

JDH Capital Pty Ltd

# Probity Advisor's Report

DESIGN COMPETITION  
SIRIUS BUILDING  
2 – 60 CUMBERLAND STREET, THE ROCKS, SYDNEY

5 February 2020



# Document Information

<b>Client</b>	<b>JDH Capital Pty Ltd</b>
Project	Design Competition Sirius Building 2 - 60 Cumberland Street, The Rocks, Sydney
Procurement type	Design Competition
Report status	Final
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## STATEMENT OF RESPONSIBILITY

This probity report has been prepared for the purpose of assisting JDH Capital Pty Ltd in its decision making regarding the Project. Procure has compiled the report on the basis of:

- information it has been given and which it has reviewed;
- the processes and procedures it has observed; and
- the issues raised with it.

The conclusion stated in section 2 of this report is based upon the work performed as documented in it. While Procure has identified probity risks and considered the controls, environment and action taken by assisting JDH Capital to address those risks, probity issues may nevertheless have arisen that have not been identified. While Procure may provide input into processes followed, assisting JDH Capital Pty Ltd retains responsibility for the probity of its personnel, contractors and processes. The report cannot be relied upon by any other party or for any other purpose.

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# 1 Introduction

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Procure Group Pty Ltd (**Procure**) has been engaged by Architectus Pty Ltd (**Competition Advisor**) to provide independent probity advisory services in relation to the process followed for the Architectural Design Competition for the Sirius Building (**Sirius**), 2 – 60 Cumberland Street, The Rocks, Sydney (**the Competition**). Architectus have been engaged to manage the Competition by Siruis Developments Pty Ltd, a wholly owned subsidiary of JHD Capital Pty Ltd (**JHD Capital**) who are considered to be the proponent of the development for the purposes of this report.

This report sets out our work performed and observations from a probity perspective relating to the process followed by JHD Capital, within the context of the framework provided by the NSW Independent Commission Against Corruption's (ICAC) probity fundamentals, the provisions of Schedule 3 Part 34 of the State Environmental Planning Policy (State Significant Precincts) 2005 (**the SEPP**) and the Government Architect NSW (**GANSW**) Draft Architectural Design Competition Guidelines 2018 (**the Guidelines**).

## 1.1 Background and overview

In 2015 the NSW Government announced that it would sell Sirius. In August 2018 the Government made amendment to the SEPP that declared Sirius as a State Significant Precinct (**SSP**). The SEPP amendment:

- + Nominated the Minister for Planning as the Consent Authority for the development of Sirius;
- + Required that an Architectural Design Excellence Competition be run as part of any Development Approvals process in relation to Sirius and that the competition be run in accordance with the Design Excellence Guidelines (which were subsequently subsumed into the Guidelines);
- + Placed controls on the height of any new building;
- + Required that any design presented for approval activate both Cumberland St and Gloucester Walk;
- + Specified the design excellence factors that should be taken into account in assessing any design presented for approval, including views for the Sydney Harbour Bridge and from the Sydney opera use;
- + Allowed for a maximum of Gross Floor Area (GFA) of 8,420 m<sup>2</sup>;
- + If a substantial amount of the current building were maintained provided for some relaxation of some of the development controls providing there were an offsetting public benefit.

Following a competitive tender process, the Government announced that JDH Capital, through Sirius Development, were the successful tenderer in June 2019. The NSW Government entered into a Development Agreement with JDH Capital that will result in the sale of the building providing JDH Capital meet the deadlines specified in the Development Agreement. As part of its successful tender JDH Capital produced a reference design (**Reference Scheme**) that retained much of Sirius. Procure has been advised that the Development Agreement requires the retention of some features of the Reference Scheme.

Following the announcement of their successful tender, JHD Capital appointed Architectus as their agents to manage the Competition. As required by the Guidelines, JHD Capital:

- + Prepared a Design Excellence Strategy that set out the basis for the Competition, including that it be a "Type A" invited single stage design excellence competition with three invited competitors (**Competitors**) which was endorsed by the GANSW on 4 November 2019;
- + a Design Competition Brief (**Competition Brief**) that was endorsed by the GANSW on 4 November 2019.

The Competition Brief was released to the Competitors on 4 November 2019. At the close of the Competition at 5.00 pm on 6 December 2019 all three Competitors submitted proposals.

The Competition Jury (**Jury**) convened on 16 December 2019. The Jury received presentations from JHD Capital's technical advisors on the proposals and then each Competitor presented their proposal. The Jury then met to assess the proposals. The Jury was unanimous on the proposal that best met the requirements of the Competition Brief and which they considered exhibited design excellence. The Jury also agreed on a Design Integrity Process. A Jury report was prepared and signed by all members of the Jury on 29 January 2020.

## 1.2 Key activities and dates

ACTIVITY	DATE
Design Excellence Strategy and Competition Brief Approved	4 November 2019
Design Brief Released	4 November 2019
Competitor Briefing	6 November 2019
Site Visits	6,7,12,18 and 26 November 2019
Mid Point Reviews	22 November 2019
Competition Closing date	6 December 2019 5.00 pm
Jury Presentations	16 December 2019
Jury Deliberations	16 December 2018
Jury Report finalised	29 January 2020

## 2 Conclusion

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Based upon our work performed and detailed in this report, no issues of a probity nature have come to our attention that would lead us to conclude that the process followed by JDH Pty Ltd in the evaluation of submissions received in response to the Design Competition for 2 – 60 Cumberland Street, The Rocks, Sydney has not been conducted in a fair and equitable manner with due regard to probity.

## 3 Probity advisor's role

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### 3.1 Role of probity advisor

Attachment A provides a more detailed description of the role of the probity advisor as well as a definition of probity, taken from relevant publications of the ICAC. In short, a probity adviser is engaged to observe, review and provide guidance on the integrity of procedures and processes, focusing on the means, rather than the ends, of the project in question.

### 3.2 Probity fundamentals

In undertaking the probity advisory role, Procure has had regard to the “probity fundamentals” identified by the ICAC. These probity fundamentals are:

- + Maintaining accountability and transparency;
- + Maintaining impartiality;
- + Managing conflicts of interest;
- + Maintaining confidentiality; and
- + Obtaining value for money.

Further detail describing these probity fundamentals is included in Attachment A.

Sections 4 and 5 of this report outline our work performed to monitor the application of the probity fundamentals.

## 4 Scope and methodology

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### 4.1 Scope of work

Procure notes that it was appointed in early December 2019. Our scope of work included the following:

- + Reviewing the Design Excellence Strategy and associated approval from the GANSW;
- + Reviewing the Design Excellence Competition Brief and associated approval from GANSW;
- + Reviewing minutes of the design competition briefing session and site visits;
- + Reviewing the records of all clarifications sent to all Competitors
- + Verification of project confidentiality agreements;
- + Reviewing the minutes of the interim review meetings;
- + Attending the Jury presentations;
- + Attending the Jury deliberations;
- + Reviewing the Jury Report;
- + Obtaining probity confirmations from Jury members;
- + Confirming application of the Competition process; and
- + Provision of a probity report.

### 4.2 General approach taken

In providing the above services, Procure has employed a range of approaches, including:

- + Consideration of the NSW Government Architects Draft Design Excellence Competition Guidelines;
- + Consideration of the requirements of the SEPP;
- + Observation of the Jury presentations and deliberations, activities and processes; and
- + Discussions with relevant representatives of Competition Advisor and JDH Capital.



## 5 Work performed and observations

### 5.1 Maintaining accountability and transparency

In advising and monitoring the process in relation to *Maintaining Accountability and Transparency*, Procure has undertaken the following tasks:

#### Pre-Competition Close

- + Noted that, as required by the Guidelines, a Design Excellence Competition Strategy (**the Strategy**) had been prepared that:
  - o Sets out the broad scope of works that the redevelopment will involve, including those design principles that the SEPP and/or the Development Agreement Requires;
  - o Sets out the objectives of the Strategy;
  - o Notes the location and characteristics of the Sirius site;
  - o Establishes that the Competition is to be a Type A invited competition under the Guidelines with three local architectural firms who are identified. The Strategy sets out the rational for these decisions;
  - o Establishes that the competition jury (**Jury**) will have five members, one nominated by the GANSW, two by JDH Capital and two by the city of Sydney;
  - o Notes that the Development Agreement is in place and provides a high-level summary of its provisions that are relevant to the Competition;
  - o Notes that a competition brief will be prepared;
  - o Notes that decision making will be according to Section 4 of the Guidelines;
  - o Sets out the design integrity process and provides the Jury a role;
  - o Establishes the ecologically sustainable development targets;
  - o Sets out the timeline for the Competition.
- + Noted that the Strategy was approved by the Principal Design Review, GANSW on 4 November 2019 (by email).
- + Noted that a Competition Brief was prepared as required the Guidelines. The Competition Brief contained:
  - o A vision for the Sirius redevelopment and the Competition objectives;
  - o A brief description of the history of the site and the existing Sirius building;
  - o A description of the location of the Project and its planning context;
  - o The Project vision and key guiding principles;
  - o A description of tender process including the Reference Scheme and the Development Agreement;
  - o The design principles for the redevelopment of Sirius;
  - o the site of the Project, including;
    - Location;
    - Existing Development;
    - Local Context, including the Rocks Conservation Area and the relationship with the Sydney Harbour Bridge and Sydney Opera House; and
    - The existing Sirius building.

- The planning context, including the site specific control incorporated in the SEPP relating to building height, gross floor area, active street frontages and design excellence;
- The Competition procedures, Including:
  - The architects invited to compete;
  - The Jury members, role and required conduct including that they not have a conflict of interest in relation to the development;
  - The Competition program;
  - Fees payable to Competitors;
  - Technical assistance to Competitors and the Jury;
  - The Interim Review requirements;
  - The process for the Jury assessment of the proposals and the evaluation criteria;
  - The design integrity process;
  - Submission requirements including the requirement for hard and soft copies of proposals to be lodged with the Competition Advisor by the close time of 5.00 pm on 6 December 2019.
- + Observed that the Competition Brief appeared to satisfy all the requirements of the SEPP and the GANSW Guidelines.
- + Noted that as required for SSD's. the Competition Brief was approved by the Principal, Design Review, GANSW on 4 November 2019.
- + Noted that the Competition Brief was released to the Competitors and Jury by email on 4 November 2019.
- + Reviewed the presentation given and the minutes of the competition briefing held on 5 November 2019. Noted that all Competitors were represented. The presentation summarised key elements of the Competition.
- + Reviewed the minutes of the site visits held on 6,7,12,18 and 26 November 2019. Noted that Competitors were offered as many site visits as they required. Two Competitors had two site visits while the third had three site visits. Noted from the minutes that all competitors appeared to have been granted similar access to areas of the site. The Competition Advisor accompanied all site visits.
- + Reviewed the records maintained by the Competition Advisor and noted that the following Advisory notes were sent to all competitors:
  - on 12 November 2019 a note with an extract of the SEPP relating to Sirius, and appendices G (heritage report) and H (BCA report) of the Competition Brief;
  - on 12 of November 2019 a note regarding the SSD application for the nearby Mercantile Hotel;
  - on 14 November 2019 a note dealing with view analysis and providing responses to questions raised by competitors at the site visits;
  - on 20 November 2019 updating the Competition Program (changing the date of the final presentations to 16 December) and providing surveyed photographs;
  - on 29 November 2019 a note revising membership of the Jury, notifying a change in the Secretary's Environmental Assessment Requirement's for Sirius, a change in the planning technical advisor, information on maximum building heights and City of Sydney waste collection requirements.
- + Noted that the Interim Review occurred on 22 November 2019. Procure has reviewed the minutes of the Interim Review meetings, and notes that:
  - the same technical advisors were present at each Interim Review meetings;
  - the agenda was the same for each of the Interim Review meetings; and,

- while the feedback varied according to the design scheme presented by each competitor, it appears to have been consistent in relation to how the design excellence criteria related to each Competitor's design.

## Post Competition Close

- + Was advised by the Competition Advisor that all three Competitors had provided a response by the Competition close date of 5.00 pm on 6 December 2019.
- + Noted that the Competition Advisor loaded the Competitors responses onto a password protected secure file sharing service.
- + Noted that Jury members and technical advisors were provided with access to the file Sharing Service on 9 December 2019.
- + Attended the Jury meeting on 16 December 2019 at which the Competitors made presentations of their proposals. Noted that all competitors were given equal opportunity to present to the Jury and for the Jury to ask questions.
- + Noted that the composition of the Jury was consistent with the Design Excellence Strategy and the Competition Brief.
- + Observed the Jury deliberations following the Competitor presentations on 16 December 2019. The Jury considered the three proposals in the context of the design excellence principals and evaluation criteria in the Competition Brief. The Jury quickly agreed that one of the Competitors had an interesting response to the heritage values of the site, but that there were a number of concerns with the proposal and its resolution of other design excellence criteria which meant it ranked below the other Competitors. The Jury then considered the other two Competitors in greater detail. It became clear that there was a Competitor that was favoured by all Jury members. The Jury then proceeded to note the positive and negative features of each of the Competitor's proposals against the evaluation criteria in the Competition Brief, identify the design excellence features and risks with each Competitors proposal, identify elements of the winning design that needed further resolution or represented design excellence that should be preserved through the design and development process.
- + The Jury also agreed that they would act as the Design Integrity Panel and the stages of the development at which they should review the design.
- + Noted that a draft Jury Report was circulated to the Jury members for comment. All members of the jury signed the final report by 29 January 2020.
- + Reviewed the Jury Report and consider that it has accurately described the deliberations of the Jury and the outcomes of the Competition process.
- + Noted that the Jury appeared to have the qualifications or experience required in the GANSW Guidelines.

## 5.2 Maintaining impartiality

In advising and monitoring the process in relation to *Maintaining Impartiality*, Procure has undertaken the following tasks:

- + Confirmed by observation of competitor presentations, the Jury meeting and through review of documentation maintained by the Competition Advisor that the process established in the Competition Brief has been followed in all material respects and that the process appears to have been compliant with the approved Competition Brief and the Guidelines.
- + Noted from the review of documentation relating to the process for Competitors to seek technical advice from the technical advisors that all Competitors were treated equally in terms of access to technical advisors.
- + Noted that one of the Competitors had prepared Reference Scheme. Procure has been advised that the other Competitors were provided a brief that described the Reference Scheme but were not

provided the Reference Scheme itself. Procure notes that all competitors appeared to have adequate time to develop a design for the Competition, and that these actions mitigated the advantage for the Competitor who developed the Reference Scheme.

- + Confirmed that no Competitor exceeded the time allowed to interact with various technical advisors as set out in the Competition Brief.
- + Attended Jury meeting at which the Competitors proposals were assessed. We observed robust and appropriate discussion and consideration of relevant issues.
- + Confirmed that each Competitor was assessed against the same Evaluation Criteria which were those in the Competition Brief and reflected the design excellence criteria in the SEPP;
- + Confirmed with each member of the Jury by email on 18 December 2019, that each member:
  - + Had sufficient time and information to complete the assessment;
  - + Had followed the evaluation process set out in the competition brief; and
  - + Was not aware of any unresolved probity issue.

### 5.3 Managing conflicts of interest

In advising and monitoring the process in relation to *Managing Conflicts of Interest*, Procure undertook the following tasks:

- + Noted that Jury members are prohibited from having conflicts of interest under the GANSW guidelines. Confirmed with the Competition Advisor that the Jury members were aware of this.
- + Noted that JHD Capital were concerned that one of the Jury members nominated by the City of Sydney may have a conflict of interest as the Chairperson of the Save our Sirius organisation. This was raised with the GANSW and following discussion it was agreed that the conflict was manageable and JDH Capital agreed that the nominee would remain on the Jury. Refer to section 6.1 for more detail.
- + Confirmed that no Jury member had any undeclared conflicts of interest by email on 18 December 2019.
- + Confirmed that no unmanaged Conflicts of Interest have been brought to the attention of the Probity Advisor.

### 5.4 Maintaining confidentiality

In advising and monitoring the process in relation to *Maintaining Confidentiality*, Procure has undertaken the following tasks:

- + Noted that JHD Capital had confidentiality agreements in place with its technical advisors and with Competitors.
- + Noted that the Competition Advisor approached Procure Group on 9 November 2019 indicating that not all Jury members had returned the Confidentiality Deed. Given that there was a requirement to provide the Competitor submissions to the Jury that day under the Guidelines if the Jury meeting was to occur on the 16 December 2109, Procure agreed that the proposals could be forwarded to the Jury prior to the receipt of Confidentiality Deeds. Confidentiality Deeds were subsequently signed by all Jury members.
- + Confirmed with the Jury members that they were not aware of any breach of confidentiality by email on 18 December 2018
- + Confirmed that no breach of confidentiality has been brought to the attention of the Probity Advisor.

## 5.5 Obtaining value for money

In advising and monitoring the process in relation to *Obtaining Value for Money*, Procure has undertaken the following tasks:

- + Noted that the Competitors were chosen by GHD Capital on the basis of their experience in the design of high end residential apartment buildings and experience in adaptive reuse of heritage sites.
- + Noted that the Competition evaluation criteria had been devised to identify the Competitor most likely to provide optimal value for money.
- + Noted that a budget estimate was prepared on the basis of the Reference Scheme prior to the close of the competition to facilitate the evaluation of Competitors submissions.
- + Noted that the cost of each Competitor's proposal was compiled by JHD's Quantity Surveyors using consistent methodologies.
- + Noted that the Competitor recommended by the Jury had the best non-price score and also had was at the lower end of cost estimates, and as such represented the best value for money.

## 6 Matters to Note

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### 6.1 Potential Juror Conflict of Interest

The Design Excellence Brief and the Competition Brief both provided for the Jury to have 2 members nominated by the City of Sydney. On 1 November 2019 the GANSW advised GJHD Capital of the City of Sydney nominees, one of whom was Mr Shaun Carter. Mr Carter is an architect and also the Chairperson of the Save our Sirius organisation that had opposed the sale and potential demolition of Sirius.

GHD were concerned that, given his role with Save our Sirius, Mr Carter may have a conflict of interest as a Jury member. The Competition Advisor raised the conflict of interest issue with the GANSW office on 3 November 2019. This resulted in further discussions between the GANSW and the City of Sydney regarding a potential replacement juror for Mr Carter.

As a result of these discussions Mr Graham Jahn, the Director City Planning Development Transport for the City of Sydney emailed Mr Carter on 13 November 2019 asking if his role with Save our Sirius would present a conflict of interest and impact his impartiality if he was nominated to the Jury. Mr Carter responded on 13 November 2019 noting that he was pleased that JHD Capital had committed to the retention and adaptive reuse of the building and that the SEPP provided a strong basis for this to occur. Mr Carter also noted that his knowledge of Sirius and its context would add great value to my assessment of any proposal for Sirius. He noted that he had spent time reviewing the plans, sections, elevations and the urban environment of Sirius to understand its opportunities and flaws. In his view, at the hands of skilled architects through a Design Excellence process, these flaws can be fixed, improving opportunity, amenity and public domain, whilst accommodating the additional floor space allowed under the SEPP.

On 19 November the GANSW contacted the Competition Advisor confirming the GANSW supported Mr Carter's nomination and provided a copy of Mr Carter's response regarding the conflict of interest. The same day the Competition Advisor responded back to the GANSW office noting a concern that Mr Carter's response was caveated in that it was only in relation to the "retention and adaption of the Sirius building". The declaration did not address Mr Carter's impartiality in considering competition entries that propose some minor demolition and building additions – as presented in the Reference Scheme and as is permitted under the SEPP.

Mr Carter was briefed by JHD Capital with regard to the Reference Scheme on 20 November 2019. The Competition Advisor advised that while Mr Carter considered the Reference Scheme to be an appropriate response to the site, he raised the issue of the Reference Scheme not containing affordable housing. The NSW Government tender for Sirius was based on highest value return to the state, and neither the tender nor the SEPP required affordable housing. As a result, the Competition Advisor relayed further concerns regarding Mr Carter's nomination to the Jury to the GANSW.

Further discussion occurred between Mr Carter, the GANSW office and the Competition Advisor. Mr Carter provided further assurances over his ability to act impartially on 21 November 2019. During this period the Competition Advisor indicated that GHD Capital accepted Mr Carter's nomination. On 25 November 2019 the GANSW Office notified Mr Carter that his Jury nomination had been accepted.

Procure notes that GHD Capital's concerns over Mr Carter's conflict of interest appear to have been appropriately managed. Mr Carter's assurance around how he would manage the conflict of interest and his understanding of his obligations as a juror resulted in GHD Capital accepting his nomination. GHD Capital made Procure aware of their concerns. Procure observed that Mr Carter, while having clear views around the management of the heritage value of the building appeared to make a positive contribution to the Jury deliberations.

# Attachment A

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## 6.2 Key terms and definitions

### 6.2.1 What is a probity adviser?

In its publication *Probity and Probity Advising* (November 2005) the ICAC describes a probity adviser as: “an individual or organisation engaged to observe, review and provide guidance on the probity framework and/or processes of a project. Agencies use internal or external probity advisers to verify that the processes followed are consistent with government regulations, policies, guidelines and best practice principles. A probity adviser provides opinions and guidance on probity risks and issues that may arise during the process and confirms, in writing, whether the concluded process is consistent with the requirements outlined in a probity plan as well as general probity fundamentals. If probity requirements are not being or have not been met, the adviser identifies the non-conformities and any reasons for these in a written report, and if necessary, suggests solutions and monitors their implementation.”

### 6.2.2 What is probity?

Probity may be defined as: “integrity, uprightness, honesty”. Within the public sector, the word “probity” is often used in a general sense to refer to an “appropriate process”. Government seeks to conduct its commercial dealings with integrity. Public officials (and their advisers) must be able to demonstrate high standards of probity while pursuing the stated project objectives.

### 6.2.3 Maintaining accountability and transparency

Public sector **accountability** requirements are intended to save money, resources and time in the long term and prevent corruption, maladministration and substantial waste of public resources. All persons with responsibilities in relation to a project should be accountable for their actions associated with the project. All key activities and decision-making associated with the project should be recorded.

**Transparency** helps ensure that a process is conducted with integrity, thus enhancing competition and the delivery of value for money, as well as reducing opportunities for corruption, maladministration and substantial waste of public money. An evaluation process should be applied consistently and conducted in accordance with an appropriate methodology. Processes should be well documented and reviewable.

### 6.2.4 Maintaining impartiality

Individuals and organisations involved in preparing and submitting proposals for large public sector contracts often invest considerable time, effort and resources in doing so. In return, they are entitled to expect impartial treatment at every stage of the process. If they do not consider the process to be impartial and honest they may withhold valuable ideas or be deterred from bidding in the future. Any form of bias, whether driven by personal interests or not, could jeopardise the integrity of the project.

### 6.2.5 Managing conflicts of interest

Conflicts of interest arise when there is a conflict between a public official's public duty and private interests, where those private interests could improperly influence the performance of their official duties and responsibilities. Advisers and other consultants working on the project must comply with public sector conflict of interest requirements. Conflicts of interest can be actual, perceived or potential.

Failure to declare and/or effectively manage conflicts of interest can damage the integrity of the project, therefore eroding public or market confidence in the outcomes. The management of perceived or potential conflicts of interest is no less important than the management of actual conflicts of interest. Inadequate systems for identifying and dealing with conflicts of interest provide opportunities for corruption, maladministration and serious waste of public resources.

### 6.2.6 Maintaining confidentiality

Accountability and transparency are fundamental to the work of public sector organisations and public officials. However, there is some information that needs to be kept confidential, at least for a specified period of time, in order to protect the integrity of a process and give private sector participants the confidence to do business with government. This information can include the content of proposals, intellectual property and pricing and profit structures. Importantly, much of the information relating to a project needs to be kept confidential up to the point where a contract is signed.

### 6.2.7 Obtaining value for money

Value for money is achieved by fostering an open competitive environment in which public sector organisations can make attractive, innovative proposals with the confidence that they will be assessed on their merits. Lapses in probity often end with one or more parties obtaining unreasonable financial gains at the expense of the public interest.

Value for money does not necessarily mean lowest price. Agencies need to consider non-price elements of proposals (including risk) and devise criteria that allow them to be evaluated.