement framework and internal training.

<sup>22</sup> NSW Government, '*Procurement Policy Framework 2021*' (February 2021) available at <[https://buy.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/958509/210205-Procurement-Policy-Framework\\_v1\\_7.pdf](https://buy.nsw.gov.au/__data/assets/pdf_file/0009/958509/210205-Procurement-Policy-Framework_v1_7.pdf)> (accessed on 17 August 2021) p 8.

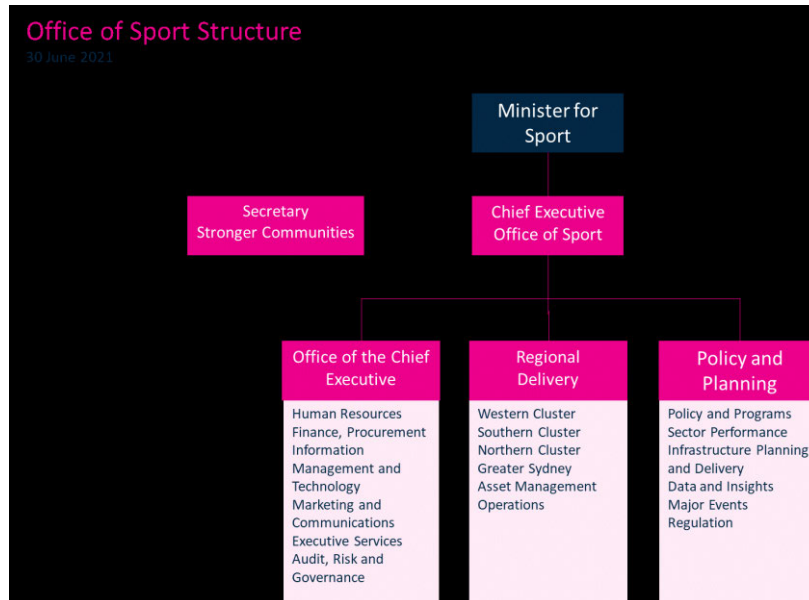
<sup>23</sup> NSW Government, '*Procurement Policy Framework 2021*' (February 2021) available at <[https://buy.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/958509/210205-Procurement-Policy-Framework\\_v1\\_7.pdf](https://buy.nsw.gov.au/__data/assets/pdf_file/0009/958509/210205-Procurement-Policy-Framework_v1_7.pdf)>, (accessed on 17 August 2021) p 9.

<sup>24</sup> NSW Office of Sport, '*Tendering and Other Competitive Processes*' (2021) available at <<https://www.sport.nsw.gov.au/corporate-information/tendering-and-other-competitive-processes>> (accessed on 9 August 2021).



## OoS Procurement Policies and Guidelines

26. The OoS Finance and Procurement Team form part of the *Office of the Chief Executive* and report directly to the Chief Executive of the OoS. Below is the current Organisational Structure:<sup>25</sup>



27. The OoS is "*committed to ensuring value for money in its procurement of goods and services whilst being fair, ethical, and transparent in procurement activities.*"<sup>26</sup> The OoS is a Level 1 accredited agency under the NSW Government Accreditation Program for Goods and Services. This enables the OoS to procure goods and services up to a maximum contract value of \$50 million for low risk procurement activities and \$20 million for high risk procurement activities.<sup>27</sup>
28. The OoS utilises the NSW Government eTendering website (**eTender**) to release information on upcoming opportunities, to seek submissions for current opportunities, as well as disclose contracts awarded above \$150,000 (incl. GST) in accordance with the *Government Information (Public Access) Act 2009 (NSW)*.<sup>28</sup>
29. During the 2017/2018 financial year, the OoS implemented a range of initiatives to enhance its procurement capability and operational efficiencies. At that time, the OoS was successful in attaining the Level 2b procurement accreditation with the NSW Procurement Board, enabling the OoS to procure goods and services up to a value of \$8.8 million. The OoS finalised 15

<sup>25</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 96.

<sup>26</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 44.

<sup>27</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 44.

<sup>28</sup> NSW Office of Sport, 'Tendering and Other Competitive Processes' (2021) available at <<https://www.sport.nsw.gov.au/corporate-information/tendering-and-other-competitive-processes>> (accessed on 9 August 2021); *Government Information (Public Access) Act 2009 (NSW)* s 27.



procurement projects in 2017/2018 with a total whole of life value of \$33 million over a period of five to seven years.<sup>29</sup>

30. Within the Asset Management Team in the Regional Delivery Group is the Asset Program Delivery Team, which has a variety of responsibilities, including contractor procurement and performance.
31. The Asset Management Team consists of:
  - (a) Director, Asset Management;
  - (b) Manager, Asset Program Delivery;
  - (c) Project Coordinator Works; and
  - (d) Project Managers.
32. In 2017, the Asset Management Team sat within the Sport Infrastructure Group.
33. Separately, the OoS also has a dedicated "Procurement Function", led by the Director, Finance Procurement and Information Management and Technology (**IM&T**), who is the Chief Procurement Officer (**CPO**) for the OoS. The CPO provides oversight of all construction and capital work procurement activities undertaken by the Asset Management Team that are over \$150,000 (including GST). This team includes the "Manager Procurement" and "Procurement Officer". The vision of Procurement within the OoS is to provide best value-for-money services that comply with NSW Government procurement policies and guidelines. The Procurement Function sits within the Office of the Chief Executive, which provides additional oversight over the OoS's procurement activities. A similar team existed in 2017 within Corporate Services. However, unlike the present Procurement Function, the 2017 procurement team was responsible solely for goods and services procurement, while the Asset Management Team were responsible for procurement relating to assets and capital works. The Asset Management Team oversaw the procurement for the SIEC Arena Upgrade. The OoS has since updated its procurement policies and procedures, such that the Procurement Function is responsible for all OoS procurement. The roles and responsibilities for the Procurement Function are outlined in this Submission in Part E(e).
34. At the time of the SIEC Arena Upgrade, the NSW Procurement Policy Framework dated July 2015 (**NSW Procurement Policy**)<sup>30</sup> and the NSW Office of Sport Procurement Manual dated 3 May 2016 (**2016 Procurement Manual**) (which was consistent with, and complied with, the NSW Procurement Policy) were both in place.
35. The following Table, extracted from the OoS Annual Report 2019/2020, demonstrates that there was a notable increase in expenditure on asset maintenance, minor and major upgrades at sport and recreation centres as well as Olympic venues in 2017/2018.<sup>31</sup> The increase in funding between 2016/2017 and 2017/2018 was the result of a "one off" increase of funding from NSW Treasury to support the OoS Maintenance Program:

<sup>29</sup> NSW Office of Sport, 'Annual Report 2017/2018' (31 October 2018), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/oos-annual-report-2017-18.pdf>> (accessed on 27 August 2021) p 51.

<sup>30</sup> NSW Government Procurement Board, 'NSW Procurement Policy Framework for NSW Government Agencies' (July 2015) available at <[https://buy.nsw.gov.au/\\_data/assets/pdf\\_file/0012/600240/procurement\\_policy\\_framework\\_-\\_july\\_2015\\_0\\_1.pdf](https://buy.nsw.gov.au/_data/assets/pdf_file/0012/600240/procurement_policy_framework_-_july_2015_0_1.pdf)> (accessed on 9 August 2021).

<sup>31</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020) available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 25.

**TABLE C - AMOUNT EXPENDED ON ASSET MAINTENANCE, MINOR AND MAJOR UPGRADES AT SPORT AND RECREATION CENTRES AND OLYMPIC VENUES**

ASSET MAINTENANCE - CAPITAL WORKS	\$
2015/2016	12,738,513
2016/2017	11,314,594
2017/2018	20,204,738
2018/2019	16,239,170
2019/2020	6,810,000

36. In 2017, the OoS also had a number of internal policies, procedures and template documents in place which governed construction-related procurement processes, which applied to the SIEC Arena Upgrade. These included the:
- Minor Capital Works Program Procedures Manual;
  - Project Scoping/ Definition and Initiation Document for Small Projects;
  - Letter of Award for Works Contract;
  - Tender Evaluation Plan and related scores calculation spreadsheet;
  - Deed of Confidentiality and No Conflict of Interest; and
  - Tender Evaluation Report and Recommendation Form.
37. The OoS has developed and enhanced its procurement-related documentation and materials over time. This has included regular updates to contracts, policies and procedures to ensure compliance. As at September 2021, the OoS continues to develop a new Procurement Manual and a suite of further revised document templates for construction-related projects. The OoS submitted these to ICAC in August 2021 for their consideration. The revisions to the OoS's procurement documents and policies are explored further in Part E of this Submission starting at paragraph 351.

### (c) The Sydney International Equestrian Centre (SIEC)

38. The OoS owns and manages a portfolio of three Olympic Sport Venues, which are the SIEC, Sydney International Shooting Centre and Sydney International Regatta Centre. In addition, the OoS currently manages a fourth Olympic venue, being the Dunc Grey Velodrome, which remains owned by Canterbury-Bankstown Council. It also owns and manages the Southern Highlands Regional Shooting Complex, built subsequent to the 2000 Olympics.
39. The SIEC venue is the heart of equestrian sports in NSW and hosts an impressive calendar of international, national and state accredited events, including Olympic qualifying events and competitions.<sup>32</sup>
40. National and state sporting organisations and horse societies, including Equestrian Australia (EA), ENSW, Pony Club NSW and Riding for Disabled NSW, use the SIEC for competitions, high performance clinics and training. EA athletes used SIEC's world class facilities to

<sup>32</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 20.

participate in Olympic and Paralympic selection and test event clinics in preparation for the recent Tokyo Olympics.<sup>33</sup>

41. In 2019/2020, a number of events were held at the SIEC Indoor Arena. Of these, key events included the:
  - (a) Grand National Saddle Horse and Rider Championships;
  - (b) Sydney Concours de Dressage International (**CDI**) - FEI International Dressage Event;
  - (c) Para Equestrian Selection Event - Dressage;
  - (d) Australian Dressage Championships;
  - (e) Pony Club Australia National Championships;
  - (f) East Coast Arabian Championships;
  - (g) Australian and NSW Interschool Championships; and
  - (h) Australian Jumping Teams League.
  
42. During 2019/2020, SIEC also hosted a range of community participation events, including cross country events, towing education courses and The Foam Fest - an obstacle-based fun run. During this period, and prior to COVID-19, SIEC hosted four international events, nine national and seven state accredited equestrian events.<sup>34</sup> Based on bookings from March to June 2020, the SIEC was "*set for its busiest year on record.*"<sup>35</sup> However, the schedule of SIEC events has been interrupted over the last 18 months due to the COVID-19 pandemic. For example, the 2020 and 2021 National Dressage Championships were both scheduled to be held at SIEC but were cancelled due to COVID-19 restrictions.
  
43. The OoS is committed to ensuring that the SIEC complies with international standards to accommodate multi-discipline equestrian sports. The OoS successfully completed a host of capital works projects at SIEC throughout 2019/2020. These works maintain the standards of participant and visitor experience as well as to ensure safety. They have included the completion of a new truck park area with amenities and horse wash bay facilities as well as the replacement of arena fences.<sup>36</sup> As a major equestrian facility, the most important assets at the SIEC are the competition arenas as these are used from club competitions through to international tournaments.
  
44. According to ENSW, in 2017, there were four main types of solutions available to provide the type of surfacing needed at the SIEC indoor arena and associated warm up area:
  - (a) Sand - super fine (0.02-0.03mm), sub-angular (i.e. a similar shape to rail ballast) silica sand, is used by most international arena suppliers. However, the raw

<sup>33</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 20.

<sup>34</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 20.

<sup>35</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 20.

<sup>36</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 18 August 2021) p 20.

materials used to manufacture this specification are rare in NSW and are expensive;

- (b) Additives - geotextiles and synthetic fibres are the preferred additives, which provide the right dynamic characteristics. Typical examples include SoilTex (produced by Capricorn (Australia) Pty Ltd (**Capricorn**)) or ArenaTex (produced by Otto Sport International GmbH (**Otto**)). Wax additives or similar synthetic alternatives are available but are not recommended for show jumping surfaces;
- (c) Matting - profiled rubber matting is also available. Otto markets a system which provides a cushioning surface, whilst allowing moisture to move through the layer; and
- (d) Ebb and Flow Watering System (**Ebb & Flow System**) - these Systems have been used in Europe and are becoming popular in Australia. They are manifolded, sub-surface watering systems, using polyethylene pipes, jacketed with a geotextile and mesh shroud, to control the moisture level in the sand. The design is both simple and effective and, once calibrated, can deliver a specified moisture level to optimise surface performance. The OoS is aware of a number of equestrian centres in NSW that use the Ebb & Flow System for both indoor and outdoor arenas and considers that it is a top tier solution. For example, the Ebb & Flow System is used at Willinga Park Equestrian Centre,<sup>37</sup> specifically, the Otto Systems were built by BSMS for the Grand Prix Arena and the Outdoor Show Jumping Arena. The Ebb & Flow System is also used at the Australian Equine & Livestock Centre<sup>38</sup> and it was the surface system used at the Rio Olympics in 2016.

#### (d) Relationship between the OoS and Equestrian NSW (ENSW)

45. ENSW is the state branch of EA - the peak body for equestrian sports in Australia.<sup>39</sup> ENSW was established in 1951 and incorporated in 1990.<sup>40</sup>

##### *Relationship between OoS and ENSW*

46. As set out above at paragraph 10, SSOs and SSODs are key partners to the OoS in the design and delivery of policy, grants design and regulation. When compared to the larger participation sports such as, for example, football and netball, the equestrian community has a small participant cohort. As part of this, OoS relies on ENSW to act in accordance with its vision to "provide leadership for equestrian sport in NSW" and act on behalf of its representatives' best interests to "promote, develop and grow the sport".<sup>41</sup>
47. ENSW has a long history of being affiliated with the OoS (and its previous iterations) - as is the case with most SSOs and the OoS. Recognition by the OoS as an SSO affords ENSW the following benefits:
- (a) invitations to participate in regular networking and professional development opportunities and stakeholder consultations facilitated by the OoS, as well as access to resources such as the SSO Organisational Health Survey Tool;

<sup>37</sup> Note that this is a privately owned facility in Bawley Point, NSW.

<sup>38</sup> This is based in Tamworth, NSW.

<sup>39</sup> Equestrian NSW, 'Annual Report 2019/2020' (2020), available at <<https://www.nsw.equestrian.org.au/sites/default/files/ENSW%20Annual%20Report%202019-20.pdf>> (accessed on 25 August 2021) p 1.

<sup>40</sup> Equestrian NSW, 'Annual Report 2019/2020' (2020) available at <<https://www.nsw.equestrian.org.au/sites/default/files/ENSW%20Annual%20Report%202019-20.pdf>> (accessed on 25 August 2021), p 1.

<sup>41</sup> Equestrian NSW, 'About Equestrian NSW' (2021) available at <<https://www.nsw.equestrian.org.au/about-equestrian-nsw>> (accessed on 17 August 2021).

- (b) approval to use the OoS logo on communication materials such as its website, in emails or on its letterhead;
  - (c) pre-requisite eligibility to apply for OoS grant funding programs; and
  - (d) access to use administrative and storage facilities free of charge to support SSOs and SSODs manage the administrative aspects of their respective sports.
48. There are two key policies administered by OoS that govern SSOs, namely, the:
- (a) Recognition Policy - that is for SSOs seeking recognition for the first time; and
  - (b) Organisation Support Program.
49. The OoS provides financial support to ENSW as a SSO under the OSP. Annual funding is in the range of \$5,000 for smaller sports to \$60,000 for larger sports. Funding is based on a number of factors, including organisation capability and membership size. At present, ENSW receives \$48,500 in annual funding from the OSP. An application must be made by each SSO to access its allocation under the OSP every year. There are 6 categories of SSOs (based on the size of the organisation) and the level of funding is dependent on the category. ENSW receives the same amount each year and will need to reapply in the coming weeks to receive funding from the 2021/2022 OSP.
50. Historically, funding for SSOs has been regulated by a standard Funding Agreement entered into by the OoS with the respective SSOs and SSODs. The standard Funding Agreements do not impose any requirements or constraints on the SSOs or SSODs in terms of corporate governance or the use of the funding. However, Funding Agreements are currently being reissued to all 94 SSOs which include the following requirements:
- (a) an obligation to adopt and comply with sound policies and practices in relation to its corporate governance and financial management;
  - (b) an obligation to undertake risk management activities which are consistent with the Australian Standard Risk Management AS/NZS ISO 31000:2009; and
  - (c) an obligation to have in place a robust process for, at a minimum, managing director or committee member conflicts of interests (actual, potential or perceived) which is documented, implemented, enacted and enforced including continual disclosure to the Office of Sport should a conflict arise.
51. The Funding Agreement entered into between OoS and ENSW is standard and similar to all other Funding Agreements between the OoS and SSOs/SSODs.
52. Being an SSO or SSOD often entitles the entity to use of on-site "Houses" or offices under a "*peppercorn rent*" arrangement where available. For example, "Sports House" is located at Sydney Olympic Park. The OoS allows 37 SSOs to use "Sports House" free of charge. "Sports House" provides office accommodation, telephone facilities, internet facilities and photocopying facilities.
53. As some SSOs, such as ENSW, utilise unique facilities which are specific to their respective sports (and are external to Sydney Olympic Park), similar arrangements have been put in place to afford those SSOs the same opportunity to access administrative and storage facilities to support their sport, as those SSOs that are based at Sydney Olympic Park. For this reason, the OoS has "*peppercorn rent*" arrangements with some of these SSOs and, in some cases, national sporting organisations such as the Olympic Winter Institute and Snow Australia. This reflects the fact that the SSOs are heavily volunteer-based community organisations and the OoS seeks to provide them with relevant assistance in terms of their administrative needs. It is also noted that similar services are provided to non-SSO sporting organisations to support and encourage community sporting groups.



54. For this reason, due to its status as an SSO, ENSW is permitted to pay a "peppercorn rent" to the OoS for access to, and usage of, an office at the SIEC site. ENSW pays a licence fee of \$1 per annum for the use of the on-site premises at SIEC as an administration centre. ENSW pays for all outgoings such as electricity and maintenance services as required. This arrangement is commensurate with the support that OoS provides to all other SSOs (and in particular the 37 SSOs based at Sydney Olympic Park who access "Sports House").
55. The "peppercorn rent" arrangement between ENSW and the then NSW Department of Tourism, Sport and Recreation was first established in 2006 and has been in place since the establishment of the OoS in 2014.
56. The licence agreement for the use of the on-site house at SIEC was renegotiated in January 2018. It is a three-year agreement with a two-year option which has been taken up. The licence for the use of the on-site house by ENSW is due to be reviewed on 1 November 2022. ENSW pays the market rates for the use of the SIEC's equestrian sports facilities, as per the current Fees and Charges schedule.

## C. PROCUREMENT PROCESS - SIEC ARENA UPGRADE

### (a) Request for Funding and Ministerial Endorsement

57. The concept of the SIEC Arena Upgrade originated in late 2016 at the request of ENSW and with support from EA and members of the NSW Equestrian community.
58. On 15 September 2016, Mr Bruce Farrar (Chief Executive Officer, ENSW) met with Mr Darren Crumpler (Director Olympic Sport Venues, OoS) and Mr Mark Fulcher (SIEC Venue Manager, OoS) to discuss initial plans for the SIEC Arena Upgrade. The OoS confirmed that they would be supportive of joint funding the project.
59. In early 2017, the proposal for the SIEC Arena Upgrade was supported by letters to the (then) NSW Minister for Sport, the Hon. Stuart Ayres MP from several members of the NSW Equestrian community, including:
- (a) a letter from Ms Julie Farrell (Manager, Mulawa Arabian Stud Pty Ltd) dated 7 February 2017;
  - (b) a letter from Ms Judy Fasher (Chair, EA) dated 10 February 2017. Ms Fasher's letter noted that "*other, newer facilities at Boneo Park (Vic) and Willinga Park (NSW) using similar technologies to those used in Europe have become the benchmark venues in Australia*" (these venues utilised an Ebb & Flow System);
  - (c) a letter from Mr Stuart Tinney OAM and Mr Shane Rose (former Australian Equestrian Olympic medallists on behalf of EA) dated 10 February 2017; and
  - (d) a letter from Dr James Whitfeld (Randwick Equestrian Centre) (undated).
60. On 7 March 2017, Mr Farrar (on behalf of ENSW) and Ms Fasher (on behalf of EA) attended a meeting with Minister Ayres to discuss government investment for the SIEC Arena Upgrade. Also in attendance was Mr Brett Parbery, an equestrian dressage rider, trainer, and former Dressage Coach to the Australian Olympic Team.<sup>42</sup> A Ministerial Briefing for the meeting prepared by OoS, endorsed by Ms Anne Gripper (Executive Director - Sport & Recreation, OoS) on 7 March 2017, and approved by Mr Matt Miller (Chief Executive, OoS) on 8 March 2017, indicated that:

*"The Indoor Arena and Arena 6 surfaces were installed in preparation for the Sydney 2000 Olympics.*

<sup>42</sup> Brett Parbery, 'The Parbery's' (undated) available at <<https://www.brettparbery.com.au/about>> (accessed on 17 August 2021).

*The surface mixture has been refined in recent years with the guidance of Equestrian NSW in an effort to improve horse footing conditions, however, no significant upgrade to the surfaces have been completed since 2000.*

*Arena surfaces used at Rio 2016 for both Dressage and Show jumping are noticeably different to what is currently installed at SIEC. Equestrian NSW believes that training on surfaces that match with competition surfaces will provide the best results for their athletes and would therefore like SIEC surfaces upgraded.*

*Equestrian NSW receives an annual Sport Development Program grant for \$48,500 and has received additional funding towards 3 events - Sydney International Horse Trials \$20,000, Summer Classic Show jumping/World Cup Qualifier \$10,000 and Australian Dressage Championships \$10,000. Note funding for Australian Dressage Championships will be withdrawn as event has been awarded to Victoria.*

*The proposed surface upgrade has not been formally presented to the OoS with Equestrian NSW approaching the Minister for funding first. Upon initial review and discussion, the OoS would be supportive of a surface upgrade following stakeholder engagement and independent product reviews."*

61. The Ministerial Briefing noted that the financial implications of the SIEC Arena Upgrade were: "\$600k to upgrade surfaces to Indoor Arena and Arena 6, no budget is currently available for such capital works". Minister Ayres endorsed the recommendation contained in the Ministerial Briefing that he: "acknowledge OoS intent to upgrade Arena surfaces, however, no funding is currently available to complete such works".
62. On 13 March 2017, ENSW prepared a Request for Funding (also referred to as the "Business Case") for the SIEC Arena Upgrade to secure a funding commitment from the OoS. The Request for Funding was signed by Mr Farrar.
63. The Request for Funding stated that its purpose was to:
- 1. Seek continued support and investment from the NSW Government in the Sydney International Equestrian Centre (SIEC) to ensure it can meet the future demands of equestrian sport.*
  - 2. Demonstrate the economic benefits that equestrian sport provides to NSW and more specifically the estimated economic benefit that can be derived from the investment in the SIEC facility over the next 10 years.*
  - 3. Request an initial investment of \$600,000 to upgrade the SIEC Indoor Arena and Arena 6."*
64. The Request for Funding identified that it was appropriate to urgently refresh the SIEC to attract national equestrian events as the indoor arena and warm up surfaces were ageing and key bookings were being lost. The Request for Funding stated:
- "In practical terms, the SIEC arenas don't provide the right give, rebound and grip for our equine athletes to perform at their best. Over the last few years, there has been significant global innovation in arena surfaces. The benefits of these new technologies include improved horse welfare, optimal surface dynamics which contribute towards improved performance, added flexibility to cater for multi discipline equestrian sports and reduced maintenance costs.*
- Recently, Equestrian NSW lost the right to host the 2017 Australian National Dressage Championships to a new facility at Boneo Park in Victoria, for the first time in 16 years, due to concerns about the arena surfaces at SIEC. The newly completed facility at Willinga Park on the south coast of NSW will put further pressure on SIEC to retain its high level competitions."*
65. The Request for Funding included a high-level suggested scope which noted that an Ebb & Flow System was required for the surface upgrade:
- "Equestrian NSW submits that the SIEC arena surfaces are in need of substantial upgrades and requests an initial investment of up to \$600,000 to upgrade the Indoor and Arena 6, using super-fine sand with geotextile and fibre additives, **an Ebb and Flow sub-surface watering system** and rubber cushioning mats. Upgrading the main competition surfaces to international standard at SIEC is proposed to ensure its long term viability as a premier stadium and host of major equestrian events. It will also consolidate SIEC's position as the hub of equestrian sport in NSW, including the training*



*ground for the development of future NSW based World Championship and Olympic representatives."*

(Emphasis added)

66. The Request for Funding also detailed the "*Financial and Economic Benefits*" to the SIEC and NSW generally through the SIEC Arena Upgrade, stating:

*"Since 2014, Equestrian NSW and its affiliates have supported SIEC by staging more and bigger competitions (eg National Interschools, Rider Series and NSW Showjumping Championships). In 2016, these competitions delivered \$965,000 in revenue for SIEC, an increase of 45%. This in turn made a significant contribution towards improving the Net Cost of Service to the NSW Government.*

*Analysis by Equestrian NSW shows that it could attract four new, large competitions to the SIEC calendar if the arenas are upgraded to international standard. This will in turn contribute an additional \$400,000 per annum to SIEC revenues and improve the Net Cost of Service by about 30%.*

*Further analysis also shows that there will be increased economic activity for NSW with every additional dollar paid to SIEC realising at least two dollars of related business, equating to an overall benefit of \$1.2 million per annum, or \$12 million over a ten year period."*

67. The Request for Funding proposed that the OoS "*invite Expressions of Interest from suitably qualified and competent arena suppliers*" including:

- (a) Attwood Equestrian Surfaces (United States);
- (b) Capricorn;
- (c) Equestrian Services Australia (Australia) (**Equestrian Services**);
- (d) Martin Collins (Australia); and
- (e) Otto (Germany).<sup>43</sup>

68. The Request for Funding stated that:

*"To assist with the technical analysis of the proposals, Equestrian NSW suggests that an independent consultant be engaged. Oliver Hoberg, based in Malaysia, is a suitable candidate, as he advised the FEI, which is the international peak body for equestrian sports, about the arena surfaces at the London and Rio Olympics."*

69. On 13 March 2017, Mr Farrar, Ms Fasher and Mr Parbery attended a further meeting with Minister Ayres in relation to the SIEC Arena Upgrade.

70. The Request for Funding was submitted to the Minister on 20 March 2017. The OoS prepared a Ministerial Briefing for Minister Ayres in relation to the Request for Funding which was endorsed by Ms Gripper on 27 March 2017 and approved by Mr Miller on 4 April 2017. The Ministerial Briefing noted Minister Ayres' meeting with ENSW and EA on 13 March 2017 and attached the Request for Funding. The Ministerial Briefing stated that:

*"ENSW has submitted to the Minister a very detailed proposal and has requested that the NSW Government approve expenditure of up to \$600,000 for the upgrades, with work to be completed in 2017.*

*Included with the proposal are letters of support from Judy Fasher, Chair of Equestrian Australia, Stuart Tinney OAM, Olympian, Shane Rose, Olympian, Dr Whitfield, Randwick Equine Centre and Julie Farrell, Mulawa Arabian Stud.*

...

*The Office of Sport will now commence consideration of the submitted proposal, which will include consultation with relevant stakeholders, including ENSW."*

<sup>43</sup> The OoS acknowledges that although Otto is specifically identified in the Request for Funding, BSMS has been designated by Otto as its exclusive representative in Australia. As such, a reference to "Otto (Germany)" is, by default, a reference to BSMS as its provider.

71. The Ministerial Briefing noted in relation to the financial implications of the SIEC Arena Upgrade that: *"No funds are currently available. Should the proposal have merit, another submission will be forwarded to the Minister with options to source funding"*. The Ministerial Briefing recommended that Minister Ayres note the information in the Ministerial Briefing and sign a letter (attached to the Ministerial Briefing) to ENSW.

72. The letter from Minister Ayres to Mr Farrar stated:

*"Dear Mr Farrar*

*I refer to our meeting of 13 March 2017 regarding funding of \$600,000 to assist with an upgrade to the Indoor Arena and Arena 6 at the Sydney International Equestrian Centre. I appreciate our discussions and I thank you for providing me with a very detailed proposal.*

*As you may know, the amount you have requested far exceeds the funds available within the normal Office of Sport (OoS) budget allocation. However, I have asked the OoS to closely consider the information you have submitted and to make contact with you so that you may be involved in an assessment process that will be required to help develop a business case in an attempt to secure funding for this amount.*

*The OoS contact for this matter is Darren Crumpler, Director Olympic Sport Venues, and he will be in touch with you shortly to commence the assessment."*

73. It is unclear if the letter from Minister Ayres to Mr Farrar was signed or sent.

## **(b) Funding Commitment and Approval of Funding Source**

### *Funding Commitment*

74. On 7 July 2017, the SIEC Arena Upgrade was included as part of the OoS 2017/18 Sport and Recreation *"Minor Capital Works Program"* (**Minor Capital Works Program**). A *"Minor Capital Works Program"* is a project that focuses on the renewal or replacement of existing assets at a value equal to, or less than, \$500,000.

75. In a Briefing for Ms Gripper in relation to the Minor Capital Works Program, the SIEC Arena Upgrade was identified as a *"New Minor Capital Works Project"*, being an *"essential upgrade to competition arena surfaces"*. The Briefing did not contain a budget estimate for the project, instead it stated that it was to be funded by *"alternative funding"*. The Minor Capital Works Program was endorsed by Ms Gripper and by Mr Michael Bangel (Director, Asset Management, OoS). Approval for the project was ultimately granted by the then-Chief Executive, Mr Miller, who had a delegated authority for amounts up to \$3 million.

76. The SIEC Arena Upgrade was included in the Minor Capital Works Program despite the estimate of the works being \$600,000 which was beyond the financial threshold of \$500,000 for inclusion in the Minor Capital Works Program.

77. The OCM Report identified that a procurement strategy was not prepared as part of the Minor Capital Works Program approval process. The OCM Report notes that *"normally the procurement strategy would be briefly considered in each project's 'Project Scoping/Definition and Initiation Document for Small Projects' form"*. As the OoS was operating under limited time constraints to complete the tender process and the works by 11 January 2018 due to a competition scheduled to be held in January 2018, a Project Scoping/Definition and Initiation Document for Small Projects Form (**Project Scoping/Definition and Initiation document**) was not completed for the SIEC Arena Upgrade.

78. The OoS accepts that the SIEC Arena Upgrade ultimately proved to be more complex than other projects approved under the Minor Capital Works Program, particularly in the tight timeframe, and that a Project Scoping/Definition and Initiation document, including a procurement strategy, should have been prepared. This may have avoided or alleviated some vulnerabilities in the procurement process, such as in relation to the perceived Conflict of Interest issues that arose. However, the OoS has identified a number of improvements and enhancements, which are currently being implemented, to ensure a more robust and transparent procurement process in the future.

79. The OoS has now revised its procurement procedures for projects approved under the Minor Capital Works Program to strengthen the integrity of its procurement practices and to ensure that the required procurement processes are clear, easy to follow and capable of being readily implemented. Both the newly revised Minor Capital Works Program Procedures Manual (**Minor Capital Works Manual**) and the Minor Capital Works Program Procurement Checklist (**Procurement Checklist**) introduced this year each reflect the steps taken by the OoS to strengthen its procurement practices and its commitment to continuous improvement to ensure more robust procurement processes going forward. The Procurement Checklist is part of a suite of template documents that were submitted to ICAC for review on 6 August 2021.
80. As a result of changes introduced this year through the Minor Capital Works Manual, all projects must now be accompanied by a Project Scoping, Procurement Strategy, Definition & Initiation Document for Construction Projects (**Project Scoping Template**) which must comply with the NSW Procurement Policy and be completed and approved before issuing any documents to any prospective suppliers. The Procurement Checklist provides that the Project Scoping Template document must be completed and approved by the "*Director, Asset Management*" and that preparation of the document is a:
- "Detailed task that involves consultation with stakeholders and careful consideration of the market, the most appropriate procurement strategy (including evaluation expertise from within and outside of OoS), and any risks associated with the project. Completion of this document is critical to setting the project on the path to successful delivery."*
81. The Procurement Checklist also requires that an "*Authority to Procure*" form be completed and approved for all Minor Capital Works Projects (**Authority to Procure Template**). This document must be approved by the "*Director, Asset Management*" for projects valued less than \$150,000, as well as the "*Director, Finance, Procurement and IM&T*" for projects valued greater than \$150,000. The Authority to Procure Template sets out the procurement strategy, the composition of the Tender Evaluation Committee, and the evaluation criteria. The Authority to Procure Template has been submitted to ICAC for consultation and approval.
82. The OoS considers that the introduction of these updates to the templates, manuals and policies which govern the commencement of a procurement process will result in a more robust and transparent procurement process, thereby reducing probity risks and the risks of impropriety whilst achieving better outcomes for OoS and its key stakeholders going forward.
- Approval of Funding Source*
83. Following approval under the Minor Capital Works Program, agreement was provided by Mr Miller, and communicated to Mr Crumpler by Ms Gripper, to "*proceed with the project using excess recurrent funds in 2016/17 which would be reallocated to capital upgrades*". Following this, Mr Crumpler determined that "*it was not feasible to deliver the project in the remaining 3 months of 16/17*" and "*made the decision to hold off until 2017/18*".
84. On 1 September 2017, Mr Crumpler recorded in an email to Mr Matt Brown (Project Manager, Facilities and Assets, OoS) that: "*This was agreed by [Ms Gripper] and following conversation with Sajjjeev<sup>44</sup> it was identified that funding for this could be rolled over with sign off from Treasury*".
85. Ultimately, funding for the project was allocated from the OoS budget for "*other maintenance projects scheduled for late 2017/18*". On 1 November 2017, Mr Crumpler prepared a Briefing to Mr Miller advising that:
- "Rollover funding to complete upgrades to SIEC's indoor arena and warmup arena surfaces has not been confirmed by Treasury. It is recommended that funding is reallocated from other maintenance projects scheduled for late 2017/18. The tender process has been completed with BSM Sport Equestrian selected, by the panel, as the preferred tenderer with a total project cost of \$745k."*

<sup>44</sup> This correspondence refers to Sajeev George (Director, Finance, Procurement and IM&T, Office of the Chief Executive, OoS). In 2017, Mr George was the Director of Finance. Mr George is presently the Director, Finance, Procurement and IM&T.

*Recommendation*

*That the CEO approves reallocation of \$745k within the maintenance budget to proceed with SIEC arena surface upgrades as a priority."*

86. On 6 November 2017, the Briefing prepared by Mr Crumpler was endorsed by Ms Gripper and approved by Mr Miller, reallocating "\$745k within the maintenance budget to proceed with SIEC arena surface upgrades as a priority".

**(c) Use of External Advisors and Formation of Tender Advisory Committee (TAC)**

87. In August 2017, following the OoS's commitment of funding under the Minor Capital Works Program and the approval of the source of funding, the OoS began the procurement process for the SIEC Arena Upgrade. During this period, the Project Manager at OoS was Mr Kevin Flynn (Venue Manager - SIEC, OoS). The other members of the Project Team were Mr Brown, Mr Crumpler and Mr Dave Porter (Operations Manager - SIEC, OoS).
88. As an initial step, Mr Flynn explored options for obtaining technical advice to provide input into the specifications for the Request for Interest (**RFI**) and Request for Tender (**RFT**), as well as assist once the tender evaluation process had commenced. It is not uncommon for OoS to consult its SSOs or other independent experts where particular expertise in relation to a particular sport is required. This is because the OoS does not have internal experts for all sports. In addition, the 2016 Procurement Manual provided that the OoS may be assisted by expert advisors.
89. Given his role as the Chief Executive of ENSW, Mr Farrar provided the OoS with technical advice throughout the procurement process, and also assisted the OoS in obtaining further technical advice from other independent parties (initially, an overseas expert, and later, experts within NSW).
90. As set out above, in the Request for Funding, ENSW suggested that Mr Oliver Hoberg would be a suitable candidate *"to assist with the technical analysis of the proposals... as he advised the FEI, which is the international peak body for equestrian sports, about the arena surfaces at the London and Rio Olympics."* Mr Hoberg is an International Federation for Equestrian Sports (**FEI**) recognised footing expert and consultant in equestrian sports, based in Malaysia and Germany.<sup>45</sup>
91. On 9 August 2017, Mr Farrar contacted Mr Hoberg regarding a potential engagement to consult on specifications for the SIEC Arena Upgrade and copied in Mr Flynn. In the email, Mr Farrar stated:
- "I have been asked to suggest a suitable independent consultant that could assist with the technical specification and assessment of the tenders. Mike Etherington-Smith suggested I contact you. The Expression of Interest document is likely to be released in September with work to commence in November 2017. Are you interested and available? If so, could you please provide a schedule of rates to:*
- visit the site as soon as possible*
  - guide the technical specification*
  - oversee the technical assessment of the proposals*
  - provide input to select the successful contractor*
  - provide signoff on behalf of the client when the works are complete."*
92. On 13 August 2017, Mr Hoberg responded to Mr Farrar and Mr Flynn, advising:

*"I am interested in a cooperation [sic] as consultant in design (ebb & flow system) and the supply of materials. The only problem I see at the moment is the site visit because my calendar is packed until the end of September. Therefore I suggest the exchange of all information first including detailed*

<sup>45</sup> Mr Hoberg's experience is listed on his LinkedIn profile, available at <<https://www.linkedin.com/in/oliver-hoberg-7213033a/>> (accessed on 18 August 2021).

*sieving analysis of your locally available sand. The main focus must be on the sand and from there we work on the final design in regards of textile/fibre amount per ton sand."*

93. Later, on 13 August 2017, Mr Farrar responded to Mr Hoberg, stating:

*"Thanks for getting back to me. I think we can make this work. Your advice about the specification and helping with the tender assessments/recommendation can be done remotely. Signoff of the completed works, on behalf of the client, is due at the end of December, so will require a site visit. Even if we can use you only for the remote services, it will be a big help. Will be in touch next week."*

94. On 14 August 2017, Mr Farrar forwarded his reply to Mr Hoberg to Mr Flynn, stating:

*"I'm happy with the offer but we'll need to refine the details in the coming weeks, including. EOI signoff  
Tender assessment and recommendation  
Site visit and works completion signoff"*

95. Later, on 14 August 2017, Mr Flynn forwarded Mr Hoberg's email, and Mr Farrar's emails in reply, to Mr Brown, Mr Crumpler and Mr Porter, stating:

*"Please refer below for a schedule of rates from Oliver Hoberg (the independent consultant & subject matter expert recommended by Bruce Farrar — ENSW).  
As suggested by Bruce, we would need to finalise the scope of consultancy work to meet our timeframe and expectations.  
Now that we know that Oliver is available (and appears to be affordable), could you please advise the next step in arranging the engagement."*

96. Mr Hoberg subsequently advised the OoS that he was unavailable to act as a technical advisor due to other work commitments.

97. In light of Mr Hoberg's unavailability, the OoS explored other options for technical advisors to advise on the technical aspects of the procurement process, without success. ENSW suggested a number of local experts. Ultimately, the OoS determined that it would form a Tender Advisory Committee (**TAC**) including representatives of the different equestrian disciplines as it was essential that the new surface met the expectations of all the different equestrian bodies and would be suitable for international competition in all respective disciplines. Establishing a TAC for an OoS procurement is unusual and it was not specifically contemplated in the Tender Evaluation Plan (**TEP**) later prepared for the procurement process - although the TEP noted that the TEC may be assisted where required by advisors.

98. Establishing and engaging a TAC is not a common feature of an OoS procurement. However, on this occasion, noting the limited time available to undertake the procurement process and deliver the project, together with the absence of Mr Hoberg or another similar highly skilled expert, the engagement of a panel of technical advisors was considered to be the most appropriate way to obtain a cross-section of advice in relation to the multi-disciplinary aspects of equestrian sport to provide key input and guidance on the most appropriate way forward. The OoS has since identified enhancements relating to the appointment of a TAC, which are currently being implemented to ensure that all future procurement processes which may involve a TAC are robust with a clearly defined scope and role.

99. The members of the TAC were recommended by ENSW. However, only one member of the TAC, being Mr Farrar, was employed by ENSW. The members of the TAC were as follows:

- (a) Mr Farrar, ENSW - as an advisor in arena surface design and technology engineering. Mr Farrar has a Bachelor of Mechanical Engineering and previously worked as an engineer. Mr Farrar was a lower grade rider in eventing and possessed relevant expertise as a result of his position as Chief Executive of ENSW. He had research and investigative knowledge from ongoing communication with elite riders and coaches who have travelled overseas, had an engineering



background and his knowledge of equestrian sport transferred into arena footing knowledge;<sup>46</sup>

- (b) Mr John Vallance, Jumping NSW - an expert in show jumping and an FEI accredited four star level show jumping course builder and technical delegate.<sup>47</sup> Mr Vallance was previously the Chairman of the Australian Jumping Committee and is an internationally accredited Level 4 course designer. Mr Vallance was Assistant Course Designer at the 2000 Olympic Games and has also been the Chief Course Designer for the World Championships and Youth Olympics. Mr Vallance works on Royal and Agricultural Shows around Australia and New Zealand; and
  - (c) Ms Farrell (who as set out above, is the Manager of Mulawa Arabian Stud) - as a horse riding consultant in the dressage discipline. Ms Farrell is a horse breeder and prepares horses for dressage competitions.<sup>48</sup>
100. Due to the limited participant cohort of equestrian sports in NSW, Mr Vallance and Ms Farrell may have had some involvement with ENSW in some capacity, however, in the time available and given the limited experts available in NSW and the need for an intersection of disciplinary experts, they were considered the most suitably qualified personnel for the role. The TAC members were formally appointed and, as is set out below, the TAC provided an opinion on the submitted tenders during the tender evaluation process in their capacity as technical advisors, but were not involved in the decision-making process. The TAC was selected to represent a cross-section of equestrian disciplines to ensure that the upgraded surface was suitable for a broad range of uses and met international standards for each discipline. Two members of the TAC (Mr Farrar and Mr Vallance) also provided input as part of the Scope of Works for the RFI and RFT.
101. Mr Farrar signed a Deed of Confidentiality & No Conflict of Interest (**Conflict of Interest Declaration**) on 25 October 2017. The Declaration from Mr Farrar was sent as a scanned document attached to an email to Mr Jim Kasif (a contractor engaged to act as Project Manager for the SIEC Arena Upgrade)<sup>49</sup> on 25 October 2017. It appears that it was "countersigned" by Mr Kasif subsequent to Mr Farrar's signature. Employees of the OoS recall that Conflict of Interest Declarations made by the other members of the TAC and the OoS is in the process of locating the signed Conflict of Interest Declarations for Mr Vallance and Ms Farrell.
102. The OoS notes that ICAC identified that:
- (a) the advice of ENSW and Mr Farrar *"appears to have been accepted in the absence of independent verification or clear record of how the advice was independently verified"*;
  - (b) *"Mr Farrar appears to have been afforded a significant amount of involvement in the process in the absence of a formal arrangement including a clear description of his duties"*;
  - (c) *"there appears to be a lack of clearly documented decisions"*; and
  - (d) there was a lack of records indicating completion of Conflict of Interest Declarations by the TAC.

<sup>46</sup> Mr Farrar's experience is listed on his LinkedIn profile, available at <<https://www.linkedin.com/in/bruce-farrar-b5566342/>> (accessed on 18 August 2021).

<sup>47</sup> Weekly Times Now, 'Equestrian Australia names John Vallance as new committee chairman' (25 April 2017) available at <<https://www.weeklytimesnow.com.au/sport/equestrian-australia-names-john-vallance-as-new-committee-chairman/news-story/83209a77c8bc0c33b934579b75f32ed1>> (accessed on 18 August 2021).

<sup>48</sup> Mulawa Arabian Stud, 'Julie Farrell' (2015) available at <<http://www.mulawaarabians.com.au/team/julie-farrell>> (accessed on 18 August 2021).

<sup>49</sup> A further description of Mr Kasif's engagement and his role is located at paragraph 138.

103. The OCM Report also identified improvements in relation to the OoS processes pertaining to the Conflict of Interest Declarations for external advisors and recommended that the OoS implement: *"better practice activities to enhance the probity of the process"*, including:
- "Ensuring that all individuals involved in the tender process, including technical advisors who are provided with access to confidential information, have signed relevant conflict of interest and confidential declarations. The Procurement Manual requires these declarations to be signed by all employees of the NSW Office of Sport; however, consideration should be given to expanding this requirement to include all parties involved in the tender assessment who will have access to confidential information."*
104. In relation to the role of ENSW and Mr Farrar providing technical expertise to the OoS, the OoS submits that this was not unusual (although the use of TAC in a procurement process was). As set out above at paragraph 10, SSOs are key partners to the OoS in the design and delivery of projects, and are frequently relied on for their subject matter expertise as OoS does not have internal expertise for specific sports. The NSW Equestrian community is small and there are limited experts available.
105. The OoS submits that, in circumstances where the OoS was operating under time constraints to find an expert, and could not use the services of Mr Hoberg, it was appropriate for the OoS to rely on:
- (a) the advice of ENSW, as the State's peak equestrian body and SSO; and
  - (b) Mr Farrar given he was the Chief Executive of ENSW.
106. In addition, it is noted that there was an arrangement in place (albeit, not specifically documented) with Mr Farrar in relation to the provision of his advice on the Scope of Works for the RFI and RFT, and opinions on the submitted tenders, via his appointment to the TAC. As set out above, Mr Farrar submitted a Conflict of Interest Declaration where no conflicts were disclosed. During the procurement process, the OoS had no knowledge of any conflict relating to Mr Farrar.<sup>50</sup>
107. The OoS acknowledges that there were weaknesses in the procurement function at the time and that records should be readily available evidencing all members of the TAC having signed Confidentiality and Conflict of Interest Declarations. However, even if they had done so, this may not have assisted OoS in identifying a potential, indirect conflict concerning Mr Farrar, as Mr Farrar (who arguably did have a perceived conflict) did not declare any potential conflict of interest when signing his Conflict of Interest Declaration. It would have been appropriate, at the time Mr Farrar signed the Conflict of Interest Declaration, for him to disclose to the OoS the fact that the then-President of ENSW, Mr Dingwall's son worked for BSMS and was married to Mr Smith's daughter. Although this may not have had any bearing on the final outcome of the RFT, it would have afforded the OoS the opportunity to manage any potential conflict of interest, by taking relevant steps to satisfy itself that the relationships would not have any adverse bearing on the procurement. The OoS has now amended their Conflict of Interest processes to elicit such information from any person involved in a procurement process who has *"access to and regularly view potential suppliers' competitive quotes or commercially sensitive information. This includes but not [sic] limited to any person on the Opening Committee, Evaluation Committee, and external advisors"*.
108. The OoS recognises that Mr Farrar's role as an expert advisor, and his position on the TAC, should have been more effectively documented and that this reflects a weakness in the procurement process in place at that time. The OoS also recognises that, generally, the record-keeping relating to the formation and role of the TAC was limited, and that OoS processes surrounding the understanding, and completion, of Conflict of Interest Declarations by external advisors (including a TAC if appointed) could be improved.

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<sup>50</sup> OoS only became aware of a potential conflict on 18 December 2017.



109. However, to enhance and ensure the robustness of the OoS's procurement process going forward, the OoS has identified improvements for its procurement procedures and Template documents for projects approved under the Minor Capital Works Program, as follows:

- (a) in the Minor Works Capital Works Program (Project Scoping, Procurement Strategy, Definition & Initiation Document for Construction Projects), section 3 addresses engaging external advisors (which addresses the concept of the TAC);
- (b) in the revised template for the TEP (**TEP Template**) introduced in 2021, a new section (section 7) has been formulated to specifically define the roles and responsibilities of a TAC, how to identify the members and sets out the selection process. The section reads:

**"7.2 Tender Advisory Committee**

**7.2.1 The Role of the TAC**

*In the event of an unusually technical and/or complex project, a Tender Advisory Committee (TAC) may be formed to assist in guiding design solutions, assessing the market, and evaluating the tender responses. The TAC provides specialist industry subject matter knowledge regarding the project topic to:*

- *Inform the review and development of technical specifications and specific competencies and qualifications*
- *Validate the technical content of the design documentation*
- *Make recommendations to the Project Manager and the Facilitator of the Evaluation Committee on the products required to be delivered via the project*
- *Assist in identifying and engaging specialist service providers in the market*
- *Offer advice and guidance to assist in informing the direction of the project throughout its duration*

**7.2.2 TAC Roles and Responsibilities**

*Because a TAC is only formed when there is a specific set of questions that needs external experts to answer, this will drive selection of the appropriate resources and what access to tender documents the TAC is given. These questions should be clearly defined and articulated to the TAC.*

*The TAC structure is designed to balance the skills, interests, and expertise of its members so that the group may offer sound advice to the project. All members are responsible for:*

- *Remaining fundamentally committed to the project's goals throughout their tenure*
- *Operating in a transparent, timely, and acceptable manner*
- *Ensuring all technical issues and new research submitted by stakeholders are properly considered by the committee and independent expert advice sought as necessary*
- *Contributing to the development of clear timelines and work plans for the Project Manager and the Evaluation Committee*
- *Considering alternative approaches to technical problems*
- *Ensuring the committee's recommendations are focussed on the intended project objective*
- *Ensuring all interested stakeholders have the opportunity to provide review input*
- *Clearly analysing the benefits of the proposed options for the affected stakeholders in a balanced and objective manner*
- *Acting in the best interests of the Office of Sport at all times*

**7.2.3 Establishing the TAC**

*The Facilitator [sic] will establish a TAC through a transparent and documented nomination process. All individuals selected as members of a TAC are subject to a strict vetting process and must read the Code of Conduct and sign a Deed of Confidentiality and Declaration of No Conflict of Interest prior to being appointed. The Director, Asset Management has responsibility for appointing members of the TAC.*

The Tender Advisory Committee will comprise: (if no TAC is required for the project, insert 'TAC not applicable' here)

Name	Position	Role during evaluation
[insert Advisory Committee Member]	Insert the Member's specific role to be performed for the TAC	[insert voting or non-voting]

TAC members may be removed, or additional members appointed, subject to the approval of the Director, Asset Management;"

- (c) in the Authority to Procure Template introduced in 2021, section 1 requires that:

"A Confidentiality and Conflict of Interest Undertaking shall be by those who have access to and regularly view potential suppliers' competitive quotes or commercially sensitive information. This includes but not [sic] limited to any person on the Opening Committee, Evaluation Committee, and external advisors";

- (d) in a revised template for the Tender Recommendation Report (prepared at the tender evaluation stage of the procurement process) (**TRR Template**) introduced in 2021, the OoS is required to insert information about the TAC, its role, and whether Confidentiality and Conflict of Interest Declarations have been completed. Section 2.5 reads:

"To obtain the appropriate advice, the Evaluation Committee also elected to form a Tender Advisory Committee (TAC) to assist with the evaluation of responses. The TAC consists of the following members (complete table).

Name	Position	Role during evaluation
(insert Facilitator)		Facilitator (insert voting or non-voting)

...

Delete the following reference if a TAC is not required.

In addition to the Evaluation Committee, the TAC members were also required to read the Office of Sport's Code of Conduct for Procurement and sign the Confidentiality and Declaration of Interest Agreement";

- (e) in section 2 (entitled "Procurement Strategy") of the Project Scoping Template, it states that all "consultants, advisers or personnel from other organisations... participating in the procurement activity must: (a) Read the Code of Conduct for Procurement and Competitive Processes; and Sign the Confidentiality and Declaration of Interest Agreement. Declarations are required to be completed prior to any involvement".
- (f) in a revised template for the Code of Conduct and Deed of Confidentiality and No Conflict of Interest (**Conflict of Interest Template**) introduced in 2021, individuals involved in procurement processes are given detailed guidance in relation to their Conflict of Interest obligations, including by reference to examples of conflicts. The Conflict of Interest Template relevantly states as follows:

#### "4. Conflict of Interest

Members must not use information obtained in the course of their membership on an Evaluation Team, Steering Committee, Opening Committee, Negotiation Team or as a Subject Matter Experts to gain any direct or indirect advantage or personal gains for themselves or any party other than NSW Government clients.

As an ongoing obligation (i.e., for the duration of their involvement in the life of the Procurement), members and individuals must disclose in writing to the Chairperson of their Committee if they become aware of any conflict of interest that:

- they or any member of their immediate family have or has which might possibly be thought to conflict with their duty as a member of a committee or individual to the Procurement or Competitive Process; or
- any organisation they are affiliated with (e.g., sporting or community organisation) which might possibly be thought to conflict with their duty as a member of a committee or individual to the Procurement or Competitive Process.

For example:

- a family member or relative works for a supply company that is in pursuit of a contract;
- a family member or relative works for a company in pursuit of an agreement;
- the member, or a family member, holds shares in one or more companies in pursuit of an agreement;
- a member providing advice as a subject matter expert, is affiliated with an organisation that is a supply company in pursuit of a contract;
- a member providing advice as a subject matter expert, is affiliated with an organisation who has staff that owns or works for a supply company that is in pursuit of a contract; or
- a member providing advice as a subject matter expert, is affiliated with an organisation that is sponsored by a supply company that is in pursuit of a contract.

*In most cases, early and open disclosure of such an interest (perceived or actual) will allow the Chairperson or Project Manager to prevent a conflict of interest occurring. If the conflict is not serious, no action beyond disclosure may be required. If the conflict is serious, it may be necessary for the member or individual to be fully removed for the competitive process and be replaced. If there is any doubt about whether or not a Conflict of Interest exists, then the assumption must be that one does, and appropriate action must be taken.*

*Individuals and Members must advise the Facilitator or the Project Manager if they are offered any employment by a company which has any interest in a supply matter, competitive process or confidential material being handled.*

*Each nominee to the opening and evaluation committees is to be notified that a declaration of personal interest in any company or agency involved in the competitive process submission is required prior to appointment. Please see the form at the end of this Code of Conduct.*

*All declarations of interest are to be retained on file with the Request for Tender documents.*

*Should it become apparent that a conflict of interests exists the convenor of the relevant committee shall consult with the nominating officer to deliberate upon whether the appropriate committee member is to continue to play a role in the procurement. The basis for any decisions and conditions applied are to be recorded and filed with the competitive process documents."*

110. The Template documents set out above form part of the suite of procurement templates that were submitted to ICAC on 6 August 2021. The OoS submits that:
- it has identified improvements and enhancements that it has implemented which has enhanced its procurement processes, procedures and templates; and
  - the introduction of clearer documents and guidance material in relation to the identification, and management of, conflicts of interest during a procurement process will result in a more robust and transparent procurement process.

111. The OoS considers that these improvements will reduce probity risks and the risks of impropriety while achieving better outcomes for the OoS and its key stakeholders going forward.

#### **(d) Request for Interest (RFI) Process**

112. In August 2017, the OoS conducted a RFI process in relation to the SIEC Arena Upgrade. On 14 August 2017, Mr Farrar emailed Mr Flynn "*background documents*" regarding the SIEC Arena Upgrade, attaching:
- the Request for Funding; and

- (b) two of the Appendices to the Request for Funding, namely:
- (i) "Appendix D - Ebb and Flow Watering System.docx"; and
  - (ii) "Appendix F - Project Estimate.xlsx; Equestrian Surfaces - a Guide 2014.pdf".
113. Mr Flynn emailed these documents to Mr Brown, Mr Crumpler and Mr Porter, stating:
- "Please find background documents attached from Bruce Farrar (ENSW). I hope to have the Request for Information drafted today for approval by Chris Baun<sup>51</sup> and yourself tomorrow. All going well, we should be able to distribute on Wednesday to the six arena suppliers that Bruce has identified for us. We've also had a reply from Oliver Hoberg (the independent consultant/technical expert) recommended by Bruce. I'll forward a copy of his schedule of rates shortly."*
114. The "six arena suppliers that Bruce has identified", referred to in Mr Flynn's email, included:
- (a) Australian Horse Arenas;
  - (b) Capricorn;
  - (c) Equestrian Land Developments;
  - (d) Equestrian Services;
  - (e) Martin Collins; and
  - (f) BSMS;
- (collectively, the "RFI Recipients").
115. The RFI Recipients were initially recommended to the OoS by Mr Farrar, and, according to interviews conducted by OCM, the recommendations for the RFI Recipients were based on Mr Farrar's knowledge of the industry, experience with products and the surfaces of other facilities both domestically and internationally. According to OCM, Mr Dingwall does not appear to have been involved in the making of these recommendations, nor in the decision to include BSMS as part of the list of RFI Recipients.
116. The OoS decided to issue the RFI to the RFI Recipients as a discrete group under a limited tender.<sup>52</sup> As the nature of the SIEC Arena Project was specialist in nature, the use of a limited tender was appropriate in the circumstances. This was supported by the OCM Report, which noted that:
- "The NSW Government's Market Approaches Guide v2 (April 2015) states that limited tendering is generally used for "specialist work" or in "special circumstances where only one or a limited number of service providers are known to be able to carry out the work". OCM notes that the nature of the goods and services being procured could be considered specialist in nature thereby supporting the use of a limited tender in these circumstances."*
117. Once provided by Mr Farrar, the list of potential RFI Recipients was tested by the OoS for suitability through desktop research and discussions with internal staff who had relevant knowledge. In addition to the six identified RFI Recipients, the OoS canvassed the broader market through a desktop search and by consultation with EA to find as many suppliers as possible. No additional suppliers were identified during this process.

<sup>51</sup> This is a reference to Mr Christopher Baun (Senior Procurement Officer, OoS).

<sup>52</sup> NSW Government's Market Approaches Guide v2 (April 2015) states that limited tendering is generally used for 'specialist work' or in 'special circumstances where only one or a limited number of service providers are known to be able to carry out the work'. Accordingly, the use of a limited tender was appropriate in these circumstances.

118. On 14 August 2017, Mr Flynn prepared a draft version of the RFI with input from Mr Farrar, including in relation to a "Scope of Work" section.
119. On 14 August 2017, the draft RFI was emailed by Mr Flynn to Mr Brown, Mr Baun and Mr Crumpler for their review and comments.
120. On 15 August 2017, Mr Crumpler responded to Mr Flynn's email in relation to the draft RFI, stating: *"Documentation looks thorough, well done on keeping the momentum moving and subject to an [sic] feedback from Chris Baun happy for this to proceed later today."*
121. On the same day, the following email exchanges took place:
- (a) at 2:38pm, Mr Flynn emailed Mr Brown, copying Mr Crumpler and Mr Baun, stating:
- "Following discussions with Chris, the following process has been suggested:*
1. *Confirm funding provision for the project. Escalate as necessary to fast track funding approval*
  2. *Asset Management to release the Request for Interest (attached) on e-tenders*
  3. *Kevin to forward the e-tender link to the six suppliers identified by Equestrian NSW;"*
- (b) at 2:54pm, Mr Brown responded to Mr Flynn stating: *"No problem with that, Kevin, except that I thought we weren't due to receive confirmation of the funding until some time in September. Is that not right?"*
- (c) at 3:47pm, Mr Crumpler responded to Mr Brown stating:
- "Matt you are correct, indications are we will not receive confirmation until September. Can we not proceed with points 2 and 3 regardless... We are only engaging a request for interest at this stage?"*
- (d) at 4:06pm, Mr Flynn also responded to Mr Brown, stating:
- "Yes Matt, I understand that unless approval is granted in advance by Sajeev, the usual process is as follows:*
1. *Finance apply to Treasury to carry forward the funding. This is submitted by Finance at the end of August*
  2. *Treasury generally take one month to review the request/s*
  3. *Given this timeline, funding approval would not be given till end of Sept / early Oct*
- Since the work needs to be completed 15 Nov — 31 Dec 2017, this will not leave sufficient time for:*
1. *The tender and assessment process (4 weeks)*
  2. *Shipping 3 x 40' containers from Europe (up to 8 weeks) and Customs (up to 4 weeks)*
  3. *Construction: Remove existing arena surfaces (3-4 days), construct the Ebb & Flow arena watering system and lay the surface (4 weeks)*
- Darren — could you please speak with Sajeev to see if there is any way that we can get this funding approval fast tracked?"*
122. On 16 August 2017, Mr Crumpler responded to Mr Flynn and Mr Brown, stating:
- "Sajeev is already in conversations with Treasury and we have received additional clarifications on roll over submissions this week so confident we will have our decision early September. Funding rollover for this project will not be fast tracked further in preference to any of the other 6 roll over projects unfortunately. From my calculations we need to place our order by early October to deliver this timeline. Chris advised that tender process would be 3 weeks if we conduct request for interest process prior so we need tender ready to go by second week of September."*
123. On 16 August 2017, the RFI was distributed to the RFI Recipients via eTender as well as by email notification to each of the RFI Recipients. The RFI requested that, if they were able to meet the Scope of Work requirements, the RFI Recipients were to provide their company



details and sign the Respondent Warrant (contained at section 5 in the RFI) to Mr Flynn by 23 August 2017.

124. The RFI stated:

**"1. Background**

*The Office of Sport is an executive agency within the NSW Department of Industry. We provide leadership and support to the sport and active recreation sector to enhance its performance and sustainability. We are also responsible for infrastructure and facilities planning, asset management and delivering high quality venues and facilities.*

*The Office of Sport is responsible for a portfolio of four Olympic Sport Venues, including the Sydney International Equestrian Centre (SIEC). The SIEC was purpose built for the Sydney 2000 Olympic and Paralympic Games. The venue is the heart of equestrian sports in NSW and continues to host a demanding calendar of National, State and Olympic qualifying events as well as training for high performance teams.*

*Venue facilities and assets are nearing 20 years of age and an upgrade of the surface of the Indoor Arena (5) and adjoining Arena 6 has been identified as a critical project in the 2017/18 Program of Works.*

*Currently these arenas are not providing the right give, rebound and grip for our equine athletes to perform at their best and do not meet the expectations of the State and National equestrian bodies for staging international competitions.*

*The SIEC is committed to providing and maintaining a competition surface that complies with international standard to cater for multi discipline equestrian sports. In recognition of new innovation in arena surfaces, the SIEC is seeking to benefit from these new technologies to upgrade the field of play, reduce maintenance costs and ensure the venue continues to be the premier facility and hub of equestrian sport in NSW."*

125. The Scope of Work section included that the SIEC Arena Upgrade must include an Ebb & Flow System. It stated:

**"2. Scope of Work**

*Once released, the tender document will include a full Statement of Requirements. At this stage, prospective suppliers are being advised that the surface upgrade must:*

- *be compliant with international best practice for arena surfaces to meet the competition and high performance needs of multi discipline equestrian sports at a World Championship and Olympic level*
- ***include an Ebb & Flow sub-surface watering system** and surface suitable for equestrian sports (e.g. this could include rubber cushioning, super-fine sand, geotextile and fibre additives, etc)*
- *provide a consistent and even riding surface that is considered to be low maintenance*
- *be able to be supplied, constructed and delivered within a 6-week timeframe, specifically 15 November to 31 December 2017*
- *be developed in cooperation with the Office of Sport's Asset Management, SIEC Venue Management and an independent consultant/technical expert"*

(Emphasis added)

126. By 23 August 2017, five of the RFI Recipients (Australian Horse Arenas, Capricorn, Equestrian Services, Martin Collins, and BSMS) responded to the RFI indicating that they were able to undertake the SIEC Arena Upgrade. Equestrian Land Developments advised that they did not have capacity to undertake the work.

127. On 24 August 2017, Mr Flynn sent an email to Mr Brown stating:

*"In response to the Request for Interest that was distributed to the six identified suppliers on 16 August, we have five registrations. Here's an update on the registered interest:*

*Australian Horse Arenas  
Registered interest via the eTendering website.*

*Capricorn Australia*  
Registered interest via the eTendering website, plus replied to Kevin with Company Details (Attachment 1).

*Equestrian Land Developments*  
Fully booked until February 2018, so would be unable to do the job. Todd advised that "Ebb & Flow is the only way to go in NSW (it's too wet for it in QLD)". Recommended that we contact Lou at Capricorn.

*Equestrian Services Australia*  
Registered interest via the eTendering website. Surface includes wax.

*Martin Collins Australia*  
Completed 'Request for Interest' (Attachment 2).

*BSM Sport Equestrian (Agent for Otto Sport)*  
Completed 'Request for Interest' (Attachment 3). Would partner with JK Williams to do the job. Currently constructing the surface at the Wallaby Hill equestrian facility in Robertson. Invited SIEC staff to visit next Tues 29 – Thurs 31 Aug to see the surface being laid. This is the surface used for the Rio Olympic Games. Includes synthetic mats and fibre from o/s."

128. In the email, Mr Flynn stated that: "At this stage, we have five companies confirming that they could complete the job before the end of the year, assuming a decision is made shortly".
129. The OoS decided that each of the RFI Recipients that registered their interest should be invited to participate in the RFT process. Accordingly, no assessment or selection process was conducted during the RFI process and no RFI Suppliers approached for the RFI were precluded from participating in the RFT Process.
130. As noted above, the OoS has considered the comments by ICAC that:
- (a) the advice of ENSW and Mr Farrar: "appears to have been accepted in the absence of independent verification or clear record of how the advice was independently verified. There appears to have been no or a limited mechanism to test information"; and
  - (b) "Mr Farrar appears to have been afforded a significant amount of involvement in the process in the absence of a formal arrangement including a clear description of his duties."
131. The OoS submits that it was appropriate and justifiable for it to rely upon Mr Farrar's advice in relation to the RFI Recipients in circumstances where he was the key representative of a relevant SSO with known subject matter expertise, a member of the TAC, and the OoS was operating under time constraints and in circumstances where there was a limited pool of equestrian experts available. However, the OoS acknowledges that Mr Farrar's role as an advisor to the OoS in relation to the RFI Recipients and the Scope of Works in the RFI should have been clearly articulated and documented more effectively. The OoS acknowledges that this was a weakness in the procurement function at the time which resulted in gaps in the procurement process for the SIEC Arena Upgrade.
132. However, the OoS has identified improvements and enhancements that it has implemented to better document and regulate the role of external technical advisors, which have been outlined at paragraph 156. This will ensure that the OoS has a transparent and robust procurement process in future. The OoS notes that, going forward, the extent of input required in relation to the RFI process by an external technical advisor (like Mr Farrar) would be formally detailed in the Project Scoping Template as part of the scope of the role of any "External Advisors". The relevant section of the Project Scoping Template reads as follows (section 3):
- "Determine whether or not the Office has the required resources and expertise. In the event external advisors are to be engaged, consider the following:*
- *is the expertise available elsewhere within the Public Sector?*
  - *level and nature of involvement of the external provider*
  - *access to information by the external provider*



- *due diligence required before engaging an external provider*
- *any Contract Framework to be used when engaging an external provider*
- *any training an external adviser may need to undertake*
- *need for probity advisor to monitor and report on the involvement of any external provider."*

133. The OoS also acknowledges the comments of ICAC in relation to the procurement process generally, that: "*There appears to be a lack of clearly documented decisions and rationale for the decisions*". In addition to formalising the input of a technical external advisor like Mr Farrar, the OoS agrees with ICAC's comment that the record-keeping in relation to key decisions taken in the RFI process (such as the decision to issue the RFI under a limited tender, and the reasoning behind the final selection of the RFI Recipients) could have been improved.

134. To address these weaknesses in the procurement function, the OoS has implemented the following improvements, which will contribute to a robust and transparent procurement process going forward:

- (a) the Project Scoping Template now contains a specific section requiring the OoS to address "*Market Research*" and the reasons for proceeding with either an open tender or a market tender (at section 2). The relevant extract states:

**"Market Research**

*Describe any market research for all or specific part of the project that suggests that a unique market approach is required.*

*Summarise only the market findings that are relevant to this Procurement Activity e.g.:*

- *Sustainability issues (trends, best practice suppliers)*
- *Performance and growth (past & future)*
- *Capacity utilisation (current and predicted)*
- *Competitiveness (no. suppliers, mergers/acquisitions, pricing trends)*
- *Top suppliers, ownership structures*
- *Barriers to entry*
- *Threats – substitution, new entrant, innovation, global sourcing opportunities*
- *Political, economic, legal and regulatory aspects of the market*
- *Economic considerations*
- *Technological aspects of the market*
- *Supply solutions implemented by other buyers*

*Identify the effects of the market research in formulating and defining the Procurement Strategy. Consider how the characteristics of the market might impact risks and how these characteristics might affect the way in which we engage with and manage suppliers, e.g.:*

- *Does a competitive market exist or are we faced with a monopoly provider?*
- *Identification of potential suppliers and/or suppliers not to consider*
- *How might any of the findings above be impacted by a change in government, legislation, economic conditions etc.?*
- *Do the findings indicate that an open tender should be preferred over a limited tender?"*

- (b) the Project Scoping Template requires the OoS to describe the sourcing method chosen for the procurement process (at section 2). The relevant extract states:

**"Market Engagement Method**

*Based upon the strategy drivers above, describe the sourcing method chosen e.g., Expressions of Interest (EOI), Open or Closed Request for Quote (RFQ), Tender (RFT), or Proposal (RFP), Direct Negotiation etc. State which contract will be used for the engagement.*

*Indicate how long the market will have to submit a response and how the response will be submitted e.g., through the NSW Government eTendering system"; and*

- (c) the Project Scoping Template also requires the OoS to detail the selection of suppliers and reasons regarding same, namely:

**"Supplier Selection**

*Which Suppliers do you propose to approach and why?*

*If your selected sourcing method involves only inviting one supplier to provide a bid/tender, you must explain why you are not testing the market e.g., if you are extending an existing contract or are negotiating with a single supplier, why has this method been chosen?"*

**(e) Request for Tender (RFT) Process**

135. From August to October 2017, the OoS prepared the RFT for release to the relevant recipients in relation to the SIEC Arena Upgrade.
136. In August 2017, Mr Flynn began preparing a draft Scope of Works for the RFT in consultation with Mr Farrar and Mr Vallance (in their capacity as members of the TAC). The suggestions and amendments to the draft Scope of Works proposed by Mr Farrar and Mr Vallance were tested by the OoS through online research, discussions with internal staff with relevant knowledge and by reviewing case studies of other similar projects to confirm the veracity of the proposed Scope of Works.
137. In August 2017, the draft Scope of Works was distributed for feedback to 16 key stakeholders. Feedback was received from three stakeholders, namely, Dressage NSW, the Arabian Horse Society of Australia and the Show Horse Council of Australasia, who each responded positively.
138. On 25 September 2017, Mr Jim Kasif commenced working at the OoS as the Project Manager for the SIEC Arena Upgrade. Mr Kasif was engaged as a skilled Project Manager for the SIEC Arena Upgrade. Mr Kasif worked with Mr Flynn in relation to the procurement process, and reported directly to Mr Brown, but generally worked independently as in his role as project manager. Mr Kasif was engaged as a contractor through the recruitment company Chandler Macleod, who were on the NSW Government Panel to provide project management services, for a 37 week period ending 30 June 2018 due to internal OoS staffing constraints and the workload that had to be completed before the end of the financial year. Mr Kasif was engaged to work on range of projects during his tenure at the OoS. Based on his experience and expertise, it was expected that he would operate autonomously and that he both understood and would comply with any and all relevant policies and procedures in place at the OoS. Mr Kasif's engagement was always intended to be a temporary arrangement.
139. On 28 September 2017, Mr Kasif conducted a pre-Tender site meeting at the SIEC, which was attended by representatives from each of the RFI Recipients, with the exception of Equestrian Land Developments. On 4 October 2017, Lindsay Dynan Consulting Engineers were engaged by way of Letter of Award signed by Mr Bangel to provide surveying services for the SIEC Arena Upgrade, specifically, as a "*Land Surveyor to provide a drawing of sport levels to surface substrate and top of concrete kerbs to Arena 6 (outdoor arena - warmup)*" (at a total cost of \$1,800 excl. GST).
140. Mr Kasif took over the role of drafting the Scope of Works from Mr Flynn. This included incorporating the feedback received from Dressage NSW, the Arabian Horse Society of Australia and the Show Horse Council of Australasia.
141. On 5 October 2017, Mr Kasif emailed Mr Farrar the Scope of Works "*for your information and comment*" and received revisions back from Mr Farrar on 6 October 2017.
142. The final Scope of Works for the RFT was as follows:
- "Sydney International Equestrian Centre (SIEC) – Arena Upgrade*
- Project Description*
- 1.0. Upgrade two (2) existing arena's [sic] at the Sydney International Equestrian Centre*

(SIEC);

- Arena 5 (indoor arena), approximately 70m x 35m and
- Arena 6 (outdoor arena), approximately 70m x 28m
- The **new surface** to both arena's [sic] is to be world class to meet FEI requirements and **the preferred system is the Ebb and Flow system.**

2.0. Arena surfaces are to achieve

- 2.1. stable footing to ensure that horses and riders are not injured
- 2.2. the right dynamic characteristics (give, slip, rebound and grip) so that horses and riders can demonstrate their highest level of capability
- 2.3. maintain consistency and fairness of the field of play across the entire surface, and throughout a whole day of intensive competition
- 2.4. be robust enough to cope with high volumes of use without intensive and expensive maintenance
- 2.5. host multi discipline shows at one event - for example, Show Jumping; Vaulting; Showing; Dressage
- 2.6. An even riding surface

DESIGN AND SPECIFICATION OF THE WHOLE OF THE WORKS INCLUDING

Scope of Works

Note: The Scope of Works in this Contract includes but is not limited to:

- 2.7. Production of documents including drawings, specifications, manuals and brochures for the whole of the Works.
- 2.8. Preparation of a Works Programme in Critical Path format (Gantt Chart) to be in accordance with the programme submitted at the time of Tender amended as directed by the Principal prior to execution of the Agreement;
- 2.9. Base or bedding under tanking membrane (to be determined in consultation with the Principal following preparation of subgrade);
- 2.10. Tanking membrane
- 2.11. Provide a back brief of works to be undertaken, materials used, methodologies
- 2.12. Removing of surface material and transporting to arena's 12 and 13
- 2.13. Removing of subbase as required to achieve required levels and transporting within equestrian centre as directed
- 2.14. Supply and install all sub-surface pipework including all connections and fittings;
- 2.15. Drainage/ watering system including water level control, fittings, surplus/storm water disposal, etc.;
- 2.16. Sand(s) including grading profiles;
- 2.17. Synthetic material additives to the surface;
- 2.18. Edge boards / kerbing to outdoor arena (Arena 6)
- 2.19. Maintenance programmes.
- 2.20. Super fine sand and/or
- 2.21. Fibre additives – NOTE; fibres must be free of hazardous material (asbestos, glass, etc.)
- 2.22. Provide kerb to Arena 6 as required
- 2.23. Non-conforming tenders will be considered

Tenderers are required to provide drawings and/ or sketches including typical sections and details of the proposed surfaces for both Arenas.

3.0. Supply of Generic Supply Items including

- 3.1. Tanking membrane;
- 3.2. Sub-surface pipework to Arenas connecting to control units;
- 3.3. Drainage layer material;
- 3.4. Manual moisture control units;

4.0. Construction period

- 4.1. Construction period is strictly limited between 15/11/2017 and 11/01/2018
- 4.2. With sufficient notice and approval, access to the site is not restricted with regards to hours of work

5.0. Material storage

5.1. Storage of material on hard surface P1 as indicated in SIEC 'centre map'

5.2. Sydney International Equestrian Centre to provide tape/barriers

6.0. SIEC to provide traffic management with prior notice

7.0. SIEC to allow for suitable fencing barriers to construction zone

8.0. Supply of Proprietary Items

The Tenderer is to submit a price for supply and delivery to site of each Proprietary Supply Item. Proprietary items include but may not be limited to:

- Synthetic material to arena surface sand/fabric mix;

9.0. The Tenderer is to submit a price for construction of the Works.

- Construction of the Works must include all items required to complete the Works from acceptance of the ground works carried out by others to commissioning and hand-over of the Works as fit-for purpose.

- In pricing the construction of the Works. The Tenderer must price all items required for construction.

10.0. SUPERVISION AND CERTIFICATION OF THE WORKS

- The Contractor is to provide a suitably qualified Supervisor who is to supervise the construction of the Works on a full time basis from commencement to hand-over to the Principal as Fit-for-Purpose.

- On Hand-Over the Supervisor is to Certify the Works have been carried out and perform in accordance with the Contractors Design and Specifications."

143. In early October 2017, the remainder of the documents comprising the RFT were finalised by Mr Kasif (**RFT Documents**). The RFT Documents were based on the NSW Government MW21 Standard Form, which is used to document and manage construction contracts valued up to \$1 million.

144. The RFT Documents included:

(a) Conditions of Tendering - this required, among other things, that tenderers comply with the NSW Government Code of Practice for Procurement and the NSW Government Implementation Guidelines to the Code of Practice for Procurement.

(i) In relation to "Alternative Tenders", the Conditions of Tendering stated:

*"Alternative Tenders*

*Where a tenderer proposes an alternative tender, the tenderer must submit a detailed description of the alternative stating clearly the manner in which it differs from the requirements of the RFT documents. Where the tenderer submits more than one tender and the relevant information is different for the alternative(s), submit separate Tender Schedules. Clearly identifying each Tender Schedule the applicable alternative. The Principal will consider alternative tenders, that meet the scope and functional intent expressed in the RFT documents, but may elect not to accept an alternative tender. Alternative tenders will not be considered unless the tenderer has submitted a conforming tender".*

(ii) In relation to "General Evaluation Criteria", the Conditions of Tendering stated:

*"General Evaluation Criteria*

*In evaluating tenders, the Principal will take into consideration not only price but also other factors affecting value for money, including but not limited to:*

- ability to meet requirements of the NSW Government Code of Practice for Procurement;*
- understanding of the engagement;*
- personnel/capacity of tenderer;*

- recent experience/provision of contractor performance reports from prequalification scheme;
- construction program and methodology;
- WHS management performance;
- workplace and industrial relations management performance;
- environmental management performance; and
- conformity to RFT requirements.

*The Principal may treat any detail required by the RFT documents which is omitted, illegible or unintelligible as failing to fulfil the relevant requirement.*

*The Principal may assess the value of any qualification in any tender without reference to the tenderer, and compare tenders on the basis of the Principal's assessed valuation";*

- (b) Tender Schedules, including;
- (i) Tender Form;
  - (ii) Schedule of Prices – Lump Sum;
  - (iii) Schedule of Non-Price Criteria;
  - (iv) Schedule of WHS Management Information;
  - (v) Schedule of Compliance with NSW Government's Implementation Guidelines to the NSW Government Code of Practice for Procurement;
  - (vi) Schedule of Environmental Management Information: PART A;
  - (vii) Schedule of WHS Management Information: PART B; and
  - (viii) Schedule of Quality Management Information
- (c) Specification Documents, including:
- (i) General Conditions of Contract and Contract information;
  - (ii) Preliminaries and Project Specific Preliminaries;
  - (iii) a Survey Diagram dated 6 October 2017, a centre layout, and a guide to Arena 5 and 6 of the SIEC; and
  - (iv) the final Scope of Works.

145. On 10 October 2017, Mr Kasif and Mr Bangel (Director, Asset Management, OoS) approved the release of the RFT Documents.

146. Also on 10 October 2017, Mr David Lawrence and Mr Marty McInerney (Equestrian Sports Arenas) met with Mr Flynn to inform him: "*of the imminent release of our new product, a totally Australian manufactured & processed Geotextile Polyester & Polypropylene arena fibre footing material*". During this meeting, Equestrian Sports Arenas "*were made aware of tenders being called for the surface upgrade to Arenas 5 & 6 at SIEC*" and Mr Flynn "*suggested that [they] should put in a tender based on the information [they] provided of [the] product*".

147. On 11 October 2017, Mr Lawrence emailed Mr Kasif, Mr Farrar and Mr Flynn advising:

*"It was opportune to meet with Kevin Flynn yesterday, enabling us to outline the process by which Marty McInerney and I have arrived at the construction specifications and materials of the Equestrian Sports Arenas surfaces. It was Kevin's recommendation that we tender to refurbish the surfaces at SIEC. We were unaware the exercise was imminent.*

*The surfaces we produce come as a result of nearly two years of investigation both in Australia and overseas, seeking the best arena surfaces to be installed at the grounds of The Sydney Showjumping Club (SSJC) and as such our findings may have been of value and interest to SIEC.*

*Marty's experience stems from having built upwards of 100 arenas over his 30 years in the sport, mine is from my experience as an FEI showjumping Course designer of many years and as President of arguably, the largest Showjumping club in Australia with over 600 members.*

*We agree that a moisture control system is the answer to providing a truly International surface and would like to point out a few features of the surface we propose:*

- *All materials are of Australian origin*
- *All Materials are backed by technical specifications*
- *All Materials are NSW based and available for immediate delivery*
- *All fibre materials are certified UV safe*
- *All fibre material is quality certified and produced from premium Geotex polypropylene and polyester mix.*
- *All fibre is sourced from Australian manufactured product and contains no biodegradable material*
- *All sand meets USGA specifications and has been tested as fit for purpose.*
- *All materials being locally based confirm the construction dates 15/11/17 - 11/1/18 are very achievable.*

*Jim, we are very pleased that Bruce Farrar is involved in the tender selection process and we would be more than prepared to brief him on our product should you and Kevin feel this would be required. Bruce is aware of SSJC's work in this area.*

*In the event that we are not included in the tender process, we are still more than happy to assist SIEC, in whatever form, to arrive at the best "International Standard" surfaces possible in the interest of the sport and our horses."*

148. On 11 October 2017, the RFT Documents were publicly released on NSW eTendering to:

- (a) Australian Horse Arenas;
- (b) Capricorn;
- (c) Equestrian Services;
- (d) Martin Collins;
- (e) BSMS; and
- (f) Equestrian Sports Arenas;

(collectively, the "**RFT Recipients**").

149. The RFT was open from 11 October 2017 until 24 October 2017 (**Tender Period**). The Tender Period ran for less than 2 weeks owing to the urgency and time constraints for project delivery, namely, to prepare for the upcoming Australian Dressage Championships.

150. During the Tender Period, three Addenda to the RFT were issued through eTender on 18 October 2017, 19 October 2017 and 20 October 2017 respectively with all RFT Recipients acknowledging receipt.

151. On 22 October 2017, Mr McInerney wrote to Mr Kasif advising that Equestrian Sports Arenas had decided to withdraw from the RFT process. Mr McInerney stated:

*"The team at Equestrian Sports Arenas, have decided to withdraw from the tender process for the upgrade of Arenas 5 & 6 at the Sydney International Equestrian Centre [SIEC].*

*...*

*After careful consideration we have decided to decline from being a part of the Tender Process for the following reason.*



*ESA's Geotextile Fibre Footing Material has gone through extensive and independent laboratory testing to provide detailed results confirming our product is definitely "Fit For Purpose" on Equestrian Arenas and Horse Racing surfaces. Notwithstanding this, we feel that for the international standard of competition conducted at SIEC, our product still needs to be tested by the market as a whole and that the limited number of arenas we have done to date is still not enough to be considered a truly International level product.*

*On the other hand we would ask that we might be considered in your future tender process for the refurbishment of the other arenas at SIEC when the time comes for them to be resurfaced.*

*By this time we feel we will be able to give you the assurances necessary and provide you with enough sites to inspect in support our tender and provide confidence our product will comply with your International standards. We will keep you and Kevin informed of the progress of our Australian Made product and if at any time either David Lawrence or myself can be of service to you or Kevin we are happy to assist as we have between us a vast bank of knowledge from all sides of the horse industry both here in Australia and Internationally as far as arena construction and especially as far as arena footing is concerned."*

152. In considering the RFT process for the SIEC Arena Upgrade, the OoS has noted ICAC's observations regarding the significant role of Mr Farrar, the need to better formalise his role as well as the need for further documentation regarding key procurement decisions taken and the resulting gaps in the procurement process.
153. The OoS recognises that Mr Farrar and Mr Vallance assisted the OoS in drafting the Scope of Works for the RFT, without clear articulation or documentation in relation to their role as external technical advisors and as members of the TAC. In addition, the OoS acknowledges that the documentation concerning the way in which the members of the TAC were to engage with, or contribute to the RFT process, could be improved.
154. The OoS submits that, for the same reasons as set out above, it was appropriate and justifiable for the OoS to rely upon Mr Farrar's advice. It was also appropriate and justifiable for the OoS to consult Mr Vallance who is an expert in show jumping and an FEI accredited four star level show jumping course builder and technical delegate.<sup>53</sup> However, the OoS acknowledges that the provision of advice by Mr Farrar and Mr Vallance in relation to the Scope of Works should have been clearly articulated and documented, as well as how this consultation was reconciled with their membership of the TAC.
155. As outlined above, the OoS has now identified and implemented a number of improvements to enhance its procurement procedures for projects approved under the Minor Capital Works Program, specifically to better define the roles of external advisors. These amendments specify that the scope of the role of any "External Advisors" must be recorded at the outset of the procurement process in the Project Scoping Template. The OoS is of the view that the increased requirements outlined in the Project Scoping Template will ensure that the OoS procurement suite of templates contributes to achieving a more robust and transparent procurement processes going forward.
156. The OoS has also introduced the following measures to improve record-keeping in relation to the role and input of external advisors and/or the TAC:
- (a) the Project Scoping Template now contains a specific section requiring the OoS and any external advisors to comply with "Record Keeping" requirements (at section 3). The relevant extract states:

**"Record Keeping**

*All records should be filed in the relevant TRIMs project file noted above. Consistent with an environment of professionalism and fair dealing, all project team members, including external advisors and Evaluation Committee members, should take reasonable steps to ensure that the information on which decisions or recommendations are based is:*

- *well thought out, correct and complete*
- *excludes irrelevant information or unsubstantiated opinions*

<sup>53</sup> Weekly Times Now, 'Equestrian Australia names John Vallance as new committee chairman' (25 April 2017) available at <<https://www.weeklytimesnow.com.au/sport/equestrian-australia-names-john-vallance-as-new-committee-chairman/news-story/83209a77c8bc0c33b934579b75f32ed1>> (accessed on 18 August 2021).



- fully and properly documented
- minimises any personal bias or influences

*In particular, where there is any departure from policy, procedures or normal practice, the reasons for the departure must be clearly documented"; and*

- (b) the TEP Template requires the OoS to appoint a "Facilitator" of the TAC "through a transparent and documented nomination process" to act as a spokesperson for the TAC and be responsible for record keeping. The TEP Template relevantly states in this regard (at section 7.2.4):

**"7.2.4 Managing the TAC and Integration of TAC's advice**

*To maximise the results of the TAC's efforts, the Facilitator of the Evaluation Committee must define, document, and communicate the questions that are to be answered. The Facilitator must also structure the TAC's activities (e.g., frequency of meetings; clarifications; reporting; etc.) and ensure that it's [sic] advice:*

- aligns with the Evaluation Committee's original requirements and answers the defined questions;
- includes the evidence on which the findings are based; and
- considers the feasibility for the Office of Sport in implementing the recommendations.

*Finally, the Facilitator must decide and document how the TAC's findings are to be incorporated into the Evaluation Committee's overall results, decisions and recommendations."*

157. The OoS also notes that, as part of the reform and development of its procurement Templates, processes and procedures, it needs to better outline the approach to the RFT process (including the extent of the involvement of external advisors in the Scope of Works) in further detail. Such improvements to existing procurement templates and policies will ensure OoS continues to enhance its procurement process going forward.

## **(f) Tender Evaluation Plan (TEP) and Formation of the Tender Evaluation Committee (TEC)**

158. On 10 October 2017, Mr Bangel approved a TEP for the evaluation of tenders for the SIEC Arena Upgrade, which had been drafted by Mr Kasif using the standard template.

159. The TEP stated its purpose was:

*"to document the methodology that will be used to evaluate Tenders received in response to the Department's Request for Tenders (RFT) to Sydney International Equestrian Centre - Arenas 5 & 6 Upgrade - [sic]. The RFT was issued on 10/10/2017 with a closing date of 24/10/2017."*

160. The TEP referred to a "tender evaluation team", stating that:

*"The tender evaluation team (the Team) will:  
- use its professional skills and experience to identify the preferred tenderer and evaluate tenders in accordance with this TEP; and  
- produce and evaluation report to award a contract, and/or to pass over any or all tenders."*

161. The TEP noted the following responsibilities for the tender evaluation process:

- (a) two representatives designated as the Tender Opening Committee (**TOC**) were to record the tender responses electronically, print them, and then store them securely;
- (b) a Tender Evaluation Committee (**TEC**) was designated to assess the tender responses in accordance with the TEP and to submit a TRR for approval by the Director, Asset Management and Procurement (that is, Mr Bangel); and
- (c) the Director, Asset Management and Procurement (that is, Mr Bangel) was to:
- (i) approve the undertaking of the RFT process;

- (ii) approve the TEP;
  - (iii) conduct any review of the TEC's recommendations (and, if deemed appropriate, request that the TEC reconsider or further consider nominated matters); and
  - (iv) decide whether or not to approve the TEC's recommendations in the TRR.
162. The TEP nominated the following OoS staff to be on the TEC (which was accepted via Mr Bangel's approval of the TEP):
- (a) Mr Kasif;
  - (b) Mr Flynn; and
  - (c) Mr Porter.
163. The TEP described the governance framework and methodology which was to be applied when assessing and evaluating Tender Responses to prepare the TRR. This included the Evaluation Criteria and weightings to be applied for each criterion (namely, Non-Price and Price), the scoring scale to be used for the Non-Price Criteria, the formula to assess Price Criteria and provisions allowing for the conducting of due diligence activities such as clarifications, interviews and referee checks. The Evaluation Criteria in the RFT was broadly consistent with those listed in the TEP. This included the disclosure of Non-Price Criteria weights.
164. The TEP attached the following supporting documents "*to be used in the evaluation of tenders*":
- (a) Code of Conduct for a Tender Process;
  - (b) spreadsheet for schedule of prices and spreadsheet for hourly rates for variations;
  - (c) guide to scoring Non-Price Criteria;
  - (d) Non-Price Criteria scores; and
  - (e) scores calculations spreadsheets.
165. The TEP stated that it complied with the "*NSW Government Procurement System for Construction and the Tender Document*" (the "Tender Document" being the RFT) and that "*neither the TEP nor any of its contents will be made known to tenderers*". Under the heading, "*Probity Matters*", the TEP stated:
- "10. Probity Matters**
- All participants in this tender process, including Evaluation Committee members, advisers and any staff having any involvement with this project, are required to maintain confidentiality in respect of this process and to declare any perceived, potential or actual conflict of interest. All participants should sign Deeds or Declarations in these respects. People attending Evaluation Committee meetings should declare at those meetings whether they may have a conflict of interest.*
- Any questions or concerns about any possible breach of confidentiality or perceived, actual or potential conflict of interest, or any other matters of a probity nature, should be referred to the Chair of the Tender Evaluation Committee or the Director, Asset Management and Procurement."*
166. As outlined above, the engagement of external advisors and the establishment of the TAC was not recorded in the TEP.
167. On 10 October 2017, under the heading "*Concurrence with TEP*", the TEP was signed by individuals who constituted the Tender Evaluation Team referred to in the TEP, being Mr Kasif,

Mr Brown and Mr Flynn. The signatures appeared following a sentence stating that the "Team concurs with the TEP and agrees to sign a 'Declaration of No Conflict of Interest'."

168. Mr Porter, one of the three TEC members, did not sign the TEP, as, at the time, it was Mr Brown and not Mr Porter that was intended to be part of the TEC. Mr Porter was asked, at a later stage, to join the TEC due to Mr Brown's unavailability to carry out evaluations of the RFT Responses on the designated date.
169. As stated above, the TEP was approved by Mr Bangel, as Director, Asset Management and Procurement, on 10 October 2017.
170. Between 19 and 25 October 2017, "*Deeds of Confidentiality and No Conflict of Interest*" were signed by certain OoS staff involved in the procurement process, including all members of the TEC and the TOC:
- (a) Mr Porter;
  - (b) Ms Sue Hartog, Events Coordinator, OoS;
  - (c) Mr Kasif;
  - (d) Mr Ryan Lee, Asset Management, OoS;
  - (e) Mr Baun;
  - (f) Mr Farrar;
  - (g) Mr Raph Hui (Project Officer, Asset Information, OoS);
  - (h) Mr Brown;
  - (i) Mr Flynn; and
  - (j) Mr Robert Batchelor (Events Officer, OoS).
171. No conflicts of interest were noted by any of the members of the TEC or TOC in the signed Conflict of Interest Declarations. The OoS also notes that in relation to the TAC (as outlined above), the OoS has a signed Conflict of Interest Declaration for Mr Farrar and is undertaking searches to identify the same documents for Mr Vallance and Ms Farrell.
172. The OoS acknowledges that there were weaknesses in the procurement process in relation to the TEP and formation of the TEC that were the subject of the following recommendations from ICAC and OCM in the OCM Report:
- (a) the recommendation by OCM that the TEP should document the use of a TAC or, if the use of a TAC is not contemplated in the TEP, this should be formally updated by amendment to the TEP and signed off by an appropriately delegated authority;
  - (b) the recommendation by OCM that: "*in future, all members of the TEC review and sign the TEP so that their roles and responsibilities including the requirements for maintaining probity in the evaluation process are clearly understood*";
  - (c) the issue raised by ICAC that:
 

*"The issue of clearly documented conflict of interest declarations appears to be a widespread one, having regard to the Office of Sport being unable to confirm whether or not former CEO Matt Miller declared his appointment on the selection committee for the ENSW Board"*; and
  - (d) the recommendation by OCM that:

*"in future, all evaluation participants with access to confidential information in the RFT be asked to sign a Deed at their first involvement in the project. Early signing of non-disclosure agreements reinforces the need for keeping confidential information secure and obligates the individual to not discuss the procurement with anyone that is not authorised to receive such information".*

173. The OoS agrees that the process suggested in the OCM Report to include the detail of the TAC in the TEP reflects best practice in terms of procurement. The OoS has since made a number of enhancements to its procurement documents to ensure a more transparent and robust procurement process and reduce the possibility of probity risks. As set out above, the OoS has included a distinct section (section 7.4) in the TEP Template to specifically define the roles and responsibilities of a TAC, identify the members and to set out the selection process. The OoS also agrees that a process should be implemented mandating that, should a TAC be formed following approval of the TEP, a formal amendment must also be made to the TEP.
174. In relation to the signing of the TEP by all members of the TEC, the OoS notes that, at the time, this was not a requirement in the 2016 Procurement Manual which only required the TEP to be *"signed and approved by the authorised officer"*. However, the OoS has implemented a number of additional measures to ensure that, going forward, all members of a TEC will review and sign the TEP so that their roles and responsibilities, including the requirements for maintaining probity in the evaluation process, are clearly understood, thereby ensuring a more robust procurement process going forward and reducing any probity risks in doing so. The OoS notes that the TEP Template now requires approval by the TEC (see section 13). The TRR Template also contains the following section to ensure that this has occurred (section 2.5):

**"2.5 Evaluation Committee**

*The Evaluation Committee consists of the following members (complete table).*

<b>Name</b>	<b>Position</b>	<b>Role during evaluation</b>
<i>(insert Facilitator)</i>		<i>Facilitator (insert voting or non-voting)</i>

...

*The TEP was signed by all Evaluation Committee members prior to commencing the evaluation. In signing the TEP, Evaluation Committee members were also required to read the Office of Sport Code of Conduct for Procurement and Competitive Processes and sign the Confidentiality and Declaration of No Conflict of Interest Agreement."*

175. In relation to the use of Conflict of Interest Declarations, the OoS notes that section 10 of the TEP stated that: *"All participants in this tender process, including Evaluation Committee members, advisers and any staff having any involvement with this project, are required to maintain confidentiality in respect of this process and to declare any perceived, potential or actual conflict of interest"*. The OoS acknowledges that this requirement extended to OoS staff and external advisors, many of whom did not complete a "Declaration", but could be classified as *"participants in the tender process"* and had access to confidential information regarding the procurement process, including:
- (a) Mr Crumpler (whom, although had limited involvement in the RFT process and tender evaluation process, had significant involvement in the Request for Funding and the RFI process);
  - (b) Mr Bangel (who approved the TEP and the TRR); and
  - (c) Mr Miller (who ultimately approved the awarding of the Contract after reviewing a Brief of the RFT and tender evaluation processes).
176. The OoS acknowledges this gap in its previous procurement processes and, as set out above, has since identified a number of improvements and enhancements, which expand on available guidance material for the OoS's employees and strengthen the OoS's procurement processes in relation to Conflict of Interest Declarations in the following ways:

- (a) in the Project Scoping Template, section 3 (titled "*Project Resourcing (roles and responsibilities)*") requires that all "*consultants, advisers or personnel from other organisations... participating in the procurement activity must: (a) Read the Code of Conduct for Procurement and Competitive Processes; and Sign the Confidentiality and Declaration of Interest Agreement. Declarations are required to be completed prior to any involvement*";
- (b) in the Authority to Procure Template, section 1 (titled "*Project Details*") requires that: "*A Confidentiality and Conflict of Interest Undertaking shall be by those who have access to and regularly view potential suppliers' competitive quotes or commercially sensitive information. This includes but not [sic] limited to any person on the Opening Committee, Evaluation Committee, and external advisors*";
- (c) in the TRR Template, the OoS must include the following provisions relating to the completion of Confidentiality and Conflict of Interest Declarations by the TEC and TAC (if a TAC has been engaged for the project):
 

*"The TEP was signed by all Evaluation Committee members prior to commencing the evaluation. In signing the TEP, Evaluation Committee members were also required to read the Office of Sport Code of Conduct for Procurement and Competitive Processes and sign the Confidentiality and Declaration of No Conflict of Interest Agreement.*

...

*In addition to the Evaluation Committee, the TAC members were also required to read the Office of Sport's Code of Conduct for Procurement and sign the Confidentiality and Declaration of Interest Agreement;"* and
- (d) in the Conflict of Interest Template, individuals involved in procurement processes are given detailed guidance in relation to their Conflict of Interest obligations, including by reference to examples of conflicts.

177. The OoS also agrees with the suggestion by OCM that, in future, all participants in the procurement process should be asked to sign a Conflict of Interest Declaration when first involved in any project. The OoS will include a process in this regard as part of its overarching procurement reform and enhanced Procurement Strategy Template. Improvements such as these, and as set out above, will enhance the OoS's procurement processes and ensure a robust procurement process going forward.

### **(g) Tender Opening**

178. On 23 October 2017, and as required by the TEP, the TOC opened the tenders received from five of the six RFT Recipients in response to the RFT. The following responses were received:
- (a) Equestrian Sports Arenas declined as: "*they felt their product was not tested at the international level of surface that SIEC is commanding*";
  - (b) Martin Collins Australia declined as: "*the current commitments company was too busy and unable to achieve the completion date set in the tender*";
  - (c) BSMS submitted a tender of \$725,938.00 (incl. GST);
  - (d) Capricorn submitted a tender of \$648,230.00 (incl. GST); and
  - (e) Equestrian Services submitted an RFT Response with two tender options:
    - (i) one for a total cost of \$574,294.97 (incl. GST); and
    - (ii) the other (described as "non-conforming") for a total cost of \$472,633.92 (incl. GST).
179. Australian Horse Arenas did not submit a response. No late tenders were submitted.



180. The non-conforming RFT response from Equestrian Services quoted a total price of \$472,633.92 and stated:

*"With regards to the above contract we would like to submit the following prices based on the installation of our waxed surface as opposed to an ebb and flow system. We would like to raise the following points as to why we feel this would better suit your requirements.*

- no requirement to install any new infrastructure to accommodate this surface.*
- no need to change the concrete kerb or sub-base layer in the outdoor arena.*
- surface would be consistent in all weathers from minus temperatures to extreme heat.*
- is regarded as one of the best surfaces worldwide being installed in competition venues for all disciplines.*
- timescale of works on site dramatically reduced. - cost to supply and install less than the Ebb and Flow.*
- surface has minimal maintenance requirement.*
- Outdoor arena would have a drainage layer added so it would be able to cope with severe rainfall and still be usable.*
- surface is very safe and consistent.*
- You would be purchasing a very high quality surface as opposed to a system which requires continual observation and maintenance which can result in varying surface conditions."*

181. The non-conforming RFT response was passed over as it did not involve an Ebb & Flow System but, instead, proposed a Waxed Surface.

182. The OoS submits that there was nothing unusual about the decision by OoS to pass over the non-conforming RFT response. As set out above, the RFT Scope of Works (consistently with the RFI Scope of Works) indicated that: *"the preferred system is the Ebb and Flow system"*. The RFT Conditions of Tendering permitted the submission and consideration of Alternative Tenders *"that meet the scope and functional intent expressed in the RFT documents, but may elect not to accept an alternative tender"*. In circumstances where a Waxed Surface was proposed, rather than the strongly preferred Ebb & Flow System, it was open to the OoS to pass over the non-conforming RFT response. The OoS notes that the OCM Report explored this issue and concluded that, passing over the non-conforming RFT response, was appropriate in light of the 2016 Procurement Manual.

183. The remaining three RFT responses were examined for conformance and met the requirements of the RFT.

184. The Capricorn RFT response stated in a cover letter addressed to Mr Kasif that:

***"Company Capabilities and Achievements***

*Capricorn (Australia) Pty Ltd is a wholly owned Australian company.*

*We have been serving the Australian Equestrian community since the year 2000 and we have been over the years the first to supply new technology into Australia. ...*

*Our arena fibres (SOILTEX) and EBB & FLOW Technology are just two examples of this.*

*With reference to EBB & FLOW Technology - Capricorn (Australia) Pty Ltd is the only company with a proven record in Australia with Capricorn EBB & FLOW arenas installed for private, professional and in competition arenas both indoor and outdoor.*

*In total approximately 20,000 m2 off EBB & FLOW has been installed in Australia. These arenas have not only proven on riding performance but also have been proven to be able to cope with the Australian climate conditions.*

*An event with record rainfall the day prior and rain during the day was held on Capricorn EBB & FLOW without any delay or problem.*

*In a recent CDI event held at Willinga Park (Bawley Point, NSW) nine riders scored over 70% in a Grand Prix class on a Capricorn EBB & FLOW arena (outdoor) this has never happen in Australia before.*

*The company's successes have been well noted by other Equestrian Event Venues in Australia and Capricorn has recently been awarded the contract to supply and install arenas AELEC in Tamworth.*

***Installation Period***

*The proposed installation / execution time between 15 November, 2017 and 11 January, 2018 is unrealistic and carries a high risk factor.*

*In the meeting 18 September, 2017 it was mentioned (by the CEO EA NSW) that the new surface should be ready for the CDI to be held 3-5 May, 2018.*

*With our experience we feel that there is no need to take the high risks of upgrading the arenas and installing the surface during this time frame if it can be done with better planning and less risk at a later date.*

*Capricorn (Australia) Pty Ltd would suggest installation in February to March 2018.*

*In addition Capricorn (Australia) Pty Ltd will commit to having a team and machinery available prior to and during CDI 2018 this to keep arenas in excellent order and at the same time train SIEC staff to maintain the arenas in competition circumstances."*

185. The Capricorn RFT Response stated in relation to the Non-Price Criteria that:

**"Confirmations and Specifications**

- *The area of the Outdoor Arena (arena 6) is based on 2,129 m2 as per Surveyor's Report.*
- *The area of the Indoor Arena (arena 5) is based on 2,450 m2.*
- *Base or bedding under the tanking membrane (to be determined in consultation with Principal following preparation of subgrade) refer to Scope of Works point 2.9.*
- *To accommodate the EBB & FLOW system a new and higher steel reinforced concrete kerb needs to be installed on the Outdoor Arena (arena 6)  
Note: we consider the cheaper method of using so called "besser" blocks not an option for the EBB & FLOW application (refer to drawing attached).*
- *Tanking membrane will be a 1,000 micron (1mm) fully welded on-site with leak tested design.*
- *Latest technology of special fibre-lined extended collection surface drain hoses will be used / installed. The manufacturing of the drain hoses is certified by Kiwa and carries the KOMO Product Certificate.*
- *All PVC pipes used / installed will be to SN8 standard heavy duty sewer pipe (EN ISO 1401).*
- *The sump / balance tank which is specially designed and manufactured for the Capricorn EBB & FLOW system, will be manually operated  
There are no level probes and electrical power will not be required  
The manual operation is a continuous function and does not need adjusted.*
- *Isolation valves will be installed at each arena outlet to preserve the arena water.*
- *The arena fibre additive (SOILTEX Premix) is free from hazardous materials (asbestos, fiberglass etc) there is no waste from the production of nappies or sanitary products. There is no carpet waste where rubber and glued backing could be present.*
- *...*
- *The SOILTEX Premix is manufactured especially for Capricorn (Australia) Pty Ltd by an ISO 9001 accredited European company.*
- *A skirting board will be fixed onto the concrete wall and concrete kerb. The liner will be locked in / sandwiched between the board and the concrete wall / kerb.*
- *The sand has been selected with the correct Hydraulic Conductivity to provide adequate drainage and capillary action / capability with angular shape particles optimally graded to provide the correct coefficient of uniformity, gradation index and "D" factors to ensure uniformity and stability in a secure footing.*
- *All the work will be carried out by experienced operators which have installed Capricorn EBB & FLOW technology before.  
The project / contract will be supervised by a qualified supervisor from Capricorn (Australia) Pty Ltd.*
- *The supervisor will be on site on a full-time basis during construction and hand over."*

186. The BSMS RFT response gave the following Schedule of Prices:

**"2. Schedule of Prices - Lump Sum**

- *...*
- 1. *Arena 5 - removal arena surface and transport to area 12 precinct at the centre - \$18,413*
- 2. *Arena 6 - removal arena surface and transport to area 12 precinct at the centre - \$10,933*
- 3. *Arena 6 - earth works to level and removal of excess material of arena substrate to P1 at the centre - \$18,380*
- 4. *Arena 5 - supply and install irrigation/drainage system - \$107,605*
- 5. *Arena 6 - supply and install irrigation/drainage system including kerbing/retaining structure as required - \$142,017*
- 6. *Arena 5 - supply and install surface material - \$169,302*
- 7. *Arena 6 - supply and install surface material - \$145,459*

8. All work and obligations under the Contract not included elsewhere in the schedule - \$114,099"

187. BSMS submitted the following in relation to the Non-Price Criteria:

**"3. Schedule of Non-Price Criteria**

**Scope of Project**

**Arena 5**

*Arena 5 is the main indoor arena at SIEC. The base of the arena has been constructed with a hard base and the arena surface laid on top of this surface. The current surface is not performing to a level that encourages participation by leading riders and is in urgent need of replacement.*

*BSMSport propose to utilise the existing hard base, and to build an Ebb & Flow irrigated riding surface upon this base.*

*This will involve the following steps:*

- *Remove the existing surface and stockpile locally*
- *Install a thin layer of washed sand to protect the HOPE liner from damage from irregular objects on the existing base and to ensure a level base*
- *Install an Otto Sport Ebb & Flow riding surface (see below for details)*

**Arena 6**

*This arena is the outdoor warmup arena for Arena 5. It currently has a sand surface and is irrigated by sprinklers around its perimeter.*

*In order to install a new riding surface irrigated by an ebb & flow system, the following steps are proposed:*

- *Remove the existing surface and stockpile locally*
- *Excavate the subsoil to a depth of at least 300mm to produce a level surface (Arena 6 currently has a 1% fall from West to East)*
- *Construct an internal block wall to provide boundary support to the arena*
- *Install a thin layer of washed sand to protect the HOPE liner from damage from irregular objects on the excavated base*
- *Install an Otto Sport Ebb & Flow riding surface (see below for details)*

**Otto Sport Ebb & Flow Riding Surface**

- *Install a sealed HPOE liner on the prepared surface*
- *Install an irrigation system consisting of 100mm draincoil pipes to a design provided by Otto Sport, cover with a 200mm layer of washed sand and grade to a level surface*
- *Install automatic water level monitoring equipment*
- *Install Otto Sport perforated mat system on top of irrigation sand layer*
- *Install premixed Otto Sport Riding Surface on top of perforated mats*
- *Fill arena with water to predetermined level."*

188. The BSMS RFT response also provided the following relevant information, including in relation to recent experience completing "Arena Projects at Wallaby Hill Farm":

***"Recent Successfully completed Arena Projects at Wallaby Hill Farm***

*Otto Sport in cooperation with BSMSport have recently successfully completed the refurbishment of both an indoor and outdoor arena at Wallaby Hill Farm at Robertson, NSW.*

*This project is identical in scope and size to the proposed upgrade of Arenas 5 & 6 at SIEC. The indoor arena was the same size as Arena 5 and the Outdoor arena was slightly larger than Arena 6.*

*In both cases, the Wallaby Hill Farm arenas used ebb & flow irrigation, exactly as is proposed for SIEC.*

*Should BSMSport be the successful tenderer for the SIEC project, the exact same team of sub-contractors will be used on the SIEC project as were used on the Wallaby Hill Farm project, providing certainty of an excellent result.*

*The contact person at Wallaby Hill Farm is the owner, Alex Townsend.*

...

**Construction Methodology**

*Due to the lead time in the shipping of the imported components - Perforated Mats & ArenaTex fabric it is critical that all prior steps are completed well in advance so that when the imported material arrives it can be quickly installed.*

The initial work will centre around the preparation of the arena sites for the installation of the Ebb & Flow system as this involves no imported components.

Arena 5 will have the surface removed and stockpiled.

Arena 6 will have the surface removed & stockpiled, then it will be excavated to a level surface approximately 300mm below the current arena surface and a block wall two blocks high built around the perimeter.

At this point, both arenas will be at the same stage, ready for the installation of the ebb & flow irrigation.

Then the following operations will be performed in sequence, with each step performed on Arena 5 first, followed by Arena 6.

- Installation of HDPE Liner
- Installation of Irrigation pipes
- Covering of liner & pipes with washed sand to a depth of 200mm
- Connection of arena plumbing to Electronic Regulating Shaft and in the case of Arena 6 to the additional Auxiliary Pump Shaft
- Connection of Regulating shaft to mains water and storm water system
- Connection of Auxiliary Pump Shaft in Arena 6 to storm water system

The container with the ArenaTex fabric will arrive first during the Christmas period. As soon as practicable and no later than January 1, the ArenaTex will be mixed.

When the containers of mats arrive, the mats will be laid on Arena 5 and then Arena 6.

Then the premixed Arena Surface will be installed on both arenas, and the irrigation system flooded to the predetermined level.

...

#### **Project Management**

While BSMSport acknowledges primary responsibility for all aspects of the Project, BSMSport also recognises its lack of experience dealing with NSW Government Projects and their particular requirements.

To ensure that all requirements and obligations are fully met, BSMSport has engaged JK Williams Contracting Pty. Ltd to provide a fully experienced Project Manager to oversee all aspects of the project, and in particular, to monitor all aspects of Work Health and Safety and to ensure the protection of the Environment during the period of Construction."

189. The Equestrian Services RFT response provided the following Schedule of Prices:

#### **"Indoor Arena 35 x 70m:**

##### **Scope of works:**

- Excavate existing surface and remove to customers tip
- Blind sub-surface with fine sand and compact.
- Install two layers of 300upm laminated PVC liners.
- Install 100mm heavy duty perforated drainage pipe with integrated geotextile sock at two metre centres in a grid format.
- Lay 150mm of coarse sand over pipework and grade level.
- Lay 100mm of fine sand over coarse sand and grade level.
- Lay 50mm of Fibre Footing pre-mixed sand and fibre surface.
- Install water level control unit along with drainage outlet.
- Grade and groom surface

TOTAL INCLUDING GST \$254,720.40

#### **Outdoor Arena 28 x 70m:**

##### **Scope of works:**

- Excavate existing surface and remove to customers tip
- Excavate sub-surface to create new level. Spoil to be removed to customers tip.
- Install new concrete kerb to create level to enable installation of system.
- Blind sub-surface with fine sand and compact.
- Install two layers of 300upm laminated PVC liners.
- Install 100mm heavy duty perforated drainage pipe with integrated geotextile sock at two metre centres in a grid format.

- Lay 150mm of coarse sand over pipework and grade level.
- Lay 100mm of fine sand over coarse sand and grade level.
- Lay 50mm of Fibre Footing pre-mixed sand and fibre surface.
- Install water level control unit along with drainage outlets.
- Grade and groom surface

TOTAL INCLUDING GST \$319,574.57

Total lump sum price for contract OoS17/18-021 \$574,294.97

**Maintenance equipment.**

We would need to view present maintenance machinery to evaluate if it would be suitable for the new surfaces.

We manufacture our own equipment as follows:-

Trailed arena harrow \$3,630.00 incl gst

Tractor mounted harrow \$3,850.00 incl gst

**Fibre Footing Surface:**

*This Surface is one of the most economical and cost effective riding surfaces available made with a fine high grade equestrian silicas and carefully weighed and blended through our specialist mixing plant along with the addition of our own top of the range Polypropylene synthetic fibre. Golden brown in colour."*

190. In relation to the Non-Price Criteria, Equestrian Services stated:

**"Recent Experience**

*Equestrian Services Pty Ltd have been trading in Australia for the past three years as a manufacture, supply and install company of Equestrian Surfaces and facilities. We have over twenty years past experience with the same company working throughout Europe before our move.*

*Please note Equestrian Services Pty Ltd are the first Equestrian Construction company in Australia to manufacture the fibre required to create superior equestrian surfaces.*

*We carry out all of our works using in house staff without the use of sub-contractors.*

*We are able to source all materials required for this contract within Australia.*

*Please see our Recent contracts and Testimonial page for further proof of experience, as you will see we have already completed many installations for Australia's top riders.*

**Construction methodology.**

*On award of the contract we would follow the below construction program to deliver the works on time. As we are able to readily source materials required for the whole of this project within Australia, and do so on a daily basis, we are more than confident of this program. Equestrian Services strive to deliver all of our projects on time and within budget."*

191. On 30 October 2017, Mr Reid Sanders (Martin Collins) emailed Mr Kasif and Mr Farrar advising:

*"As you would be aware Martin Collins Australia did not submit a tender for SIEC.*

*This was due to the short time frame in which the tender return was required and the dates allocated for the installation. We were extremely busy during the request of tender phase and have a number of other projects on during the installation period.*

*I note that you are keen on using an Ebb and Flow watering system to support whatever surface you are installing. We have installed many surfaces around the world, and although the Ebb & Flow system works well, in hot climates such as Australia you will still need to have an over the top irrigation system to water the top section of the surface. I believe that they are having issues with the surface at a large private facility call [sic] Willinga Park which you may wish to review as part of your due process.*

*Unfortunately MCA was unable to meet the timeframes available for this project, which is disappointing as our arena surface is proving to be best arena surface available, and is cost effective. After the recent success of the Australia Dressage Championship at Boneo Park on our surfaces and the recent announcement that the Australia Show Jumping Championships have been moved to Boneo Park, we have been extremely busy selling our surfaces all over Australia and New Zealand.*



*Although your tender process has been completed MCA would be happy to discuss options available for providing SIEC with the world class surfaces they so desperately require."*

## (h) Review of Tender Responses by the TAC

192. Between 30 October 2017 and 1 November 2017, the TAC conducted a review of the RFT responses following the tender evaluation process undertaken by the TEC. This was intended to operate as a mechanism to validate the TEC's conclusions and ensure the recommended RFT response was "fit for purpose". The TAC ultimately provided an assessment to the TEC which provided technical guidance designed to assist the TEC in understanding the nature of each RFT response and its compliance with the RFT.
193. The TAC were provided with a copy of each of the RFT responses but were not explicitly directed to assess against the RFT Evaluation Criteria. The TAC members reviewed the RFT responses individually, although discussion amongst the TAC members did occur via email exchange.
194. Once the TAC members had reviewed the RFT responses, they provided their own assessments as written responses to Mr Kasif (**TAC Assessments**). Each of the TAC Assessments are outlined below:

- (a) on 30 October 2017, Mr Farrar emailed his TAC Assessment to Mr Kasif. For the following reasons, Mr Farrar advised that his preferred tenderer was BSMS:

*"As requested, provided below is my feedback about the tenders submitted:*

*Capricorn:*

- *Comparable works at Willinga Park*
- *Soiltex being replaced at some locations (Wallaby Hill, Ryans, Chugg and Roycroft)*
- *Simple water balance mechanism used in ebb and flow*
- *Not committed to the program due to shipping schedules and concurrent work at AELEC (100 X100 + 60 X 30m)*
- *Inferior geotextile/sand mixing process*
- *Difficult contractor principal*

*Equestrian Services*

- *Low price*
- *Good program with all local materials*
- *No comparable contracts using ebb and flow*
- *Only 50mm top surface*
- *Wax surface not proven in Australia*

*Barrie Smith (Otto)*

- *Highest price*
- *Comparable works at Wallaby Hill*
- *Rio Olympics supplier*
- *Mats are highly regarded, providing extra cushioning (40%) and a barrier between the drainage and riding layers*
- *Far easier to replace the riding surface in the future if new technology is adopted*
- *Mats add about \$150k to the cost*
- *Uses two different sands in the riding surface - pre-mix from Germany plus local sand*
- *Block wall adequate but not as good as steel reinforced concrete curbing*
- *JK Williams experienced with Government contracts and safety requirements*
- *Easy to do business with*

*Summary*

*BSM preferred tenderer, due to mats technology, international elite experience, commitment to the program and ease of doing business with. The additional cost,*

*amortised over 15-20 years, is worth it. Also, the Otto solution is a point of difference compared with Boneo Park, Willinga Park and AELEC, so presents ongoing commercial opportunities";*

- (b) on 31 October 2017, Mr Vallance submitted his TAC Assessment to Mr Kasif, indicating that his preferred tenderer was BSMS:

*"Thank you for the opportunity to be involved in this exciting project for the Sydney International Equestrian Centre. (SIEC)*

*Having been a team member for the development of the SIEC for the Sydney 2000 Olympic Games I am thrilled that at last we have an opportunity to bring the surface of two arenas to true international standard.*

*I have received and read the three tender documents provided for the surface upgrade of arenas 5 and 6 at SIEC.*

*Tenderers*

*Equestrian Services*

*Barrie Smith Motor Sport P/l*

*Capricorn Australia*

***Equestrian Surfaces***

*Appears to have very limited experience with 'ebb and flow system'*

*Technical drawings are rudimentary.*

*Appears to be more interested in the contract variation for use of fibre footing and wax track.*

*Limited experience with competition arenas, main references are from personal equestrian training centres.*

*As all products will be locally sourced the scope of completion within the agreed time.*

*Low price*

***Barrie Smith Motor Sport***

*Limited local testimonies but with significant work at one venue, Wallaby Hill. Competition and personal training centre.*

*Use of Otto Sport materials and design is widely used throughout the equestrian world of temporary and permanent competition arenas as well as training arenas for jumping and dressage riders.*

*Use of very experienced consultant from Otto Sport (Significant experience throughout Europe and 2016 Rio de Janeiro Olympic Games.) to oversee construction and training of SIEC staff.*

*Use of perforated mats ensures limited contamination of sand layers, increase traction of competition horses to maximise performance, allows for easier refurbishment of competition surface when necessary. Allows for limitation of damage to drainage and watering pipes by vehicular traffic or unforeseen arena usage.*

*Mats are a significant financial outlay in the initial stages but have long term savings.*

*Locally sourced sands have been identified and tested to meet the required specifications for use with ebb and flow and perforated mats.*

*Detailed schedule for importation of materials*

*Highest quotation*

***Capricorn Australia***

*First company to install ebb and flow in Australia*

*Positive response to recent installations.*

*Lead time between construction and use can be an issue.*

*Use of heavy vehicle traffic is limited.*

*Simple operation of water levelling mechanism.*

*Mixing of riding surface, Soiltex, has had Issues in the past.*

*No apparent separation layer/s between subsurface sand and riding surface*

*Medium quotation.*

***Summary.***

*The international experience of Otto Sport Arenas makes Barrie Smith Motor Sport the preferred tenderer.*

*Barrie Smith Motorsport appear to have a schedule in place that will allow them to comply with the tight frame for the installation of a new surface.*

*Otto Sports fastidious attention to the nature and quality of the sands used, the mixing of the sand and fibre, the installation of the mats, with all of the benefits attributable to their use, provide greater confidence in attaining an international riding surface that will survive for a long time and provide Australian equestrians the greatest opportunity to perform at their best"; and*

- (c) on 1 November 2017, Ms Farrell emailed her TAC Assessment to Mr Kasif, advising that her preferred choice was BSMS:

*"As the riding consultant on the Sydney International Equestrian Centre project, my preferred surface tender is BSM.*

*This is based on BSM being an internationally experienced company offering a superior product in comparison to the other two tenders, which would give the venue a point of difference from an elite competition point of view. As a supplier of the most recent Olympics, the surface technology is the most advanced to date worldwide. I have seen this surface in Germany and have been very impressed with how it withstood the multitude of horses without compromise. In my opinion the mats create additional cushioning, stopping the coarse sand surrounding the pipes from mixing with the finer sand and fibre riding surface above. From my perspective, this can only increase the longevity of the surface in comparison to the other two tenders.*

*I have concerns that the tender from Equestrian Services Australia uses a wax substance that is more suited to cooler climates as it has a propensity to melt and become sticky with prolonged exposure to heat — this may present to be an issue with the Australian climate.*

*I have had quite a lot of experience with the Capricorn product, and find it to be a very good surface for use on a smaller scale. In my experience with this surface I have found that it needs constant grading, as it tends to shift with use if the water level is not managed exactly, being a manual water balancing system. This issue would not present itself with the BSM tender as BSM use an electro probe to manage the moisture levels.*

*Thus, I find the tender from BSM to be the most superior choice of surface."*

195. There was no formal interaction between the TAC and TEC. The TAC was not present during TEC discussions, deliberations and scoring of the RFT responses. As explained above, the TEC undertook their review on 25 October 2017 followed by the TAC conducting their review of the RFT responses between 30 October and 1 November 2017. The TAC Assessments were received by Mr Kasif after the TEC completed their individual scoring against the Non-Price Criteria and reached a consensus recommendation for BSMS to be the preferred supplier (although BSMS had the second highest score). Mr Kasif then approved the unanimous recommendation of BSMS.

196. The TAC Assessments were incorporated into the TRR by Mr Kasif, who drafted the TRR. Mr Kasif extracted the following from the TAC Assessments:

- (a) from Mr Vallance's TAC Assessment, that:

*"The international experience of Otto Sport Arenas makes Barrie Smith Motor Sport the preferred tenderer. Barrie Smith Motor Sport appear to have a schedule in place that will allow them to comply with the tight frame for the installation of a new surface. Otto Sports fastidious attention to the nature and quality of the sands used, the mixing of the sand and fibre, the installation of the mats, with all of the benefits attributable to their use, provide greater confidence in attaining an international riding surface that will survive for a long time and provide Australian equestrians the greatest opportunity to perform at their best";*

- (b) from Mr Farrar's TAC Assessment, that:

*"BSM preferred tenderer, due to mats technology, international elite experience, commitment to the program and ease of doing business with. The additional cost, amortised over 15-20 years, is worth it. Also, the Otto solution is a point of difference compared with Boneo Park, Willinga Park and AELEC, so presents ongoing commercial opportunities"; and*

- (c) from Ms Farrell's TAC Assessment, that: *"I find the tender from BSM to be the most superior choice of surface"*.
197. It should be noted that the OCM Report refers to the "TAC" as the "TAP". The OoS notes that the OCM Report concluded that the TEC's evaluation was conducted independently:
- "...based on OCM's interviews, it was confirmed that TEC assessed the tenders independently of the TAP's involvement and formed their own view as to a preferred Tenderer. The TAP advice was not received by the TEC members and therefore was not considered in the TEC's decision to recommend BSMS as the preferred supplier. However, we note that the TAP written advice was incorporated into the TRR to strengthen the TEC's recommendation."*
198. However, and as set out above, OCM recommended that the documentation surrounding the workings of the TAC could be improved, and drew attention to the fact that Mr Vallance and Ms Farrell did not provide Conflict of Interest Declarations (which the OoS indicated above is the subject of further ongoing investigations).
199. As detailed above, in the revised template for the TEP Template introduced in 2021, a new section (section 7) has been formulated to specifically define the roles and responsibilities of a TAC, how to identify the members and sets out the selection process. These enhancements will ensure that the OoS can achieve a more robust procurement process going forward, and includes the appointment of a "Facilitator" of the TAC in the TEC Template who will act as a spokesperson for the TAC and ensure that:
- (a) the TAC's activities are structured;
  - (b) the TAC advice aligns with the TEC's original requirements and answers defined questions;
  - (c) the TAC's advice includes the evidence on which the findings are based; and
  - (d) the TAC's advice considers the feasibility for the OoS in implementing the recommendations.
200. The OoS has also strengthened its procurement processes and templates to ensure that, going forward, all external advisors and TAC members complete Confidentiality and No Conflict of Interest Declarations and are given detailed guidance in relation to their Conflict of Interest obligations. This will address the previously identified weaknesses in the procurement system and ensures that the OoS is able to undertake procurement processes in a more robust and transparent manner going forward.

### **(i) Tender Evaluation Process and Tender Recommendation Report (TRR)**

201. Between 24 and 25 October 2017, the TEC completed the tender evaluation process.
202. The following steps occurred during the tender evaluation process by the TEC:
- (a) each TEC member assessed the Non-Price Criteria by documenting individual scores and comments on each RFT response in a scorecard which was signed and attached to the TRR. The TEC members each completed their scoring individually and then discussed their respective positions to gain a greater understanding of compliance of each RFT response with the specifications;
  - (b) consensus scores for each Non-Price Criteria were individually weighted before being added up to form a final score which was the total average of the TEC member scores. This was documented in the scores calculation spreadsheet attached to the TRR; and
  - (c) the final Non-Price scores were then individually weighted in accordance with the TEP, and the Price Criteria were scored in accordance with the Price Formula set out in the TEP. Final scores were then normalised in accordance with the

methodology stated in the TEP before being weighted and added together to form a final consolidated score. Non-Price was weighted at 40% and Price at 60%.

203. On 25 October 2017, the TEC undertook their assessments of the RFT responses and provided their recommendations to Mr Kasif. On 2 November 2017, Mr Kasif prepared a TRR incorporating the recommendations of the TEC and TAC.
204. The TRR recommended that:
- "1. the withdrawal of the Equestrian Sports Arenas and Martin Collins Australia tenders be accepted; and*
- 2. the Tender Amount of \$659,944.00 (excluding GST) submitted by BSM Pty Ltd be accepted for Contract No. OsS17-18/21 [sic] for Sydney International Equestrian Centre."*
205. In relation to "Selection of Preferred Tenderer", the TRR stated:
- "Scores were obtained by adding the normalised total non-price score and weighted price score for each of the tenders.*
- The tender with the highest score of 92.21 is Equestrian Australia with a tender amount of \$522,086.00 excluding GST, however the experience of Equestrian Australia is very limited in practice with the Ebb and Flow drainage system as they are spealised [sic] in an alternative surface that does not adhere to Equestrian Federation International "best practice" to attract world class competitions*
- Capricorn have provided a tender amount of \$589,300 however the risk is they could not provide a program to meet completion date of 11/01/2018 and they have undertaken a large project in Tamworth which is has [sic] just commenced*
- The preferred tenderer offered by BSM Pty Ltd Tender Amount of \$659,944.00 excluding GST, has offered the Ebb and Flow system and specialised mats to achieve Equestrian Federation International "best practice."*
206. In relation to "Commentary on Preferred Tenderer", the TRR stated:
- "BSM Pty Ltd is considered capable of completing the work satisfactorily, and recent relevant completed projects indicate a satisfactory level of performance with other contracts. These matters were taken into account in the non-price criteria scoring.*
- BSM Pty Ltd final price of \$659,944.00. The amount is reasonable considering the areas where excessive allowances were included in the estimate relative to those now understood to be required.*
- The preferred tenderer's current workload and resources proposed for the contract have been checked and allowed for in the non-price criteria scoring, and the tenderer is considered capable of completing the contract satisfactorily. The preferred tenderer has provided evidence of satisfactory WHS management on previous projects.*
- Consultant - John Vallance - Course Design and Bruce Farrar CEO Equestrian New South Wales (Attachment D) have both conducted tender assessments, Both John Vallance and Bruce Farrar recommend BSM Pty Ltd."*
207. Although Equestrian Services was the highest scoring RFT response, the comments by the TAC note that their proposal appeared "to be more interested in the contract variation for use of fibre footing and wax track". As noted by Ms Farrell above:
- "I have concerns that the tender from Equestrian Services Australia uses a wax substance that is more suited to cooler climates as it has a propensity to melt and become sticky with prolonged exposure to heat — this may present to be an issue with the Australian climate."*
208. The OoS submits that it was reasonable and justifiable that the successful RFT response was not the highest scoring RFT respondent on the basis that the proposed variation to project delivery included a wax product which did not satisfy the Scope of Works and was deemed unsuitable for the Australian climate. However, the OoS acknowledges that this may indicate that the Evaluation Criteria and/or the scoring in the RFT documents could have more accurately reflected the requirements of the OoS in the context of this project, which reflects a weakness in the procurement process at that time.



209. As noted above, the TRR also outlined the TAC responses of Mr Vallance, Mr Farrar and Ms Farrell respectively.
210. On 2 November 2017, the TRR was signed by:
- (a) Mr Kasif, who was listed as the "*Author - Project Manager*";
  - (b) Mr Brown, who was listed as the "*Reviewer - Project Manager, Facilities and Assets*";
  - (c) Mr Flynn, who was listed as the "*Client - Centre/Venue Manager*"; and
  - (d) Mr Bangel, who was listed as the "*Approver - Director, Asset Management*".
211. The OoS acknowledges that one member of the TEC, Mr Porter, did not sign the TRR. As at 2017, the TRR did not require members of the TEC to sign the TRR. Mr Kasif and Mr Flynn signed the TRR in their capacities as Project Manager and Venue Manager respectively, rather than as members of the TEC.
212. As acknowledged above, the OoS notes that ICAC identified that:
- (a) there was a lack of "*clearly documented decisions and rationale for the decisions*" during the procurement process; and
  - (b) there should have been "*records that would normally be relied on to support the integrity of the tender. For example, supplier due diligence including reference checks*".
213. The OoS recognises that OCM also specifically considered the "*Tender Evaluation and Selection Process*" in their Report and made the following comments, which are addressed below:
- (a) while "*the majority of TEC members provided detailed commentary and justification to support their scores, one (1) TEC member provided limited commentary across all tenders assessed, which weakens the accountability and transparency of their assessment approach*";
  - (b) a comparison of the "*final scores documented in the Scores Calculation Spreadsheet with the individual TEC member scorecards*" indicated that "*final scores were determined by the total average of TEC scores.*" OCM noted that the TEP was "*silent on how the TEC were to determine Non-Price scores other than to reach a consensus*" and indicated that further "*discussion to understand the differences in scores with score readjustments as appropriate would have assisted in a more robust assessment of the tender submissions and their relative strengths, weaknesses and risks*";
  - (c) among the TEC members, there were four instances of deviations of 30 points when scoring the RFT responses against the evaluation criteria. The OCM concluded that there was no "*evidence available to OCM to indicate that further discussions of the TEC were held to understand the differences in scores and readjust as final scores appropriate. However, information provided to OCM from the interviews with two of the three TEC members was that the TEC was unanimous in its recommendation for the selection of BSMS;*"
  - (d) that: "*the reasons provided in the TRR for not recommending the first ranked supplier, Equestrian Services Australia, under the evaluation framework described in the TEP, should have been considered and reflected in the scoring of Non-Price Evaluation Criteria. Equestrian Services Australia scored 70% for both 'Understanding of the Engagement' and 'Recent Experience/Provision of Performance Reports' whereas the TRR comments highlight their inexperience as a*

key consideration in the decision not to proceed. In the scoring methodology in the TEP, a score of 70 is defined as “meets a number of the requirements of an ideal tender”;

- (e) that the TEC’s considerations about Equestrian Services “limited experience with the ‘ebb and flow’ systems required in the RFT” were “important considerations for the assessment of the tenders, as OCM understands that this is a requirement in the specifications, these concerns should have been factored into the scoring of this tender against the relevant Non-Price Evaluation Criteria. If this has not occurred, then the scoring of the tender response on which the final rankings were based would be incomplete. Alternatively, if the risk identified by the TEC has been considered as part of the scoring and is part of the reason this Tenderer scored 70 for one of the criteria, then to use this information as part of the reason for not awarding them the contract would be penalising the Tenderer for this weakness twice”;
- (f) that “OCM has undertaken a level of sensitivity analysis of the tender assessment and even if the score for this tenderer against this criteria was reduced to 60 (defined in the TEP as “meets minimum requirements...”), Equestrian Services Australia would remain the top ranked tenderer”; and
- (g) that there “is no additional evidence made available to OCM of any other due diligence activities being completed such as clarifications, interviews and referee checks”.

214. Based on the above concerns, OCM made the following recommendations to enhance future procurement processes:

- (a) that: “The TEC should ensure that all comments on the strengths and weaknesses of the tender responses is considered in the scoring against the selection criteria, consistent with the requirements identified in Section 17.8 of the NSW Office of Sport Procurement Manual. The TRR includes statements on the reasons as to why the top ranked Tenderer should not be recommended for contract award. These reasons do not appear to have been factored into the scoring of the Tenderer against the relevant criteria. In order words, the scoring of the Tenderers as presented in the final scoresheet and the TRR does not appear to reflect the TEC’s views on the assessment of the tenders;”
- (b) that: “Based on OCM’s review of the individual and consensus TEC assessment scores, it appears that consensus scores have been calculated based on an average of each TEC member’s individual scoring. There is specific requirement in the NSW Office of Sport Procurement Manual; however, in line with better practice, it is recommended that in future, the TEC thoroughly discuss and understand the reasons for differences in individual scores and to readjust scores as appropriate in order to reach a TEC consensus score – and as per above record clearly the rationale;” and
- (c) that: “With regards to the RFT, we note that the Project Team as opposed to the TEC provided endorsement of the TRR. Consistent with the probity principle of Accountability, it is recommended as better practice that all members of the TEC endorse the TRR so as to provide confirmation that the documented assessment process, findings and outcome in the TRR is consistent with the actual decision-making process of the TEC. This would ensure that all members of the TEC accept accountability for their decision making.”

215. Having regard to the findings of ICAC and OCM, OoS recognises that there were weaknesses within the tender evaluation process which created vulnerabilities in the broader procurement process, including in relation to:

- (a) processes around ensuring that considerations of any strengths and weaknesses of tenders are factored into the tender scoring, and reflected in the TRR;

- (b) mechanisms for each member of the TEC to discuss and understand the reasons for any scoring discrepancies in order to reach a consensus score;
  - (c) the formal endorsement of the TRR by all TEC members; and
  - (d) documentation prepared to support the tender evaluation process, including records of any due diligence conducted or meetings held.
216. Following receipt of ICAC and OCM's findings in relation to the tender evaluation process, the OoS has since identified a number of improvements, which have been implemented in order to enhance, strengthen and ensure the robustness of its construction-related procurement processes and procurement processes generally.
217. The OoS recognises the importance of all TEC members understanding their role in the tender evaluation process and ensuring the accountability of the TEC. To ensure that TEC members understand their role and endorse their reports as true reflections of the outcome of any tender, the OoS has implemented the following measures:
- (a) in the Procurement Checklist, it is a requirement that the Project Manager ensures that tender evaluations are completed in detail and that all scoring sheets and the TRR is "*signed by all parties*", with approval being the responsibility of the Director, Asset Management. The OoS will also include a provision in the Procurement Checklist that requires all members of the TEC to endorse the TRR as true reflections of the outcome of the tender;
  - (b) in the TRR Template, there is a provision which states:
 

*"The TEP was signed by all Evaluation Committee members prior to commencing the evaluation. In signing the TEP, Evaluation Committee members were also required to read the Office of Sport Code of Conduct for Procurement and Competitive Processes and sign the Confidentiality and Declaration of No Conflict of Interest Agreement";* and
  - (c) the TRR Template also includes an "*Approvals*" section that requires the following signatures:
    - (i) Author (Project Manager);
    - (ii) Reviewer (Manager, Facilities and Assets);
    - (iii) Client (Centre/Venue Manager);
    - (iv) Reviewer (Director, Finance, Procurement, and IM&T); and
    - (v) Approver (Director, Asset Management).

The OoS will also include a provision in the TRR Template that requires all members of the TEC to endorse the TRR as true reflections of the outcome of the tender.
218. In addition, the OoS has implemented the following improvements to ensure that the TEC achieves consistency and clarity in the evaluation process by considering all strengths and weaknesses of tenders in the scoring process and that this is documented in the TRR:
- (a) the TEP Template includes a section at 7.8 titled, "*Scoring non-price criteria*", that contains an updated provision which stipulates:
 

*"The Evaluation Committee must ensure the non-price criteria to be scored is recorded exactly the same in the tender evaluation documentation as it is in the sourcing documents released to the market";* and

- (b) the TRR Template also includes sections which focus on "Evaluation of Price" and "Commentary on Preferred Tender" and separately encourages the TEC to provide detailed answers about the tender evaluation process, including in relation to the assessment of scoring.
219. The OoS has identified and implemented the following positive changes to ensure that, in the case of any differences in scoring among the TEC members, the reasons for the differences are discussed and documented for the purposes of reaching a consensus:
- (a) the TEP Template includes a section at 7.8 titled, "Scoring non-price criteria", that contains a number of tables and methodologies for undertaking scoring calculations, as well as updated provisions which stipulate:
- "The scores awarded to responses will not necessarily form the sole basis for reporting the relative merits of responses, or for recommending a response for awarding of a contract. The Objectives, affordability, technical, commercial, and contractual risks, will also be considered, particularly if these are not appropriately reflected in the scores awarded to respondents or their assessed costs*
- For each Criteria, responses will be scored in accordance with scoring assessment methodology contained in the table below. Scores will be allocated by consensus. If consensus for a particular score cannot be reached at first, then a discussion must ensue to ensure the Committee eventually settles on an agreed score. These discussions, and the reasons for the original differences of opinion, must be fully documented and the documentation retained on the relevant project file";*
- (b) the TRR Template includes a section about "Evaluation of Price", which outlines that:
- "The price submitted by each tenderer was weighted and scored in accordance with the TEP. The weighted scores were then totalled, normalised and ranked using a tender assessment spreadsheet and the appropriate formula;" and*
- (c) the TRR Template includes a section about "Commentary on Preferred Tender", which encourage the TEC to provide detailed answers about the tender evaluation process, including in relation to the assessment of scoring. The OoS also will also include an explicit direction in the TRR that the TEC must discuss and document the reasons for differences individual scores when determining a consensus score.
220. The OoS has also implemented enhancements to the TEP Template to ensure that the TEC provides a rationale for the award of any tender, including to the non-top ranked tenderer and that any such decision is in accordance with the TEP and RFT. Section 8.1 of the TEP Template, entitled "Tender Evaluation and Recommendation Report" states:
- "Following completion of all stages of the evaluation, the respondents deemed the best value-for-money shall be recommended for award, provided the Evaluation Committee is satisfied that:*
- a) the [sic] respondent/s satisfactorily meets all technical and commercial requirements*
  - b) An acceptable balance between price and service has been achieved*
  - c) There is no unacceptable level of risks associated with the respondent/s*
  - d) An acceptable level of compliance with the Proposed Agreement is achieved*
- In making its recommendations the Evaluation Committee shall ensure that justification is provided for its recommendation, including passing over any lower priced response and any higher VFM scoring response, as applicable, and shall demonstrate how value for money has been achieved.*
- A Tender Evaluation and Recommendation Report will be prepared by, or for, the Facilitator of the Tender Evaluation Committee. The Report will include the Committee's scoring sheet (or a summary there-of). The Report may also include sub-reports from:*
- A Quantity Surveyor on the analysis of costs*
  - The Project Manager on the program and methodology*
- Once the Evaluation and Recommendation Report has been completed and approved by the Evaluation Committee, the Facilitator will submit the report to the Director, Asset Management seeking approval of the recommendation."*

221. In order to strengthen processes in relation to due diligence and investigations as part of the tender evaluation process and to achieve a more robust procurement process generally, the OoS has made the following changes:
- (a) in the TEP Template, there is an update which provides for "*Reference checks*", as follows:
 

*"The Tender Evaluation Committee may obtain information from any source to assist it in its assessment. It must obtain reference checks from the nominated referees (amongst others) and must obtain independent financial assessments of tenderers if not selected from an existing whole-of-government prequalification scheme";*
  - (b) in the TRR Template, under the heading "*Examination of Tenders*", there is a guidance note which states:
 

*"Sufficient information is required to satisfy reviewing and approving officers and that the tender review process was appropriate;"*
  - (c) the TRR Template also includes the following prompt as part of the template answer for "*Evaluation Methodology*", which encourages a TEC to acknowledge and include details of any additional material received and/or considered as part of the tender evaluation process:
 

*"During the assessment stage, the Evaluation Committee sought the following additional information from respondents. (Summarise any clarifications, presentations, [sic] or demonstrations received from respondents)";* and
  - (d) in the Procurement Checklist, it is a requirement that all project documentation from the procurement stage is "*recorded in the relevant TRIMs project file*".

## (j) Tender Decision and Funding Approval

222. On 6 November 2017, a Briefing for the approval of the successful RFT respondent and the Contract award was prepared by Mr Kasif for Mr Miller. The Briefing stated:

### **"Key Information**

- *The construction project is an approved project within the Sport and Recreation Minor Capital Works Program for 2017/18 and is required to be completed prior to major competitions being held at the venue in January 2018.*
- *Barrie Smith Motorsport Pty Ltd was selected as the preferred tenderer for this construction project via a selective competitive tender process.*

### **Financial Implications**

- *The value of the construction contract is \$735,438.00 including GST.<sup>54</sup>*
- *Funds have been reprioritised from other approved capital works projects within the Sport and Recreation Minor Capital Works Program and are now available for construction to commence immediately.*

### **Recommendation**

- *That the Chief Executive approves the construction contract by signing the attached Letter of Award to Barrie Smith Motorsport Pty Ltd."*

223. On 6 November 2017, a Letter of Award was sent to BSMS following its successful response to the RFT and indicating that the OoS had accepted its offer for the purposes of entering into a Contract for the SIEC Arena Upgrade. The Contract Price was \$735,438 which included \$9,500 for surface grooming and included GST. The Letter stated:

*"The Principal accepts your offer for the above Contract, for the Contract Price of \$735,438.00 (including \$9,500.00 for surface groomer) inclusive of GST. Particulars of the accepted offer are set out below.*

<sup>54</sup> The OoS acknowledges that this amount differs from the Tendered Amount by \$9,500. The Contract Price was increased by \$9,500 to include a surface groomer.



...

1. Tender dated 24/10/2017 comprising:

- Tender Form
- Schedule of Prices - Lump Sum+
- Schedule of WHS Management Information - PART A
- Schedule of Non-Price Criteria Information
- Addenda Numbers 01, 02 and 03"

224. On 9 November 2017, the OoS prepared a Briefing for Mr Miller to "reallocate funding from other maintenance projects" to proceed with the SIEC Arena Upgrade. The Briefing stated:

*"Rollover funding to complete upgrades to SIEC's indoor arena and warm up arena surfaces has not been confirmed by Treasury. It is recommended that funding is reallocated from other maintenance projects scheduled for late 2017 /18. The tender process has been completed with BSM Sport Equestrian selected, by the panel, as the preferred tenderer with a total project cost of \$745k. Works are scheduled to be completed on 11 January based on the construction program with issuing of Letter of Authority (LOA) on 1 November."*

225. The Briefing also included the following information:

**"Key Information**

*The tender process was a select tender based on EOI conducted earlier in the year to specialist contractors. Due to the delivery time constraints, a design and construct (D&C) approach was taken. Equestrian NSW has investigated a variety of surfaces and watering systems and have recommended the Ebb and Flow watering system - which provides consistent moisture levels throughout a full day of events. The tenderers were asked to price an Ebb and Flow system and the contractor to provide the surface option system to complement the Ebb and Flow system.*

*From the EOI, six equestrian surface contractors were invited to tender. From the six tenderers only three tenders were received, two withdrew and one didn't respond.*

*The Tender panel assessment of each of the tenders has been received endorsing BSM Sport Equestrian as the preferred Tenderer. Equestrian NSW have endorsed this recommendation as a preferred tenderer*

**Construction program**

*01/11/2017 Issue of LOA - overseas material ordered (mats, sand and fibre) - delivery and Australian Custom clearance 04/01/2018*

*15/11/2017 contractor take possession of site*

*04/01/2018 commence overseas material (mats and surface sand/fibre)*

*11/01/2018 project handover*

*NOTE: delays in issuing LOA will delay overseas delivery*

**Financial Implications**

*Summary of proposed cost (excluding GST) to complete the works are*

*\$660,000 - BSM Tender sum, \$10,000 Groomer, \$20,000 Consultants fee (estimate)*

*\$690,000 sub total*

*\$55,200 contingency (8%)*

***\$745,200 Total Project Cost***

**Recommendation**

*That the CEO approves reallocation of \$745k within the maintenance budget to proceed with SIEC arena surface upgrades as a priority."*

226. The OoS notes that the Briefing for Mr Miller was endorsed on 6 November 2017 and signed on 9 November 2017.

## **D. PROJECT DELIVERY OF THE SIEC ARENA UPGRADE CONTRACT**

227. On 20 November 2017, the SIEC Arena Upgrade was scheduled to commence at the SIEC, with Mr Kasif as Project Officer. As set out above, the RFT response from BSMS involved the

installation of new "*premixed Otto Sport Riding Surface*" to be imported from overseas (**Imported Surface Materials**).

228. On 22 November 2017, Mr Smith emailed Mr Kasif and Mr Brown regarding delays in relation to the arrival of the Imported Surface Materials by sea. To remedy this timing issue, Mr Smith proposed using "*existing stocks of ArenaTex and ArenaTex Concentrate from my warehouse, combined with the same sand which was already planned to be used for the riding surface*". Mr Smith relevantly stated:

*"Attached is the latest SIEC Construction Program.*

*I have moved back the start of the project in line with the date of granting the tender and the date from which the facility was available. The main impact of the delay in granting the tender was that the container procurement & packing could not commence as planned and so the containers are booked on a ship one week later. At this stage, containers from both Barcelona (mats) & Hamburg (ArenaTex) are scheduled to arrive in Sydney Port on January 7 2018. **To help gain some time on the critical stages of laying mats and mixing & spreading the arena surface, I have arranged to deliver to the SIEC site a mix of sand & fibre based on existing stocks of ArenaTex and ArenaTex Concentrate from my warehouse, combined with the same sand which was already planned to be used for the riding surface.** Once the ebb & flow irrigation level is complete in the indoor arena, I will utilise the existing stock of mats from my warehouse to lay mats in approximately 50% of the indoor surface, and then stockpile the above sand & fibre mix on top of the mats in the indoor arena. Once the first container of mats arrives, the mat layer in the indoor can be completed and the stockpiled sand will be spread, effectively completing the riding surface in the indoor arena."*

(Emphasis added)

229. Due to delays in the arrival of the Imported Surface Materials, the OoS was concerned that the project deadline would not be met and agreed to the use of the "*existing stocks of ArenaTex and ArenaTex Concentrate*" from BSMS's warehouse, which the OoS understood to be new and unused materials. Material was subsequently deposited at the SIEC site where SIEC staff noticed and, as a result, became concerned that the material appeared to be contaminated with rubber grommets. It is noted that references to "contamination" refer to the rubber grommets and not to any dangerous or chemical contamination or similar.
230. Once the contaminated materials were identified by SIEC staff, the OoS requested a meeting with Mr Smith to discuss its concerns in relation to the surface material that was onsite.
231. Mr Smith explained to OoS that he proposed to use the materials onsite in place of the Imported Surface Materials in order to meet the timeframe of the project. Mr Smith advised that the materials onsite had been relocated from Wallaby Hill Farm (**Wallaby Hill Materials**), owned by Ms Alex Townsend, a board member for ENSW. Mr Smith advised that the surface had previously been installed at Wallaby Hill but, in order to meet the timeframes of the SIEC Arena Upgrade, the surface materials were offered as a replacement given that the Wallaby Hill surface was the exact same specifications as those needed for the SIEC Arena Upgrade.
232. On 13 December 2017, Mr Smith emailed Mr Crumpler in relation to the progress of the SIEC Arena Upgrade, stating:

*"It was good to meet with you last Monday & I hope that the concerns raised were adequately dealt with.*

*Attached is a schematic drawing showing the components of an Otto Sport ebb & flow riding surface for your information.*

*As of this morning, the irrigation pipes in the indoor arena are complete, and the 200mm sand layer is being installed over the pipes.*

*Once this is completed, the Construction Schedule indicates that the Otto Perforated mats which I have in my warehouse at Arndell Park will be laid in the front half of the indoor arena - I have just over half the number of mats required. When the mats have been laid, the mixed surface stored in the top car park will be stockpiled on top of these mats awaiting the arrival of the first container of mats in January. This will ensure that the indoor arena is up and running within days of the arrival of the first container.*

*The laying of the irrigation pipes in the outdoor arena is well under way and will be completed tomorrow, after which the sand layer will be installed in this arena.*

*The installation of the water level control systems for each of the arenas will follow next week.*

*Once the above is completed, further work is dependent upon the timely arrival of the containers from Europe."*

233. As set out in the RFT response from BSMS, the SIEC Arena Upgrade was "*identical in scope and size*" to BSMS's recently completed Arena Project at Wallaby Hill Farm.
234. On 19 December 2017, Mr Crumpler emailed Mr Smith raising two primary concerns about the use of the Wallaby Hill Materials, the first being that the surface appeared to contain "*contamination*" (referring to the fact that the sand appeared to contain pieces of rubber matting) and the second being that the composition of the surface was unknown. Mr Crumpler advised that the OoS would not accept the use of the Wallaby Hill Materials unless they were "*exactly the same*" as the Imported Surface Materials, to be established through surface testing by Geotech Testing Pty Ltd (**Geotech**). Mr Crumpler relevantly stated:

*"Thank you for taking the time to meet and discuss our concerns regarding the surface last week. ... the one item which is still a large concern is the top surface which has been removed from Wallaby Hill and relocated to SIEC.*

*Two items that are of most concern is firstly the evident contamination in the surface which is clearly not what any client would expect noting the large cost and clear procurement contract on the specified delivery method for a new arena surface. The second item is the lack of clear guidance on the make-up of the surface and how this is being assessed to ensure we not only have the best surface in Australia but also as intended that the partial surface relocated from Wallaby Hill is exactly the same is the new mixed surface installed in the remainder of the indoor arena in January.*

*For us to be able to accept this proposed surface which has been removed from another site then the following items have to be adhered to.*

- *Last delivery of surface from Wallaby Hill which is heavily contaminated and has large clumps of clay is not to be used*
- *The Old Wallaby Hill surface must be Geo-Tech tested to provide clarity on the surface break up with results provided before Mid-January and no contamination is to left in the surface upon handover*
- *The new surface which will be mixed following arrival of product from Germany will also need to be tested post mixing to confirm consistent Geo-Tech break up especially if its integrated into indoor arena with the old surface and also separated tested for the outside warm up arena*

*If these items cannot be guaranteed then we will require the project to be delivered as per the agreed spec, original program and legal contract with the new indoor surface being shipped, mixed and installed mid-January and the old surface from Wallaby Hill removed from SIEC for stock piling elsewhere."*

235. On 12 January 2018, Mr Smith emailed Mr Crumpler in relation to the status of the Geotech testing of the Wallaby Hill Materials, stating:

*"For your info, all the containers have arrived at SIEC and have been unloaded.*

*The Geo-Tech testing of the surface to be installed in the Indoor arena should be completed next week. Unfortunately Christmas got in the way of having this performed sooner.*

*The mixing of the surface for the outdoor arena will be completed next week & the Geo-Tech testing of this material will follow as soon as the mixing is completed.*

*The Otto Sport engineer Gerd Hermann will arrive on Tuesday to oversee the installation of the mats, the mixing & installation of the surface in both arenas and the commissioning of the ebb & flow system in both arenas."*

236. On 19 January 2018, Geotech completed their report of their testing of the Wallaby Hill Materials now located at the SIEC Arena (in response to the requirements set out by Mr Crumpler to Mr Smith on 19 December 2017) (**Geotech Report**). The Geotech Report stated:

*"As requested we have carried out sampling of two sand stockpiles at the above site on 15 January 2018. A Laboratory manager from this company secured two samples from each stockpile.*

*The four samples were returned to our NATA accredited Prestons laboratory where they were identified as sample numbers 8781/1-1 to 8781/1-4 respectively. Testing on each sample was carried out to the following methods.*

- *Particle Size Distribution AS1141.11*
- *Material Finer than 75um AS1141.12*

*The samples of material sourced from Wallaby Hill were screened on the 1.18mm sieve prior to testing in order to remove the inert fabric portion of the material. Note that it is not possible to remove all fabric material and the test results obtained will be marginally different from results obtained on unmixed source material.*

*Actual test methods and conditions are shown on the attached test results certificate."*

237. The Geotech Report test results certificate recorded that a sieve analysis had been undertaken of *"Fine Sand, yellow-grey ex Wallaby Hill"*. A test results certificate attached to the Geotech Report indicated that the Wallaby Hill Material was the same as the Imported Surface Materials and was not contaminated.
238. Following the results of the Geotech Report, the OoS accepted Mr Smith's proposal to use the Wallaby Hill Material in the SIEC Arena Upgrade on the basis that this was a necessary compromise to keep the project on track for completion in January 2018 and that the upper soil profile was exactly as specified in the OTTO System.
239. On 19 January 2018, the SIEC Arena Upgrade was registered as completed in a Letter of Completion from BSMS.
240. On 29 January 2018, Mr Kasif prepared a Briefing for Mr Miller in relation to a *"Variation to Construction Contract OoS17/18-021"*. The Briefing was a *"Request to Authorise Contract Variation no. 01 and 02 submitted by BSMSport Pty Ltd for latent conditions discovered during works for the upgrade of the surface at the Sydney International Equestrian Centre"*. The variations referred to in the Briefing did not relate to the Wallaby Hill Materials. The Briefing relevantly stated:

***"Key information***

*...*

*The variation submitted by BSMSport Pty Ltd has been assessed by the Project Manager and is considered to be both valid and to represent good value for money.*

***Financial Implications***

*The value of Contract Variation numbers 01 and 02 is \$12,522.00 excluding GST (\$13,774.20 including GST). With the variation included, the overall construction contract value is now \$749,212.20 including GST.*

*Funds are available to cover the cost of this contract variation within the 2017/18 Sport and Recreation Minor Capital Works Program budget."*

241. The Briefing was signed by Mr Kasif and Mr Brown on 30 January 2018. On 8 February 2018, it was approved by Mr Bangel. On 15 February 2018, it was approved by Mr Miller.
242. A Variation Approval Form attached to the Briefing to Mr Miller described the variations as follows:

*"Variation:*

*Variation 1 - Removal of existing kerb  
Variation 2 - Pathway between arenas*

*Reason/Justification:*

*Variation 1 - Latent condition due to adjusted new levelling the outdoor arena  
Variation 2 - To ensure a smooth transition between both arenas without affecting the level of the roadway that runs between the two (2) arenas"*

243. On 29 January 2018, Mr Kasif wrote to Mr Smith, confirming that work under the Contract reached completion on 19 January 2018.
244. Upon completion of the SIEC Arena Upgrades on 19 January 2018, and further to the Geotech Report in relation to the Wallaby Hill Materials (as outlined above), OoS arranged for a testing session of the surface to be *"conducted by the riders"* and Mr Vallance on 31 January 2018.
245. Later, on 31 January 2018 and following this session, Mr Farrar reported positive feedback about the arena surfaces in an email to Mr Flynn, Mr Kasif, Mr Porter, Ms Hartog and Mr Crumpler, stating:

*"Feels like the best in Europe" was Australian Showjumping Champion and frequent international competitor Jamie Kermond's feedback. We jacked the jumps up to 1.60m, which is maximum international competition height and he cruised around. Jamie and Billy Raymont, who also jumped are competing in Hong Kong next week, then off to Paris for the World Cup Final "Couldn't have been a better hit out."*

*John Vallance "It feels right, sounds right, the colour will make for great photos and the horses jumped amazing".*

*Also, happy to advise that Dressage NSW has confirmed that the Sydney CDI will be a World Equestrian Games selection event with the Grand Prix to be staged on the upgraded Indoor.*

*You're on a winner. Congratulations to the project team."*

246. On 22 February 2018, Mr Smith emailed Mr Crumpler stating: *"I hope you are pleased with the excellent feedback which SIEC have received from both expert riders (Dressage & Showjumping), John Valance [sic] and participants at the first event, Show Horse of the Year".* Mr Smith attached a copy of the Geotech Report and provided invoices for the additional testing work carried out by Geotech which was not considered in the original cost of the project. Mr Smith stated:

*"As this was not part of the original Tender, I have included the invoice for this additional work. There is a copy of the original invoice made out to JK Williams who arranged the testing for me and was paid as part of the work performed by JK Williams on the project, and my invoice to the Office of Sport at cost."*

247. On 26 February 2018, Mr Crumpler emailed Mr Smith stating:

*"Thank you for your email and yes you are correct, I am very glad/relieved that we are hearing positive feedback on the arena surface*

*With reference to your invoice and comments around this not being in the original tender, I would like to emphasise our position that the scope was changed by yourself (not OoS) with the original spec clearly outlining importing new material and mixing onsite, which changed to relocating a surface from another site which had failed. The Geotech reports were your opportunity to demonstrate that this surface was suitable and provide the client with assurances as to the final product being provided, so that this proposed change in scope could be agreed to."*

248. The OoS notes that the Geotech Report confirms that the Wallaby Hill Materials were not contaminated and were suitable for use in the SIEC Arena Upgrade. At the completion of the SIEC Arena Upgrade, a visual observation of the surface did not reveal any further pieces of rubber grommets. The use of the Wallaby Hill Materials, whilst not anticipated in the Contract, were presented by BSMS as a solution to the problem of the delay in the Imported Surface Materials arriving from overseas. The OoS agreed to accept the use of the Wallaby Hill Materials in circumstances where the Geotech Report indicated that the materials were not contaminated, they were an adequate replacement of the Imported Surface Materials and to keep the project on track for completion by the time of the Australian Dressage Championships in 2018. The OoS received positive feedback from a range of professional competitors following the completion of the Contract. Therefore, there were no issues associated with the use of the Wallaby Hill Materials at this stage.
249. The OoS has identified a number of improvements in relation to contract management and recognises that the decision to accept the use of the Wallaby Hill Materials could have been the subject of better scrutiny at the time (and additional protections could have been sought via the Contract). In addition, the OoS acknowledges that this decision could have been formalised in the context of the contract and better documented, noting that ICAC identified that generally, *"there appears to be a lack of clearly documented decisions"* in relation to the SIEC Arena Upgrade. However, in light of the steps taken to obtain the Geotech Report, the OoS took the necessary steps to satisfy itself that it was not receiving an inferior product which was prudent and efficient whilst simultaneously not causing or contributing to any delay to the project.
250. The OoS notes that the Minor Capital Works Manual (and its predecessor from 2015) contain the following paragraph regarding contract variations:

***"Variations***



37. Variations resulting from either unforeseen circumstances or changes in design are common during the construction phase of a project. In the event a variation is required, the request will usually be generated by the construction contractor and discussion between all stakeholders (with specific reference made to the original project scope) is then held and a decision reached.

38. The request is directed to the PM and a written quotation is provided. **A written variation request is then submitted to the Director, Asset Management, noting that a variation request may result in a change to the project duration and/or funding.**

39. The Director, Asset Management will assess the variation request and consult as necessary. The Director, Asset Management has delegated authority to approve variations within the existing Minor Works Capital Program budget."

(Emphasis added)

251. The OoS notes that the use of the Wallaby Hill Materials did not result in a change to the project duration, in fact, it was used to ensure that there was no change to the project duration. The OoS accepts that the use of the Wallaby Hill Materials could have been better documented and supported by a "written variation request" as required by the Minor Capital Works Manual and submits that the lack of a written request is likely to have been a result of the timeframe pressures experienced by the OoS at the time
252. The OoS has identified a number of improvements to the contract management process throughout the life of contract, including training for staff in relation to contract management practices and the availability of updated guidance material and relevant resources. This will support staff working on future projects, particularly in circumstances where variations or other unforeseen events arise.

## E. AFTERMATH OF PROJECT COMPLETION

### (a) Complaints

253. Various complaints about issues with the SIEC Arena Upgrade have been raised with ENSW, the OoS, the Minister for Sport and members of the Legislative Council at various times. We have summarised the complaints by complainant / theme of complainant as follows:

#### *Verwey Complaints*

254. Between 5 and 10 October 2017 (prior to the Tender Period), Mr Lou Verwey (Capricorn) sent several emails to Ms Fasher (**Verwey Complaints**) complaining about Mr Farrar's conduct and an alleged conflict of interest relating to Mr Farrar. This alleged conflict of interest involved Mr Farrar having a connection with BSMS via the then-President of the ENSW Board Mr Peter Dingwall, whose son worked for BSMS and was married to Mr Smith's daughter (**Farrar Conflict**). Mr Verwey stated:
- (a) that Mr Farrar: "asked the owner of Willinga Park (Terry Snow) for a sand and fibre sample of that what we have installed on the Willinga Park EBB & FLOW arenas" (Willinga Park being a property with an Ebb & Flow system supplied by Capricorn).<sup>55</sup> Mr Verwey complained that "I find it highly inappropriate that the CEO is collecting such samples... this can be requested directly from me at Capricorn (Australia) Pty Ltd"; and
- (b) that there was a connection between Mr Farrar and a "Board Member installing arenas from a Competitor's Company and the family connection within EA NSW with the agent of this opposition company is not at all a comfortable position to be in and has raised some eyebrows" and that he had "been a victim of conflict of interest within EA NSW before concerning a very controversial draw in a Sydney 3 DE (owner / event secretary scenario)."

<sup>55</sup> Willinga Park, 'Capricorn Australia Announced as Major Sponsor' (21 July 2017) available at <<https://willingapark.com.au/capricorn-australia-announced-as-major-sponsor/>> (accessed on 24 August 2021).

255. On 10 October 2017, Mr Farrar emailed Mr Verwey in relation to his complaints. Mr Farrar stated:

**"Willinga Sample**

*Since starting at Equestrian NSW in 2013 and with civil engineering experience, I have taken a keen interest in arena specifications and performance. I have inspected many arenas, including those installed by Capricorn. I've been to Aachen and have had many discussions with leading international course designers Leopoldo Palacios and Werner Deeg about arena surfaces. I have collected, with the owners' permission, an inventory of samples which have been tested at NATA accredited laboratories using Australian Standard testing techniques. In my industry experience, asking for a sample from the contractor is not as reliable as taking independent samples under controlled conditions. On Sunday 1 Oct 17, I asked Terry Snow for his permission to take a sample of the indoor arena surface and explained that I was benchmarking surfaces to better understand the relative inputs to performance. Terry readily agreed and confirmed this position when I called him on Saturday 7 Oct 17. You saw me taking the sample, so was aware of what I was doing.*

**Conflict of Interest**

*Peter Dingwall, President of the Equestrian NSW Board, has not been provided with any information about the specifics, analyses or costs that I have collected about arena surfaces. Similarly, I have spoken to Peter's son Stephen Dingwall, who works part time for Otto, but once again haven't disclosed the details of any discussions I've had with other suppliers, nor the results of any samples tested.*

*Alex Townsend, Board Member of Equestrian NSW, recently installed Otto surfaces in her indoor and outdoor arenas. I had no input to her decision to use Otto and didn't disclose any information to her about Otto or other suppliers.*

*Based on my discussions with John Vallance and Mike Etherington-Smith, Oliver Hoberg was recommended to SIEC, as an independent expert to assist with the scope of works and tender evaluations. SIEC has dealt with Oliver directly as part of the tender process. I am an interested stakeholder as CEO of Equestrian NSW, but the decision which is the successful tenderer for SIEC will be made by Sport NSW."*

256. During the procurement process, the OoS was not made aware of the Verwey Complaints nor of Mr Farrar's response to same. As set out above, on 25 October 2017, Mr Farrar signed a Conflict of Interest Declaration confirming that he did not have an interest or a perceived interest in relation to any of the tendering parties and the OoS accepted this to be true. At no point before, during or after the procurement process did Mr Verwey or Capricorn raise any issues in relation to the Farrar Conflict with OoS. This is despite Capricorn being one of the respondents to the RFT.

**SIEC Employee complaints**

257. On 18 December 2017, Mr Crumpler was notified of the Farrar Conflict by two OoS employees based at the SIEC, Ms Hartog and Mr Porter. This was the first time that the OoS became aware of any potential conflicts of interest involving Mr Farrar or at all. As explained above, the Contract was awarded to BSMS on 6 November 2017 and by the time the Farrar Conflict was brought to the attention of anyone at OoS, the project was well underway (with expected completion in early January 2018).
258. On 18 December 2017, Mr Crumpler met with Mr Farrar who advised that the son of the then-President of ENSW, Mr Dingwall, was employed by BSMS and married to Mr Smith's daughter.
259. On 20 December 2017, Mr Farrar forwarded to Mr Crumpler the Verwey Complaints and his response to same. Mr Farrar advised Mr Crumpler that:

*"You should also have received an email from Suzanne Doyle (attached), who until recently was Chair of the Equestrian NSW Finance, Audit and Risk Management Committee, confirming that she was satisfied that I have not acted inappropriately and that conflicts of interest were managed appropriately."*

260. Mr Farrar stated: *"I'm disappointed that the two SIEC staff members made the allegations to you without first discussing them with me. In saying that, I respect their right to raise the issue*

and will keep our discussions confidential, apart from informing my Board". The OoS considers that the action taken by Ms Hartog and Mr Porter to raise the conflict of interest issue internally at the OoS rather than directly with Mr Farrar was appropriate. The OoS is also of the view that, given that Mr Verwey did not raise the Farrar Conflict with the OoS, it was appropriate that no response was provided by OoS to Mr Verwey.

261. On 20 December 2017, Ms Suzanne Doyle (ENSW) sent an email to Mr Crumpler (copying Mr Farrar and Mr Dingwall) in relation to the Farrar Conflict, stating:

*"... we are conscious that we need to have the right governance around what our role is in this project and how we execute these roles - particularly as there are a number of people on the ENSW Board who in their personal capacity, have dealt with arena designers, builders and surface providers given they are actively involved in the industry and the perceived conflict of interest.*

***We have assured ourselves that we have acted in accordance with the governance framework to manage conflicts.***

***With regard to Bruce, I am assured that he has no conflict of interest with Otto Sports.***

*If you believe there are other issues with the actions of Bruce in relation to the re surfacing project taking place at SIEC, either Peter or myself are more than happy to talk further."*

(Emphasis added)

262. Later on 20 December 2017, Mr Crumpler raised the Farrar Conflict within the OoS via an email to Mr Brown and Mr Kasif. Mr Crumpler advised:

*"I had concerns raised by two SIEC staff that Bruce Farrar and the Equestrian NSW Board had undisclosed conflicts of interest which could have impacted the procurement project for the SIEC arena surface upgrades. I met with Bruce on Monday afternoon to discuss and he provided the following information.*

- He acknowledged that the President of Equestrian NSW Peter Dingwall has a son who is married to Barrie Smith's Daughter*
- He also advised that another of their board members is the owner of Wallaby Hill which was the first site to install the Otto surface in Australia*
- Bruce advised that they [sic] conflicts had been declared at a board level and excluding the initial report which was submitted to Minister Ayres no detailed information on the procurement process has been communicated with the Board.*
- Aside from SIEC staff concerns, Equestrian Australia received a complaint regarding Bruce's involvement in the procurement process from one of the Tenderers (Bruce has provided a copy of this correspondence which is attached)*
- Bruce has also provided email correspondence from Suzanne Doyle who oversees the board audit committee to confirm these conflicts have been declared*
- As part of preparing costings for the business case to the Minister Bruce advised that he did obtain costings for 3 items (Otto Mats) from Barrie Smith*

***Having reviewed the feedback and the procurement process I am happy that the process has been conducted internally within appropriate guidelines however on reflection an independent expert aside from Equestrian NSW would have provided reduced conflicts and clear delineation."***

(Emphasis added)

263. The OoS did not anticipate learning about the Farrar Conflict in December 2017 given that the issue was first raised by Mr Verwey with Mr Farrar in October 2017.

264. The OoS notes the following two provisions in the Conflict of Interest Declaration signed by Mr Farrar:

*"1. a) In signing this Deed, the person undertakes that she/he will: Maintain the confidentiality of the information to which they will have access and take reasonable precautions to prevent its unauthorised dissemination or use*

...

*4. The person also undertakes to immediately notify the Director, Asset Management and Procurement of any interest, potential interest or perceived interest of a sort as described above, in the event that she/he becomes aware of the relevant circumstances after they have signed this Deed."*

265. Also, the OoS refers to the following observation made by ICAC about the way in which the Farrar Conflict was addressed by the OoS in December 2017:
- "It appears that Mr Farrar's and ENSW's potential and/or perceived conflicts of interest became known amongst the Office of Sport staff, however, it appears that they were not formally documented, and any plan set in place to manage them. Doing so likely would have reduced perceptions of corrupt conduct having occurred."*
266. As soon as Mr Crumpler became aware of the Farrar Conflict, he met with Mr Farrar and outlined his views in relation to the conflict in his email to Mr Brown and Mr Kasif on 20 December 2017. Mr Crumpler, acting in good faith, satisfied himself that the conflict had not tainted the procurement process and did not consider that it required further escalation (nor did Mr Brown or Mr Kasif).
267. The OoS recognises that the alleged conflict should have been more formally documented, and a plan put in place in terms of how to manage this potential conflict (at the time and earlier). The OoS also acknowledges that, given Mr Farrar's Conflict of Interest Declaration, the internal OoS assessment of the alleged conflict should have been raised with Mr Farrar in this context and the alleged conflict of interest could have been managed better. The timing of when this issue was raised was unfortunate given that Mr Crumpler was dealing with the issue associated with the delayed arrival of the Imported Surface Materials and the resulting potential project delay.
268. We assume that Mr Crumpler was satisfied that, to the extent that any conflict existed, it could be managed and had not adversely impacted upon the procurement process. As the procurement process had ended and the project delivery was underway, the options available to Mr Crumpler to deal with the matter were limited. Given Mr Crumpler's position as the senior OoS officer and project sponsor, it was reasonable and appropriate that he took steps to satisfy himself that the Farrar Conflict was acknowledged and dealt with. In his email dated 20 December 2017 to Mr Brown and Mr Kasif, Mr Crumpler acknowledged the advantage of utilising an expert outside ENSW which OoS accepts would have given rise to a reduced prospect of a potential conflict of interest arising in the circumstances.
269. As set out above, the OoS has strengthened its procurement procedures and Template documents for projects approved under the Minor Capital Works Program, particularly in relation to conflicts of interest, to ensure that procurement processes are more robust and transparent in future.
270. In doing so, the OoS has developed clearer guidance material and improved education and training in relation to the identification, and management of, potential conflicts of interest during a procurement process and strategies to manage conflicts of interest post-procurement. The OoS considers that this will reduce probity risks and any risks of impropriety, while achieving better outcomes for the OoS and its stakeholders. This includes the reporting of potential (actual or perceived) conflicts to the Director - Asset Management and the Director - Finance, Procurement and IM&T:
- (a) in the TEP Template, section 11 provides that:
- "Should a conflict of interest be declared, become apparent, or there is a perception of conflict, the Facilitator shall first consult with the Director, Asset Management and Project Sponsor to deliberate upon whether it is or is not appropriate for the individual to continue to play a role in the procurement process. If it is proposed for the individual who has the conflict or perceived conflict to continue to be involved, the Director, Finance, Procurement, and IM&T, in the role of Chief Procurement Officer, is then to be notified and included in the process."*
- (b) in the Conflict of Interest Template, a section headed "Accountability" relevantly provides:
- "2.       Accountability  
...

*Individuals and members finding unethical or suspected unethical behaviour or practices should immediately inform the Facilitator of their committee or the Project Manager. Alternatively, if that action is not considered appropriate, the information should be disclosed to the Director, Asset Management and the Director, Finance, Procurement, and IM&T, in the role of Chief Procurement Officer, or in very serious circumstances the Independent Commission against Corruption. Please refer to the OoS Procurement Policy for reporting information."*

271. The OoS will also include processes surrounding the management of conflicts, and formal documentation in relation to same, in its enhanced Procurement Strategy Template.

*Complaints by Hannah Brooks, Maggie Dawkins and Suellen Saals*

272. On 27 December 2019, 3 January 2020 and 9 February 2020, formal complaints in relation to the SIEC Arena Upgrade were made to the Hon. Anthony Sidoti MLC (although the OoS notes that the Hon. Dr Geoff Lee MP was the appropriate recipient as Acting Sports Minister at the time) by Ms Hannah Brooks and Mrs Maggie Dawkins - two members of the NSW Equestrian community (**Brooks and Dawkins Complaints**). Ms Brooks and Mrs Dawkins made their complaints following their review of documents released under the *Government Information (Public Access) Act (NSW) (GIPA Act)* by the OoS relating to the procurement process.
273. In essence, the substance of the Brooks and Dawkins Complaints were in relation to the following:
- (a) the Farrar Conflict;
  - (b) undisclosed conflicts of interest by the ENSW Board, namely, that Ms Townsend had a connection to BSMS (as a consequence of having Otto Sport arenas installed by Mr Dingwall's son), that the ENSW Board approved a limited tender process which favoured Mr Dingwall's son (as an employee of BSMS), and that no members of the ENSW Board completed a Conflict of Interest Declaration;
  - (c) that Mr Miller had an undisclosed conflict of interest as he sat on the ENSW Board Selection Committee at the time;
  - (d) that Mr Farrar took unauthorised samples from Willinga Park - a property where Capricorn had previously supplied an Ebb & Flow System;
  - (e) that Ms Fasher of EA should have disclosed the Verwey Complaints to OoS during the procurement process;
  - (f) there were issues with the procurement process in terms of the consideration of other surfaces, such as wax surfaces;
  - (g) there were irregularities with tender scoring during the tender evaluation process;
  - (h) there were issues with the procurement process - Ms Brooks complained that there is "*no evidence*" the referees of Capricorn and Equestrian Services were contacted, and that: "*Barrie Smith Motor Sport could only include one referee being Alex Townsend who may have been conflicted given her association with Peter Dingwall (ENSW Chair). Both Alex Townsend and Peter Dingwall were members of the Board of ENSW at that time*". Ms Brooks further noted that, at the time of the Contract, BSMS "*had installed only one arena in Australia, that of Alex Townsend - herself a board member of Equestrian NSW*". Mrs Dawkins complained that: "*The composition and level of knowledge and expertise to advise the Office of Sport needs to be investigated. John Vallance is a show jumping course designer and has little if any expertise in the science of dressage arena surfaces. Julie Farrell is not a riders consultant*";



- (i) the use of the Wallaby Hill Materials was due to Ms Townsend being unsatisfied with the Wallaby Hill Farm arena surface, and that the use of these materials was not disclosed to the OoS during the procurement process;
- (j) Wallaby Hill Farm, PHM Building CO and JK Williams were unauthorised sub-contractors who were engaged on the SIEC Arena Upgrade;
- (k) there was inadequate consultation during the procurement process;
- (l) that Mr Kasif's approval of BSMS as the preferred tenderer was difficult to understand; and
- (m) that the SIEC Arena Upgrade resulted in poor surface quality and has led to safety issues for dressage riders.

274. Between 12 February 2020 and 25 June 2021, Mrs Dawkins and Ms Brooks sent frequent correspondence to the OoS, in addition to the Office of the Minister of Sport and Members of the Legislative Council, in relation to their complaints. On 11 February 2021, the Hon. Dr Geoff Lee MP (then Acting Minister Sport, Multiculturalism, Seniors and Veterans) issued a response to correspondence from Ms Dawkins. In his response, the Minister provided answers to Ms Dawkins' questions and outlined the steps taken to address Ms Dawkins' concerns relating to the procurement process, suitability and independent verification of the Indoor Arena Surface, the level of usage of the Indoor Arena and stabling costs.

275. Mrs Dawkins and Ms Brooks have become aware of, and have closely followed, the OCM Review and Report, the referral of the SIEC Arena Upgrade to ICAC, and the Inquiry. Throughout these processes, and since their complaints were lodged, the OoS has diligently and respectfully responded to Mrs Dawkins and Ms Brooks, provided them with information and kept them informed of developments.

276. On 22 July 2021, the Hon. Natalie Ward MLC (Minister for Sport, Multiculturalism, Seniors and Veterans) issued a response to correspondence dated 25 June 2021 from Ms Dawkins. In this letter, Minister Ward stated:

*"Thank you for your correspondence of 25 June 2021 regarding the safety of the surface at the Indoor Arena at the Sydney International Equestrian Centre.*

*I am advised an assessment of the surface was undertaken by Equestrian experts Ms Mary Seefried and Mr John Vallance in March 2021. They found the surface was fit for the highest-level international dressage and jumping competitions.*

*Nonetheless given further concerns have been raised by you, and to provide additional assurance, I have asked for a new assessment to be conducted by experts from the equestrian sector, in addition to an independent assessment by Public Works NSW and an independent assessment by Safework NSW.*

*This will build on the assessment conducted in March 2021 by Ms Seefried and Mr Vallance, who I understand are highly regarded and experienced in dressage and show jumping.*

*I would welcome your attendance at the assessment, as an interested party. Personnel from the Office of Sport will be in contact to invite you to attend the assessment, which is currently scheduled to occur on 18 August 2021 (pending Covid-19 safety arrangements).*

*I have carefully considered your request to close the Arena. In the current Covid-19 Health Order lockdown there is no public competition activity occurring at the venue.*

*I am advised that a pre-Tokyo training activity by our Paralympian team is scheduled to take place prior to 18 August 2021.*

*On balance, I must take an evidence based approach, guided by the assessment conducted by equestrian experts who undertook a thorough inspection in March 2021 and which found no safety issue to warrant closing the venue.*

*I am advised by the Office of Sport that on the basis of the March 2021 expert assessment, the Centre will remain open to allow for the very specific and crucial pre-Olympic preparation that is scheduled for our Paralympian team."*

277. On 29 March 2021, a further complaint was conveyed to the Hon. Mark Latham MLC by Ms Suellen Saals, a member of the NSW Equestrian community. Ms Saals raised issues regarding the safety of horses competing on the SIEC arenas.
278. The OoS welcomes all questions, issues or concerns raised by stakeholders in relation to all aspects of NSW sport. The OoS has carefully considered feedback from the NSW Equestrian community, including the comments of Ms Brooks, Mrs Dawkins and Ms Saals, and whether they can or should be addressed in its updated procurement policies and Templates and the nature of any such improvements:
- (a) in relation to the Farrar Conflict and the allegation that that Mr Farrar took unauthorised samples from Willinga Park (a property with an Ebb & Flow System supplied by Capricorn), the OoS acknowledges that, in 2017, there were limitations in relation to its processes for the identification and management of conflicts of interest. The OoS has now strengthened its procurement policies and Templates, as set out above;
  - (b) in relation to undisclosed conflicts of interest by the ENSW Board, the OoS submits that, other than Mr Farrar, no members of the ENSW Board were involved in the procurement process for the SIEC Arena Upgrade. Accordingly, there was no requirement that any other ENSW Board members complete a Conflict of Interest Declaration. However, the OoS has since broadened the requirements relating to conflicts of interest in its procurement policies and Templates, to ensure that it is clear that potential conflicts of this nature will be required to be disclosed in future;
  - (c) in relation to any conflict of interest by Mr Miller, as set out above, the OoS acknowledges that the requirement to complete a Conflict of Interest Declaration extended to Mr Miller as CEO, given it applied to anyone involved in the procurement process. The OoS has strengthened its procurement processes and Templates to ensure that, in future, Conflict of Interest Declarations are received from all participants in the procurement process at the outset;
  - (d) in relation to the Verwey Complaints, the OoS notes that Ms Fasher and ENSW were not involved in the procurement process. However, issues such as those raised in the Verwey Complaints, will now be required to be disclosed under the OoS's expanded definition of conflicts of interest within its updated procurement policies and Templates;
  - (e) in relation to the complaint that the procurement process did not consider other surfaces, such as wax surfaces, the OoS notes that (for the reasons set out above) it was appropriate for it to rely upon the opinion of external advisors in developing the RFT Scope of Works, and to come to the conclusion that the Ebb & Flow System was the most effective system for the SIEC Arena Upgrade, noting also that the OoS consulted with 16 stakeholders in relation to the proposed Scope of Works and the Ebb & Flow System was used in other Australian equestrian facilities and at the Rio Olympics;
  - (f) in relation to the comments about the tender evaluation process, the OoS recognises that the OCM Report and ICAC made recommendations in relation to the tender evaluation process, including the scoring system used by the TEC, the detail provided in the TRR, the checking of referees, and the endorsement of the TRR by the TEC. As set out above, the OoS has taken steps to improve its tender evaluation processes, including in relation to:
    - (i) processes around ensuring that considerations of any strengths and weaknesses of tenders are factored into the tender scoring, and reflected in the TRR;
    - (ii) mechanisms for each member of the TEC to discuss and understand the reasons for any scoring discrepancies in order to reach a consensus score;

- (iii) the formal endorsement of the TRR by all TEC members; and
  - (iv) documentation prepared to support the tender evaluation process, including records of any due diligence conducted or meetings held.
- (g) in relation to the suggestion that the use of the Wallaby Hill Materials was due to Ms Townsend being unsatisfied with the Wallaby Hill Farm arena surface, and that the use of the Wallaby Hill Materials was not disclosed, any issues surrounding this would need to be explored with Mr Smith and Ms Townsend. The OoS notes that the use of the Wallaby Hill Materials was disclosed to, and investigated by, the OoS whilst the works were being undertaken under the Contract, as set out above. Also as outlined above, the OoS was not privy to any information about the Wallaby Hill Materials being used in the SIEC Arena Upgrade due to a dissatisfaction by Ms Townsend regarding those materials. The OoS ensured that BSMS arranged for independent Geotech Testing in relation to the Wallaby Hill Materials which confirmed that the materials were identical to the Imported Surface Materials and were not contaminated. Given the lack of information available, and other than the Geotech Testing, the OoS are not in a position to speculate in relation to the merits or otherwise of using the Wallaby Hill Materials versus the Important Surface Materials. Further inquiries would need to be made with BSMS in relation to how this material was subsequently used;
- (h) in relation to the comment that Wallaby Hill, PHM Building CO and JK Williams were unauthorised sub-contractors on the SIEC Arena Upgrade, the OoS notes that Wallaby Hill was not a sub-contractor for the SIEC Arena Upgrade. However, JK Williams were put forward by BSMS in the BSMS RFT response as the Project Manager for the SIEC Arena Upgrade and this was accepted as part of the Contract. In relation to PHM Building Co, this organisation was not specifically mentioned in the BSMS RFT response, but the RFT response advised that:
- "there will be a number of Sub-contractors involved in the Project. Most of these Subcontractors have been involved with BSMSport in identical Equestrian Arena upgrades in other Australian locations as are proposed for SIEC Arenas 5 & 6, so BSMSport will be providing a very experienced team to undertake the project."*
- This was accepted by the OoS as part of the Contract. Accordingly, the OoS submits that there is nothing unusual, unauthorised or inappropriate about PHM Building Co being sub-contracted by BSMS for the SIEC Arena Upgrade;
- (i) in relation to the comment that there was inadequate consultation during the procurement process, the OoS disagrees with the proposition. As set out above, in August 2017, the draft RFT Scope of Works was distributed for feedback to 16 key stakeholders. Feedback was received from three of those stakeholders, namely, Dressage NSW, the Arabian Horse Society of Australia and the Show Horse Council of Australasia. This feedback was positive and was considered during the development of the RFT Scope of Works; and
  - (j) in relation to the comment that the SIEC Arena Upgrade involved poor surface quality and led to safety issues for dressage riders, the OoS notes that, in 2019 and 2020, the OoS became aware of rubber grommets coming to the surface of the SIEC Arena. The OoS took prompt action to rectify this issue by requiring BSMS to carry out remediation works on the SIEC Arena Surfaces to remove the grommets. On 11 March 2021, the OoS arranged for an assessment of the SIEC Arena Surfaces by FEI accredited personnel, which did not reveal any issues relating to the safety or quality of the Surfaces. Although the SIEC Arena Surfaces have been deemed safe, the OoS has arranged for further testing to take place once COVID-19 restrictions make it possible to do so. The way in which the OoS has responded to concerns raised over the quality of the SIEC Arena Surfaces is set out in further detail below under the heading "*Remediation*".

279. The OoS submits that, as a direct result of the concerns that have been raised in relation to the SIEC Arena Upgrade and brought to its attention by members of the equestrian community, and as set out above, the OoS have identified a range of improvements to its internal processes and procedures that it has implemented (or is in the process of implementing) which have strengthened its procurement processes to achieve better outcomes into the future.

## (b) Remediation of Issues with Surface Quality

280. Following receipt of the Geotech Report in relation to the Wallaby Hill Materials, the OoS was not aware of any issues relating to the quality of the SIEC Arena surfaces in the aftermath of the SIEC Arena Upgrade until nearly two years later, namely, in October 2019, following the National Dressage Championships.
281. In February 2019, a year after the project's completion, the 52-week Post Completion Period under the Contract expired. On 18 February 2019, Mr Smith requested the release of the security amount of \$29,037.52, noting the expiration of the Post Completion Period. Given that the OoS was not aware of any issues relating to the surface at the time, the OoS organised for the release of the security amount to Mr Smith shortly after Mr Smith's request.
282. On 24 October 2019, Mr Fulcher emailed Mr Crumpler and Mr Brown to report on negative feedback that had been received about the SIEC Arena surfaces during the National Dressage Championships. This email stated:

*"We have had some negative feedback on the arena based on the hardness of the surface for dressage. We worked with the Technical Delegate throughout the event to improve it.*

*- The challenge we are having is getting the right moisture content for the different disciplines in particular Showjumping [sic] and Dressage, jumping wants it firmer and dressage softer. Adjusting the water system, especially after back to back events of the different disciplines is a challenge.*

*- The other is compaction with the different sands and the clay content of the Indoor Arena product.*

*I have been given some brief on the issue with the Indoor product coming up from Wallaby Hill and used in the Indoor.*

*Another issue we have been having is the rubber grommets form [sic] the matting coming to the surface, this I am told has come from the Wallaby Hill product. We have two bags of the grommets collected which are in Dave's office. (photos [sic] attached) and another bag was collected by the stewards of the National Dressage Championships last week.*

*There also seem to be more talk around from the sport of people becoming aware that the surface is second hand and come up from Wallaby Hill.*

*The event organiser, that collected the samples, has requested some photos of the grommets they collected as I understand the a [sic] steward from the event is writing a report about the surface.*

*Looking for suggested actions on the way forward:*

- 1. Matt, the warranty on the project, when does that cease? Do we have a bank guarantee on this one?*
- 2. Following on from the question 1, warranty or not, I think there should be a meeting with the contractor, a Project Manager (noting Jim is no longer engaged) or Matt and SIEC to discuss the above.*
- 3. Darren, feedback on supplying the photo to the OC. If we hold back are they thinking we are hiding something anyway?"*

283. Despite this feedback, the OoS notes that the Report completed by the FEI Chief Steward for the National Dressage Championships on 28 November 2019 did not raise any issues or concerns relating to the SIEC Arena. The Report is in the format of "yes/no" (or pass/fail) where the FEI Dressage Chief Steward will identify where events may have failed certain criteria. The OoS would expect that any issues with the surface would have been recorded in the Report. The Report did not include any recommendations for future improvements to the event nor did it suggest that any follow-up actions should be taken with the Event Organiser. This was considered an overall positive result and suggested that there were no issues to be addressed following the National Dressage Championships.

284. On or around 6 January 2020, Ms Karen Jones (Chief Executive, OoS) became aware of potential issues with the quality of the SIEC Arena Upgrade via a complaint made by Ms

Brooks on 27 December 2019 and subsequently forwarded to Ms Jones. Ms Jones promptly coordinated an internal OoS response to ensure that any remediation works that were required were actioned efficiently and at no additional cost to OoS or to the NSW taxpayer. Ms Jones gave various directions and instructions to OoS staff to coordinate the remediation works throughout this process and ultimately ensure that the SIEC Arena was safe and of an international standard for competitors and horses.

285. On 13 February 2020, on behalf of the OoS, Mr Brown emailed Mr Smith in relation to the negative feedback received following the Australian Dressage Championships, forwarding the email sent by Mr Fulcher on 24 October 2019 (see paragraph 282), and requested a site visit with Mr Smith. Mr Brown stated:

*"I received the below email update from Mark Fulcher, Venue Manager Sydney International Equestrian Centre (SIEC), in October last year regarding the condition of the new arena surface at the Indoor Arena at SIEC. Since then, there has been no improvement in surface condition so we are now seeking a site meeting with you or your representative/s to formally discuss a solution. This is a very serious situation for us in terms of potential damage to our reputation so we hope you will be willing to work with us to identify appropriate rectification actions.*

*Please let me know by return email or phone call (my contact details are below) when you will be able to meet us onsite."*

286. On 17 February 2020, Mr Smith replied to Mr Brown's email. Mr Smith acknowledged that he was "aware of the issues mentioned" in Mr Brown's email but stated that:

*"most of the issues seem to be regarding some people's perception of what constitutes a riding surface suitable for Dressage versus Show Jumping. Where individual perceptions are involved, you are never going to get 100% agreement, but from what I've seen & heard, it would be difficult to find a show jumper who wasn't 100% happy.*

*I agree that some Dressage competitors prefer a riding surface to be "softer" or "fluffier" (their terms not mine) compared with how Show Jumping competitors prefer the surface, but I submit that some of the Dressage riders are comparing the SIEC Otto surface to those more commonly found in sand or sand & fabric 60 x 20m dressage arenas at other venues which don't have a surface with the technical benefits of the Otto system.*

*SIEC is a leader in providing a World Class Equestrian Surface for Australian competitors with the installation of the Otto Indoor & Warmup Outdoor arenas. Possibly more education has to be provided to both SIEC staff and competitors so that the Otto design concept and the adjustability of the surface for differing equestrian disciplines is better understood.*

...

*I recall the acceptance test of the SIEC Otto arenas which was supervised by John Valance. The Dressage riders selected to test the surface were two of Australia's most prominent Dressage competitors, Brett Parbery and Denise Rogan. Brett made this comment about the Indoor surface "It's firmer than some competitors like, but we actually prefer it this way". The Show Jumping test was performed by a group of Australia's leading Show Jump riders, who were about to take their horses to a major competition in Hong Kong. The riders included Jamie Kurmond, Dave Cameron and Billy Raymont. Their feedback was "It's now just like Show Jumping in Europe".*

*An Otto representative Markus Fleischmann attended the CDI Dressage competition at SIEC in 2018. During competition, my equestrian manager, Stephen Dingwall, had a meeting with Markus and Maree Tompkinson the rider's representative which was organised by the Show organiser Toni Venhaus, to ensure that both the Indoor and Outdoor arenas were satisfactory. SIEC maintenance staff were also included in the meeting. Markus, Stephen and Maree examined the surface on both Otto arenas. Following an adjustment of the arena groomer to increase the depth of grooming, Maree approved both arenas.*

*The feedback that we have received from leading Show Jump riders after jumping at SIEC is that an indication of the excellence of the surface is that the older Show Jump horses are still performing at the same level after four days of jumping. Normally on lesser surfaces, the performance of the older horses decreases over the time of the competition. One competitor, Billy Raymont, when jumping at the Adelaide Show the week after jumping at SIEC, claimed that his horses were performing better than expected in Adelaide due to the confidence gained from the previous week's jumping at SIEC."*

287. In Mr Smith's email reply, he addressed the following matters:



(a) **The SIEC Arena Construction Design:**

*"Otto Sport International has been appointed by the FEI (World Equestrian body) as an "FEI Campus Partner". The link below shows the full text of the announcement, but the following statement from the announcement says it all - "OTTO Sport International, known globally for producing footing for equestrian arenas at the world's biggest events, including the Olympic and Paralympic Games, will now help to drive the education strategy for the FEI - the global governing body for horse sport." <https://inside.fei.org/news/otto-sport-international-announced-fei-campus-partner>*

*SIEC has installed an equestrian surface designed by a company which the FIA considers worthy of driving the education strategy for equestrian surfaces worldwide.*

*[There has been some recent work by Prof. Lars Roepstorff of the Swedish University of Agricultural Sciences which has been performed in conjunction with the FEI (see You Tube link: [https://www.youtube.com/watch?v=VNV9vgmpKik&trk=organization-updatecontent\\_share-video-embed](https://www.youtube.com/watch?v=VNV9vgmpKik&trk=organization-updatecontent_share-video-embed) share-article title)*

*His work has concentrated on measuring the main functional properties of equestrian riding surfaces, these being:*

- *Impact Firmness - Influences the mechanical shock experienced by the horse when the hoof first hits the ground. This relates to the hardness of the top layer of the surface.*
- *Cushioning - Cushioning describes how the surface is able to dampen and reduce the maximum force when the horse puts its full weight on the leg*
- *Responsiveness - How active or springy the surface feels to the horse*
- *Grip - Grip is determined by both surface friction and how well the top layer and the materials beneath interlock and hold the surface together to provide traction*
- *Uniformity - Uniformity describes how much the characteristics vary across a whole arena*

*Further details on the above can be found in the attachment, "Equestrian Surfaces - A Guide" which is the result of an FEI sponsored project in 2013.*

*Otto Sport has had their arena design system tested by Prof. Lars Roepstorff on two occasions.*

*The first occasion was the Otto Sport arenas in Brazil for the 2016 Olympic Games. This testing was performed by the same equipment as in the above You Tube video and on the actual arenas in Brazil. All the arenas were fully approved.*

*On the second occasion, the proposed construction of the arenas for the Tokyo Olympics was duplicated in Sweden (using samples of exactly the same sand, gravel etc. as would be used in Tokyo) and tested by Prof. Lars Roepstorff (see photo in attachment). Again, the Otto Sport surface construction was approved.*

*Samples of all sands used for the riding surface in Otto Sport arenas constructed by BSMSport Equestrian / Otto Australia are tested at the Otto laboratories in Germany to ensure that their characteristics satisfy the stringent requirements for Otto riding surfaces. Currently there are only two sands which have received Otto approval - the sand in the SIEC Indoor arena and the sand in the SIEC Outdoor Warmup arena."*

(b) **SIEC Arena Maintenance**

*"Arena Maintenance is the key to providing Competitors with a riding surface which meets their requirements for their particular discipline, whether it be Show Jumping, Dressage or other. It is worth noting here that the Otto surface is not suitable nor is it designed for equestrian events which involve excessive sliding.*

*The issue which Mark Fulcher raised where Dressage competitors felt the surface was "too hard for Dressage" is also addressed in the attached document "Equestrian Surfaces - A Guide", which recognises this as an issue. The following is a quote from this document:*

*"Traditionally, Jumping and Dressage riders have had different demands, with Dressage riders wanting less impact hardness and less grip. Experience from international championships with both disciplines competing in parallel on the same surface has shown that riders from both can be satisfied, with the help of appropriate maintenance work. In addition experience shows that a surface with more impact hardness, as expected for Jumping competitions, gives the Dressage horse better traction in piaffe and passage."*

*Even the above statement is slightly conflicting, in that while it indicates Dressage Riders want less impact & hardness, a surface to the liking of Show Jumpers may offer Dressage riders better traction in the Piaffe & Passage movements found in the highest level Dressage tests.*

*At the start of this email, I described how with deeper grooming (from memory 20mm deep instead of 10mm deep), the rider's representative for a Dressage competition approved the riding surface. Deeper grooming may take an hour, whereas a water level adjustment can take a number of days to reduce the moisture content sufficiently to provide a change in the surface conditions and so is not an instant fix.*

*Adapting to a totally new riding surface such as been the task of SIEC staff is not a simple matter. This is made more difficult when the staff are not high level equestrian competitors themselves, so their opportunity to test ride the surface themselves does not exist. For example, Wallaby Hill, with the same Indoor/ Outdoor sand & fabric combinations as SIEC have had no issues with either surface, partly due to the fact that the riders are also the arena groomers.*

*Problems have occurred with the maintenance of the SIEC arenas in the past due to variations in the water level of the two Ebb & Flow systems. At times, the water has been shut off due to a water saving directive. This had drastic results on the integrity of the surface in the outdoor Warmup Arena, and was discovered by competitors at a small competition the week prior to a major FEI CSIW competition (Waratah Show Jumping).*

*To overcome this problem, I arranged, at my own expense, for my Earthmoving Contractor to scrape the surface into one stockpile, re-mix the sand & fabric, and then re-lay & laser level the arena (called "flipping" the arena). The arena was in perfect condition for the Waratah Show Jumping two days later.*

*This same lack of water issue in the Indoor arena (with a slightly higher clay content) can cause the compacted surface to dry out and become hard. As a result of this, and after a discussion between myself, my Earthmoving Contractor & Mark Fulcher, it was decided to perform the same process with the Indoor Arena. This process is only possible because of the mat structure in the Otto riding surface which allows the earthmoving equipment to shave the riding surface off the mats so it can be stockpiled, re-mixed & re-laid.*

*To improve the understanding of Otto client arena maintenance in general, and for SIEC staff in particular, I would like to make the following proposal.*

*I would like to arrange for the Otto Engineer Gerd Hermann, who oversees the construction of Otto arenas in Australia, to join with BSMSport Equestrian staff and present an Arena Maintenance clinic, hopefully at SIEC if the schedule permits, to which we will invite both existing and potential clients. This will give SIEC staff the opportunity to interact with other Otto clients & compare experiences. I would also invite several high level and medium level Show Jumping and Dressage competitors to attend the clinic to assess the outcome of the various grooming strategies which may be discussed at the clinic. I am sure that such a clinic will go a long way towards deepening the understanding & confidence of the SIEC staff in their Arena Maintenance."*

**(c) Difference in sand composition between the SIEC Indoor & Outdoor Warm up Arenas**

*"It is correct that the sand in the Indoor Arena has a higher clay content than the sand in the Outdoor Warmup arena. In the Indoor Arena, the increased clay content assists in the Impact Firmness properties of the surface. For the premier equestrian events at SIEC such as National Dressage Championships and World Cup Level Show Jumping events, this is an important property, and for these premier events, the finals are typically held in the Indoor Arena.*

*Consider a Show Jumper in the final jump-off going over a 1.6m high combination in the Indoor, after which he has to make a sharp turn to head to the next jump. The Impact Firmness & Grip of the surface are important properties in allowing the horse to land safely and then turn sharply without slipping. Similarly a Dressage rider in the final of the Grand Prix competition needs a high level of Responsiveness and Grip to best perform the high level Dressage movements.*

*The Outdoor Warmup arena is exposed to rain events, and so to avoid water pooling on the surface and affecting the use of the arena during and after rain, the clay content of the sand must be much lower so that water can flow down through the riding surface into the irrigation layer & be pumped out into the storm water drain. The Impact Firmness and Grip for this sand must be enhanced by increasing the water level so that the sand particles*

*and water bind together. The outdoor Arena is also exposed to wind and sun, both of which can create difficulties in maintaining the correct moisture content, but also both of which conspire to make the riding surface drier and softer than the Indoor surface.*

*Again maintenance is the key. The Indoor can be made softer by deeper grooming, and the Outdoor can be made firmer by shallow grooming and a higher water level."*

(d) **"The Elephant in the room"**

*"It is correct that the SIEC Indoor surface was mixed at Wallaby Hill. It is also correct that it was laid on the outdoor arena at Wallaby Hill. When tested for water absorption, it was found that the clay content affected the rate of absorption adversely. For the reasons described above, the same quality sand was to be used for the SIEC Indoor arena, so I made the decision, in conjunction with the Otto Engineer & Otto CEO, to move the new riding surface from Wallaby Hill to SIEC.*

*What is not correct is that the surface was "second hand". It was a freshly mixed combination of selected sand & fibre.*

*In order to achieve a totally homogenous mixture of sand and fibre, an Otto surface is always mixed away from the arena site and not laid on the arena site until the sand and fibre mixture is approved, and in the case of Ebb & Flow arenas this approval is always given by the Otto Engineer. The SIEC Outdoor Warmup surface was mixed in the top car park in a similar way.*

*An unfortunate consequence of the lifting of the surface from the Wallaby Hill Outdoor arena was that the Bobcat cut the tops of some of the perforated mats in the arena, and this is the source of the pieces of mat found in the Indoor arena at SIEC. I have been assured by Otto that, while cosmetically not ideal, these pieces represent no danger to horses. The incidence of these pieces decreased after the first few months of grooming and have only reappeared following the "flipping" of the Indoor arena as a maintenance task. This involved stockpiling the Indoor surface, re-mixing it, laying it back on the mats & laser levelling its surface. It is untidy, and I'm disappointed that these pieces distract from the benefits of one of the best riding surfaces in the country."*

(e) **Warranty Questions**

*"The warranty was 12 months and the Bank guarantee has been returned to me. This has no effect on my keenness or desire to ensure that the SIEC arenas continue to perform to the highest level for many years to come. My Wife is a Dressage rider & my family contains top level show jumpers. My reasoning behind getting involved with Otto was to make a difference so that Australian Equestrian competitors would be able to ride on the same standard of arena surfaces as are enjoyed by their compatriots (and competition) overseas. That has not changed.*

*I had no obligation to arrange (with one day's notice) and pay for the Outdoor arena to be "flipped" prior to the Waratah Show Jumping event when the cause, according to the show jumpers in the competition on the weekend prior, was lack of or incorrect maintenance. This was done out of concern that the arena be perfect for the major competition running later that week.*

*I have offered above to run a maintenance clinic at no cost with an Otto engineer present, at SIEC if possible, so all SIEC staff can attend along with other Otto arena clients.*

*I think the solution to the issues being experienced at SIEC is more education regarding maintenance strategies for the many different clients of the Indoor arena. It is a difficult environment for the staff. Show Jumping one weekend, a bunch of school children the next, followed by dogs running & jumping over a course, and then fish tanks!"*

288. Following receipt of Mr Smith's email, in early March 2020, various OoS employees, including Mr Brown and Mr Fulcher, corresponded with Mr Smith via email to arrange a meeting time to conduct a site visit at the SIEC.
289. On 12 March 2020, Mr Smith attended the site visit at the SIEC Arena with OoS employees.
290. On 19 March 2020, Mr Brown emailed Mr Smith to follow up on the outcomes of the 12 March 2020 meeting, stating:

*"Thanks again for meeting with us at SIEC last Thursday. We thought it was both a particularly productive and necessary conversation.*

*Just a quick follow-up email here to confirm that you'll be responding to us in due course once you've managed to discuss some rectification options with your OTTO Sport representative. We of course look forward to hearing from you."*

291. Between 19 March 2020 and 7 April 2020, Mr Smith and OoS employees exchanged a number of emails in relation to determining a remediation plan. On 7 April 2020, Mr Smith proposed a solution as follows:

*"I can assure you that the presence of the pieces of mat, while of no consequence to the performance of the arena surface, annoy me more than they annoy the Office of Sport, and so I'm very keen to remove them.*

*To reduce the number of pieces of mat in the SIEC indoor arena, I propose the following.*

*Excel earthworks will use a device called a power rake or Harley rake to "fluff up" the top 50mm of the surface. This device has a cylindrical drum with carbide tips which spins at high speed (I think backwards) and can be set to any required depth.*

*This will bring many of the mat pieces to or near the surface where they can be collected. I'll supply the labour for the collection.*

*Once completed, the arena will then be laser graded. The above will be done at no cost to SIEC.*

*When it's time to "flip" the arena again, we will again trawl the arena to pick up any remaining pieces.*

*I'll need to check whether the current restrictions on social contact will affect this procedure, and therefore the timing, and also confirm a suitable time with Mark Fulcher with regard to the SIEC schedule, which I suspect is shot to bits anyway."*

292. On 14 April 2020, Mr Brown replied to Mr Smith's email and shared the OoS's perspective in relation to carrying out rectification works on the SIEC Arenas. The email stated:

*"Thanks again for your update. We appreciate your commitment to resolving this.*

*The Office of Sport has considered your email of 7 April and I am writing to share today's discussion.*

*We need a definite timeline for the rectification works. SIEC is currently closed for events, which provides an opportunity to complete the rectification works as soon as practicable. We need a resolution sooner rather than later.*

*The equestrian community, in particular the users of the Arena, are strongly concerned that the pieces of the mat pose a hazard to the health and performance of their horses. We would appreciate your company focussing on removing the pieces of mat, not reducing the number of pieces. We need a world class venue that is attractive to hirers.*

*The best outcome is to achieve the objective of the D&C contract. We leave it to you as to how that is best resolved."*

293. On 28 April 2020, Mr Brown followed up on his previous email to Mr Smith, stating:

*"Have you got an update for us? We were hoping to have heard back from you by now."*

Mr Smith replied to Mr Brown on the same day, stating:

*"I was hoping for a date by now too. The problem I have is my earthmoving contractor is flat out & having difficulty finding a day to do it.*

*I hope to have a date for you this week."*

294. On 29 April 2020, Mr Brown replied to Mr Smith about a potential site visit with Mr Smith to take place the following day, stating:

*"I understand you are potentially able to be on site tomorrow to undertake some remedial works at the indoor arena at SIEC. That would be very welcome but we first need to see two things from you, as follows:*

1. *Written confirmation of all works planned - including the plant and materials to be used - to rectify the presence of all foreign material in the arena surface to comply with original OTTO Sport design/specification; and*
2. *Documented evidence of your plan to implement Government directives relating to the COVID-19 pandemic."*

295. On 4 May 2020, Mr Smith replies to Mr Brown's email, stating:

*"The works planned involve the use of a Harley rake (see attached photo) to fluff up the surface, therefore exposing many of the remaining pieces of mat which will then be collected and removed. The rake will be cleaned prior to arrival at SIEC to avoid contamination of the surface and excess material will be removed prior to leaving the arena to avoid loss of valuable surface material.*

*The surface will then be laser levelled, and any remaining exposed pieces of mat collected & removed.*

*This procedure will ensure that most of the remaining pieces of Otto mat are removed, but I cannot guarantee that every piece of mat will be removed.*

*I wish to make the following points in regard to the presence of the pieces of mat.*

*SIEC and The Office of Sport staff were aware of the presence of pieces of mat in the stockpiled surface prior to it being installed in the Main Indoor arena. Otto did not consider this to be a functional problem and I made staff aware of this in meetings.*

*The pieces of Otto mat are not foreign material as you have suggested, and as you will read in the attached letter from Otto, these can appear throughout the life of an arena surface for various reasons.*

*Following the installation of the surface, the various rider tests confirmed the performance of the surface, and experience since has confirmed that the surface in the SIEC main arena conforms to the requirements of a World class arena surface.*

*During the 12 month warranty period, I remained in regular contact with SIEC and during that period provided sponsorship for some major events to help support events which chose to hire the SIEC arenas. The Otto engineer was present during the installation of both the indoor and outdoor riding surfaces. The Otto International Sales Manager also attended at least one of these major events. There were no significant matters raised during this period, and consequently The Office of Sport returned the withheld Bank Guarantee after 12 months.*

*Since this time, my company has remixed the surface in the Outdoor (warmup) arena at no cost to SIEC, and it was really only after the SIEC Indoor arena surface was remixed that the issue of the remaining mat pieces was raised as an issue. This remixing would have brought to the surface the remaining pieces of mat which were deeper under the original surface. I am aware that SIEC staff have already collected many of these pieces of mat.*

*With regards to operating in the current Covid-19 climate, both Excel Earthworks and PMH Building, who will together undertake the planned works, are both fully conversant with the current NSW Government restrictions. Both companies have continued to work continuously through recent months, and have successfully completed arena construction works as well as building construction works during this period.*

*Can you please confirm that you are happy to proceed with the procedure outlined above so that I can arrange to have the works completed as soon as practicable."*

296. Mr Smith's letter attached an additional letter from Otto Sport dated 29 April 2020 about the "OTTO ArenaTex Footing – traction knobs", which states:

*"The OTTO Riding Mat system consists of two essential components: The OTTO Perforated Mat and the OTTO ArenaTex Footing.*

*On its upper side, the OTTO Perforated Mat is equipped with traction-knobs of different lengths. These knobs in conjunction with the water cups of different heights guarantee best skid resistance and a secure surface.*

*It might happen that some of these knobs break off. This can be the case when the hooves touch the mat layer (especially when the footing is too dry or not equally levelled) or when the points of the arena leveler are put too deep. It can also occur when piling up the footing for example for remixing it on the occasion of a top-up.*



*Given that each mat (1 sqm) has more than 400 knobs as well as more than 200 water cups of different heights, the functionality of skid resistance is also guaranteed when some of the knobs are missing.*

*The knobs are made of the same resilient plastic as the mats. Even when broken off, they do not show any sharp edges and do not represent any security issues when found in the footing."*

297. On 12 May 2020, Mr Brown replies to Mr Smith, stating:

*"We need to have a definite timetable for the rectification of the surface at the indoor arena at Sydney International Equestrian Centre.*

*We would be grateful for advice, by COB 15 May 2020, on your timetable to remedy the substandard surface so that the indoor arena meets international competition standards and is available for Olympic preparatory events within the next ten weeks.*

*Attached is an email exchange between yourself and Darren Crumpler of our office dated 19 December 2017 that makes clear that a contaminated surface would not be acceptable.*

*Office of Sport only accepted the works because your company did not disclose the presence of contamination. This is extremely disappointing.*

*We do not accept the surface as fit for purpose until all of the contaminating pieces of rubber mat are removed.*

*We appreciate your intention to rectify this issue as a matter of urgency."*

298. On 18 May 2020, Mr Smith replied to Mr Brown, stating:

*"I have previously sent you my proposal to perform an operation to remove most of the small particles of Otto Perforated mat from the Indoor arena at SIEC.*

*All I need is your acceptance of this proposal and the work can be performed almost immediately.*

*My offer is to use our best endeavours to remove the mat particles from the riding surface, but I cannot guarantee that 100% of the pieces will be removed. I am however, quite certain that following the completion of our works, the number of pieces which may appear from time to time due to arena grooming will be low.*

*I have also previously provided a letter to you from Otto Sport in Germany which stated that the presence of particles of Otto Perforated mat in the surface did not present any danger to horses using the arena, did not affect the World Class quality of the arena, and were likely to occur during the life of an arena due to a number of different causes. I do not accept that these pieces represent contamination.*

*I am under no legal obligation to perform any of the work that I have proposed. I have offered to undertake this work at my own expense purely in the interests of customer satisfaction.*

*In the email from Darren Crumpler, to which you refer in your email below, Darren asked for three items to be adhered to "for us to be able to accept this proposed surface". This email also referred to pieces of "rubber", so I dispute your comment regarding any attempt by my company to not disclose the pieces of mat.*

*These three items were adhered to, and I have attached above a copy of the Geo-Tech report.*

*I have attached a later email from Darren, which includes in the email trace, the earlier email you attached to your email below. This email from Darren confirms that "we are hearing positive feedback on the new arena surface".*

*I have also attached the email from Darren, dated about 12 months later, replying to my request of the Bank Guarantee for the 12 month warranty period of the SIEC Arena upgrade project.*

*As there were no claims during this period, the Bank Guarantee was returned.*

*Payment of the initial invoice, and return of the Warranty period Bank Guarantee is a strong indication that the Office of Sport considered the project a success. I am aware of many of Australia's top Dressage and Show Jump riders who share this opinion.*

*Mark Fulcher can confirm that some time after this, there was a problem with the sand profile of the surface of the Warmup arena caused by turning off the water supply to the ebb & flow system. This problem was reported to me by show Jump competitors, and I had this arena remixed at my expense in time for the surface to be back to World Standard for the World Cup Show Jumping the following weekend.*

*My company has indicated a willingness to go above & beyond what would often be expected to ensure customer satisfaction. I am happy to do the proposed work in the same spirit of ensuring customer satisfaction.*

*All I require is your acceptance of my proposal outlined in previous emails."*

299. Following receipt of this email, and following consultation with the OoS internal legal team, the OoS sought external legal advice in relation to their rights under the Contract relating to the SIEC Arena surfaces. The OoS was keen to ensure that acceptance of Mr Smith's offer was the best course and would not amount to a waiver of any rights the OoS has under the Contract.

300. On 23 June 2020, Mr Toohey (Director - Greater Sydney Regional Delivery Group, OoS) issued written correspondence to Mr Smith by email in relation to: "*SIEC Indoor Arena Upgrade—Rectification of Defective Works*". This letter stated:

*"I refer to the agreement dated 6 November 2017, between the Crown in Right of New South Wales as represented by the Office of Sport (**Office**) and Barrie Smith Motorsport Pty Ltd (**Contractor**), for the upgrade of the outdoor and indoor arenas at the Sydney International Equestrian Centre (**SIEC**) (**Agreement**). The Agreement included the MW21 General Conditions of Contract (**Contract**).*

*The purpose of this letter is to reiterate the Office's concerns in relation to the Contractor's breach for defective delivery of the goods and services against the requirements contained in the Agreement and propose a way forward to allow for rectification of such defects to the mutual benefit of both parties.*

*Amongst others, the Contractor has the following obligations under the Agreement:*

- i. to supply materials which are free from defects and fit for purpose in accordance with Clause 8.1 (a) of the Contract; and*
- ii. to ensure that fibre additives to the surface must be free of hazardous materials in accordance with item 2.21 of the scope of works in the Agreement.*

*The presence of foreign mat particles in the surface installed by the Contractor do not comply with above obligations as:*

- i. their presence may increase the likelihood of injury to an equine or human user of the indoor arena and, as such, are considered a hazardous material; and*
- ii. their presence has resulted in the Contractor not supplying materials which are free from defects and fit for purpose for a facility that must meet international competition standard.*

*For these reasons, consistent with previous representations, the Office deems the presence of foreign mat particles a Defect, as that term is defined in the Contract, and requires the Contractor, under clause 14.1 of the Contract, to make good such Defect at its cost.*

*In order to make good such Defect, the Office invites the Contractor to propose a methodology and program to achieve this make good. Such methodology and program must:*

- i. outline all works planned - including the plant and materials to be used; and*
- ii. allow for the works to be completed to allow the Office to use the indoor arena from 1 August 2020.*

*Should no methodology and program be received by close of business Tuesday 30 June 2020 then the Office will consider alternate make good arrangements which may be at the Contractor's cost.*

*Notwithstanding the above, should the Contractor achieve the make good required, the Office may consider engaging the Contractor under a fixed term contract to carry out periodic maintenance of the arenas including removal of further foreign mat particles (if any) surfacing from time to time.*

*The Office reserves all of its rights under the Agreement (including as to breach) or otherwise."*

301. On 24 June 2020, Mr Markus Fleischmann (Sales Manager, Otto) emailed Mr Toohey attaching a statement from Mr Wolfgang Otto (CEO, OTTO). This letter stated:

*"Referring to the Office of Sport's concerns in relation to the presence of traction knobs in the footing of the SIEC indoor arena, I would like to point out the following.*

*The OTTO Riding Mat system consists of two essential components: The OTTO Perforated Mat and the OTTO Arena Tex Footing.*

*On its upper side, the OTTO Perforated Mat is equipped with traction-knobs of different lengths. These knobs in conjunction with the water cups of different heights guarantee best skid resistance and a secure surface.*

*It might happen that some of these knobs break off. This can be the case when the hooves touch the mat layer (especially when the footing is too dry or not equally levelled) or when the points of the arena leveler are put too deep. It can also occur when piling up the footing for example for remixing it on the occasion of a top-up.*

*Given that each mat (1 sqm) has more than 400 knobs as well as more than 200 water cups of different heights, the functionality of skid resistance is also guaranteed when some of the knobs are missing.*

*The knobs are made of the same resilient plastic as the mats. Even when broken off, they do not show any sharp edges and do not represent any security issues when found in the footing.*

*Therefore, I would like to underline that the knobs are not contamination. They present absolutely no danger to the health of horses or to the safety of riders.*

*The presence of traction knobs in the footing is purely a visual issue which our partner Barrie Smith has offered to address on several occasions.*

*The SIEC indoor arena is equipped with a high quality and state-of-the-art footing system. To preserve its quality, regular maintenance is crucial. By removing any traction knobs from time to time, the visual issue will soon be resolved."*

302. On 29 June 2020, Mr Smith sent an email to Mr Toohey, forwarding his previous email to Mr Brown dated 4 May 2020 (see paragraph 295). Mr Smith's email stated:

*"You have requested that I reply to your letter prior to June 30.*

*In your previous letter, you referred to the pieces of perforated mat in the surface in the Indoor arena at SIEC. I sent a copy of your email to Otto Sport in Germany and I believe that they have replied to you directly.*

*I have previously outlined to the office of Sport my plan to reduce the occurrence of pieces of mat, and I have offered to do this at no cost to the Office of Sport as an act of Good Faith.*

*A copy of the email which I sent to Matt Brown early in May and which was CC'd to you is included below, and this email includes details of my proposal.*

*If the Office of Sport has a problem with the method I have outlined, then I am happy to discuss this further, but as no concerns have previously been raised, I do not expect this to be the case.*

*I am now asking you formally to give me approval to perform this work."*

Mr Toohey acknowledged receipt of this email on the same day.

303. On 10 July 2020, Mr Toohey replied to Mr Smith's email dated 29 June 2020, attaching correspondence from the OoS which stated:

*"We refer to:*

- 1. agreement between the Crown in Right of New South Wales as represented by the Office of Sport (**Office**) and Barrie Smith Motorsport Pty Ltd (**Contractor**) for the upgrade of the outdoor and indoor arenas at the Sydney International Equestrian Centre (**SIEC**) dated 6 November 2017 (**Agreement**);*
- 2. our letter issued 23 June 2020; and*
- 3. your email response dated 29 June 2020.*

*Whilst the letter from Otto (dated 29 April 2020) indicates that the traction knobs on the Otto Perforated Mat may break off due to various reasons, it has no utility in circumstances where the source or origin of the foreign mat particles found in the indoor arena surface cannot be verified. This is particularly the case where "second hand" top surface material was used. Any suggestion that the foreign mat particles are parts of the Otto Perforated Mat (broken traction knobs or otherwise) is unsubstantiated and could only be an assumption.*

*In the absence of conclusive evidence that the foreign mat particles are from the Otto Perforated Mat installed as part of the works under the Agreement and the condition of the indoor arena surface (including the presence of foreign mat particles or the broken traction knobs to the Otto Perforated Mat) do not pose a safety issue for users of the arena (including riders and horses), the Office*

*maintains the requirement for the Contractor to comply with its obligation under the Agreement to ensure that materials are free from defects and fit for purpose.*

*To the extent that the foreign mat particles are from the Otto Perforated Mat, the Office relies upon the Contractor and Otto's representation that the broken traction knobs do not represent any security (or safety) issue when found in the footing.*

*Without waiving any right or entitlement that the Office has, or may have under the Agreement, any warranty (in connection with the works undertaken pursuant to the Agreement) or otherwise at law, the Office agrees to the Contractor performing works to remove foreign mat particles from the indoor arena surface. As proposed in your email of 4 May 2020, the works will involve:*

- (a) use of a Harley rake to fluff up the surface, therefore exposing foreign mat particles which will then be collected and removed. The rake will be cleaned prior to arrival at SIEC to avoid contamination of the surface and excess material will be removed prior to leaving the arena to avoid loss of valuable surface material;*
- (b) the surface will then be laser levelled, and any remaining exposed pieces of foreign mat particles collected and removed; and*
- (c) any other ancillary works to remove foreign mat particles from the indoor arena surface.*

*Please confirm the anticipated time required to undertake the rectification work as set out above, the proposed commencement date and completion (prior to 31 July 2020) date."*

304. On 28 July 2020, Mr Smith emailed Mr Toohey, Mr Fulcher and Mr David Hough (Excel Earthworks) to advise that:

*"Excel Earthworks will be on site at SIEC from about 7:30 tomorrow morning 29/7/202 [sic] to undertake the previously outlined and agreed works. The works are expected to be completed the same day."*

This was noted by Mr Toohey via email on the same day.

305. On 29 and 30 July 2020 and 10 August 2020, contractors from BSMS attended the SIEC Arena to undertake remediation works to remove the rubber grommets, described as follows:

*"Wednesday 29 July*

- 1 x BSM Contractor on site using skid steer bobcat with Harley rake attachment*
- 2 x BSM Contractors walking the surface area picking up rubber grommets*

*Thursday 30 July*

- 2 x BSM Contractors walking the surface area picking up rubber grommets*

*Monday 10 August*

- 1 x BSM Contractor on site to laser level the arena surface"*

306. On 14 August 2020, SIEC staff walked the arena surface and continued to locate a "couple of hundred" rubber grommets.

307. On 17 August 2020, Mr Fulcher sent a follow-up email to Mr Toohey in reply to Mr Toohey's email to Mr Smith dated 10 July 2020 (see paragraph 303). This email provided an overview of BSMS's remediation works, subsequent SIEC staff findings and further stated:

*"As mentioned in a previous email, there was no BSM reps on site apart from the sub-contractor they engaged who does their arena work for them, and I have a feeling that each time the surface is groomed we will most probably continue to keep finding grommets all be it in hopefully smaller numbers each time.*

*I'm not sure if you ever received written acknowledgement from BSM to the email sent on 10 July, in regards to the letter with the proposed rectification of the surface?, but [sic] I believe we need a commitment for them to keep doing this periodically to achieve the aim of trying to eradicate or really minimise the number of grommets or what other options are there for the next steps."*

308. On 9 September 2020, Mr Toohey emailed Mr Smith in relation to "SIEC Remediation Works Proposal - next steps". In this email, Mr Toohey relevantly stated:

*"Please find attached the Office of Sport's response to the work performed by contractors, on behalf of Barrie Smith Motorsport Pty Ltd (BSM), at SIEC on 29-30 July and 10 August 2020 in accordance with your company's Remediation Works Proposal.*

*Notwithstanding the works undertaken on 29-30 July and 10 August 2020, the Office still requires BSM to outline, propose and undertake any other ancillary works as stipulated in your Remediation Works Proposal of 4 May 2020."*

309. Attached to Mr Toohey's email was a letter also dated 9 September 2020 and addressed to Mr Smith, which stated:

*"We refer to:*

- 1. agreement between the Crown in Right of New South Wales as represented by the Office of Sport (**Office**) and Barrie Smith Motorsport Pty Ltd (**Contractor**) for the upgrade of the outdoor and indoor arenas at the Sydney International Equestrian Centre (**SIEC**) dated 6 November 2017 (Agreement);*
- 2. Contractor's remediation works proposal issued 4 May 2020 (**Remediation Works Proposal**); and*
- 3. Our letter and covering email issued 10 July 2020 (**Correspondence**).*

*We note that, whilst it appears no formal response was received to our Correspondence, the Contractor's service providers attended the SIEC on 29-30 July and 10 August 2020 and undertook works [sic] in accordance with the Remediation Works Proposal.*

*We note that the Remediation Works Proposal specifically included for:*

*"(b) the surface will then be laser levelled, and any remaining exposed pieces of foreign mat particles collected and removed; and*

*(c) any other ancillary works to remove foreign mat particles from the indoor arena surface."*

*Whilst the surface was laser level on 10 August 2020 the Contractor's service providers failed to then subsequently collect and remove any remaining exposed pieces of foreign mat particles. Office staff undertook this activity on 14 August and collected approximately 200 particles, noting that approximately 2,965 particles were collected by the Contractor's service providers on 29 and 30 July 2020.*

*Notwithstanding the works undertaken on 29-30 July and 10 August 2020, the Office still requires the Contractor to outline, propose and undertake any other ancillary works as stipulated in the Remediation Works Proposal.*

*As previously mentioned, should the Contractor achieve the make good required, the Office may consider engaging the Contractor under a fixed term contract to carry out periodic maintenance of the arenas including removal of further foreign mat particles (if any) surfacing from time to time to ensure that the SIEC remains a world class equine sporting venue.*

*Please confirm the anticipated time required to undertake the required ancillary works as set out above, the proposed commencement and completion dates for the Office's consideration."*

310. The OoS notes that, as the sole representative of Otto in Australia and NSW, BSMS is currently the most appropriately qualified service provider to complete maintenance works on the SIEC Arena Surfaces, as they will work closely with the Otto supplier to ensure that the Ebb & Flow surface is maintained to the Otto standard.

311. On 10 September 2020, Mr Smith replied to Mr Toohey and acknowledged receipt of Mr Toohey's correspondence dated 9 September 2020. Mr Smith advised that he was *"in the middle of replying to a Tender request"* due the following week and would give Mr Toohey a call to *"clarify a few things"*. On the same day, Mr Toohey acknowledged receipt and the reason for the delay.

312. Between 23 and 24 September 2020, Mr Fulcher and Mr Toohey discussed the ongoing maintenance of the SIEC Indoor Arena and the approach to same. Mr Fulcher and Mr Toohey ultimately considered that:

- (a) SIEC staff would undertake the day to day maintenance of the arenas, following instructions supplied by Otto and other techniques developed based on research and discussions with staff at other equestrian venues;



- (b) the OoS would directly engage the contractor previously engaged by BSMS to undertake the half-yearly to yearly flipping of the arena surface, noting that they were already undertaking this work and had already been communicating with SIEC staff;
  - (c) SIEC staff would contact Mr Smith, as the sole Otto representative in Australia, if any issues arose or if Ebb & Flow-specific advice was required; and
  - (d) SIEC staff would undertake periodic walks of the arena surface to identify and remove any residual rubber grommets that have come to the surface of the Arena.
313. On 2 October 2020, Mr Toohey emailed Mr Smith in relation to "*SIEC Remediation Works*", attaching a letter dated 30 September 2020. The email confirmed that the OoS no longer required any further ancillary works outlined in the Remediation Works Proposal, as the OoS was satisfied that it could finalise routine maintenance to ensure that the SIEC Arena "*remains a world class equine sporting venue*". Also, on 2 October 2020, Mr Smith responded, confirming Otto's commitment to ensuring the SIEC Arena remained a world-class sporting arena.
314. On 11 March 2021, following the ongoing complaints about the SIEC Arena from members of the public, an assessment of the SIEC Arena surfaces organised by the OoS took place. The purpose of the assessment was to "*provid[e] an independent assessment on the safety for equine athletes (especially elite) of the surface of the indoor arena and its associated warm up arena*". The assessment was conducted for the OoS by:
- (a) Ms Mary Seefried (Federation Equestre Internationale - FEI) who was a Technical Delegate to the Tokyo Olympics and is an expert in dressage (one of two main uses of the surface). Ms Seefried was recommended by EA and is based in Queensland; and
  - (b) Mr Vallance, as FEI Jumping Course Designer, who was recommended by Equestrian Victoria. He is based in New South Wales and is an expert in show jumping - which is the other main use of the surface.
315. As part of the assessment, Ms Seefried and Mr Vallance:
- (a) received an initial briefing from Mr Toohey, Mr Fulcher and Mr Porter, who "*provided background to the construction, development and ongoing management*" of the SIEC Arena surfaces, as well as the remediation work carried out in July and August 2020;
  - (b) personally inspected and examined the surfaces and "*were impressed by the well-prepared surface and its quality, consistency, levelness [sic] as well as potential degree of spring and security for horses*";
  - (c) observed three elite level dressage riders using the surface, who were asked to:
 

*"test their horses thoroughly by riding all movements of an Olympic level, including extended trot and canter on both diagonals and long sides of the dressage arena. These latter movements are particularly importantly related to the ability of the horses to go forward to maximum with confidence, come back to collection with confidence and then be able to go through arena corners with maximum security"*;
  - (d) debriefed the riders for their own observations and their sense of their horses' reactions, described by Mr Vallance and Ms Seefried as:
 

*"enthusiastic about the quality of the surfaces and felt it was of the highest international quality. They confirmed that the safety and welfare of their horses was at no time compromised by the surface and in fact it enhanced their performance because of the security and elasticity of the well-groomed moist fibre /sand mixture"*; and

- (e) concluded that the:

*"surfaces of the indoor and associated warm up arenas are fit for purpose ie to hold the highest level international dressage and jumping competitions with safety. They do not compromise the safety and welfare of equine athletes in any way."*

316. Although the March 2021 assessment did not reveal any issues relating to the quality or safety of the SIEC Arena Surfaces, in view of the current concerns relating to the SIEC Arena surfaces (raised by Ms Brooks, Mrs Dawkins and Ms Saals) and the OoS's commitment to ongoing monitoring to ensure that the SIEC Arena is safe and of an international standard for competitors and horses, the OoS has arranged for a further assessment to take place.
317. Initially planned for September 2021, this assessment will take place once COVID-19 restrictions make it possible to do so - noting that a number of key stakeholders who will be invited to attend the assessment live outside of NSW. As part of the assessment:
- (a) NSW Public Works Advisory will assess the construction process and their Geotech advisor will provide an assessment of the surface against relevant equestrian facility guidelines;
  - (b) Ms Seefried will return to reassess the facility along with an additional assessor, namely, Mr Graeme Watts. Mr Watts was an arena advisor at the Tokyo Olympics and is a National Judge Level 3 and Course Designer Level 3 based in Queensland whose area of expertise is show jumping;
  - (c) elite level horses and riders will be observed using the surface for both dressage and show jumping;
  - (d) the recently appointed full-time National Safety Manager from EA will also inspect the surface and observe and debrief the riders;
  - (e) SafeWork NSW, the State's statutory work, health and safety regulator, will also attend the assessment and provide an opinion; and
  - (f) the OoS is proposing to invite a number of individuals to attend, namely, those who have recently raised concerns relating to the safety of the SIEC Arena surfaces.

### **(c) O'Connor Marsden (OCM) Review and Report**

318. In response to the Brooks and Dawkins Complaints, the OoS were proactive in commissioning an independent probity review into the procurement process for the SIEC Arena Upgrade.
319. In March 2020, the OoS commissioned *"an independent non-government review by OCM and managed by John Egan, an OoS Director who had no involvement with the procurement or construction of the project"* (**OCM Review**).
320. As part of the OCM Review, OCM conducted an information gathering process to determine the factual background to the SIEC Arena Upgrade. On 17 March 2020, Ms Sarah Mullins (Principal, OCM) sent an email to Mr John Egan (Director, Infrastructure Strategy, Planning and Delivery, OoS) requesting information as follows:

*"Eric has been going through the documentation provided and has identified be below [sic] list of information and document gaps for the tender review we are undertaking:*

#### **Documents**

- *Approved Procurement Strategy/Plan - we have been provided with the BN for the works program which included this tender. Is this to be taken as the approval of the procurement or is there a separate*
- *Procurement Strategy for the tender, including the budget approval just for this component of the program?*
- *Funding Approval for the Procurement - see above comment also.*
- *RFT Tender Opening Report (or eTendering Report)*

- *Request for Interest (RFI) Documentation*
- *Information related to the RFI stage appears to be a gap in our available records*

**Information Required**

- *Appointment of Advisory Panel*
- *John Vallance - was he a NSW representative? Or was he directly engaged by SIEC?*
- *Julie Farrell - was she a NSW representative? Or was she directly engaged by SIEC?*
- *Independent Consultant Recommended by NSW (Oliver Holberg) [sic]*
- *Comments indicate that he was approached by OoS but not ultimately appointed? Is CDOC17/35602 available?"*

321. Between 17 March 2020 and 19 March 2020, the OoS prepared internal responses and comments in response to the information requested by OCM, which was ultimately provided to OCM on 19 March 2020.
322. On 24 March 2020, OCM emailed the OoS advising that they had: *"taken the time to consider"* the comments provided by OoS on 19 March 2020, as well as *"comprehensively review the project documents."* OCM issued follow-up questions which related to the following ten themes:
- "Project Scoping/Definition and Initiation Document for Small Projects;  
Recommendation of 6 Suppliers to Invite to Tender;  
RFT Open and Closing Dates;  
Development of RFT Scope of Works;  
Addendum 3 to the RFT;  
Involvement of the Tender Advisory Panel (TAP);  
Signed Deed of Confidentiality and No Conflict of Interest;  
Capricorn Complaint to Equestrian Australia;  
NSW CEO Conflict of Interest; and  
SIEC Officer Written Complaints."*
323. The OoS provided their responses to the follow-up questions issued by OCM on 26 March 2020. OCM subsequently provided a final list of questions to the OoS on 31 March 2020. On 2 April 2020, the OoS provided their response to OCM in respect of the final list of questions.
324. The OCM Review was based on *"analysis of relevant documentation"* as well as *"interviews with relevant key stakeholders."* The probity review included the following:
- (a) Review of the tender documentation;
  - (b) Review of the tender process;
  - (c) Review of the appointment of the tender panel, its processes and deliberations;
  - (d) Review of the role of NSW in the tender process;
  - (e) Review of the declarations of Conflicts of Interest and the management of those declared and the management of those not declared; and
  - (f) Interviews with three OoS staff and one NSW representative held on 21 April 2020, as follows:
    - (i) Mr Flynn;
    - (ii) Mr Porter;
    - (iii) Mr Bangel; and
    - (iv) Mr Farrar.

325. On 29 April 2020, OCM provided the OCM Report to the OoS.

326. The OCM Report stated that the objective of OCM's engagement was to:

*"Review the 2017 RFT process conducted by the NSW Office of Sport and provide probity advice and comments in relation to our observations of any areas of probity risk associated with the process; and Review the allegations of an undeclared conflict of interest in relation to BSMS and the ENSW President and provide probity advice and comments in relation to our observations of whether the undeclared conflict of interest had any impacts on the integrity of the RFT process."*

327. The OCM Report set out the concerns raised with the undeclared conflict of interest issue, being:

*"allegations of an undeclared conflict of interest in relation to the successful contractor, Barrie Smith Motor Sport Pty Ltd (BSMS). It is alleged that Mr Bruce Farrar, Chief Executive Officer of Equestrian NSW (CEO of ENSW), who was involved in the evaluation process as an advisor, did not disclose the association between ENSW and BSMS. Namely, the family connection between Mr Peter Dingwall, President of Equestrian NSW (President of ENSW) and his son, Mr Stephen Dingwall who has worked for BSMS and is also married to the daughter of BSMS owner, Mr Barrie Smith. BSMS is the Australian distributor for German arena surfaces company Otto Sport, a company that Mr Stephen Dingwall and his wife currently work for as sale representatives. It is understood that materials used for the surface upgrades as part of the contract awarded to BSMS included those supplied by Otto Sport."*

328. The OCM Report made key findings in relation to the alleged Farrar Conflict and conflicts of interest management, potential areas for improvement in the procurement process and performance management of the contractor.

#### *Farrar Conflict and Conflicts of Interest Management*

329. In relation to the Farrar Conflict, the OCM Report stated:

- (a) that there was *"no evidence to support that Mr Dingwall had any involvement, directly or indirectly, in the RFI or RFT process"* and that: *"There is also no evidence to suggest that Mr Dingwall was provided with any confidential information regarding the procurement process other than general status updates provided by Mr Farrar to the ENSW Board"*;
- (b) that there was *"no evidence provided that Mr Dingwall provided any direction on this procurement to Mr Farrar, who was the ENSW representative involved in the procurement"*;
- (c) that: *"based on the information provided by Mr Farrar, Mr Dingwall would have been present when briefings were provided to the ENSW Board but OCM understands that the information provided was limited to a status update on the project"*; and
- (d) that, in line with the ICAC definition of a *"conflict of interest"*:
  - (i) Mr Dingwall: *"did not have a public duty in relation to this tender as he was not involved in the RFT process and ENSW was not a decision maker for the tender process"*;
  - (ii) Mr Farrar *"did not have a conflict of interest relation to this tender process"* [sic] and *"was not a decision maker in the tender and his role was limited to that of an advisor and subject matter expert"*;
  - (iii) according to the OoS Procurement Manual in place at the time of the procurement, only an *"employee"* was required to disclose a conflict of interest with any procurement process; and
  - (iv) although the OoS Procurement Manual required that a contract not be awarded where a conflict of interest exists, there was no conflict of

interest in the procurement process given that Mr Farrar *"did not have a personal association with any tenderers"*, Mr Dingwall was *not involved in the tender process*, and *"ENSW was not a decision maker in the process (and did not have a public duty"*.

330. In relation to conflicts of interest management, the OCM Report made the following observations and recommendations:

(a) it:

*"would have been preferable for Mr Farrar to disclose the association between Mr Dingwall and BSMS in order to manage the perception risk. If the conflict had been disclosed, then it would appear from the information available to OCM that the appropriate strategies for the management of the interest would have been to ensure there was no involvement of Mr Dingwall in the evaluation process and that no confidential information relating to the tender process was provided to Mr Dingwall. Based on the information received during the interviews, including the undertakings from Mr Farrar, these management strategies were effectively adopted"*;

(b) in future, *"all evaluation participants with access to confidential information in the RFT be asked to sign a Deed at their first involvement in the project"* and that *"all participants in the RFT process be asked to sign a Conflict of Interest declaration"*;

(c) full disclosure should occur if there is *"any uncertainty from evaluation participants in relation to whether a declaration is required"*; and

(d) in *"future procurement activities where similar subject matter expertise is obtained from the industry during the tender process"* the OoS should *"ensure that there is a clear understanding of conflicts of interest and the types of associations which should be disclosed."*

#### *Procurement Process*

331. In relation to potential areas for improvement in the procurement process, the OCM Report stated that the areas identified are not areas of non-compliance with the OoS Procurement Manual, but identified *"better practice activities to enhance the probity of the process"*.

#### *Performance Management of Contractors*

332. In relation to performance management of contractors, the OCM Report stated that the OoS:

*"should give consideration to ensure that any action taken on the performance of the contractor during the project has been clearly documented in the event that there is a need to refer to this as part of future procurement activities (where reference checking and due diligence activities are being undertaken)."*

333. Since receiving the OCM Report, the OoS has taken significant steps to implement the recommendations and to improve its internal corporate governance, policies, practices, processes and procedures in relation to procurement to ensure that all future procurement processes are undertaken to the highest standard. The OoS considers that addressing any past weaknesses in the procurement process through the development of updated procurement templates, guidance and training for staff will reduce probity risks, and risks of impropriety, while achieving better outcomes for the OoS and its key stakeholders going forward. For further details, refer to the Procurement Reform section at Part E(e) below.

334. Specific improvements and enhancements that the OoS has introduced in response to the issues raised by OCM during the OCM Review and contained in the OCM Report are outlined in various sections of this Submission.



## (d) Independent Commission Against Corruption (ICAC)

335. Following receipt of the OCM Report, Ms Jones proactively sent the concerns raised by OCM to ICAC together with the OCM Report. On 11 May 2020, Ms Jones emailed ICAC in response to the *"the probity review of the procurement process for the surface arena upgrade project at the Sydney International Equestrian Centre"* and requested that ICAC consider the concerns raised. To this email, Ms Jones attached correspondence addressed to Mr Phillip Reed (CEO, ICAC) in relation to:

*"concerns regarding the procurement process for the surface arena upgrade at the Sydney International Equestrian Centre, in particular perceived conflicts of interest by members of the Tender Advisory Panel, which comprised individuals from the equestrian sport sector, and perceived influence over the Tender Evaluation Committee's selection of the successful tenderer."*

336. In this letter, Ms Jones acknowledged the nature of the concerns and stated the following:

*"Notwithstanding the OCM findings, I do understand the serious concerns that have been raised with me regarding perceived conflicts of interest and influence during the tender process."*

*Further concerns have been raised into the relationship with Equestrian NSW of two former Office of Sport employees, Mr Matt Miller, former Chief Executive Officer, and Mr Darren Crumpler, Director, Greater Sydney. A copy of the email is attached.*

*The tender process was managed by the Asset Management team in the Office of Sport. The then Chief Executive, Mr Matt Miller, did not participate in the tender process. The Chief Executive's role was to consider and if agreed, approve the Tender Evaluation Committee's recommendation. Mr Crumpler was not on the Tender Evaluation Committee.*

*I would appreciate the Independent Commission Against Corruption's consideration of the concerns that have been raised with me."*

337. The reference to "concerns" being raised about the relationships of Mr Miller and Mr Crumpler with ENSW relate to:

- (a) Mr Miller's appointment to the selection committee for the ENSW Board; and
- (b) a photograph on the ENSW Facebook page showing Mr Crumpler presenting an award at an ENSW event.

338. On the same day, the then Acting Minister of Sport, the Hon. Dr Geoff Lee MP was advised that the OCM Report had been sent to ICAC.

339. On 17 August 2020, ICAC issued correspondence to the OoS in which ICAC posed over 30 questions in relation to the procurement process for the SIEC Arena Upgrade.

340. On 11 September 2020, Ms Jones emailed Mr Andrew Garcia (Manager - Assessments, ICAC), attaching correspondence and extensive responses to the questions raised by ICAC on 17 August 2020. In correspondence attached to the email, Ms Jones stated:

*"As per your request, some questions could not be answered as the documents were unavailable. The questions are 1c, 2ai, 2c, 3a, 3b, 3c, 3d, 4a, 4d, 4h, 4i and 5b and request responses provided by Messrs Flynn, Porter, Farrar, and Bangel during their interviews with O'Connor Marsden and Associates. It also include emails and documents that Messrs Flynn and Porter may have regarding the Tender Advisory Panel and engagement with Mr Farrar; documentation that Mr Kasif may have stored in relation to the Tender Advisory Panel and engagement with Mr Farrar; and Mr Miller's documents relating to question 3b."*

341. Ms Jones' email dated 11 September 2020 also attached the following documents:

- (a) a *"List of Attachments"* that outlined documents provided by the OoS in response to each of the questions raised by ICAC; and

- (b) a document titled, "*Further Information provided in response to ICAC's questions*", which supplements or clarifies the documents outlined in the List of Attachments.
342. On 14 September 2020, Ms Jones sent Mr Garcia a further email, containing:
- (a) the same material as Ms Jones' previous email dated 11 September 2020; and
- (b) additional attachments that addressed particular questions.
343. On 1 December 2020, Ms Georgia Pelle (Senior Assessment Officer, ICAC) sent an email to Ms Jones, attaching correspondence from Mr Garcia. In the letter, Mr Garcia stated that given "*the lack of viable lines of enquiry, the Commission has determined that we will not be investigating the matters raised*". However, ICAC acknowledged that "*the information before the Commission indicated a number of corruption risks*", which ICAC identified as follows:
- "\* *On numerous occasions, the advice of Equestrian NSW (ENSW) and/or Bruce Farrar appears to have been accepted in the absence of independent verification or clear record of how the advice was independently verified. There appears to have been no or a limited mechanism to test information provided by parties with a vested interest in the upgrade.*
  - \* *Mr Farrar appears to have been afforded a significant amount of involvement in the process in the absence of a formal arrangement including a clear description of his duties. It is of some concern that the Office of Sport was 'unable to comment' on whether some of Mr Farrar's actions were the norm for the role he was performing, essentially on behalf of the Office of Sport.*
  - \* *There appears to be a lack of clearly documented decisions and rationale for the decisions.*
  - \* *It appears that Mr Farrar's and ENSW's potential and/or perceived conflicts of interest became known amongst the Office of Sport staff, however, it appears that they were not formally documented, and any plan set in place to manage them. Doing so likely would have reduced perceptions of corrupt conduct having occurred.*
  - \* *Mr Farrar approached Barrie Smith Motor Sport prior to the release of the tender to obtain a funding estimate to include in the proposal. This could be perceived as a tenderer with links to ENSW being given advance notice off the tender and scope.*
  - \* *There appears to be a lack of records that would normally be relied on to support the integrity of the tender. For example, supplier due diligence including reference checks, and completion of conflict of interest declarations by members of the Tender Advisory Panel.*
  - \* *The issue of clearly documented conflict of interest declarations appears to be a widespread one, having regard to the Office of Sport being unable to confirm whether or not former CEO Matt Miller declared his appointment on the selection committee for the ENSW Board.*
  - \* *Mr Farrar appears to have been responsible for conducting and/or relaying advice of the outcome of the surface test to the Office of Sport. Given the quality issues that have since become know, [sic] Mr Farrar's involvement is likely to be another contributing factor to the perception that ENSW was partial to Barrie Smith Motor Sport.*
  - \* *The lack of documents and records available to the Office of Sport in responding to the Commission's enquiries gives rise to concerns of poor recording keeping [sic], oversight, and overall governance."*
344. Mr Garcia concluded the letter by stating that "*it is strongly suggested that the Office of Sport consider engaging with the Commission's Corruption Prevention division to obtain advice on future procurement.*"
345. Since the OoS received Mr Garcia's letter, the OoS has taken steps to address the corruption risks identified by ICAC (as outlined in paragraphs 360 to 369 of this Submission).
346. On 17 June 2021, The Hon. Natalie Ward, MLC sent a letter to Ms Jones in which she acknowledged the "*additional information raised recently in Parliament*" and requested "*another independent investigation be carried out as a priority*". Minister Ward further stated that the "*investigation is to be all encompassing with regards to the activities of the Sydney International Equestrian Centre, its tender processes, and the Board's role.*"
347. On 23 June 2021, Ms Jones wrote to ICAC requesting that ICAC "*further review and re-examine*" the procurement process for the SIEC Arena Upgrade. Ms Jones stated:

*"I write to request the Independent Commission Against Corruption's assistance, under the Independent Commission Against Corruption Act 1988, in reviewing the procurement process tender for the upgrade of the surface of two arenas at the Sydney International Equestrian Centre (RFT ID: OoS17/18-021).*

*I appreciate that this matter was investigated by Independent Commission Against Corruption (ICAC) in 2020. In response to ICAC's advice, the Office of Sport strengthened its procurement processes to further reduce and/or negate the identified corruption risks.*

*In February 2021, the Legislative Council called for papers relating to the Sydney International Equestrian Centre upgrade be laid out in Parliament.*

*Notwithstanding ICAC's 2020 review, there remains considerable ongoing public interest in the matter. Given this, the Minister for Sport has requested that the Office of Sport arrange for DPC and ICAC to further review and re-examine the matter. I have separately written to the Secretary, Department of Premier and Cabinet seeking assistance.*

*I would appreciate the Independent Commission Against Corruption's reconsideration of the matter. Owing to the volume of documents attached to this matter, a separate email will be sent with all relevant documentation to assist in re-examining this matter."*

348. Also on 23 June 2021, Ms Jones wrote to Mr Tim Reardon (Secretary, DPC), in which she requested " *the Department of Premier and Cabinet's assistance in reviewing the procurement process tender for the upgrade of the surface of two arenas at the Sydney International Equestrian Centre (RFT ID: OoS17/18-021).*" In this letter, Ms Jones further stated:

*"In March 2020, the Office of Sport commissioned an independent probity review into the tender process, which did not identify areas of non-compliance with relevant Procurement Policy. Better procurement practices were recommended, which have since been implemented by the Office of Sport.*

*In May 2020, the Office of Sport sent probity review to the Independent Commission Against Corruption (ICAC). On 1 December 2020, ICAC advised that: "Given the lack of viable lines of enquiry, the Commission has determined that we will not be investigating the matters raised". ICAC also advised that "the information before the Commission indicated a number of corruption risks". Subsequently, the Office of Sport has strengthened its procurement processes to further reduce and/or negate the identified corruption risks.*

*In February 2021, the Legislative Council called for papers relating to the Sydney International Equestrian Centre upgrade be laid out in Parliament.*

*Notwithstanding the reviews, there remains considerable ongoing public interest in the matter.*

*The Minister for Sport has requested that the Office of Sport arrange for the Department of Premier and Cabinet and ICAC to further review and re-examine the procurement process for this tender. I have separately written to the Commissioner, ICAC on this matter.*

*I would appreciate the Department of Premier and Cabinet's review and consideration accordingly. Owing to the volume of documents attached to this matter, a separate email will be sent with all relevant documentation."*

349. On 13 August 2021, Mr Reardon sent a letter in reply to Ms Jones' letter to DPC dated 23 June 2021, in which he stated that:

*"As you are aware, while DPC is responsible to the Premier and other DPC cluster Ministers under administrative arrangements orders, it is not responsible to the Minister for Sport.*

*Further, as you will appreciate, DPC is not an investigative body. While DPC provides guidance and assistance to the sector, it is not responsible for overseeing the conduct of other Public Service agencies. Instead, independent integrity bodies with special powers have been established for that purpose. For example, as you would be aware, the Independent Commission Against Corruption (ICAC) has been established specifically to deal with allegations of corruption involving public authorities or public officials.*

*As noted in your letter, it is appropriate that the Office of Sport commissioned an independent probity review into the Tender Process and referred the results of that review to the ICAC. In your letter, you stated that on 1 December 2020, the ICAC advised that, "[g]iven the lack of viable lines of enquiry, the Commission has determined that we will not be investigating the matters raised."*

*In your letter you also stated that despite the reviews, there remains considerable ongoing public interest in the matter. Accordingly, as requested by the Minister for Sport, I understand from your*

letter that you have written to ICAC again to request a further review and re-examination of the Tender Process."

350. On 26 August 2021, The Hon. Peter Hall QC (Commissioner of ICAC), issued correspondence to Ms Jones, in which he stated:

*"I refer to your report of 11 May 2020 concerning the Sydney International Equestrian Centre Arena Surface Upgrade. I note the Commission wrote to you on 1 December 2020. I write to you now concerning your further letter of 23 June 2021 seeking a review of the matter.*

**Your additional information**

*In seeking a review, the Office of Sport has provided the Commission with over 600 documents. The vast majority of material contained information already known to the Commission, or was material that was administrative in nature and not relevant. Approximately 19 documents were identified as containing new or more detailed information.*

*The new material was considered by the Commission's Assessment Panel, alongside all other relevant information available to the Commission. The Assessment Panel is comprised of the Chief Commissioner, the two Commissioners, and the Executive Directors of the Commission's Investigation, Legal, and Corruption Prevention divisions. While the material overall continues to demonstrate the risks and concerns identified in the Commission's letter of 1 December 2020, the most recent material did not cause the panel to reconsider its initial determination. Therefore, the Commission's decision not to investigate this matter stands.*

*I note that your letter of 23 June 2021 refers to the Commission as having investigated this matter. I wish to clarify that this matter was not investigated by the Commission. The matter underwent an assessment, the outcome of which was the decision conveyed in the Commission's letter of 1 December 2020. Accordingly, no findings as to whether or not corrupt conduct occurred were made then, or now.*

*The Commission is currently preparing a submission to the NSW Parliament's Public Works Committee inquiry that may assist it in understanding the Commission's assessment and investigation processes. Should you require any information regarding the Commission's processes or your reporting obligations in the interim, I encourage you to contact the Commission. I note that the Office of Sport is also currently in contact with the Commission's Corruption Prevention Division."*

## (e) Procurement Reform

351. Since 2017, the OoS has proactively identified and actioned areas for reform and improvement in its procurement practices, recognising the importance of ensuring the best outcomes for both the OoS and its stakeholders. In this Section, we outline the key changes that have been implemented and the benefits to the OoS.

### *Role of the Chief Procurement Officer (CPO) and Procurement Function*

352. In 2017/2018, the OoS attained Level 2b procurement accreditation, enabling the OoS to procure goods and services up to a value of \$8.8 million.<sup>56</sup> Following this, the OoS expanded the role of the CPO, which originally had oversight of goods and services procurement. However, as part of the procurement reforms implemented following the findings and recommendations of OCM and ICAC, the OoS has expanded the role of the CPO and has given it greater visibility within the OoS and greater seniority. The CPO now has additional oversight in relation to construction-related procurement and holds the role of Director, Finance, Procurement and IM&T. Currently, the OoS is a Level 1 accredited agency under the NSW Government Accreditation Program for Goods and Services, which enables it to procure goods and services up to a maximum contract value of \$50 million for low risk procurement activities and \$20 million for high risk procurement activities.<sup>57</sup> The OoS is not currently

<sup>56</sup> NSW Office of Sport, 'Annual Report 2017/2018' (2018), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/oos-annual-report-2017-18.pdf>> (accessed on 30 August 2021) p 51.

<sup>57</sup> NSW Office of Sport, 'Annual Report 2019/2020' (31 October 2020), available at <<https://www.sport.nsw.gov.au/sites/default/files/2021-04/annual-report-oos-2019-20.pdf>> (accessed on 30 August 2021) p 44.

accredited for construction-related procurement and, as such, it may only undertake construction-related procurement for projects under the threshold of \$1.3 million.<sup>58</sup>

353. The role of the CPO is to oversee the procurement process to ensure that procurement outcomes are maximised in terms of quality, efficiency and value for money for the OoS and its stakeholders. This includes the development of procurement policies and procedures, monitoring the implementation of policies and procedures as well as ensuring compliance with same and reporting to the OoS Executive, as well as externally, in accordance with relevant NSW Government policies and directions.
354. The CPO is responsible for endorsing key milestones for goods and services procurement activities valued above \$150,000 (incl. GST) such as required by the Authority to Procure Template, Procurement Strategy Template, TEP Template, TRR Template, Contracts and Authority to Award Contracts (all have which have been introduced and/or updated in 2021) and refers procurement matters to the Chief Executive, OoS as required.
355. The CPO is assisted by:
- (a) the Manager Procurement - who reviews key milestones for goods and services procurement activities valued above \$150,000 (incl. GST) in the Authority to Procure Template, Procurement Strategy Template, TEP Template, TRR Template, Contracts and Authority to Award Contracts, and refers procurement matters to the CPO as required; and
  - (b) the Procurement Officer - who provides procurement expertise and assists stakeholders to plan, develop, source and manage procurement arrangements to effectively meet organisational and business objectives. The Procurement Officer refers procurement matters to the Manager Procurement as required.
356. A procurement management system has been implemented and is currently being used by the procurement team. It will soon be configured and rolled out to the Asset Management Team for all procurement activities above \$30,000. The procurement management system means that there is increased transparency and that the Director, Finance, Procurement and IM&T has increased oversight of procurement activities being undertaken by the Asset Management Team between \$30,000 and \$150,000.
357. The CPO, Manager Procurement and the Procurement Officer form the "*Procurement Function*" at the OoS. The Procurement Function coordinates the procurement activities of the OoS more generally by providing the following services:
- (a) developing, maintaining and monitoring procurement process, systems and governance;
  - (b) developing and maintaining procurement templates;
  - (c) maintaining a Tenders Register and Contracts Register;
  - (d) maintaining a Procurement Risk Register;
  - (e) developing and managing a Procurement Management Plan;
  - (f) providing advice and assistance for all procurement activities below \$150,000 (incl. GST);
  - (g) undertaking goods and services procurement activities valued above \$150,000 (incl. GST);

<sup>58</sup> NSW Government buy.nsw, 'Accreditation for construction procurement', available at <<https://buy.nsw.gov.au/buyer-guidance/get-started/accreditation/construction-accreditation>> (accessed on 24 August 2021).



- (h) managing key spend categories including the development of category plans;
- (i) monitoring the realisation of benefits and savings;
- (j) building and developing the procurement capability via training opportunities; and
- (k) reporting to the NSW Procurement Board under the NSW Government Procurement Accreditation Program for Goods and Services.

*Revised Templates and procedures in response to OCM and ICAC recommendations*

358. In late 2018, Mr Kristian Hodgson (Manager, Procurement, OoS) joined the OoS and, as part of his role, he reviewed and revised a number of the OoS's procurement templates and operational documents in accordance with the relevant policies, materials and guidelines issued by the NSW Government. This process continued until early 2020.
359. On 11 May 2020, the OoS advised the Minister that it would further reform its procurement policies and processes in light of the recommendations in the OCM Report. Mr Hodgson was tasked with doing so under the oversight of Mr Sajeev George (Director, Finance, Procurement and IM&T, OoS), who is the current OoS CPO.
360. The OoS began this reform process in May 2020 in response to the recommendations in the OCM Report by working with the CPO and Procurement Function to strengthen and enhance its procurement policies and procedures for the purposes of developing procurement processes, procedures and templates that will help the OoS achieve more robust procurement processes going forward. From 1 December 2020 onwards, these changes also addressed the "corruption risks" identified by ICAC.
361. Continuing the first phase of its revision of the OoS's procurement materials commenced by Mr Hodgson in late 2018, the OoS updated a number of key overarching policy and procurement governance documents, in particular, to ensure that each of the materials covered construction procurement and was consistent with, and reflected the NSW Government Procurement Policy Framework. The documents updated include the following:
- (a) Procurement Strategy (a key amendment to this Strategy was the strengthening of procedures relating to the management of conflicts of interest);
  - (b) Procurement Manual;
  - (c) Easy Approach Guides (which support and summarise the Procurement Manual);
  - (d) Procurement Governance Manual;
  - (e) Administrative Delegations for Procurement; and
  - (f) Disposal of Goods Policy;
- (in conjunction with the previously revised documents referred to in paragraph 358, collectively, the "**Phase One documents**").
362. The Phase One documents were officially made available organisation-wide in February 2021. However, the updated templates revised by Mr Hodgson in late 2019/early 2020 were made available to business units prior to February 2021, particularly for those undertaking procurement works which exceeded \$150,000 in value.
363. The OoS has ensured that staff have readily available access to probity advisors for future procurement processes by ensuring it has access to the NSW Government Panel of Probity Advisors and it is in the process of developing documentation to clearly outline when OoS should consider currently engaging probity advisors for procurements.

*Formation of Taskforce*

364. In addition to the work already undertaken by OoS to identify and implement improvements to its procurement processes and procedures, in July 2021, Mr Feargus O'Connor, an Executive Director seconded to the OoS from the Department of Communities and Justice, was appointed by Ms Jones to work with the CPO to oversee the continuing development of procurement procedures and Templates, and to lead a range of assurance processes directly in response to the SIEC Arena Upgrade. Mr O'Connor has formed a taskforce (**Taskforce**) for the purposes of doing so, which consists of:
- (a) the CPO;
  - (b) the Manager, Procurement;
  - (c) the Director, Asset Management;
  - (d) the Manager, Facilities and Assets and
  - (e) the Manager, Audit Risk and Governance (Chief Audit Executive).
365. The purpose of the Taskforce is to:
- (a) further strengthen procurement documentation, processes and procedures;
  - (b) seek guidance from ICAC on procurement risks and input into the documentation;
  - (c) design staff training to be rolled out in relation to best practice procurement processes and to ensure OoS staff are confident using the updated procurement documentation; and
  - (d) other ancillary matters.
366. As part of the work of the Taskforce, and continuing on from the Phase One documents developed, the OoS has taken the key step of developing a suite of revised document Templates for construction-related projects (**Phase Two documents**). As set out above, the revised Templates include:
- (a) the Procurement Checklist - which outlines the mandatory steps to be completed by the OoS during the procurement process;
  - (b) the Project Scoping Template - which must comply with the NSW Procurement Policy and be completed and approved before issuing any documents to the supplier market;
  - (c) the Authority to Procure Template - which sets out the procurement strategy, the composition of the TEC, and the evaluation criteria. This document must be approved by the Director, Asset Management for projects valued less than \$150,000 and endorsed by the Director, Finance, Procurement and IM&T (who is also the CPO) for projects valued greater than \$150,000;
  - (d) the enhanced Procurement Strategy Template - which must be completed and approved before issuing any documents to the supplier market and ensures adherence to procurement policies and procedures;
  - (e) the TEP Template - which has been revised to outline the roles and responsibilities of the TAC and TEC in further detail, include a requirement that it be endorsed by the TEC, and better provide for conflict of interest requirements;

- (f) the TRR template - which has been revised to more accurately reflect the tender evaluation process, it also better provides for conflict of interest requirements and must be endorsed by the TEC; and
  - (g) the Conflict of Interest Template - which must be completed by individuals involved in procurement processes and provides detailed guidance in relation to their conflict of interest obligations, including by reference to examples of conflict.
367. The OoS has also further developed its Minor Capital Works Manual and is in the early stages of developing an updated Procurement Strategy for construction-related procurement.
368. At present, the Taskforce meets bi-weekly to discuss progress. On 26 July 2021, the Taskforce were briefed by the Executive Director Corruption Prevention, ICAC on procurement risks.
369. The development of the Taskforce, as well as the updates to Templates and procedures undertaken in terms of the development of both Phase One documents and Phase Two documents reflect the steps taken by the OoS to strengthen its procurement process and its commitment to continuous improvement to ensure it achieves more robust and transparent procurement processes. As set out above, the OoS has sent draft versions of the revised procurement Templates to ICAC for consideration. Once ICAC provide any comments, the OoS will undertake further internal reviews (including in consultation with OoS legal) before being finalised and published for use by staff. Once published for use, the OoS will conduct in-depth training sessions in relation to the use of the Templates as well as the revised Minor Capital Works Manual and Procurement Strategy and other Phase One documents and Phase Two documents.
370. Mr O'Connor and the Taskforce are continuing to work closely with ICAC to ensure that any issues that arose in relation to the procurement process and the awarding of the Contract in 2017 have, to date, been remedied and that the OoS's procurement processes and procedures are:
- (a) thorough and robust;
  - (b) compliant with relevant legislative and policy requirements; and
  - (c) designed to achieve best value-for-money for the NSW taxpayers as well more robust and transparent procurement processes.

## (f) Current Status

371. The Taskforce continues to implement improvements to the OoS procurement policies and processes, together with the CPO and Procurement Function.
372. Separately to addressing conflicts of interest in the context of a procurement process, the OoS's Human Resources team has developed an enhanced Conflict of Interest policy to be introduced organisation-wide (**OoS Conflicts Policy**). The OoS Conflicts Policy builds on the existing Conflict of Interest Policy which comprised part of the OoS Code of Conduct and Ethics Policy. The enhanced OoS Conflicts Policy is intended to set standards and provide guidance on how to manage conflicts of interest in an ethical manner and commits the OoS to preventing adverse consequences that can arise from conflicts of interest, as well as the appearance of undue influence or impropriety. The OoS Conflicts Policy builds on effective processes for declaring, managing, registering (onto a central Register) and monitoring conflicts of interest. The OoS has also outlined the relevant responsibilities under the policy, as well as outlined clear examples of conflicts of interest relevant to the OoS's business and the types of associations which should be disclosed. This Policy has been developed and reviewed in consultation with various internal business units, including the Procurement Function, Asset Management and the OoS legal team as well as with ICAC. Once finalised and approved, the Policy will complement the guidance relating to conflicts of interest in the

OoS's procurement materials and will be uploaded to the OoS intranet and accompanied by a communications plan and staff training.

373. The OoS has welcomed feedback from OCM, ICAC and the NSW Equestrian community to assist it in strengthening its procurement policies and will continue to implement any further recommendations from ICAC, as well as any recommendations arising from the Inquiry. This will benefit all OoS procurement activities going forward, including beyond those relating to the Equestrian community.
374. As set out above, when issues with the SIEC Arena surfaces were raised, the OoS were responsive, proactive and effective in rectifying these issues at no public cost and ensuring that BSMS was at the forefront of resolving these issues. The OoS also continues to monitor the safety and quality of the SIEC Arena surfaces. The SIEC Arena surfaces have been formally assessed as safe to use, with further assessments scheduled, pending the COVID-19 lockdown.
375. The OoS submits that, despite the improvements identified by OCM, ICAC and the NSW Equestrian community in relation to the procurement process, the SIEC Arena Upgrade has delivered value for money to the citizens of NSW. At the time that steps were taken to embark on the SIEC Arena Upgrade, the SIEC Arena was 17 years old and in urgent need of upgrading to avoid the loss of future events (having lost a number of these key events in the lead up to 2017) and to maintain its status as Australia's premier Equestrian Arena.
376. Since the SIEC Arena Upgrade, the SIEC Indoor Arena has been very popular for event organisers who seek to run their events at SIEC and there is often great demand for the use of the Indoor Arena, particularly on weekends between March and May. Following the SIEC Arena Upgrade, the SIEC has staged a number of high profile events, including the following elite events:
- (a) in 2019, the National Dressage Championships returned to the SIEC;
  - (b) the National Dressage Championships were booked to be held at the SIEC in 2020, but were cancelled due to the COVID-19 pandemic. They were booked to be held again at the SIEC from 14 to 17 October 2021 but again have been cancelled this year due to the COVID-19 pandemic; and
  - (c) the Sydney Concours de Dressage International (commonly referred to, and, defined above as "CDI"), a major International Dressage event held at the SIEC since the early 2000's, was held at the SIEC in May 2021 with no safety or surface quality incidents reported. This event is also booked at the SIEC Arena for 2022.
377. The OoS notes that there continues to be ongoing demand for the use of the SIEC in 2022 despite the current restrictions on the use of the venue due to the COVID-19 pandemic.

## F. SUMMARY OF SUBMISSION

378. In summary, the OoS makes the following concluding statements:
- (a) the OoS acknowledges that there were weaknesses in the procurement function that resulted in gaps and vulnerabilities in the procurement process for the SIEC Arena Upgrade;
  - (b) the OoS have identified improvements and enhancements that it has implemented (or, in some instances, is in the process of implementing) which has enhanced its procurement processes, procedures and templates (and will continue to enhance) to ensure that the OoS achieves more robust procurement processes going forward;

- (c) there are improvements in relation to contract management throughout the life of the contract that have been identified and which will be implemented through training and the availability of revised guidance material and relevant resources;
- (d) clearer documents and guidance material, in conjunction with improved education and training in relation to the identification, and management of, "Conflicts of Interest" during a procurement process, will result in a more robust and transparent procurement process, thereby reducing probity risks and the risks of impropriety whilst achieving better outcomes for the OoS and its key stakeholders going forward;
- (e) the OoS welcomes all questions, issues or concerns raised by stakeholders in relation to all aspects of NSW sport. As a direct result of the concerns that have been raised in relation to the SIEC Arena Upgrade, and brought to its attention, by members of the equestrian community, the OoS have identified a range of improvements to its internal processes and procedures that it has implemented (or is in the process of implementing) that have strengthened its procurement processes to provide better outcomes into the future;
- (f) the OoS took prompt and effective steps in the identification of issues for remediation for the SIEC Arena Surface once they were brought to its attention. The concerns and safety issues identified were addressed as soon as possible to ensure that the SIEC Arena was safe and of an international standard for athletes, horses and competitors. Some of these issues are continuing to be monitored; and
- (g) overall, the SIEC Arena Upgrade was a successful project which was completed on time. It has resulted in attracting a number of events and competitions back to the SIEC as a result of being upgraded to international standards.

Dated: 3 September 2021