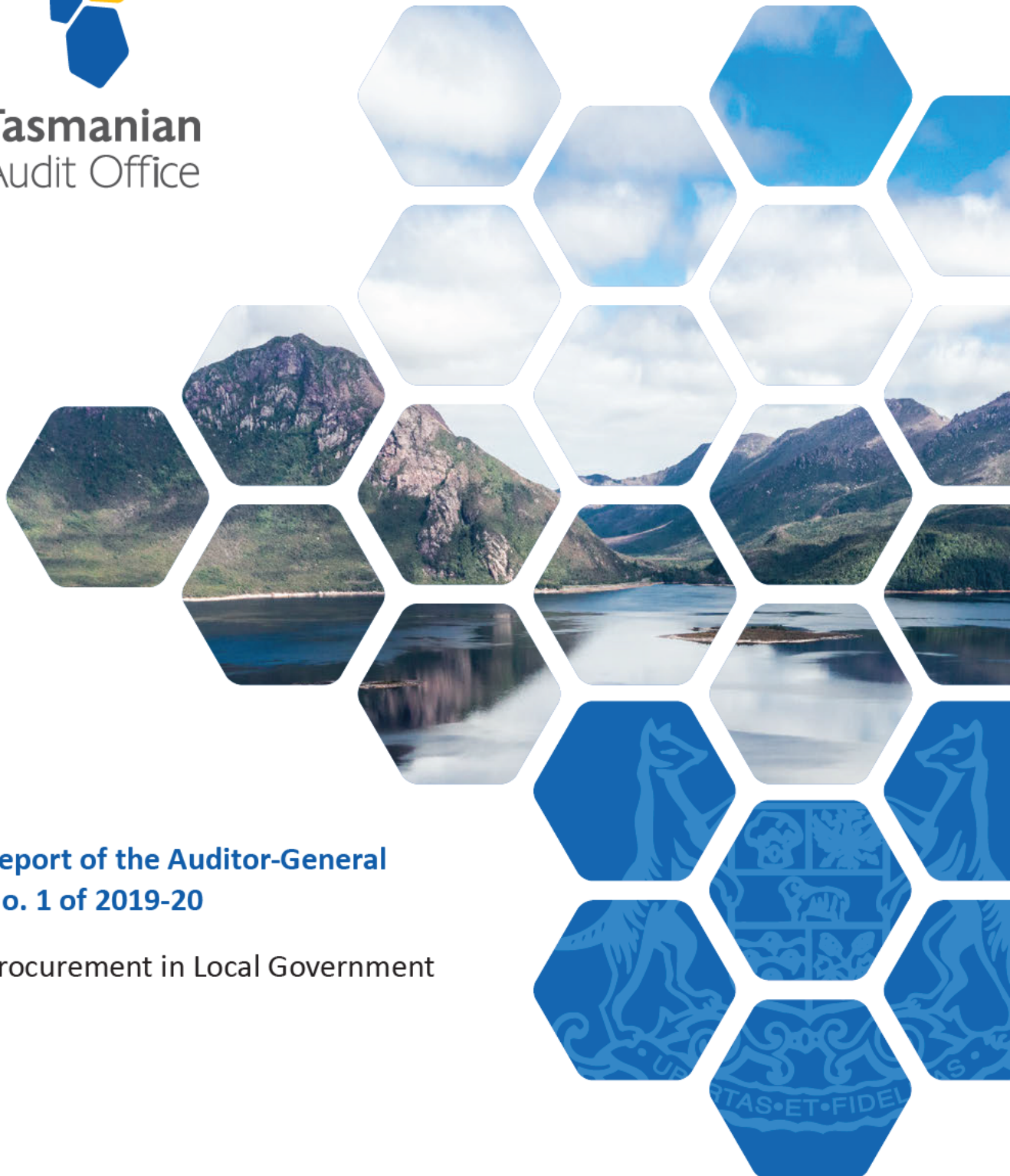




Tasmanian
Audit Office



**Report of the Auditor-General
No. 1 of 2019-20**

Procurement in Local Government

September 2019

THE ROLE OF THE AUDITOR-GENERAL

The Auditor-General's roles and responsibilities, and therefore of the Tasmanian Audit Office, are set out in the *Audit Act 2008* (Audit Act).

Our primary responsibility is to conduct financial or 'attest' audits of the annual financial reports of State entities. State entities are defined in the Interpretation section of the Audit Act. We also audit those elements of the Treasurer's Annual Financial Report reporting on financial transactions in the Public Account, the General Government Sector and the Total State Sector.

Audits of financial reports are designed to add credibility to assertions made by accountable authorities in preparing their financial reports, enhancing their value to end users.

Following financial audits, we issue a variety of reports to State entities and we report periodically to the Parliament.

We also conduct performance audits and compliance audits. Performance audits examine whether a State entity is carrying out its activities effectively and doing so economically and efficiently. Audits may cover all or part of a State entity's operations, or consider particular issues across a number of State entities.

Compliance audits are aimed at ensuring compliance by State entities with directives, regulations and appropriate internal control procedures. Audits focus on selected systems (including information technology systems), account balances or projects.

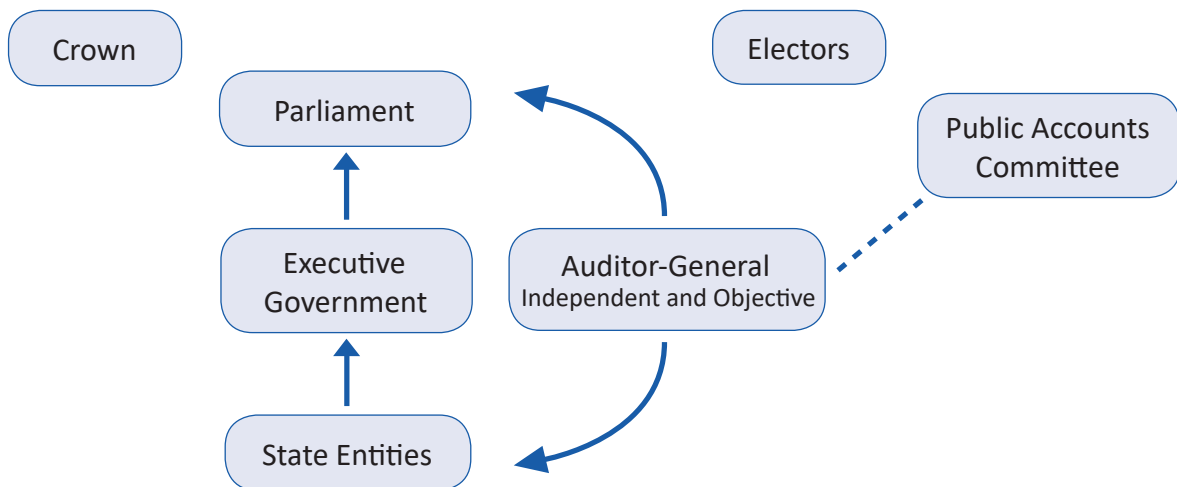
We can also carry out investigations but only relating to public money or to public property. In addition, the Auditor-General is now responsible for state service employer investigations.

Performance and compliance audits are reported separately and at different times of the year, whereas outcomes from financial statement audits are included in one of the regular volumes of the Auditor-General's reports to the Parliament normally tabled in May and November each year.

Where relevant, the Treasurer, a Minister or Ministers, other interested parties and accountable authorities are provided with opportunity to comment on any matters reported. Where they choose to do so, their responses, or summaries thereof, are detailed within the reports.

THE AUDITOR-GENERAL'S RELATIONSHIP WITH THE PARLIAMENT AND STATE ENTITIES

The Auditor-General's role as Parliament's auditor is unique.





TASMANIA

2019
PARLIAMENT OF TASMANIA

Report of the Auditor-General No. 1 of 2019-20

Procurement in Local Government

19 September 2019

Presented to both Houses of Parliament pursuant to
Section 30(1) of the *Audit Act 2008*

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19 September 2019

Mr President
Legislative Council
HOBART

Madam Speaker
House of Assembly
HOBART

Dear Mr President
Dear Ms Speaker

REPORT OF THE AUDITOR-GENERAL

No. 1 of 2019-20: Procurement in Local Government

This Report has been prepared consequent to audits conducted under section 23(d) and 23(e) of the *Audit Act 2008*. The objectives of the audits were to assess:

- the effectiveness of governance and procurement processes for Devonport City Council's Living City project and its compliance with procurement requirements in the *Local Government Act 1993* and *Local Government (General) Regulations 2015* and former regulations
- Dorset Council's compliance with procurement requirements in the *Local Government Act 1993* and *Local Government (General) Regulations 2015* in relation to the extension of the Blue Derby Bike Trails
- Glenorchy City Council's compliance with procurement requirements in the *Local Government Act 1993* and *Local Government (General) Regulations 2015* and former regulations in response to recommendations made in the *Glenorchy City Council Board of Inquiry Report November 2017*.

Yours sincerely



Rod Whitehead
Auditor-General

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FOREWORD

The requirements for procurement by Local Government are specified in the *Local Government Act 1993* (LGA) and associated regulations. All councils are required to maintain a Code for Tenders and Contracts (Code) and comply with that Code when acquiring goods and services over the prescribed amount. The regulations provide specific exemptions from the requirement to undertake a public tender, applied by Devonport City Council (DCC) and Dorset Council. Our audits assessed the use of these exemptions. We also examined the effectiveness of governance and procurement processes relevant to DCC's Living City project.

Our examination of Glenorchy City Council (GCC) was undertaken to examine three specific recommendations addressed to the Auditor-General by the Board of Inquiry in its *Glenorchy City Council Board of Inquiry Report November 2017* (Board of Inquiry Report).

This report is structured differently to our usual reports to Parliament. This report separates each examination into individual discrete chapters and should be read as such.



Rod Whitehead

Auditor-General

19 September 2019

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AUDITOR-GENERAL'S INDEPENDENT ASSURANCE REPORT

This independent assurance report is addressed to the President of the Legislative Council and the Speaker of the House of Assembly. It relates to my examination of the governance and procurement of goods and services by DCC for the Living City project.

Audit objective

The objective of the audit was to form a reasonable assurance conclusion on the effectiveness of governance and procurement processes for DCC's management of the Living City project.

Audit scope

The audit scope covered governance and procurement processes relating to DCC's Living City project, with a focus on:

- the engagement of contractors and consultants, including compliance with DCC procurement policies and the LGA
- examining the commercial nature of the Project Development Management Agreement (PDMA) entered into with Project & Infrastructure Holdings Pty Ltd (P+i), payments made under the PDMA and any amendments to the PDMA
- examining compliance with DCC policies and the LGA relevant to the Providore Place head lease and consideration of the commercial nature of the lease
- the sale of land related to the hotel development as part of Stage Two of the Living City project
- examining costs of the project against original and revised budgets.

The audit covered the period from June 2013 to June 2019.

Audit approach

The audit was conducted in accordance with Australian Standard on Assurance Engagements ASAE 3500 *Performance Engagements* issued by the Australian Auditing and Assurance Standards Board, to express a reasonable assurance conclusion.

The audit evaluated the following criteria and sub-criteria:

1. Did the engagement of contractors and consultants comply with DCC procurement policies and the LGA?
 - 1.1 Did DCC comply with the procurement principles outlined in its procurement Code and the LGA?
 - 1.2 Did DCC comply with its annual reporting requirements in relation to tenders and contracts?
 - 1.3 Did DCC establish adequate procedures for review and reporting in relation to the purchase of goods or services in circumstances where a public tender process was not used?
2. Did DCC takes steps to assess the commerciality of the PDMA?
3. Did DCC follow sound commercial and governance processes in entering into the Providore Place head lease?
4. Did DCC follow appropriate commercial and governance processes for the sale of land for the Stage Two hotel development?
5. Did DCC adhere to its budget for Stage One of the Living City project?

I have conducted my reasonable assurance audit by making enquiries and performing procedures I considered reasonable in the circumstances. Evidence for the audit was primarily obtained through discussions with relevant DCC personnel and examination of documentation related to the Living City project.

I believe that the evidence I have obtained is sufficient and appropriate to provide a basis for my conclusion.

Devonport City Council's responsibilities

The functions of a council are contained in section 20 of the LGA and include:

- to provide for the health, safety and welfare of the community
- to represent and promote the interests of the community
- to provide for the peace, order and good government of the municipal area.

In performing its functions, a council is to consult, involve and be accountable to the community. Aldermen (or Councillors) of DCC are also required to comply with a Code of Conduct that sets out standards of behaviour with respect to all aspects of their role. The Code of Conduct acknowledges the importance of high standards of behaviour in maintaining good governance and supports each Alderman's or Councillor's primary goal of acting in the best interests of the community.

In relation to procurement, sections 333A and 333B of the LGA, require DCC to maintain a Code for Tenders and Contracts and comply with that Code when acquiring goods and services. The requirements of the Code are to be consistent with the requirements of *Local Government (General) Regulations 2015* (LGR), and former regulations.

Auditor-General's responsibility

In the context of this audit, my responsibility was to express a reasonable assurance conclusion on the effectiveness of project governance and procurement processes for DCC's management of the Living City project, as evaluated against the criteria.

Independence and quality control

I have complied with the independence and other relevant ethical requirements relating to assurance engagements, and apply Auditing Standard ASQC 1 *Quality Control for Firms that Perform Audits and Reviews of Financial Reports and Other Financial Information, and Other Assurance Engagements* in undertaking this audit.

Findings and recommendations

Findings and recommendations for the audit criteria are summarised below. The recommendations highlight actions DCC, the Government and the Director of Local Government should undertake or consider.

Findings and recommendations

1. Did the engagement of contractors and consultants comply with DCC procurement policies and the LGA?

1.1 Did the engagement of contractors and consultants comply with DCC procurement policies and the LGA?

- DCC undertook procurement processes that complied with its Code, LGA and LGR in awarding 12 contracts that were subject to tender requirements.
- For two procurements, DCC applied the exemption from public tender available under the LGR. The appropriateness of the use of the exemption was examined under sub criteria 1.3.
- In reviewing all significant contracts and expenditure related to Stage One of the Living City project, no evidence of invoice splitting was found.

1.2 Did DCC comply with its annual reporting requirements in relation to tenders and contracts?

- In general, DCC complied with the annual reporting requirements of the LGA and the LGR.
- One instance was found where disclosures did not comply with the LGR whereby the total value of the goods or services acquired was not disclosed.

Recommendation:

1. DCC review internal processes and procedures to ensure future compliance with annual reporting requirements in relation to tenders and contracts.

1.3 Did DCC establish adequate procedures for review and reporting in relation to the purchase of goods or services in circumstances where a public tender process was not used?

- The process followed by DCC in applying the exemptions met the procedural requirements of the LGA and LGR.
- Clarity on the use of 'extenuating circumstances' could be improved with a definition within the LGA or LGR. This would ensure councils only apply the exemption in truly exceptional circumstances.

Recommendations:

2. The Government consider reviewing the circumstances in which the exemption from public tender under the LGR can be applied, including providing a definition of extenuating circumstances.
3. The Director of Local Government consider providing guidance on minimum documentation requirements where the exemption from public tender is applied, including a requirement for detailed market research and analysis to be undertaken.

Findings and recommendations

2. Did DCC take steps to assess the commerciality of the PDMA?

- DCC had taken reasonable steps to assess the commerciality of amounts payable under the PMDA and obligations of both parties under the agreement, although the documentation of the assessment of the reasonableness of amounts payable under the contract could have been improved.
- Based on the evidence presented, DCC took reasonable steps to assess and document the basis or justification for the subsequent amendment to the PDMA in July 2016.
- Payments made to P+i were made in accordance with the terms of the PDMA.

Recommendation:

4. In negotiating a commercial contract for the supply of goods and services, in the absence of a public tender because of extenuating circumstances, DCC should sufficiently document its assessment of the reasonableness of amounts payable under the contract.

3. Did DCC follow sound commercial and governance processes in entering into the Providore Place head lease?

- DCC obtained an independent valuation for Providore Place in compliance with its obligations under the LGA. Based on the valuation obtained, the Providore Place head lease provided an appropriate commercial return to DCC.
- Evidence obtained indicated the head lease was primarily drafted by P+i and it appeared to be missing a number of standard lease clauses.
- Council advised the lease was prepared based on an agreed 'term sheet' approved by council in the knowledge that it would not be a traditional lease arrangement but more akin to a cooperative shared arrangement.
- DCC did not obtain independent legal advice on the head lease agreement prior to signing the lease.
- The close relationship risk between DCC and P+i in entering into the head lease was not adequately managed.
- A review of the governance activities undertaken by DCC prior to entering into the Providore Place head lease, found DCC had not met good governance principles relating to transparency, equity, participation and inclusion and effective and efficient decision making.

Recommendation:

5. The Government consider reviewing the LGA and LGR to strengthen requirements relating to the lease of property. Specifically, significant lease opportunities should be open to all interested market participants.
6. DCC update its policies to provide guidance relating to property lease transactions.
7. DCC amend its policies to clarify when independent legal advice should be obtained in connection with property leases.
8. DCC review its measures to mitigate risks arising from contracts entered into where potential conflicts of interest may arise.

Findings and recommendations

4. Did DCC follow appropriate commercial and governance processes for the sale of land for the Stage Two hotel development?

- DCC advertised a Request for Proposal (RFP) to progress the hotel development component of Stage Two of the Living City project. DCC sought developers willing to purchase the site, build and finance the hotel.
- DCC complied with the requirements of the LGA by obtaining an independent valuation for the site prior to the sale of land for the Stage Two hotel development.
- The sale price for the site was \$1.18m with Fairbrother responsible for required building demolition costs.
- All future hotel development project and financial risks rest with Fairbrother.

5. Did DCC adhere to its budget for Stage 1 of the Living City project?

- DCC and its project manager P+i adequately documented, monitored and reported the progress of the project against budget.
- At 30 June 2019, Stage One of the project was substantially complete. The actual cost of the project, \$70.10m, was \$1.00m below the revised budget amount of \$71.10m and compared favourably against the original budget of \$70.50m.

Submissions and comments received

In accordance with section 30(2) of the *Audit Act 2008*, a summary of findings was provided to the Minister for Local Government, DCC, and directors of P+i, Providore Place Devonport Pty Ltd (PPD) and Fairbrother Pty Ltd (Fairbrother) with a request for submissions or comments. Responses, or a fair summary of them, are included in Appendix 4.

Auditor-General's conclusion

DCC's governance and procurement processes for management of the Living City project were not effective as measured against audit criteria 3 due to DCC failing to follow sound commercial and governance processes before entering into the Providore Place head lease. This included failing to obtain independent legal advice prior to entering into the head lease and not adequately managing the relationship risk between DCC and P+i in entering into the head lease.

It is my conclusion that, except for the matters described above, governance and procurement activities undertaken by DCC in connection with the Living City project, as measured against the audit criteria, were in all material respects performed effectively.



Rod Whitehead

Auditor-General

19 September 2019

CONTEXT

Living City project

The Living City project is one of the largest urban renewal projects undertaken in regional Tasmania. Its primary objective is to transform Devonport through the creation of new retail, business/service and waterfront precincts focused on highlighting tourism, arts, food and services.

The project is expected to benefit the North West region and is estimated to generate \$250.00m in construction investment over the next decade.

DCC officially opened Stage One on 3 September 2018, representing a \$70.10m investment in Devonport which included the new multi-purpose civic building, the Paranaple Centre (Centre). The Centre accommodates a library, integrated customer service centre including Service Tasmania, a café, Devonport Online, DCC offices and an 800 seat conference centre.

Stage One also included a multi-level car park and a food pavilion, known as Providore Place, to showcase the region's premium produce through restaurants, a distillery, accredited training facilities and market spaces. The Providore Place facility is approximately 1 500m², comprising five permanent tenancies, an open market space and a mezzanine floor to accommodate a cooking school and food education opportunities.

At the beginning of November 2018, the Devonport Art Gallery, Visitor Information Centre and the former Devonport Entertainment Centre relocated to an adjoining site, now known as the Paranaple Arts Centre and complete the precinct.

Stage One was a collaboration between the three tiers of government with funding provided by DCC, and the Tasmanian and Australian Governments.

Stage Two of the Living City project, known as the Waterfront Precinct comprises a hotel, residential apartments, a riverside park and a potential marina. In November 2018, DCC lodged a development application for the redevelopment of the waterfront parkland as part of Stage Two of the project.

The total value of Stage Two is estimated to be about \$50.00m. The Australian Government announced \$10.00m in funding towards the waterfront parkland with the balance largely funded by private investment.

Timeline of notable events

The following events have been highlighted due to their significance:

Date	Notable event
December 2012	DCC endorsed the Central Business District (CBD) Investment and Development Strategy. It identified the need to capitalise on Devonport's role as the retail and service hub for the region.
June 2013	DCC appointed P+i for a maximum term of 12 months to collaborate on developing the concept for CBD revitalisation.
August 2014	Living City Master Plan (Master Plan) released by DCC.
September 2014	Master Plan adopted by DCC.
September 2014	DCC entered into a four year contract with P+i, without seeking tenders, to progress the concepts in the Master Plan into detailed plans and manage the development to completion.
March 2016	DCC adopted a funding model and plans for Stage One.
June 2016	Construction work on Stage One commenced.
July 2016	Council confirmed the construction of Providore Place and entered into an agreement with PPD.
August 2017	DCC approved Fairbrother as the preferred proponent to progress the Stage Two hotel development.
October 2017	DCC and Fairbrother signed a Memorandum of Understanding (MOU) for the purchase of the land and development, financing and construction of the hotel.
December 2017	Practical completion of the multi-level car park and Providore Place. The multi-level car park commenced operations.
July 2018	Rental payments under the head lease for Providore Place were to commence.
August 2018	Practical completion of the Paranaple Centre.
September 2018	Official opening of Stage One.
December 2018	Development Application for Stage Two approved.
January 2019	Construction of Stage Two commenced.

Governance and compliance requirements

DCC's Model Code of Conduct Policy articulates the principles of good governance required of the Aldermen (Councillors) of DCC. In adopting the Code of Conduct, Aldermen (Councillors) commit to being:

- Accountable – Explain, and be answerable for, the consequences of decisions made on behalf of the community.
- Transparent – Ensure decision making processes can be clearly followed and understood by the community.
- Law-abiding – Ensure decisions are consistent with relevant legislation or common law, and within the powers of local government.
- Responsive – Represent and serve the needs of the entire community while balancing competing interests in a timely, appropriate and responsive manner.
- Equitable – Provide all groups with the opportunity to participate in the decision making process and treat all groups equally.
- Participatory and inclusive – Ensure that anyone affected by or interested in a decision has the opportunity to participate in the process for making that decision.
- Effective and efficient – Implement decisions and follow processes that make the best use of the available people, resources and time, to ensure the best possible results for the community.
- Consensus oriented – Take into account the different views and interests in the community, to reach a majority position on what is in the best interests of the whole community, and how it can be achieved.

In relation to procurement, sections 333A and 333B of the LGA, provide requirements for a council relating to tenders and contracts for goods and services. This includes maintaining a Code for Tenders and Contracts and complying with that Code when acquiring goods and services. The requirements of the Code are to be consistent with the requirements of the LGR. The Code governs how DCC is to procure goods and services including the need to obtain quotes or tenders.

The Code has specific procurement principles ensuring:

- Open and effective communication - transparent and open purchasing processes.
- Value for money - procurement at the most competitive price available, but value for money does not mean buying at the lowest price.
- Enhancement of the capabilities of the local business industry - engaging local markets.
- Ethical behaviour and fair dealing - promote procurement practices that are legal, ethical, fair and unbiased.

Further details of the legislative requirements under the LGA and LGR are included in Appendix 1. Further details on the procurement principles, taken from a Local Government Association of Tasmania guide - *Code for Tenders and Contracts*, are included in Appendix 2.

DETAILED FINDINGS

1. Did the engagement of contractors and consultants comply with DCC procurement policies and the LGA?

1.1 Did DCC comply with the procurement principles outlined in its procurement Code and the LGA?

In assessing whether DCC complied with the procurement principles outline in its procurement Code and the LGA we:

- examined Living City project costs for vendors with expenditure greater than \$100 000 covering the period from June 2013 to February 2019. This period represented all construction costs to practical completion of Stage One of the project. We identified whether goods and services procured were subject to public tender
- determined whether DCC applied the exemption from public tender available under the LGR to any of the procurements
- examined whether the selected procurements were subsequently varied, and if so, were those variations appropriately approved
- reviewed all significant contracts and expenditure to assess whether there was any evidence of invoice splitting.

We identified 14 instances where a procurement exceeded the threshold requiring tenders. For 12 of these procurements, DCC had undertaken a procurement process that complied with its Code, LGA and LGR. The largest contract awarded related to the construction component of the Living City development, which was awarded to Fairbrother with a tender of \$59.00m. The tender process was subject to an external probity review, using external lawyers as probity advisors.

For the two remaining procurements, DCC applied the exemption from public tender available under the LGR. We examined the appropriateness of the use of the exemption under sub-criteria 1.3.

Of the contracts reviewed, we found one instance where there was a subsequent variation to the contract amount. In July 2017, DCC endorsed a fee reduction to the PDMA with P+i. Based on our review of the relevant DCC minutes, the amendment did not place additional procurement obligations on DCC.

In reviewing all significant contracts and expenditure related to Stage One of the Living City project, no evidence of invoice splitting was found.

1.2 Did DCC comply with its annual reporting requirements in relation to tenders and contracts?

We reviewed DCC's tender and contract disclosure in annual reports covering 30 June 2013 to 30 June 2018. Based on the requirements of the LGR, we expected DCC to report details of contracts entered into during each year for the supply or provision of goods and or services valued at or above the legislated prescribed amount. In addition, DCC was to report all instances where the non-application of the public tender process applied.

Generally, DCC had complied with the annual reporting requirements of the LGA and the LGR. We found one instance where disclosure did not comply with the LGR. This related to disclosure of annual payments made under the PDMA rather than the required total value of the contracted goods or services. DCC advised a total contract amount was not disclosed because of the variable components of the agreement. Details of this contract are included under criteria 2.

Recommendation

1. DCC review internal processes and procedures to ensure future compliance with annual reporting requirements in relation to tenders and contracts.

1.3 Did DCC establish adequate procedures for review and reporting in relation to the purchase of goods or services in circumstances where a public tender process was not used?

Where DCC relied upon the exemption from public tender available under the LGR, we expected DCC would have appropriately documented:

- its decisions to procure without seeking public tenders
- how it had ensured it had obtained value for money
- how it managed any conflicts of interest in relation to the decision.

As noted under sub-criteria 1.1, we identified two contracts where DCC applied the exemption from public tender. The first contract related to the engagement of P+i in June 2013 to provide consultancy services for the development of a plan for the revitalisation of the CBD. P+i was paid a total of \$0.24m in fees under the contract. In appointing P+i, DCC unanimously resolved on 17 June 2013:

'... that owing to the fact that extenuating circumstances in the form of the speciality of services and skills necessary to perform the relevant tasks of the project on behalf of Council and the difficulty in defining the project scope, that tenders not be called in accordance with Council's Code of Tenders and Contracts, Local Government Act 1993 and Local Government (General) Regulations 2005.'

Following finalisation of the Master Plan for the Living City project, a second contract was entered into by DCC with P+i on 9 September 2014. DCC engaged P+i under the PDMA to deliver the recommendations from the Master Plan. DCC paid P+i \$5.26m in total over the four year period of the contract.

In appointing P+i, senior management at a meeting on 25 August 2014, provided a comprehensive report to Council on the proposed contract and a recommendation not to seek tenders. The report considered statutory requirements, services to be provided, and financial and risk implications. The report concluded:

'Both extenuating circumstances and the unavailability of competitive or reliable tenderers apply to the proposed Project and Development Management Agreement with (the contractor) and therefore a tender process is not considered the best outcome for Council.'

In reviewing the appointments, we enquired into any pre-existing relationships between DCC and P+i to determine if a conflict of interest may have existed. Responses provided by DCC and our review of Council Minutes and declared interests did not identify any pre-existing relationship or potential conflicts of interest before the initial contract in June 2013.

In examining evidence related to the appointment of P+i, the process followed by DCC in applying the exemptions met the procedural requirements of the LGA and LGR. DCC documented the reasons for adopting the exemption for each contract with P+i. Detailed reports from management were provided to Council on the matter. Council unanimously approved each recommendation.

Determining a legal interpretation of the term 'extenuating circumstances' is difficult. The use of the term in the LGR does not accord with its usual legal meaning, 'to diminish the seriousness of criminal conduct'. In attributing a meaning, it is reasonable to surmise a reference to 'extenuating circumstances' may be considered an exceptional circumstance. Clarity on the use of 'extenuating circumstances' could be improved with a definition within

the LGA or LGR. This would ensure councils only apply the exemption in truly exceptional circumstances.

Recommendations

2. The Government consider reviewing the circumstances in which the exemption from public tender under the LGR can be applied, including providing a definition of extenuating circumstances.
3. The Director of Local Government consider providing guidance on minimum documentation requirements where the exemption from public tender is applied, including a requirement for detailed market research and analysis to be undertaken.

2. Did DCC take steps to assess the commerciality of the PDMA?

As noted under sub-criteria 1.3, DCC did not seek tenders before entering into the PDMA with P+i. Based on the quantum of the estimated costs payable to P+i under the PDMA, we expected DCC would have:

- taken reasonable steps to assess the commerciality of amounts payable and obligations of both parties under the agreement, and documented the outcomes of those assessments
- taken reasonable steps to assess the basis or justification for subsequent amendments to the agreement, and documented the outcomes of those assessments
- ensured payments made to P+i were consistent with the terms of the agreement.

DCC entered into the PDMA with P+i in September 2014 following a lengthy negotiation process with P+i to finalise the terms of the agreement. The PDMA was a 4-year agreement which required P+i to manage the implementation of Stage One of the Master Plan and provide assistance in developing Stages Two and Three. The agreement included a number of specific and separate services, including:

- Development management – a monthly retainer of \$0.05m was to be paid for a maximum of two years. P+i was responsible for managing all aspects of the development including progressing the Master Plan through to completion of Stage One.
- Financial modelling – P+i prepared a detailed financial model incorporating project costs and revenues, including land acquisition/lease, infrastructure services, and other transaction costs. The model was used to determine project funding requirements and to test viability in relation to various sensitivities.
- Packaging and arranging of financing – P+i was responsible for arranging the financing for Stage One including the re-financing DCC's existing debt.
- construction management – P+i was to procure the construction contractor and manage delivery of the project.
- Retail tenant negotiations – P+i was to secure retail tenants for the food pavilion.

The PDMA included fixed and variable payment components linked to specific outcomes in the project. At the time of entering the agreement, preliminary estimated costs payable to P+i for works related to the multi-purpose civic building ranged between \$3.90m and \$4.80m. The final amount payable under the PDMA, in connection with the multi-purpose civic building, was to be determined on the completion of specific deliverables.

The decision to enter into the PDMA with P+i was considered by Council on 25 August 2014. Our examination of the process leading to the engagement of P+i for project development management services, which included inspection of documentation relating to the negotiation of the PDMA and Council meeting papers, indicated DCC had considered the commerciality of the agreement. This included consideration of:

- the nature of the PMDA and services to be provided under the agreement
- the experience and calibre of P+i staff to provide the services
- the reasonableness of the total estimated fee as a percentage of the total project cost, which included consideration of project development management fees as published on the Australian Institute of Architects website at that time
- recognition of success fee elements within the PDMA which provided an incentive for P+i to perform and protection for DCC where required outcomes were not achieved
- legal advice relating to terms and conditions within the PDMA.

We concluded DCC had taken reasonable steps to assess the commerciality of amounts payable under the PMDA and obligations of both parties under the agreement, although the documentation of the assessment of the reasonableness of amounts payable under the contract could have been improved.

During the development management phase of Stage One, DCC renegotiated the terms of the PDMA to realign costs with the scope of the final construction plans for the multi-purpose building, car park, food pavilion and market square. The scale of Stage One increased from that envisaged at the time of drafting the original PDMA. Consequently, the percentage based incentive fee became arguably excessively inflated in relation to the extra work involved. The amended PDMA changed DCC's financial commitment to some of the variable components. Council, at its July 2016 meeting, endorsed the revised PDMA. The amended PDMA reduced DCC's estimated costs from approximately \$7.00m, based on final scope of the project, to around \$5.80m, primarily through savings in:

- packaging and arranging finance, as the percentage payable was lowered from 1.5% to 1.0% of the amount financed, saving \$0.30m
- construction management, with the initial remuneration of 3.0% of construction costs changed to a fixed amount of \$1.50m, which approximated 2.6% of construction costs, a saving of approximately \$0.20m. The percentage share of contingency savings payment also reduced from 50% to 33%, a saving of \$0.40m.

Based on the evidence presented, DCC took reasonable steps to assess and document the basis or justification for the subsequent amendment to the PDMA. By the completion of the contract in October 2018, DCC had paid P+i a total of \$5.26m.

In reviewing all payments made to P+i, we found they were made in accordance with the terms of the PDMA.

Recommendation

4. In negotiating a commercial contract for the supply of goods and services, in the absence of a public tender because of extenuating circumstances, DCC should sufficiently document its assessment of the reasonableness of amounts payable under the contract.

3. Did DCC follow sound commercial and governance processes in entering into the Providore Place head lease?

On 1 November 2016, DCC finalised a head lease agreement with PPD for Providore Place. In entering into the lease, we expected DCC would have:

- considered and complied with applicable policies and legislation
- assessed the commerciality of the leasing arrangement
- undertaken appropriate governance activities.

DCC owns Providore Place and initially envisaged managing individual tenancies within the facility. In April 2016, following an approach from P+i, DCC considered whether it should enter into a head lease with P+i. Advantages of a head lease arrangement included:

- tenancy risk transfer to a third party
- removal of DCC from operational responsibility
- certainty of income for DCC from a long-term lease
- a secure long-term lease would simplify any future sale.

Council also identified disadvantages of entering into the head lease, such as the possible loss of income if the facility achieved full tenancy and the public perception of entering into a head lease with P+i. Council also acknowledged the benefit of engaging an independent agent to undertake negotiations with P+i to determine if a suitable head lease could be agreed.

In May 2016, Council obtained an independent expert valuation of possible rental returns for both the head lease and individual tenancies. The valuer noted a material discount to the aggregate net market rental value of the respective tenancies relative to the net market rental value subject to a head lease. The valuer stated the margin was considered appropriate for profit and risk.

On 25 July 2016, Council decided to confirm the construction of Providore Place and enter into an agreement with PPD, a company in which P+i had a 50% direct ownership interest, to operate the facility. Key terms of the agreement were:

- an initial 10 year term, with two five-year extension periods
- a fixed base rental, \$0.28m per annum
- a 70% share of any surplus after payment of the base rent and agreed operating expenses, up to a further \$0.12m per annum
- a 30% share of any profits after payment of the base rent and the additional \$0.12m.

We reviewed DCC's leasing policy and the LGA to determine the requirements DCC needed to comply with when entering a lease of this type. DCC's policy was silent on property leases. We noted section 177(2) of the LGA states:

'Before a council sells, leases, donates, exchanges or otherwise disposes of any land, it is to obtain a valuation of the land from the Valuer-General or a person who is qualified to practise as a land valuer under section 4 of the Land Valuers Act 2001.'

DCC obtained an independent valuation for Providore Place in compliance with its obligations under the LGA. Based on the valuation obtained, the Providore Place head lease agreement provided an appropriate commercial return to DCC. The valuation was based on expected rental of the building as owner, with a separate entity holding the head lease.

The legislative requirements on councils related to leasing, appear to be limited to ensuring the lease amount is supported by an independent valuation. This leasing arrangement indicated deficiencies in the current requirements. In particular, DCC was not required to

open the leasing opportunity to other interested participants. Given the long-term nature of some leasing agreements, further guidance in the LGA or LGR would assist councils considering undertaking these activities.

Evidence obtained by us indicated the head lease was primarily drafted by P+i and it appeared to be missing a number of standard lease clauses. Council advised the lease was prepared based on an agreed 'term sheet' approved by Council in the knowledge that it would not be a traditional lease arrangement but more akin to a cooperative shared arrangement DCC did not obtain independent legal advice on the lease agreement prior it being signed.

DCC entered into the head lease with PPD knowing:

- the existing relationship with P+i exposed the Council to potential public criticism for not engaging in an open market process for the food pavilion operations
- potential conflicts in future decision making could arise given P+i's development management role.

Despite these risks, the manner in which the lease agreement was entered into indicated Council did not exercise appropriate governance over the arrangement, and did not adequately manage the close relationship risk with P+i and PDD.

In examining the governance activities around the establishment of the head lease, the application of DCC's Model Code of Conduct Policy and principles of good governance, we found:

- the head lease, primarily drafted by P+i, appeared to be missing a number of standard lease clauses
- DCC did not obtain independent legal advice on the lease agreement prior to it being signed
- the relationship risk between DCC and P+i in entering into the head lease arrangement, although acknowledged, was not adequately managed
- DCC had not met good governance principles relating to transparency, equity, participation and inclusion and effective and efficient decision making.

We have further noted that on 24 September 2018, Council approved a variation to the lease to defer the payment of rent by PPD from 1 July 2018 to 1 February 2019, due to delays in finalising fit outs for tenancies. As at 30 August 2019, PPD was in dispute with DCC over the Providore Place head lease agreement and its rental liability.

DCC sought legal advice and was assessing its position. As at 30 August 2019, DCC had only received minimal rent for Providore Place, with the matter currently subject to arbitration.

Recommendations

5. The Government consider reviewing the LGA and LGR to strengthen requirements relating to the lease of property. Specifically, significant lease opportunities should be open to all interested market participants.
6. DCC update its policies to provide guidance relating to property lease transactions.
7. DCC amend its policies to clarify when independent legal advice should be obtained in connection with property leases.
8. DCC review its measures to mitigate risks arising from contracts entered into where potential conflicts of interest may arise.

4. Did DCC follow appropriate commercial and governance processes for the sale of land for the Stage Two hotel development?

In April 2017, DCC advertised a RFP to progress the hotel development component of Stage Two of the Living City project. DCC sought developers willing to purchase the site, build and finance the hotel. The land for the hotel was made available by the relocation of department store Harris Scarfe to the Council's former temporary offices at 17 Fenton Way.

In seeking RFPs we expected DCC would have:

- complied with its policies and the LGA (refer to Appendix 3) in seeking RFPs to purchase and develop the site
- ensured the sale of land for the development met DCC's valuation expectations
- appropriately assessed financial implications for DCC arising from the development
- ensured the development application was consistent with stated objectives and vision for the Living City project.

RFP submissions closed on 30 June 2017, with five submissions received. None of the submission fulfilled all the requirements of the RFP. At a Council meeting in August 2017, DCC considered options to move the hotel development forward. DCC could sponsor the project, seek finance, secure an operational contract and construct the hotel or nominate a preferred proponent. Given DCC's other financial commitments and the submission provided by Fairbrother, who was the only proponent to demonstrate the capacity to construct the hotel, Fairbrother was approved as the preferred proponent. DCC authorised the General Manager to negotiate suitable terms for the appointment of Fairbrother.

In October 2017, DCC and Fairbrother signed a MOU for the purchase of the land, development, financing and construction of the hotel. The MOU appointed Fairbrother as responsible for the operations on completion of construction. DCC was required to demolish existing buildings on part of the hotel development site to prepare the site for sale.

Under section 177(2) of the LGA:

'Before a council sells, leases, donates, exchanges or otherwise disposes of any land, it is to obtain a valuation of the land from the Valuer-General or a person who is qualified to practise as a land valuer under section 4 of the Land Valuers Act 2001.'

In August 2018, DCC obtained an independent expert valuation for the site of the hotel development, based on a greenfield site (site cleared of existing building improvements). The valuation, based on market value with vacant possession, was \$1.45m. Notwithstanding the market valuation, the valuer noted a degree of volatility in prices in the property market which was influenced by the particular circumstances of purchasers and vendors. Having regard to this price volatility, the valuer considered an appropriate range of values for the property to be between \$1.35m and \$1.55m.

In December 2018, DCC entered into an agreement with Fairbrother to sell the land for the hotel development site for \$1.18m, on the condition Fairbrother complete building demolition work for DCC. The sale agreement provided, in the event of the termination of the sale agreement, Fairbrother would receive a maximum payment of \$0.17m in respect of any demolition costs incurred. The implied value of the land sold for the hotel development was \$1.35m, which was within the valuation range advised by the valuer.

DCC had complied with the section 177(2) of the LGA by obtaining an independent valuation for the site, based on a greenfield site, prior to the sale.

The contract for the sale of the site included conditions requiring Fairbrother to lodge a development application for the hotel that was substantially the same as the Master Plan specifications. In November 2018, Fairbrother lodged a development application for a \$35.00m hotel and apartment complex, which will include 137 hotel rooms and 12 residential apartments on the top two floors.

Advice from DCC indicated the development application process provided DCC a mechanism to ensure consistency with the stated objectives and vision for the Living City project. DCC will monitor construction through its current building and development processes.

After reviewing information related to the hotel development, we were satisfied there were no further financial implications for DCC arising from the hotel development. The hotel development project and financial risks rest with Fairbrother.

5. Did DCC adhere to its budget for Stage One of the Living City project?

We examined information relating to the Stage One budget to determine whether the final cost of the project was in line with the original budget and whether revisions to the budget were documented, monitored and approved by DCC.

The financial model for Stage One was developed by P+i under the PDMA. The model detailed information related to capital expenditure, funding the development and forecasts of the financial impact for DCC. In March 2016, DCC adopted the model.

The original budget for the project was \$70.50m, to be funded by Tasmanian and Australian Government grants, \$10.50m and \$10.00m respectively, DCC’s cash reserves, \$11.00m, and borrowings of \$39.00m.

In March 2017, approval was provided by DCC to increase the budget to \$71.10m, due to additional scope associated with the fit-out of the LINC facility of \$1.50m (fully funded by the Tasmanian Government), offset by identified savings in the project of \$0.90m.

At the date of this Report, Stage One was substantively complete, with only the finalisation of the fit-out of Providore Place still pending. Expected future cost are expected to be minimal.

Our review also noted DCC and its project manager P+i adequately documented, monitored and reported the progress of the project against budget. Monthly detailed progress reports were provided to DCC on actual and budget costs.

The following table provides a summary of the original budget, revised budget and actual expenditure by facility:

Expenditure	Original Budget	Revised Budget	Actual to June 2019
Paranaple centre	\$45.30m	\$45.90m	\$45.60m
Car park	\$14.60m	\$14.60m	\$14.00m
Food pavilion and market square	\$10.60m	\$10.60m	\$10.50m
Total	\$70.50m	\$71.10m	\$70.10m

Financial information sourced from DCC internal project reports

At 30 June 2019, the actual cost of the project, \$70.10m, was \$1.00m below the revised budget amount of \$71.10m. This was mainly due to cost savings on the construction and fit-out of the Paranaple centre.

The following table provides a summary of the original budget, revised budget and actual funding by funding source:

Expenditure	Original Budget	Revised Budget	Actual to June 2019
Australian Government	\$10.00m	\$10.00m	\$10.00m
Tasmanian Government	\$10.50m	\$12.00m	\$13.00m
DCC – cash reserves	\$11.00m	\$11.00m	\$13.30m
DCC – borrowings	\$39.00m	\$38.10m	\$33.80m
Total	\$70.50m	\$71.10m	\$70.10m

Financial information sourced from DCC internal project reports

AUDITOR-GENERAL'S INDEPENDENT ASSURANCE REPORT

This independent assurance report is addressed to the President of the Legislative Council and the Speaker of the House of Assembly. It relates to my examination of the procurement of goods and services by Dorset Council in relation to the Blue Derby Bike Trails.

Audit objective

The objective of the audit was to form a reasonable assurance conclusion on Dorset Council's compliance with its procurement policies and reporting obligations under its Code, the LGA and LGR relating to work to extend the Blue Derby Bike Trails (the requirements).

Audit scope

The audit scope covered the contract entered into between Dorset Council and World Trail Pty Ltd (World Trail) in July 2017 and reporting obligations under regulation 29 of the LGR for the financial year ended 30 June 2018.

Audit approach

The audit was conducted in accordance with Australian Standard on Assurance Engagements ASAE 3100 *Compliance Engagements* (ASAE 3100) issued by the Australian Auditing and Assurance Standards Board, to express a reasonable assurance conclusion.

The audit evaluated the following criteria:

1. Did Dorset Council comply with its Code, the LGA and LGR in awarding the contract for Stage Two of the Blue Derby Bike Trails to World Trail?
2. Did Dorset Council comply with its annual reporting requirements relating to the contract for Stage Two of the Blue Derby Bike Trails?

ASAE 3100 requires that I plan and perform my procedures to obtain reasonable assurance about whether Dorset Council has complied, in all material respects, with the requirements as evaluated against the audit criteria.

An assurance engagement to report on Dorset Council's compliance with the requirements involves performing procedures to obtain evidence about the activity and controls implemented to meet the requirements. The procedures selected depend on my judgement, including the identification and assessment of risks of material non-compliance with the requirements, as evaluated against the audit criteria.

I have conducted my reasonable assurance audit by making such enquiries and performing such procedures I considered reasonable in the circumstances. Evidence for the audit was primarily obtained through discussions with relevant Dorset Council personnel and examination of documentation related to the development of Blue Derby Bike Trails and Dorset Council's Annual Reports.

I believe that the evidence I have obtained is sufficient and appropriate to provide a basis for my conclusion.

Dorset Council's responsibilities

Dorset Council was responsible for ensuring the procurement of goods and services and reporting of contracts and tenders was undertaken in compliance with its Code, the LGA and LGR.

Auditor-General's responsibility

In the context of this audit, my responsibility was to express an opinion on Dorset Council's compliance, in all material respects, with its Code, the LGA and LGR relating to processes to extend the Blue Derby Bike Trails, as evaluated against the criteria. Independence and quality control

I have complied with the independence and other relevant ethical requirements relating to assurance engagements, and apply Auditing Standard ASQC 1 *Quality Control for Firms that Perform Audits and Reviews of Financial Reports and Other Financial Information, and Other Assurance Engagements* in undertaking this audit.

Inherent Limitations

Because of the inherent limitations of an assurance engagement, together with the internal control structure it is possible that fraud, error, or non-compliance with the requirements may occur and not be detected. A reasonable assurance engagement does not provide assurance on whether compliance with the requirements will continue in the future.

Findings and recommendations

Findings and recommendations for the audit criteria are summarised below. The recommendations highlight actions that Dorset Council and the Government should undertake or consider.

Findings and recommendations

1. Did Dorset Council comply with its Code, the LGA and LGR in awarding the contract for Stage Two of the Blue Derby Bike Trails to World Trail?

- The procurement process followed by Dorset Council in applying the exemption met the procedural requirements of the LGA and LGR.
- Clarity on the use of 'extenuating circumstances' could be improved with a definition within the LGA or LGR. This would ensure councils only apply the exemption in truly exceptional circumstances.
- The extension clause included in the contract for Stage Two by Dorset Council, if used, would contravene the LGA.

Recommendation:

1. The Government consider reviewing the circumstances in which the exemption. From public tender under the LGR can be applied, including providing a definition of extenuating circumstances.
2. Dorset Council should not use the extension clause included in the Stage Two contract with World Trail.

Findings and recommendations

2. Did Dorset Council comply with its annual reporting requirements relating to the contract for Stage Two of the Blue Derby Bike Trails?

- Dorset Council did not fully comply with its reporting obligations under regulation 29 - Annual reporting requirements in relation to tenders and contracts, as it failed to disclose the application of the exemption under regulation 27(i) in awarding the contract and did not provide a brief description of the reason for the exemption.

Recommendation:

3. Dorset Council review its internal processes and procedures to ensure future compliance with the annual reporting requirements of the LGR.

Submissions and comments received

In accordance with section 30(2) of the *Audit Act 2008*, a summary of findings was provided to the Minister for Local Government, Dorset Council and directors of World Trail with a request for submissions or comments. Responses, or a fair summary of them, are included in Appendix 4.

Auditor-General's conclusion

In my opinion, Dorset Council complied, in all material respects, with its Code, the LGA and LGR relating to processes to extend the Blue Derby Bike Trails, as evaluated against the criteria.



Rod Whitehead

Auditor-General

19 September 2019

CONTEXT

Blue Derby Bike Trail contracts

In 2013, Dorset Council received \$2.45m in funding from the Australian Government's Community Development Grant Program for the development of mountain bike trails near Derby and Weldborough, later named the Blue Derby Bike Trails. Other funding from a partnership of local stakeholders increased the total budget to \$3.10m, making it the largest project of this kind in Australia.

Following a public tender process, in November 2013 Dorset Council awarded World Trail a contract to develop and construct the Blue Derby trails network (for the purpose of this Report, this will be referred to as Stage One). Construction commenced in April 2014, with 80 kilometres of trails completed in June 2016. In February 2015, Dorset Council officially opened the trails, with subsequent openings of completed trails completed by October 2016. In mid 2017, additional Tasmanian Government funding of \$0.80m was received to extend the Blue Derby Bike Trails, with Dorset Council contributing \$0.70m towards the project.

In July 2017, Dorset Council awarded the contract, with an estimated cost of \$1.40m, for the extension of the Blue Derby mountain bike trails to World Trail without seeking tenders (identified as Stage Two). The new contract resulted in the construction of 35 kilometres of new trails, which opened in November 2018, at a cost of \$1.60m.

In their meeting of 17 July 2017, Dorset Council by an absolute majority, applied the exemption from seeking public tenders. Specifically, Dorset Council relied on the LGR and its own Code, noting:

'That the contract for the design and construction of stage 2 of the Derby MTB trail network be exempt from the normal Council tender process in accordance with:

- a. Regulation 27 of the Local Government (General) Regulations 2015 because of extenuating circumstances and the unavailability of competitive and reliable tenders; and*
- b. Section 4 (h) of the Dorset Council Code for Tenders and Contracts where the original product or service has been selected through an open tender process and the request for exemption relates to the proposed purchase of an upgrade or addition to the existing system, and there are limited supply options.'*

The contract included the following extension clause:

The Council may, at the discretion of the Council and subject to the contractor's acceptance, extend this contract on the same terms and conditions as this Contract (except the Contract Sum is to be increased by reference to any increase in the Consumer Price Index (all groups Hobart) between the date of this Contract and the Date of any extension of it) if the Council requires additional trails or features at the Site in order to cater for the Site hosting mountain bike events including but not limited to Enduro World Cup Series events, Crank Works events, a round of the Australian Mountain Bike Series or if the Council raises additional funding to expand the trails at the Site.

Dorset Council indicated the extension clause provided it with options for further additions to the trail network. Dorset Council referenced regulation 23(5) *Public Tenders* of the 2015 LGR (refer to Appendix 1) to substantiate the inclusion of the extension clause.

Compliance requirements

The LGA requires Dorset Council to maintain a Code relating to tenders and contracts that is consistent with the LGA and LGR. This governs how Dorset Council is to procure goods and services including the need to obtain quotes or tenders.

The Code has specific procurement principles ensuring:

- Open and effective communication - transparent and open purchasing processes
- Value for money - procurement at the most competitive price available, but value for money does not mean buying at the lowest price
- Enhancement of the capabilities of the local business industry - engaging local markets
- Ethical behaviour and fair dealing - promote procurement practices that are legal, ethical, fair and unbiased.

Further details of the legislative requirements under the LGA and LGR are included in Appendix 1. Further details on the procurement principles, taken from the Local Government Association of Tasmania guide, are included in Appendix 2.

DETAILED FINDINGS

1. Did Dorset Council comply with its Code, the LGA and LGR in awarding the contract for Stage Two of the Blue Derby Bike Trails to World Trail?

In assessing Dorset Council's compliance with its procurement policies, Code, LGA and LGR in awarding the contract for Stage Two of the Blue Derby Bike Trails to World Trail, we expected to find the:

- basis for applying the exemption from public tender in accordance with the requirements of the LGA and LGR
- basis for applying the exemption from public tender in accordance with the requirements of its own procurement policies and Code
- inclusion of an extension clause in the contract for Stage Two would be in compliance with the LGA and LGR.

We examined relevant documentation, including council Minutes, and made enquiries of Dorset Council on the process undertaken in granting the exemption to assess whether this was undertaken in accordance with the Code, the LGA and LGR. The process followed by Dorset Council in applying the exemption met the procedural requirements of the LGA and LGR. Dorset Council considered World Trail were the only constructor of mountain bike trails able to deliver the standard required at Derby. This was based on the initial tender process for Stage One track construction and Dorset's view of the unavailability of competitive and reliable tenders.

In adopting the exemptions, Dorset Council relied on extenuating circumstances. Determining a legal interpretation of the term 'extenuating circumstances' is difficult. The use of the term in the LGR does not accord with its usual legal meaning, 'to diminish the seriousness of criminal conduct'. In attributing a meaning, it is reasonable to surmise a reference to 'extenuating circumstances' may be considered an exceptional circumstance. Clarity on the use of 'extenuating circumstances' could be improved with a definition within the LGA or LGR. This would ensure councils only apply the exemption in truly exceptional circumstances.

We consider Dorset Council met the procedural requirements of the Code, the LGA and LGR.

We reviewed the extension clause included in the contract for Stage Two. Dorset Council included the clause under regulation 23(5) of the 2015 LGR which states:

- 'A council may extend a contract entered into by tender*
(a) as specified in the contract; or
(b) if the contract does not specify extensions, by an absolute majority.'

In our opinion, regulation 23 is not applicable, as Dorset Council did not enter into the contract for Stage Two through an open tender. In addition, extension clauses in contracts are generally used for the extension of various factors associated with existing goods or services being provided under the contract and not for the provision of new goods and services.

Were Dorset Council to apply the extension clause to future contracts, they would be in contravention of the LGA and potentially invalid.

Recommendations

1. The Government consider reviewing the circumstances in which the exemption under the LGR can be applied, including providing a definition of extenuating circumstances.
2. Dorset Council not use the extension clause included in the Stage Two contract with World Trail.

2. Did Dorset Council comply with its annual reporting requirements relating to the contract for Stage Two of the Blue Derby Bike Trails?

We examined Dorset Council's Annual Report for the financial year ended 30 June 2018, and reviewed the disclosures made in relation to the contract awarded to World Trail for the construction of Stage Two, as required by the LGR.

Dorset Council disclosed contract information in the Annual Report, however it failed to comply with regulation 29(2) by not disclosing the application of the exemption under regulation 27(i) in awarding the Stage Two contract.

Recommendation

3. Dorset Council review its internal processes and procedures to ensure future compliance with the annual reporting requirements of the LGR.

AUDITOR-GENERAL'S INDEPENDENT ASSURANCE REPORT

This independent assurance report is addressed to the President of the Legislative Council and the Speaker of the House of Assembly. It relates to my examination of the procurement of goods and services by GCC as recommended by the Board of Inquiry.

Audit objective

The objective of the audit was to form a reasonable assurance conclusion on GCC's compliance with its procurement and reporting obligations under its Code, the LGA and LGR (the requirements) as recommended by the Board of Inquiry.

The Board of Inquiry Report on GCC included the following three recommendations for consideration by the Auditor-General:

- GCC's Code be examined by the Auditor-General to determine whether it complies with the letter and the spirit of the LGA.
- The Auditor-General investigate whether GCC had complied with regulation 27(i) of the LGR.
- The Auditor-General investigate whether GCC complied with regulation 29 of the LGR.

This audit addresses those recommendations.

Audit scope

This audit examined procurement transactions from 1 November 2014 to 28 February 2017. Procurements examined in our report, *Investigation into procurement of goods and services from CT Management Group Pty Ltd by Glenorchy City Council* (CT Management Report)¹ tabled in Parliament on 17 October 2017 were excluded from this audit.

Annual reports examined for the purposes of assessing compliance with regulation 29 of the LGR covered the financial years ended 30 June 2015, 2016 and 2017.

Audit approach

The audit was conducted in accordance with Australian Standard on Assurance Engagements ASAE 3100 *Compliance Engagements* (ASAE 3100) issued by the Australian Auditing and Assurance Standards Board, to express a reasonable assurance conclusion.

The audit evaluated the following criteria:

1. Does GCC's Code comply with the letter and the spirit of the LGA?
2. Did GCC comply with regulation 27(i) of the LGR?
3. Did GCC comply with regulation 29 of the LGR?

ASAE 3100 requires that I plan and perform my procedures to obtain reasonable assurance about whether GCC has complied, in all material respects, with the requirements as evaluated against the audit criteria.

An assurance engagement to report on GCC's compliance with the requirements involves performing procedures to obtain evidence about the activity and controls implemented to meet the requirements. The procedures selected depend on my judgement, including the identification and assessment of risks of material non-compliance with the requirements, as evaluated against the audit criteria.

¹ *Report of the Auditor-General No. 1 of 2017-18 - Investigation into procurement of goods and services from CT Management Group Pty Ltd by Glenorchy City Council.*

I have conducted my reasonable assurance audit by making such enquiries and performing such procedures I considered reasonable in the circumstances. Evidence for the audit was primarily obtained through discussions with relevant GCC personnel and examination of documentation related to the contracts and tenders and GCC's Annual Reports.

I believe that the evidence I have obtained is sufficient and appropriate to provide a basis for my conclusion.

Glenorchy City Council's responsibilities

GCC was responsible for ensuring the procurement of goods and services and reporting of contracts and tenders was undertaken in compliance with its Code, the LGA and LGR.

Auditor-General's responsibility

In the context of this audit, my responsibility was to express an opinion on GCC's compliance, in all material respects, with its Code, the LGA and LGR relating to the procurement of goods and services and reporting of contracts and tenders, as evaluated against the criteria.

Independence and quality control

I have complied with the independence and other relevant ethical requirements relating to assurance engagements, and apply Auditing Standard ASQC 1 *Quality Control for Firms that Perform Audits and Reviews of Financial Reports and Other Financial Information, and Other Assurance Engagements* in undertaking this audit.

Inherent Limitations

Because of the inherent limitations of an assurance engagement, together with the internal control structure it is possible that fraud, error, or non-compliance with the requirements may occur and not be detected. A reasonable assurance engagement does not provide assurance on whether compliance with the requirements will continue in the future.

Findings

Findings for the audit criteria are summarised below.

Findings and recommendations

1. Does GCC's Code comply with the letter and the spirit of the LGA?

- GCC's current Code complied with the letter and spirit of the LGA and the requirements of the LGR.

2. Did GCC comply with regulation 27(i) of the LGR?

- No contracts exempted from public tender requirements under the LGR were identified.
- All significant procurements related to major projects, exceeding the prescribed amount, were subject to a public tender process.
- Two procurements, out of 67 examined, relating to the use of contractors exceeded the prescribed amount and contravened GCC's previous Code and the LGA.

3. Did GCC comply with regulation 29 of the LGR?

- All contracts awarded through a public tender process, during the period under examination, had been appropriately disclosed in the relevant Annual Report.
- GCC complied with its annual reporting requirements.

Submissions and comments received

In accordance with section 30(2) of the *Audit Act 2008*, a summary of findings was provided to the Minister for Local Government and GCC with a request for submissions or comments. Responses, or a fair summary of them, are included in Appendix 4.

Auditor-General's conclusion

In my opinion, GCC complied, in all material respects, with its Code, the LGA and LGR, as evaluated against the audit criteria.



Rod Whitehead

Auditor-General

19 September 2019

CONTEXT

Board of Inquiry Report

On 14 October 2015, the then Minister for Planning and Local Government announced the establishment of a Board of Inquiry under section 215(1)(b) of the LGA to make findings and recommendations with regard to the governance arrangements and practices of GCC since the October 2014 local government elections. The Terms of Reference for the Board of Inquiry were approved by the Treasurer on 22 August 2016. The powers and functions of a Board of Inquiry are set out in Part 13, Division 1 of the LGA.

On 16 November 2017, the Board of Inquiry's Report, *The Glenorchy City Council Board of Inquiry Report November 2017*, was provided to the Minister for Planning and Local Government pursuant to section 224(1) of the LGA. The Minister tabled the Board of Inquiry Report in Parliament on 28 November 2017.

The Report made several recommendations on GCC's procurement activities, including recommendations referring to the Auditor-General, as follows:

- 1. that council's Code for Tenders and Contracts be examined by the Auditor-General to determine whether it complies with the letter and the spirit of the [LGA] Act.*
- 2. that the Auditor-General investigate whether council has complied with reg. 27(i) of the General Regulations, which state that council is not compelled to undertake a public tender process for a contract for goods or services, if the council resolves by absolute majority and states the reasons for the decision, being that a satisfactory result would not be achieved by inviting tenders because of – (i) extenuating circumstances; or (ii) the remoteness of the locality; or (iii) the unavailability of competitive or reliable tenderers.*
- 3. that the Auditor-General investigate whether council has complied with section 29 of the General Regulations, which prescribes council's annual reporting requirements in relation to tenders and contracts.*

The Board of Inquiry Report referenced the term 'spirit of the LGA', but did not provide a definition. In completing this audit, 'spirit of the LGA' has been defined as GCC meeting the procurement requirements of the LGA, LGR and its procurement Code.

The Auditor-General decided to conduct an audit in line with the recommendations as it was important to understand if further non-compliance with the LGA had occurred, similar to that identified in our CT Management Report.

Compliance requirements

The LGA requires GCC to maintain a Code relating to tenders and contracts that is consistent with the LGA and LGR. This governs how GCC is to procure goods and services including the need to obtain quotes or tenders.

The Code has specific procurement principles ensuring:

- Open and effective communication - transparent and open purchasing processes.
- Value for money - procurement at the most competitive price available, but value for money does not mean buying at the lowest price.
- Enhancement of the capabilities of the local business industry - engaging local markets.
- Ethical behaviour and fair dealing - promote procurement practices that are legal, ethical, fair and unbiased.

Further details of the legislative requirements under the LGA and LGR are included in Appendix 1.

DETAILED FINDINGS

1. Does GCC's Code comply with the letter and the spirit of the LGA?

We considered there was no benefit in reviewing previous GCC Codes that were no longer current. We compared GCC's current Code, adopted in July 2017, to the LGR to determine compliance with both the letter and spirit of the LGA. We also compared the GCC Code to the model policy template related to a Code for Tenders and Contracts prepared by the Local Government Association of Tasmania (LGAT).

We found the GCC Code complied with the letter and spirit of the LGA and the requirements of the LGR. The GCC Code was also consistent with LGAT's model policy template. The main point of difference identified was GCC had extended its Code to include exemption provisions for quotation, not dealt with by either the LGA or LGR. This did not contravene the letter or spirit of the LGA.

2. Did GCC comply with regulation 27(i) of the LGR?

We reviewed GCC's Minutes and made enquiries of GCC senior management to identify any procurements where GCC had applied the exemption from undertaking a public tender. In addition, we reviewed, in aggregate, all vendors paid over \$100 000 in the period of the audit, from 1 November 2014 to 28 February 2017.

We expected any contract over the prescribed amount applicable at the time of procurement that did not go to public tender, would have been approved by GCC, using the exemptions provided under the LGR applicable at that time.

We did not identify any procurements where GCC had applied the exemption from public tender.

Two procurements, out of 67 examined, relating to the use of contractors exceeded the prescribed amount applicable at the time of procurement, \$100 000, and appeared to contravene GCC's Code (current at the time of the procurement) and the LGA. These procurements related to Derwent Park Stormwater Reuse Project and recruitment of executives. We concluded two instances out of 67 did not represent material non-compliance.

The exceptions share characteristics with the matters identified in the CT Management Report. The exceptions should not reoccur as GCC adopted the CT Management Report's recommendations to:

- review its internal processes and procedures to ensure future compliance with:
 - the LGA
 - the LGR
 - the Code
 - Council's internal policies, procedures and manuals
- ensure appropriate documentation is maintained to evidence procurement decisions and compliance with relevant requirements.

Derwent Park Stormwater Reuse Project

In July 2012, GCC appointed a contractor to undertake a project management role in the construction of its Stormwater Project with both parties signing an Independent Contractor's Agreement. The appointed contractor had been previously an employee of GCC from March 2011 until the date of the contract agreement. A further extension of the contract agreement occurred in July 2015.

Over the period under review, Council paid the contractor a total of \$0.40m.

GCC confirmed the contracted services were not subject to tender or quotation processes. GCC advised it had assessed the initial estimated costs to be below the prescribed amount for public tenders. Further, GCC also advised the Stormwater Project changed considerably from the initial scope resulting in the expected timeframes and level of services required being greater than originally estimated. GCC could not provide documentation to support this assessment.

We consider GCC's initial estimated engineering and project management services costs of less than \$0.10m unusual, when compared to the total amount paid over the period under review of, \$0.40m, and a total project cost of \$16.00m for the Derwent Park Stormwater Reuse Project.

Recruitment of executives

In May 2015, GCC appointed a contractor to assist with the recruitment of two directors and five managers. The appointment was completed using purchase orders. A review of the purchase orders found senior management directly appointed the contractor. Our enquiries did not identify any other contracts for the appointment of the contractor.

A review of the wording used in the purchase orders indicated a single process for all recruitments. GCC paid five invoices from March 2015 to May 2015, with the cost totalling \$0.12m.

We also found three invoices, for three separate recruitment services by the same contractor, each in excess of the threshold, \$10 000, for which quotations were required to be obtained in accordance with the GCC Code. Purchase orders were each certified by senior management and notated to the effect that quotations were not required.

The GCC Code at the time of these purchases required GCC staff to estimate the cost of goods and services required. In each of the procurements noted above, GCC was not able to provide documentation to evidence any assessment of the quantum of the work. Had an assessment of the costs been undertaken, GCC may have been required to either undertake a public tender process, or apply the exemption provided in regulation 27(h).

3. Did GCC comply with regulation 29 of the LGR?

In assessing whether GCC complied with its annual reporting requirements, we compared contracts awarded within the period under examination to GCC's contracts register and disclosure within Annual Reports for the years ended 30 June 2015, 2016 and 2017. We expected disclosure of all tendered contracts awarded in the relevant Annual Report.

We found all contracts awarded through a public tender process, during the period under examination, had been appropriately disclosed in the relevant Annual Report.

We concluded GCC had complied with its annual reporting requirements.

ACRONYMS AND ABBREVIATIONS

ASAE 3100	Australian Standard on Assurance Engagements ASAE 3100 <i>Compliance Engagements</i>
ASAE 3500	Australian Standard on Assurance Engagements ASAE 3500 <i>Performance Engagements</i>
Audit Act	<i>Audit Act 2008</i>
Board of Inquiry Report	<i>Glenorchy City Council Board of Inquiry Report November 2017</i>
CBD	Central Business District
Code	Code for Tenders and Contracts
CT Management Report	Report of the Auditor-General No. 1 of 2017-18, <i>Investigation into procurement of goods and services from CT Management Group Pty Ltd by Glenorchy City Council, October 2017</i>
DCC	Devonport City Council
Fairbrother	Fairbrother Pty Ltd
GCC	Glenorchy City Council
GST	Goods and Services Tax
LGA	<i>Local Government Act 1993</i>
LGAT	Local Government Association of Tasmania
LGR	<i>Local Government (General) Regulations 2015 (LGR)</i> , and former regulations
Master Plan	Living City Master Plan
Minister	Minister for Local Government
MOU	Memorandum of Understanding
PDMA	Project Development Management Agreement
PPD	Providore Place Devonport Pty Ltd
P+i	Project & Infrastructure Holdings Pty Ltd
RFP	Request for Proposal
World Trail	World Trail Pty Ltd

APPENDIX 1: LEGISLATIVE FRAMEWORK AND RELEVANT LEGISLATION RELATING TO PROCUREMENT

The LGA requires councils to maintain a Code relating to tenders and contracts that is consistent with the LGA and LGR. This governs how a council is to procure goods and services including the need to obtain quotes or tenders.

The Code has specific procurement principles ensuring:

- Open and effective communication - transparent and open purchasing processes
- Value for money - procurement at the most competitive price available, but value for money does not mean buying at the lowest price
- Enhancement of the capabilities of the local business industry - engaging local markets
- Ethical behaviour and fair dealing - promote procurement practices that are legal, ethical, fair and unbiased.

Generally, the requirements of the 2005 and 2015 LGR are consistent, with the major differences relating to the threshold requirement for the seeking of tenders increasing from \$100 000 to \$250 000 (excluding GST) and additional reporting requirements in annual reports required from 29 June 2015.

Key clauses from the LGR and the Code referred to in this Report are outlined below.

LOCAL GOVERNMENT (GENERAL) REGULATIONS 2005 (NOW EXPIRED)

Regulation 23 (5) *Annual reporting requirements in relation to tenders and contracts*

A council is to report the following in its annual report in relation to any contract for the supply or provision of goods or services valued at or exceeding the amount prescribed under sub regulation 1, entered into or extended under sub regulation (4)(b) in the financial year:

- (a) a description of the contract;
- (b) the period of the contract;
- (c) the periods of any options for extending the contract;
- (d) the value of any tender awarded or, if a tender is not required, the value of the contract excluding GST;
- (e) the business name of the successful contractor;
- (f) the business address of the successful contractor.

Regulation 27 *Non-application of public tender process*

- (1) Regulation 23 does not apply to the following:
 - (a) an emergency if, in the opinion of the general manager, there is insufficient time to invite tenders for the goods or services required in that emergency;
 - (b) a contract for goods or services supplied or provided by, or obtained through, an agency of a State or of the Commonwealth;
 - (c) a contract for goods or services supplied or provided by another council, a single authority, a joint authority or the Local Government Association of Tasmania;
 - (d) a contract for goods or services in respect of which a council is exempted under another Act from the requirement to invite a tender;
 - (e) a contract for goods or services that is entered into at public auction;
 - (f) a contract for insurance entered into through a broker;

- (g) a contract arising when a council is directed to acquire goods or services due to a claim made under a contract of insurance;
 - (h) a contract for goods or services if the council resolves by absolute majority and states the reasons for the decision, that a satisfactory result would not be achieved by inviting tenders because of –
 - (i) extenuating circumstances; or
 - (ii) the remoteness of the locality; or
 - (iii) the unavailability of competitive or reliable tenderers;
 - (i) a contract of employment with a person as an employee of the council.
- (2) A council is to report in its annual report all instances where sub-regulation (1)(a) or (h) has been applied with the following details:
- (a) a brief description of the reason for not inviting public tenders;
 - (b) a description of the goods or services acquired;
 - (c) the value of the goods or services acquired;
 - (d) the name of the supplier.

LOCAL GOVERNMENT (GENERAL) REGULATIONS 2015 (CURRENT)

Regulation 23 *Public tenders*

- (1) For the purpose of section 333A(1) of the Act, the prescribed amount is \$250 000 (excluding GST).
- (2) A tender is to be publicly invited by one of the following:
 - (a) an open tender under regulation 24 ;
 - (b) a multiple-use register under regulation 25 ;
 - (c) a multiple-stage tender under regulation 26 .
- (3) A council, through a public tender process, may establish a standing contract in which a single tenderer or multiple tenderers may be contracted for a specified period to provide specified goods or services during that period without the need for a further tender process.
- (4) A council must not split a contract into 2 or more contracts for the primary purpose of avoiding compliance with the requirement to publicly invite tenders.
- (5) A council may extend a contract entered into by tender –
 - (a) as specified in the contract; or
 - (b) if the contract does not specify extensions, by an absolute majority.

Regulation 27 *Non-application of public tender process*

The following situations and contracts are prescribed for the purposes of section 333A(3) of the LGA:

- (a) an emergency, if, in the opinion of the general manager, there is insufficient time to invite tenders for the goods or services required in that emergency;
- (b) a contract for goods or services supplied or provided by, or obtained through, an agency of a State or of the Commonwealth;
- (c) a contract for goods or services supplied or provided by another council, a single authority, a joint authority or the Local Government Association of Tasmania;

- (d) a contract for goods or services obtained as a result of a tender process conducted by –
 - (i) another council; or
 - (ii) a single authority or a joint authority; or
 - (iii) the Local Government Association of Tasmania; or
 - (iv) any other local government association in this State or in another State or a Territory; or
 - (v) any organisation, or entity, established by any other local government association in this State or in another State or a Territory;
- (e) a contract for goods or services in respect of which a council is exempted under another Act from the requirement to invite a tender;
- (f) a contract for goods or services that is entered into at public auction;
- (g) a contract for insurance entered into through a broker;
- (h) a contract arising when a council is directed to acquire goods or services due to a claim made under a contract of insurance;
- (i) a contract for goods or services, if the council resolves by absolute majority and states the reasons for the decision, being that a satisfactory result would not be achieved by inviting tenders because of –
 - (i) extenuating circumstances; or
 - (ii) the remoteness of the locality; or
 - (iii) the unavailability of competitive or reliable tenderers;
- (j) a contract of employment with a person as an employee of the council.

Section 3 of the LGA - *Interpretation* states:

absolute majority means -

- (a) if no councillors are suspended, more than half of the number of councillors to be elected to a council; or
- (b) if one or more councillors are suspended, more than half of the number of councillors to be elected to a council after subtracting the number of councillors who are suspended

Regulation 28 Code for tenders and contracts

The code adopted under section 333B of the Act is to –

- (a) promote the following principles:
 - (i) open and effective competition;
 - (ii) value for money;
 - (iii) enhancement of the capabilities of local business and industry;
 - (iv) ethical behaviour and fair dealing; and
- (b) establish and maintain procedures to ensure that all potential suppliers are provided with the same information relating to the requirements of a tender or contract and are given equal opportunity to meet the requirements; and
- (c) establish and maintain procedures to ensure that fair and equal consideration is given to all tenders or quotations received; and

- (d) establish and maintain procedures to deal honestly with, and be equitable in the treatment of, all potential or existing suppliers; and
- (e) establish and maintain procedures to ensure a prompt and courteous response to all reasonable requests for advice and information from potential or existing suppliers; and
- (f) seek to minimise the cost to suppliers of participating in the tendering process; and
- (g) protect commercial-in-confidence information; and
- (h) for contracts valued at under \$250 000 (excluding GST), specify when 3 written quotations are required; and
- (i) establish and maintain procedures for the use of multiple-use registers for contracts valued at under \$250 000 (excluding GST); and
- (j) establish and maintain procedures for reporting by the general manager to the council in relation to the purchase of goods or services in circumstances where a public tender or quotation process is not used; and
- (k) establish and maintain procedures for the review of each tender process to ensure that it is in accordance with these regulations and the code; and
- (l) establish and maintain procedures for the following:
 - (i) amending or extending a tender once it has been released;
 - (ii) opening tenders;
 - (iii) the consideration of tenders that do not fully conform with the tender requirements;
 - (iv) the debriefing of unsuccessful tenderers;
 - (v) handling complaints regarding processes related to the supply of goods or services.

Regulation 29 Annual reporting requirements in relation to tenders and contracts

- (1) For the purposes of section 72(1)(e) of the Act, a council is to report the following in its annual report in relation to any contract, for the supply or provision of goods or services valued at or exceeding \$250 000 (excluding GST), that is entered into, or extended under regulation 23(5)(b), in the financial year to which the annual report relates:
 - (a) a description of the contract;
 - (b) the period of the contract;
 - (c) the periods of any options for extending the contract;
 - (d) the value of any tender awarded or, if a tender was not required, the value of the contract (excluding GST);
 - (e) the business name of the successful contractor;
 - (f) the business address of the successful contractor.
- (2) For the purposes of section 72(1)(e) of the Act, a council is to report in its annual report all instances where regulation 27(a) and (i) have been applied, with the following details:
 - (a) a brief description of the reason for not inviting public tenders;
 - (b) a description of the goods or services acquired;
 - (c) the value of the goods or services acquired;
 - (d) the name of the supplier.

- (3) For the purposes of section 72(1)(e) of the Act, a council is to report the following in its annual report in relation to any contract, for the supply or provision of goods or services valued at or exceeding \$100 000 (excluding GST) but less than \$250 000, that is entered into, or extended, in the financial year to which the annual report relates:
- (a) a description of the contract;
 - (b) the period of the contract;
 - (c) the periods of any options for extending the contract;
 - (d) the value of the contract (excluding GST);
 - (e) the business name of the successful contractor;
 - (f) the business address of the successful contractor.

APPENDIX 2: LGAT GUIDE - EXTRACT FROM CODE FOR TENDERS AND CONTRACTS

5 PROCUREMENT PRINCIPLES

Council will have regard to the following principles when acquiring goods and services:

5.1 Open and Effective Communication

The Council will ensure that the purchasing process is impartial, open and encourages competitive offers.

In practice this means that Council will:

- 5.1.1 use transparent and open purchasing processes so that service providers and the public are able to have confidence in the outcomes
- 5.1.2 adequately test the market through seeking quotations or via tender as appropriate
- 5.1.3 avoid biased specifications
- 5.1.4 treat all service providers consistently and equitably
- 5.1.5 ensure a prompt and courteous response to all reasonable requests for advice and information from service providers

5.2 Value for Money

The Council will ensure that it is buying at the most competitive price available, but value for money does not mean buying at the lowest price.

In practice this means that Council will consider:

- 5.2.1 the contribution the good or service makes to achieving Council's strategic plans or policies
- 5.2.2 the value of the acquisition and potential benefits against the costs of that purchase
- 5.2.3 an assessment of risks associated with the purchase including the preferred procurement method
- 5.2.4 how well goods or services meet needs
- 5.2.5 maintenance and running costs over the lifetime of a product
- 5.2.6 disposal value
- 5.2.7 time constraints
- 5.2.8 the impact of the procurement decision on the local economy, such as through industry development and employment creation
- 5.2.9 the impact of the procurement decision on the environment, such as through minimising waste and reducing demand for goods and services which have a direct impact on the environment (such as printing, utilities and travel)
- 5.2.10 the impact of the procurement decision on the society, (social value generated) such as through the elimination of discrimination and the promotion of equal opportunity, training, and other identified social objectives

5.3 Enhancement of the capabilities of the local business industry

The Council will ensure that where local capacity exists it will seek to engage the local market and encourage participation in tender and quotation processes.

In practice this means that Council will:

- 5.3.1 actively seek quotes from local businesses that are able to provide quality goods and or services
- 5.3.2 where local capability exists, ensure that discretionary elements of specifications do not prevent local business from competing
- 5.3.3 not give preferential treatment to local service providers where it cannot be reasonably justified

5.4 Ethical behaviour and fair dealing

The Council will promote procurement practice that is legal, ethical, fair and unbiased.

In practice this means that Council will:

- 5.4.1 comply with legal requirements
- 5.4.2 conduct all business in the best interests of the Council
- 5.4.3 be as effective and efficient as possible when sourcing, ordering and paying for goods and services.
- 5.4.4 expect individuals involved in procurement processes to declare and act upon any conflicts of interest that may be seen to influence impartiality
- 5.4.5 ensure that specifications are clear
- 5.4.6 ensure that any Service Provider is not provided with information or clarification that is not provided equally to all service providers
- 5.4.7 maintain confidentiality at all times in dealing with service providers
- 5.4.8 ensure that conditions of contract are not excessively onerous
- 5.4.9 decline gifts or benefits offered by those involved in the procurement process, particularly from service providers

In practice this means that Council expects service providers to:

- 5.4.10 ensure that they are well acquainted with Council requirements identified in this Code
- 5.4.11 are familiar with particulars relating to a specific tender and quotation processes including the relevant specifications
- 5.4.12 not submit a tender or quotation unless they have the financial, technical, physical, management resource or other capabilities to fulfil Council's requirements
- 5.4.13 not seek to influence a procurement process by improper means or collude with other service providers
- 5.4.14 declare and act upon any conflicts of interest that may be seen to influence impartiality
- 5.4.15 comply with all applicable legislative, regulatory and statutory requirements, including Acts of the Commonwealth and State, regulations, by laws and proclamations made or issued under such Acts and lawful requirements or directions of public and other authorities
- 5.4.16 not offer gifts or benefits to a Council officer for the discharge of official business

APPENDIX 3: LEGISLATIVE FRAMEWORK AND RELEVANT LEGISLATION RELATING TO SALE OF LAND

LOCAL GOVERNMENT ACT 1993

Section 177 Sale and disposal of land

- (1) A council may sell, lease, donate, exchange or otherwise dispose of land owned by it, other than public land, in accordance with this section.
- (2) Before a council sells, leases, donates, exchanges or otherwise disposes of any land, it is to obtain a valuation of the land from the Valuer-General or a person who is qualified to practise as a land valuer under section 4 of the *Land Valuers Act 2001* .
- (3) A council may sell –
 - (a) any land by auction or tender; or
 - (b) any specific land by any other method it approves.
- (4) A council may exchange land for other land –
 - (a) if the valuations of each land are comparable in value; or
 - (b) in any other case, as it considers appropriate.
- (5) A contract pursuant to this section for the sale, lease, donation, exchange or other disposal of land which is public land is of no effect.
- (6) A decision by a council under this section must be made by absolute majority.

APPENDIX 4: SUBMISSIONS AND COMMENTS RECEIVED

Submissions and comments that we receive are not subject to the audit, nor the evidentiary standards required in reaching an audit conclusion. Responsibility for the accuracy, fairness and balance of these comments rests solely with those who provided the response. However, views expressed were considered in reaching the summary of findings.

Section 30(3) of the Act requires that this report include any submissions or comments made under section 30(2) or a fair summary of them. Submissions received are included in full below.

Devonport City Council

There has been significant public interest in LIVING CITY and Council welcomes the findings of your independent review following an extensive 18-month examination of the project which included all governance and procurement processes since 2013.

Your report confirms that Council with one exception (relating to reporting of one contract in its 2015 Annual Report) complied with its reporting statutory requirement under the *Local Government Act 1993* and in general complied with the *Local Government (General) Regulations*.

It is noted the Report acknowledges that prior to entering into the contract with P+i, Council had considered issues around the commerciality of the agreement, however it is recognised this could have been better documented. Council accepts there is a need to improve its documenting of any value or reasonableness assessment when a contract is entered into based on the 'extenuating circumstances' provision under the *Local Government Act*.

In relation to the Providore Place, Council accepts there were a number of short comings in relation to the development of the lease agreement. Although at the time of entering into the lease there was a desire by Council and the Lessee for a non-traditional cooperative shared arrangement, this has proven to be ineffectual and has created a significant amount of angst between the parties and has reflected badly on Council within parts of the community. Council accepts that it did not fully meet good governance expectations in relation to the Providore Place lease and will commit to ensuring the recommendations provided within the Report are fully implemented.

It is noted that the 2016 lease agreement with Providore Place (Devonport) Pty Ltd has now been surrendered and a new lease, prepared on commercial terms and based on extensive legal advice, has been agreed between the parties.

Council is reassured that following the assessment of the approach taken by Council in regard to the hotel development, you did not consider it necessary to make any recommendations relating to this matter and how it was managed.

The Report highlights that extensive cost control and program reporting measures were applied in relation to Stage 1 of LIVING CITY. In part, it was these measures which contributed to the project being completed under budget. It is noted that no recommendations were provided in relation to this aspect of your review.

The Report contains eight (8) recommendations in total. Of these, three (3) are for the Government or Director of Local Government to consider relating to potential changes for inclusion in the Local Government Act with the other five (5) specifically for Council consideration. I am committed to seeing these recommendations fully implemented.

Council appreciates the detailed review your office has undertaken of the LIVING CITY project. Whilst I acknowledge that there are certain aspects of the project which could have been better managed, particularly those relating to the Providore Place lease, I can assure you that at the time decisions were made it was the view of the Council that these were in the best interests of the project.

Cr Annette Rockliff

Mayor, City of Devonport

Project & Infrastructure Holdings Pty Ltd

In broad terms, the extract appears to present a view consistent with my understanding, with only a couple of minor discrepancies, notably:

- While payment to P+I were made in accordance with the PDMA, not all payments due in accordance with the PDMA (as amended) were made, specifically the entitlement to a share of unspent project contingency at Practical Completion.
- While a head lease of Providore Place was Council's preference, it was not a recommendation from P+i. Our advice was to defer attempts to lease space prior to completion, and Providore Place would be best managed as part of a portfolio of Council owned tourism assets, including the Devonport Entertainment & Convention Centre and new conference facilities, in-house or contracted management. The TAO report is correct the structure and returns under the lease were similar to those under a management agreement. At March 2016 P+I advised "*a head lease is unlikely to be achievable at this time*" and "*cashflow after operating expenses is not sufficient to pay both rent at this level (\$400k p.a.) and generate a significant surplus*".

Robert Woolf

Director - P+i

Providore Place Devonport Pty Ltd

I have not been a Director of PPD since 16 March 2018. P+I sold its entire shareholding in PPD on 21 September 2018. We had not visibility or knowledge of events between PPD and Council after these dates.

While P+I was paid for its shares, we have, unfortunately never received a copy of the ASIC change in details lodgement. As far as we can tell, no lodgement was made. We notified ASIC of the change (repeatedly) and have reported the failure to notify the change, again to ASIC, and I cannot respond on behalf of PPD.

Robert Woolf

Director - P+i

Glenorchy City Council

We note the audit covered the period 1 November 2014 to 28 February 2017. We also note, for relevance, the audit review was completed with reference to Council's 2017 Code for Tenders and Contracts.

We have reviewed the audit report and advise we accept the findings contained therein. Since 2017 Council has continued to develop and progress its procurement services and project management expertise and the actions undertaken align to your findings.

Alderman Kristie Johnston

Mayor

Minister for Local Government

I note the findings and recommendations of the Report and the suggested follow up actions outlined. I will consider the recommendations in more detail in due course.

Mark Shelton MP

Minister for Local Government

AUDIT MANDATE AND STANDARDS APPLIED

Mandate

Section 17(1) of the *Audit Act 2008* states that:

‘An accountable authority other than the Auditor-General, as soon as possible and within 45 days after the end of each financial year, is to prepare and forward to the Auditor-General a copy of the financial statements for that financial year which are complete in all material respects.’

Under the provisions of section 18, the Auditor-General:

‘(1) is to audit the financial statements and any other information submitted by a State entity or an audited subsidiary of a State entity under section 17(1).’

Under the provisions of section 19, the Auditor-General:

- ‘(1) is to prepare and sign an opinion on an audit carried out under section 18(1) in accordance with requirements determined by the Australian Auditing and Assurance Standards
- (2) is to provide the opinion prepared and signed under subsection (1), and any formal communication of audit findings that is required to be prepared in accordance with the Australian Auditing and Assurance Standards, to the State entity’s appropriate Minister and provide a copy to the relevant accountable authority.’

Standards Applied

Section 31 specifies that:

‘The Auditor-General is to perform the audits required by this or any other Act in such a manner as the Auditor-General thinks fit having regard to -

- (a) the character and effectiveness of the internal control and internal audit of the relevant State entity or audited subsidiary of a State entity; and
- (b) the Australian Auditing and Assurance Standards.’

The auditing standards referred to are Australian Auditing Standards as issued by the Australian Auditing and Assurance Standards Board.



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Cover Photo Lake Burbury, "we are Explorers"