



Report of the

**Controller and
Auditor-General**

Tumuaki o te Mana Arotake

**Contracting Out Local
Authority Regulatory
Functions**

November 1999

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Foreword

Local authority ratepayers in general, and users of local authority services in particular, increasingly expect those services to be provided more efficiently, effectively, and economically. Contracting out (or “outsourcing” as it is frequently called) those services is seen as one way of meeting that expectation.

Indeed, local authorities have a statutory duty to consider whether to carry out their works and perform their services using their own staff or by way of arrangement or contract with someone else. The latter course has become quite common – sometimes involving a local authority trading enterprise and sometimes a private contractor – for functions such as maintaining roads, collecting rubbish, and operating swimming pools.

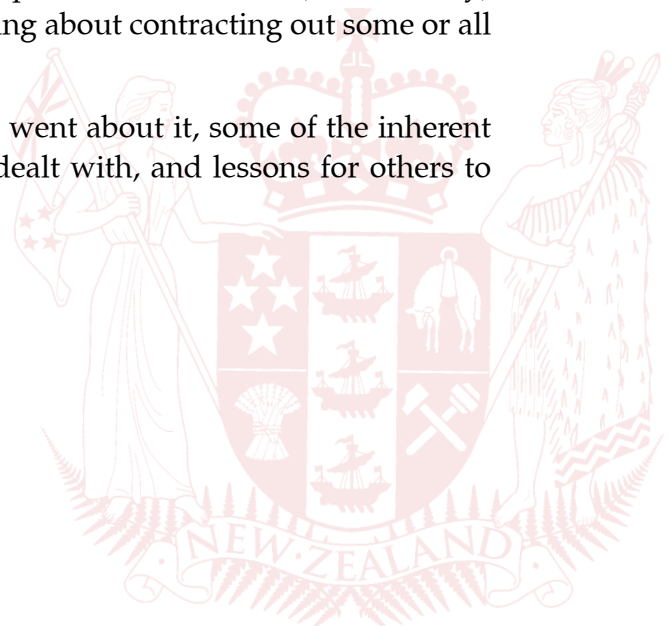
Much less common (so far) has been the contracting out of services associated with what are called “regulatory functions” – such as animal and noise control, parking enforcement, and administering building and resource consents. However, with effect from 1 July 1998 the Queenstown Lakes District Council became one of the first local authorities to contract out the performance of most of its regulatory functions to a single private sector contractor.

The impetus towards contracting out a greater range of local authority services, coupled with Queenstown’s bold step, prompted us to take this closer look at the subject of contracting out regulatory functions. We have structured the results of our review in this report in two sections:

- a good practice guide, which we hope will be useful to (and used by) those local authorities that are thinking about contracting out some or all of their regulatory functions; and
- a commentary on how Queenstown went about it, some of the inherent risks involved and how they were dealt with, and lessons for others to learn from.



D J D Macdonald
Controller and Auditor-General
16 November 1999



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Executive Summary

Impetus for Change

Changes to local government legislation, public expectations and other public sector reforms have seen the introduction of an increasing number of private and public sector partnerships throughout New Zealand. The prospect of positive results and benefits for ratepayers has encouraged local authorities to develop new alternatives for traditional means of service delivery.

What Is This Report About?

This report is concerned with contracting out the performance of local authorities' regulatory functions. The main focus of the report is on how the use of contracting contributes to the effective and efficient use of a local authority's resources, consistent with the law and the applicable policy of the authority (Public Finance Act 1977, section 25(3)).

Our review was prompted by the steps taken by the Queenstown Lakes District Council (the Council) in 1998 to enter into a contract with a private sector company for the performance of a wide range of regulatory functions. We recognise that a number of councils have, to a greater or lesser extent, contracted out the performance of their regulatory functions. However, the Council was one of the first to undertake this type of comprehensive contracting out of all regulatory activities to one private sector provider.

The Local Government Act 1974 (the Act) requires contracting out to be considered as a means of carrying out local authority works and performing local authority functions. By issuing good practice guidelines, it is our intention to help those who are investigating the latter option.

This report contains various detailed steps to be followed for good practice. The detail and breadth of our comments is necessary as the report is to be read by the whole local government sector which has councils that vary considerably – in size, complexity and experience with contracting out.

By setting out the detailed steps that we believe constitute best practice we do not intend to frustrate a council contemplating contracting out. The number of steps should not in itself be a barrier. Councils should take from this report the parts that they consider they need to action – at a level of detail that is relevant to the scale, size and risks associated with their activities.

Our Thanks to the Council

We thank the Council for its assistance in carrying out the audit upon which part of this report is based. We trust that this report will be of benefit to the Council and to other local authorities that are currently investigating similar options. By assisting with our audit, the Council has provided a valuable insight into the practicalities of contracting out the performance of regulatory functions.

The Council agreed to be reviewed so that its experiences could add value to this report. The review was not to question the Council’s policy decision to tender out its regulatory services, nor the decision to pick the successful bidder, Civic Corporation Limited (CivicCorp), ahead of the other bidders.

The Council is pleased with its decision and has retained control over policy matters. The contractor has reported to the Council performance improvements – for example, statutory deadlines now being met 97% of the time, instead of 67% when the services were being carried out in-house. The Council has also reported savings in terms of the overall cost of services.¹

Conclusions

The Council was one of the frontrunners in contracting out the performance of regulatory functions. Invariably when you review a frontrunner’s performance against good practice expectations developed after the event, the frontrunner will not meet all of the expectations. It will have tackled many topics from its own unique angle.

While we do not recommend that others follow all that the Council did, those considering contracting out can look upon the Council as a pilot in terms of its drive and determination to get to the end-point – a contract in place.

Any local authority considering contracting out the performance of regulatory functions has to know what functions can be contracted out, why it is considering contracting out, and where “the buck” stops. The law in this area is complex, confusing and, in places, contradictory.

¹ The purpose of our audit was to look at the process for contracting out – not whether the process succeeded in effecting monetary savings and efficiency gains.

EXECUTIVE SUMMARY

Key Considerations in Contracting Out

In particular, councils must note that:

- The power to contract out works and functions in section 247D(1) of the Act is only a general one. Many functions of a regulatory nature are conferred by other statutes. Any local authority that is considering the options for delivering these functions must examine, in detail, the way in which those statutes specify the manner in which a particular function is to be exercised.
- Contracting out under section 247D does not relieve a local authority, or any member or officer of the local authority, of the “liability” to perform or ensure the performance of any function or duty imposed upon the local authority. This is a significant limitation on the extent to which a local authority can contract out performance of a regulatory function. The fact that the local authority retains liability means that a contract must contain appropriate measures and sanctions to ensure adequate performance and compliance with statutory functions and duties, and to minimise the risk associated with using contractors (see Part Two).
- Regulatory functions and the manner in which they are performed can, by definition, have an impact on individual rights. Contracting out has the potential to diminish some avenues of redress for citizens whose rights are infringed or compromised. A contract should also deal adequately with these issues.
- There is a need for comprehensive strategic planning, business planning and detailed analysis (including risk analysis) in order to demonstrate rigorous compliance with section 122c of the Act.

We are satisfied that Parliament has contemplated at least some regulatory functions of local authorities being exercised by contractors. However, we found a number of mixed messages in the Act and other legislation on matters such as:

- the extent to which particular powers can be exercised by contractors;
- whether a contractor can exercise powers as an “officer” of a local authority; and
- issues of liability and responsibility for the exercise of regulatory powers.

We consider that significant clarification of the law is necessary. This would require a review and rationalisation of relevant provisions in the Local Government Act and a range of other regulatory legislation.

The Queenstown Experience

Our main conclusions with respect to the Council (see Parts Six and Seven) are:

Corporate Planning

- While the Council has a history of contracting out maintenance and other operational activities, it was not until February 1998 that a comprehensive report was prepared which discussed a variety of issues associated with contracting out regulatory functions. We consider that, following the presentation of that report, the Council was in a much better position to understand the contracting out option and risks.
- The preparation of a report towards the end, rather than the beginning, of the decision-making process illustrates a lack of strategic management rigour. It should have been prepared earlier in the process to ensure that the most effective and efficient option was chosen.

Legal Risks

- We have some concerns about the legal framework used by the Council in the light of legal advice we have received on the limits on contracting out regulatory functions. These issues are summarised in Appendix B on pages 105-107.

Consultation

- A lack of consultation, especially with associated professional parties, left the Council open to criticism that the planning and contract design phases of the process were not complete.

Business Planning

- The Council waited until well after it had determined to set itself on the contracting-out course before clearly articulating the goals it wanted to achieve from doing so.



EXECUTIVE SUMMARY

Value for Money Analysis

- The Council made its value for money assessment too late in the process. As a consequence, it increased the risk that what it was doing would not produce the maximum possible benefits.

Preparing and Conducting the Tender

- The development of a more rigorous tender process and clearer criteria may well have resulted in more bidder interest in the contract and, as a result, the Council having more assurance that the maximum benefits have been achieved from contracting out.

Contract Terms and Conditions

- The contract terms and conditions met our expectations for good practice.

Managing and Monitoring the Contract

- The establishment of specific management positions directed at the contractual arrangements (e.g. the contracts manager), and the overall reorganisation of the management and Council committee structure and responsibilities, reflect an increased focus on the handling of contracting out activities.

Recommendations

We recommend that, if a local authority is considering contracting out its regulatory functions, it should (as further detailed in Parts Three and Four):

- Take a strategic approach to the delivery of services associated with performing regulatory functions before considering individual options for delivery of particular services.
- Undertake comprehensive risk identification and management analysis associated with the options.
- Analyse the legal aspects and seek expert advice so as to satisfy itself that it has the power to perform specific functions and services by using a contractor. (We suggest that local authorities that have already contracted out regulatory functions to some extent should also carry out this analysis.)

- Carry out sufficient consultation to assure itself that it has identified the needs, issues and any concerns the community or stakeholders might have. The process should be clearly documented and used in the decision-making process.
- Develop clear objectives for the management and operation of the functions that ensure that the legislative requirements are met and that the long-term interests of the community will be protected.
- Demonstrate (so as to meet the requirements of the Act) that it has considered the advantages and disadvantages of the proposed approach compared to the alternatives.
- Establish a suitable project management and control framework for managing the contracting-out process.
- Develop a suitable bidding process and comprehensive tender documentation.
- Invest sufficient time and resources in the tender process to ensure the quality of the ensuing agreement and to protect the long-term interests of the community.
- Develop a suitable communications strategy as part of the contracting-out process.
- Conduct the tender with careful attention to the proper conduct of public business.
- Ensure that the contract detail is designed so that its objectives for the performance of the functions are likely to be met.
- Establish the necessary systems and allocate suitable resources to manage and monitor the contractor.

We also recommend to the Minister of Local Government that:

- The Government undertakes a review of the relevant law – including the Local Government Act 1974 and other regulatory legislation – with a view to promoting amendments that result in the law clearly identifying –
 - those regulatory functions which can be performed by contractors, as opposed to members and employees, of a local authority;
 - the powers capable of being exercised by contractors when performing functions on behalf of a local authority; and
 - the residual legal responsibilities of local authorities to ensure the proper exercise of regulatory functions and powers.

What Is This Report About?

- 101 Local authorities have had the power to contract out their functions since 1989. The use of external contractors for the delivery of some council functions – for example, rubbish collection – has now become common and has many attractions. More recently, some authorities have taken steps to contract out “sensitive” functions such as water supply and wastewater disposal. We reported to Parliament last year on how the Papakura District Council went about franchising those services.²
- 102 This report is about contracting out local authority *regulatory functions* – such as litter, animal, noise and parking control; health and liquor licensing; and issuing resource consents.
- 103 Our review was prompted by the steps taken by the Queenstown Lakes District Council (the Council) last year to enter into a contract with a private sector company, Civic Corporation Limited (CivicCorp), for the company to perform a wide range of the Council’s regulatory functions. We reviewed the Queenstown experience against a set of expectations that we (with assistance from an advisory committee) had predetermined. These expectations are detailed in Parts Three and Four.
- 104 The key focus of our review was on how contracting out contributes to the effective and efficient use of a local authority’s resources, consistent with the law and the applicable policy of the authority (Public Finance Act 1977, section 25(3)).

What Is a “Regulatory Function”?

- 105 The Local Government Act 1974 (the Act) and other statutes confer a wide range of functions on local authorities. The Act uses the term *regulatory function* to describe some of these functions although it does not define which ones they are. We understand the term to mean a function under which a local authority controls, governs or directs activity (whether by individuals or by businesses) in its district.³
- 106 A regulatory function can take a number of forms, and can have a number of different components. Some functions involve the development of policies and rules – for example, the preparation of district plans. Others include compiling and maintaining registers – for example, in respect of dogs.

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3 cf. *Strachan v Marriott* [1995] 3 NZLR 272, 291.



INTRODUCTION

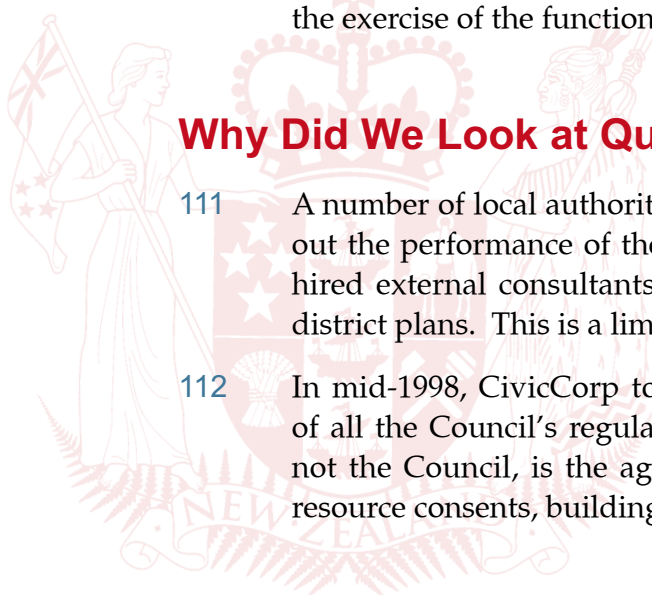
- 107 Much of the practice which has developed in contracting out regulatory functions involves the service delivery component – such as the processing of applications and other administrative services associated with a decision making power – rather than the power of decision itself. Indeed, there is doubt as to whether a local authority can lawfully contract with a third party for the exercise of a power which has been conferred by law on the authority itself.
- 108 It is neither necessary nor appropriate for the purposes of this report to attempt an exhaustive definition of a regulatory function. There is room for doubt, for example, as to whether a law enforcement function (involving the prosecution by local authorities of offences under their jurisdiction) is the same as a regulatory function, or is of a different character. Local authorities must seek their own legal advice, and ensure that the risks associated with the use of contractors can be adequately addressed in respect of each specific function or component of it.

What Do We Mean by “Contracting Out”?

- 109 We understand the term “contracting out” to mean the use by a local authority of an independent contractor, instead of its own employees, to perform a particular function or provide a particular service associated with it.
- 110 It is important to understand that, by appointing a contractor instead of an employee, a local authority remains responsible for the exercise of the function. The contractor must account to the local authority for its performance under the contract – in much the same way as an employee is responsible to his or her employer. The local authority is in turn responsible, and therefore accountable to ratepayers and residents, for the exercise of the function and the provision of the associated services.

Why Did We Look at Queenstown?

- 111 A number of local authorities have (to a greater or lesser extent) contracted out the performance of their regulatory functions. Other authorities have hired external consultants to, for example, develop and implement their district plans. This is a limited form of contracting out.
- 112 In mid-1998, CivicCorp took over (under a 5-year contract) performance of all the Council’s regulatory functions. This means that the contractor, not the Council, is the agency that the public goes to for such things as resource consents, building permits, and parking enforcement matters.



113 Accordingly, the Council was one of the first authorities to undertake a comprehensive contracting out of all regulatory functions to one private sector provider. In the light of the reforms within local government – and particularly the requirement to consider alternative options for service delivery – this type of arrangement may become more common.

Who Will Be Interested In this Report?

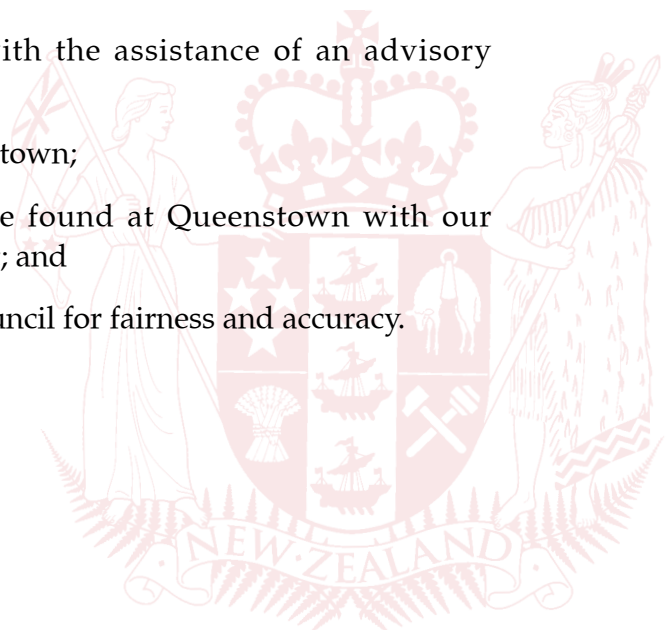
114 We believe that this report will be of interest to:

- Councillors, ratepayers and staff of other local authorities – to aid any planning for contracting out if they are considering doing so.
- Local authorities that have already partly contracted out regulatory functions – to aid in any further contracting out.
- Potential bidders to perform regulatory functions for other local authorities – to aid in bid preparation.
- Ministers and government departments responsible for administering the relevant legislative requirements (in particular the Department of Internal Affairs, Ministry of Health, and Ministry for the Environment) – to aid in considering any future policy or legislative changes.
- The Council – for any contract renewal discussions it will have in 5 years' time and for implementing its monitoring procedures.

How Did We Carry Out Our Review?

115 For the purposes of our review we:

- developed model expectations with the assistance of an advisory committee;
- looked at what happened in Queenstown;
- checked the relevance of what we found at Queenstown with our advisers and prepared a draft report; and
- cleared the draft report with the Council for fairness and accuracy.



KEY CONSIDERATIONS IN CONTRACTING OUT REGULATORY FUNCTIONS

What Regulatory Functions Can Be Contracted Out?

- 201 The Act contains a general power for local authorities to perform their functions by entering into a contract with another party, as an alternative to using their own staff (section 247D(1)). There is no limitation on either the function or who the contractor might be. It could, for example, be the Crown or another local authority. Or it could be “any person or organisation”.
- 202 The power in section 247D is, however, only a general one. Many functions of a regulatory nature are conferred by other statutes. It is important to examine the way in which those statutes specify the manner in which, and by whom, a particular function is to be exercised. They may:
- limit the ability to use contractors – for example, by specifying that certain functions are to be performed by “officers” of the local authority, where the context indicates that only council employees may be appointed as officers; or
 - limit the council’s ability to delegate the necessary functions, powers or duties to persons other than council committees or “officers”.
- 203 In other cases, appointment of non-council employees as “officers” for certain purposes is expressly contemplated.⁴

Why Contract Out?

- 204 The Act requires a local authority to have regard to particular considerations when deciding whether to use its own staff or to contract out a particular function (section 247D(2)).⁵ These include:
- section 223C, which contains a number of principles designed to ensure efficiency and transparency in the conduct of local authority business – including the principle that, so far as practicable, regulatory functions should be separated from other functions; and
 - the objectives stated in the local authority’s annual plan.

4 For further discussion on these issues, see Appendix B (pages 105-107).

5 Note also section 247D(2A), which requires a *regional* council not to use its own staff to perform its functions unless it is satisfied that the advantages of this option for the ratepayers of the region clearly outweigh those of any other option.

KEY CONSIDERATIONS IN CONTRACTING OUT REGULATORY FUNCTIONS

- The Local Government Official Information and Meetings Act 1987 applies to *information* held by an independent contractor of a local authority, making that information subject to request under the Act – but only to the extent that the local authority itself is entitled to have access to that information under the contract.⁷
- An individual’s right to *complain* to the Ombudsmen about matters of administration (under the Ombudsmen Act 1975) does not apply to the acts or omissions of local authority contractors.⁸ Unless a contractor is designated as an “officer” of the local authority, as mentioned earlier, this complaint jurisdiction may be excluded by a decision to contract out a particular function or a component of it.

211 We note also that:

- Individuals’ rights in respect of the collection, use and disclosure of personal information under the Privacy Act 1993 are unaffected by whether the information is collected or held by the local authority or a contractor.
- The rights of individuals to due process by decision makers, which are enshrined in sections 21 to 27 of the New Zealand Bill of Rights Act 1990, exist in respect of the performance of any “public function”, and are not dependent on who actually exercises that function.⁹ The regulatory functions of local authorities are by definition public functions and so would be covered by the Act, even in a contracting-out situation.
- The exercise of statutory powers of decision in connection with regulatory functions is subject to the judicial review powers of the High Court. This jurisdiction ought not to be affected by the fact that the function is exercised by a contractor of a local authority.¹⁰

212 In our view it is important to understand, from a public policy perspective, that “the buck” continues to stop at the local authority and not the person who is contracted to perform a regulatory function or service. To the extent that rights of access to information, due process, or complaint may be diminished by a decision to contract out, steps should be taken to preserve those rights by safeguards within the contract.

⁷ Local Government Official Information and Meetings Act 1987, section 2(6).

⁸ Ombudsmen Act 1975, section 13(1).

⁹ New Zealand Bill of Rights Act 1990, section 3(b). Note, however, that this Act applies to the acts of the person on whom the function is imposed “by or pursuant to law”. This, combined with section 247D(4) of the Local Government Act, suggests that the local authority retains the responsibility of ensuring the proper exercise of the functions concerned.

¹⁰ See section 247D(4).

Corporate Planning

301 Our overall expectation for corporate planning is that the local authority will have a strategic view of the delivery of services before it considers individual options for delivery of particular services.

Our Specific Expectations

302 We expect that a council would be able to demonstrate:

- a well-defined management approach towards the delivery of local government services;
- a clear relationship between its planning process and its purchasing option(s);
- how contracting out is an integral part of the strategic view;
- an understanding of what contracting out entails and how it differs from other forms of service delivery; and
- an understanding of the implications of contracting out on its management structure, policy development, future financial planning, and the ability and implications of changing priorities and direction.

Why Are These Expectations Important?

303 As noted in Part Two, a decision on whether to contract out the performance of regulatory functions, or use its own staff, requires a council to consider the advantages and disadvantages, having regard to section 223c of the Act and the objectives in its annual plan. This requires a strategic approach.

304 The option to contract out regulatory services should be considered within the strategic context for service delivery adopted by the local authority.

305 It should be evident that the council's overall approach recognises relevant communities of interest and potentially differing needs and values. This is important in terms of the overall purpose of local government as set out in section 37k of the Act.

306 The council should be able to show that the development of any particular "contracting out" option is consistent with its overall political and management approach towards the delivery of local government services to the community.



LAYING THE GROUNDWORK

- 307 Contracting out – as a means of providing services – should always follow a comprehensive planning process.
- 308 A local authority considering contracting out must seek to be an “informed purchaser”. It must understand the contracting-out option in sufficient depth so that it can debate the relative merits of contracting out against other alternatives, and be able to discuss the option with potential advisers and suppliers from a position of knowledge.

MEMO:

Corporate Planning

- Are we clear about the relationship between the planning process and the service delivery options available?
- Do we know what are we trying to achieve and why?
- Are we clear about what the “contracting out” option (as opposed to any other means of service delivery) entails?
- Will “contracting out” provide an opportunity to address any long-standing problems and increase the emphasis on outcomes?
- Is “contracting out” an integral part of our service delivery policy?
- Are we able to produce clear and settled service requirements at an early stage?
- Will those requirements be flexible enough to allow for changes in the legislative environment?
- Do we have people with sufficient authority, knowledge and commitment to successfully implement contracting out?

Legal, Accountability and Other Risks

309 Our overall expectation for legal, accountability and other risks is that the local authority will undertake a thorough risk analysis.

Our Specific Expectations

310 We expect that a council would be able to demonstrate that it has:

- analysed the legal aspects of contracting out specific regulatory functions and has sought expert advice as necessary;
- satisfied itself that a contractor, as opposed to an employee, may perform specific functions and has examined all necessary powers of appointment and/or delegations and their validity;
- considered the liability and accountability aspects of using a contractor as opposed to its own staff, and can put in place sufficient contractual and administrative safeguards to ensure that –
 - the liability for the performance of a specific function is identified and properly understood;
 - the council is appropriately protected and/or indemnified against a contractor's failure to perform;
 - the council's ability to monitor and oversee the performance of a contractor's services is preserved through rights of access to information by the council; and
 - safeguards exist, where necessary, to ensure that citizens' rights of access to information, due process and complaint procedures are not diminished by the decision to use a contractor as opposed to the council's own staff; and
- analysed a range of other risks, including –
 - the risks associated with the need to understand its own business and the components of it so that it can compare like with like to determine value for money;
 - the risks associated with tendering;
 - the risks associated with contract documentation; and
 - the risks associated with management and monitoring.

Why Are These Expectations Important?

- 311 Where a council has chosen to deliver a particular regulatory function by an alternative method to the traditional “in-house” staff approach, it is important to recognise that it is still the responsible and liable public body. As such, the clear identification of its legal responsibilities and the identification and development of risk management strategies are fundamental management practices.
- 312 The importance of the legal and accountability risks are set out in Part 2. Legal issues are discussed in more detail in Appendix B (pages 105-107).
- 313 The importance of the other risks are covered in the remainder of this section within the topics to which they relate (e.g. consultation, value for money) and particularly in the topic “Preparing for the Tender – Phase Two” (see paragraphs 406-417).

MEMO:

Legal, Accountability and Other Risks

- *Have we researched all relevant published material on risks associated with contracting out – including Appendix B of the Controller and Auditor-General’s report?*

Consultation

314 Our overall expectation for consultation is that the local authority will consult with all the appropriate parties, and the views and concerns received will be considered during the decision-making process.

Our Specific Expectations

315 We expect that a council would be able to demonstrate that it has:

- addressed its intentions to consider contracting out functions as part of developing its annual plan and long-term financial strategy; and
- if it chooses to carry out specific consultation with the local community/ key stakeholders, considered the views of interested members of the community as part of the decision-making process.

Why Are These Expectations Important?

316 Local authorities are required to prepare and adopt their annual plans and long-term financial strategies in accordance with the Special Consultative Procedure. Section 223c of the Act requires local authorities to conduct their business in a way that is comprehensive and open to the public.

317 The development of a corporate planning approach that deliberately sets out to consider alternative means of supplying service(s) will be of interest to the public. A council should tell the public, through its annual planning and long-term financial strategy, of its intention to consider alternative means.

318 The Act requires councils to have regard to, among other things, the objectives stated in their annual plans when considering whether to contract out any functions. If the annual plan objectives are sufficiently specific as to cause the public to contemplate that contracting out is at least an option, then further consultation may not be necessary. But in other cases we consider a local authority should consult before committing itself to contracting out any significant functions or services.

LAYING THE GROUNDWORK

MEMO:

Consultation

- Have we researched how best to consult by considering various publicly available documents – such as the Audit Office public consultation report of December 1998?
- Have we adequately identified all parties that have an interest – public, staff, interested other bodies, consent users, etc.?

Business Planning

- 319 Our overall expectation for business planning is that the local authority will develop clear objectives for the management and operation of its services. In the context of regulatory functions, the objectives will be to ensure that the legislative requirements are met and the long-term interests of the community will be protected. The needs and expectations of customers of regulatory functions will also be considered.

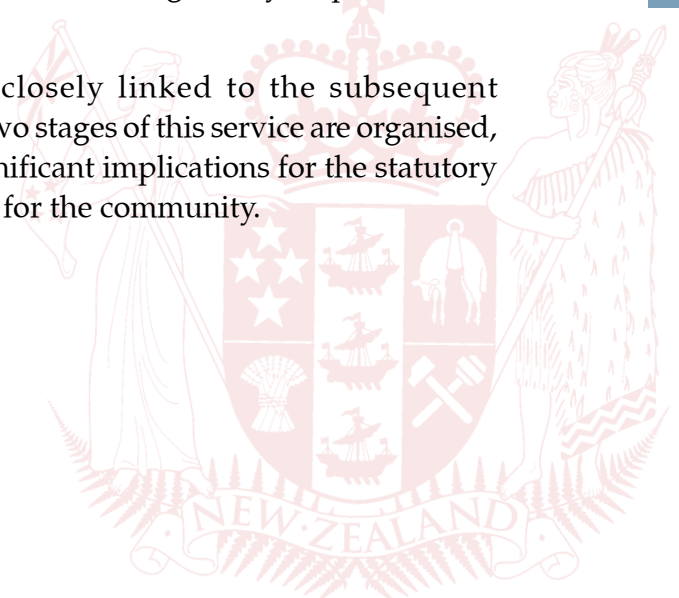
Our Specific Expectations

- 320 We expect that a council would be able to demonstrate that it:
- is clear about what it is trying to achieve through the delivery of the service(s) by having clear service objectives;

- is clear about why it has included or separated policy development and the operational aspects of regulatory functions;
- is aware of any defects in the existing in-house service delivery option and of any available strategies to improve service delivery;
- has explicitly considered the advantages and disadvantages of different service delivery options; and
- has created a high-level process diagram (or the equivalent) showing exactly what it intends to contract out.

Why Are These Expectations Important?

- 321 Good management practice requires a council to have developed – for the service(s) in question – clear requirements for inputs, outputs, and outcomes; service level objectives; performance; and costs. This would be part of the normal management process for developing annual budgets, annual plans and performance reporting within the authority. In changing to an alternative form of service delivery it is important that the appropriate levels of service performance, required outputs, and (most importantly) any required outcomes are clearly identified.
- 322 The results of forward planning and reviewing services and assets should be brought together before a decision is made as to the outputs and outcomes required and the means to deliver the service(s).
- 323 In order to meet the requirements of section 247D of the Act, a council must be able to provide reasoned and cogent justification for the course of action taken. Records should back this up by demonstrating how it has discharged its stewardship of public funds and regulatory responsibilities under the law.
- 324 Development of a district plan is closely linked to the subsequent (implementation) activities. How the two stages of this service are organised, purchased, and provided can have significant implications for the statutory role of the authority and the outcomes for the community.



LAYING THE GROUNDWORK

MEMO:

Business Planning

- *Will the "contracting out" option allow us to retain full policy control, determine which services are contracted, establish quality and safety standards, and monitor service performance?*
- *Has the council, in terms of section 247D, considered its options, identified the advantages and disadvantages of each, and selected the option most likely to deliver the desirable outcomes?*
- *What is the commitment to contracting out likely to mean for future financial planning and the ability of the council to change priorities and direction?*

Value for Money Analysis

- 325 Our overall expectation is that the local authority will undertake a detailed analysis of the value for money aspects of the options, and that decisions will be based on a clear and detailed understanding of the business.

Our Specific Expectations

- 326 We expect that a council would be able to demonstrate that it:
- has carried out an in-depth and comprehensive analysis of the quantity, quality and costs of the “in-house” service(s) delivery model;
 - is aware of the “true” (disaggregated) cost, level of service delivery, service delivery structure and workload forecasts of each component of the “in-house” option;
 - knows why it chose to separate activities into different contracts or to “bundle” aspects into one or more contract(s); and
 - has considered the advantages and disadvantages of different durations of contract to maximise the long-term benefits to ratepayers, the community and the environment.

Why Are These Expectations Important?

- 327 Before tendering the contract the council should have identified its existing costs for comparison with the tenders received. Particular care should be taken in this analysis to include relevant overheads and identify the financial impacts that might arise from contracting out. The proof of whether the “contracting out” option offers value for money in terms of service delivery will become apparent only once the service is being provided under contract.
- 328 Every local authority must be able to demonstrate (section 122c(c) of the Act) that it has taken all reasonable steps to satisfy itself that the scheme will offer value for money before undertaking any such option.
- 329 In order to assess the benefits of each option for delivery and each tender, it is necessary to have accurate information about the quality, quantity and costs of the existing service(s).
- 330 When the true cost of providing the service(s) by the existing method is known, informed discussions about any alternatives can take place.
- 331 This analysis will also form a benchmark against which the performance indicators, required outputs, and outcomes of any contract can be established and (should the contract proceed) how it is to be managed and monitored. Care should be taken to match like with like when considering the different options for service delivery. The different conditions surrounding the option to contract out (such as different reporting regimes) should be recognised and factored into the comparisons.

MEMO:

Value for Money

- *Have we analysed all the quantitative costs?*
- *Have we identified all the disaggregated costs in the service delivery process chain, including the costs of applicable overheads?*
- *Have we identified what costs will be left in terms of overheads – including monitoring the contract – for the remaining organisation to carry?*
- *Do we know what the impacts on quantity, quality and costs would be from “unbundling” services?*
- *Do we know our costs well enough that (when bids are received) we are in a position to compare the current service with what the bids are offering?*

Preparing for the Tender

Phase One

401 Our overall expectation for the first phase of preparing for the tender is that the local authority will set up a suitable project management and control framework for managing the process.

Our Specific Expectations

402 We expect that a council would be able to demonstrate that it has:

- Acquired the resources and experience necessary to successfully manage the contracting-out process and to maximise the benefits to the public. Other (external) advice may be needed where the council does not have the expertise to manage the tender process (or where one of the bidders is the existing staff).
- Identified and made plans to manage the range of relationships and relevant communities of interest likely to be involved in a contracting-out option.

Why Are These Expectations Important?

403 It is essential that the council makes arrangements to put in place an effective control framework and can demonstrate that it has done so.

404 In principle, the factors influencing decisions about contracting out will be the same as for any other decisions. What can make the decisions more difficult is the potential size or complexity of the contract.

405 As the decision-maker, the council should be confident that key controls are in the place and operating properly. A feature of contracting out is that quite specific skills are required to successfully conclude a contract that represents a good deal for the public. Because of the nature of such contracts the requirements for high-quality skills should not be underestimated.

Phase Two

406 Our overall expectation for the second phase of preparing for the tender is that the local authority will put in place a suitable bidding process and prepare comprehensive tender documents.

Our Specific Expectations

- 407 We expect that a council would be able to demonstrate that it has:
- sent initial documents to prospective tenderers that contained sufficient information to allow them to make acceptable informed bids, based on meeting the contract requirements and achieving the stated objectives;
 - adopted a tendering method designed to maximise the chances of selecting the most suitable contractor – having considered alternative methods used by others;
 - included in the initial documents a range of special processes to deal with particular issues, such as bidding failure, bid withdrawal and information irregularities;
 - carried out a risk analysis¹¹ and prepared a set of risk objectives for inclusion in the contract;
 - analysed the cost of the risks and used the analysis in evaluating the benefits of contracting out;
 - specified in the tender documents how the risks are to be allocated; and
 - developed some understanding of the issues and concerns of potential contractors within the private sector.

Why Are These Expectations Important?

- 408 The way in which the contractor is selected is critical to success and will raise issues of cost, quality, risk, probity and fairness.

Tender Documents

- 409 The tender documents – which are the basis of the contract – define the responsibilities of the contractor as well as those of the local authority. They also describe the details of performance that become the yardstick against which the contractor's performance is measured. Well-written tender documents and the ultimate contract cannot guarantee exceptional or even acceptable performance – but if poorly prepared they create opportunities for substandard performance. Substandard documentation

¹¹ NZS/AS4360: 1995 is a useful standard.

may lead to difficulties in the tendering process itself – for example, in bidders needing to seek clarification.

- 410 In general, the tender documents will include the scope of work, general terms and conditions, instructions to tenderers, and the tender form. The documents should be specific when describing the local authority's objectives. If any areas of service delivery must be performed in a particular way, they should be identified as non-negotiable methods of delivery.¹²

Tendering Method

- 411 The tender project manager must determine the best tendering method to be used to select a contractor. Some local authority purchasing policies allow only competitive sealed tendering. Others allow competitive sealed tendering and competitive negotiation. Others allow for multiple-step tendering. The legal risks involved in any particular method should be properly understood.
- 412 Different tendering methods will be appropriate to the different types, scale and complexity of services that are to be provided. Whichever method is chosen, all bidders should have the benefit of a clear description of the process and rules.
- 413 Proper competition between bidders is important in producing the best possible offer. It is important that the council manages this process very well, as failure to do so could result in it being sued by unsuccessful bidders.

Sharing Risk

- 414 An integral part of the service requirement is the desired allocation of risk between the parties. Under a traditional service delivery arrangement, all the risks of increases in costs usually rest with the local authority. One of the key features of contracting out is allocating risk to the party best able to deal with it (thereby obtaining the required standard of service at the best cost).
- 415 The first step for the council is to identify the risks associated with a proposal to contract out that could cause the quality or cost of the service delivered to differ from the standards planned.

¹² The *New Zealand Infrastructure Asset Management Manual* provides a framework.

TENDERING AND CONTRACTING

- 416 Having identified the risks inherent in a proposal, the council has to consider the likelihood of these risks occurring and their probable financial effects, and whether it wishes to seek to transfer the risks to the contractor. The tendering process will determine whether risk transfer is achievable and the associated costs.
- 417 Where the council agrees to retain or share a risk, it must make arrangements to minimise the likelihood of the risk having a financial impact.

MEMO:

Preparing for the Tender

- *Have we read some of the many publications available on preparing for tenders?*
- *Do our initial documents for prospective tenderers contain sufficient information to allow them to submit informed bids that recognise the required risk-sharing?*
- *Have we chosen a tendering method designed to maximise the chances of selecting the most suitable contractor?*
- *Have we assessed how the formal delegation arrangements can cope with taking these decisions?*
- *Have we established a timetable for the decisions and procedural steps that have to be taken?*

Phase Three

418 Our overall expectation for the third phase of preparing for the tender is that the local authority will prepare a communications strategy as part of the contracting-out process, to keep people informed about the progress of a proposal.

Our Specific Expectations

- 419 We expect that a council would be able to demonstrate that it had:
- developed a communications strategy to inform the various interested parties of progress; and
 - implemented the communications strategy according to a plan.

Why Are These Expectations Important?

- 420 Successfully managing the contracting-out process will also depend upon managing the key relationships with interested parties. Interested parties can be divided broadly into those inside and outside the organisation:
- **Inside** – The largest group and the one with the greatest concerns will be the staff whose employment may be affected directly by the proposal. The local authority needs to approach this issue carefully.
 - **Outside** – Service users and the wider community.
- 421 Procedures need to be established for responding to requests for information from potential tenderers.



MEMO:

Preparing for the Tender

- *Have we developed a suitable communications strategy?*

Conducting the Tender

- 422 Our overall expectation for conducting the tender is that it will be done properly in accordance with good public management practice.

Management Skills

Our Specific Expectations

- 423 We expect that a council would be able to demonstrate that it has:
- Assessed the appropriate knowledge, skills and experience required to conduct the tender and negotiate a successful contract. If need be, further resources should be obtained.
 - Managed the process so as to create a “competitive climate” and maximise the interest of the potential tenderers.

Why Are These Expectations Important?

- 424 A local authority needs specific skills and experience to finalise a contract that represents a good deal for the public. This includes the ability to act fairly towards all parties and in accordance with the procedures set out in the tender documents.
- 425 Because of the potential complexity of the contract, the council will need high-quality skills in negotiating complex transactions to a successful and enduring contractual agreement.
- 426 The council needs to select a contractor based upon what it is trying to achieve through delivery of the services. Establishment of non-price criteria provides an opportunity for the council to achieve quality assurance, service delivery and other objectives. Importantly, the selection criteria should ensure protection of the interests of the community.
- 427 Those responsible for establishing the selection criteria, evaluating tenders, and selecting a preferred contractor should keep in mind that selecting the wrong contractor could be as damaging to the effectiveness and reputation of the local authority as providing services inefficiently from inexperienced “in-house” staff. The contractor must be selected to improve – not detract from – the community’s perception of local authority service delivery.

Marketing the Tender

Our Specific Expectations

- 428 We expect that a council would be able to demonstrate that it has:
- comprehensively marketed the service(s) being tendered;
 - provided tenderers with every opportunity to know exactly what scope the contract covered (including details such as payment options for time-related charges, e.g. hourly rates, and for service types – allowing bidders to avoid having to make global estimates of costs which could weaken its chances of being selected); and
 - politically committed itself to the contracting-out process – and publicly demonstrated this commitment.

Why Are These Expectations Important?

- 429 Successful marketing will attract more suitable tenderers that (in turn) will increase the possibility of meeting all the interests of the ratepayers and the community. Good management practice means developing a marketing strategy setting out how the local authority intends to maximise exposure to potential bidders.
- 430 The council should demonstrate a clear sense of ownership and commitment to contracting out in order to encourage private sector interest and participation.

Fairness of Process

Our Specific Expectations

- 431 We expect that a council would be able to demonstrate that it has:
- carried out the tender process fairly, with integrity and careful attention to the proper conduct of public business; and
 - managed the tender process so as to allow sufficient time to carry out the process in order to maximise the benefits for ratepayers.

TENDERING AND CONTRACTING

Why Are These Expectations Important?

- 432 The tender process should be as set out in approved council policy, in line with accepted professional practice, and should meet all relevant legal requirements. All processes set out in the tender documentation must be followed carefully. All parties should be treated equally in terms of disclosure of information.
- 433 It is important to allow enough time for tenderers to prepare their bids; and for the authority to evaluate the bids, carry out any negotiations required, and finalise the contract.

Tender Evaluation

Our Specific Expectations

- 434 We expect that a council would be able to demonstrate that it has established evaluation criteria:
- designed to ensure that the contract met the long-term interests of the ratepayer and the community; and
 - by which it assessed all bids, stating clearly the relative weightings of all criteria.

Why Are These Expectations Important?

- 435 The success of contracting out hinges on how well the council can match qualified contractors to the service(s) to be contracted. Bid qualification criteria that are not based on the contractor's ability to provide the service, or that limit competition, should be avoided.
- 436 Cost is not the only criterion for a successful outcome. The council must be satisfied that the contractor has the capability to deliver the desired outcomes. Therefore a range of non-price criteria are important, including:
- management skills;
 - technical skills;
 - reporting, quality assurance systems, and insurance;
 - records and information transfer;

- customer focus and location;
- financial management; and
- financial security of the contractor.

437 Transparency as to the rules concerning the weighting of criteria is critical to the fairness and integrity of the tendering process.

Documentation

Our Specific Expectation

438 We expect that a council would be able to demonstrate that it has clearly documented and archived all stages of the tender process and decision making.

Why Is This Expectation Important?

439 The authority should maintain complete records of its actions. Correspondence, completed evaluation forms, results of reference checks and site tours, and minutes of meetings are all important in the interests of transparency and accountability, and could be critical in the event of any questioning of or challenge to the way that the tender was conducted.

MEMO:

Conducting the Tender

- *Have we read some of the many excellent publications available on conducting tenders?*

Contract Terms and Conditions

- 440 Our overall expectation for contract terms and conditions is that they will be comprehensive – providing all the necessary specifications to meet the local authority’s objectives, while defining and protecting both parties’ rights and obligations.

“Technical” Matters

Our Specific Expectations

- 441 We expect that a council would be able to demonstrate that the contract provides for:
- definitions, and any necessary explanation and clarification, of the terms used in the contract;
 - the duration of the contract and any conditions for renewal or extension;
 - the procedures for termination of the contract;
 - the conditions under which the contractor can (or cannot) assign or subcontract any of the obligations of the contract; and
 - the procedures for dispute resolution between the contractor and the local authority.

Why Are These Expectations Important?

- 442 Neither the contractor nor the local authority should be able to terminate the contract without cause. Adequate notice provisions are essential in the event of termination with cause. In the event of summary termination, or termination by death, insolvency, etc, processes need to be specified to enable service delivery to continue.
- 443 An assignment clause can prohibit the contractor from transferring or assigning the contract (or part of the contract) to another party without the consent of the local authority.
- 444 There will need to be procedures for handling disagreements between the local authority and the contractor. The time limits for dispute resolution and the process to be followed should be dealt with in this clause.

Scope of Work

Our Specific Expectations

- 445 We expect that a council would be able to demonstrate that the contract provides for:
- the scope of the work required; and
 - the procedures for changing the scope of work.

Why Are These Expectations Important?

- 446 The scope of work is at the heart of the contract. A well-written specification of the scope of work can do more for the success of a contract than any other part of the contracting process. This will act as an aid to understanding the contract by both parties – the contractor and the council – who must be clear about what is meant by, and meant to be achieved through, the contract.
- 447 The terms and conditions should be designed to allow for flexibility of the ways in which services are delivered in terms of both quality and quantity. Procedures for changing the scope are particularly important in the context of long-term contracts because they provide for changes of circumstances and introduce the elements of responsiveness into what could be very rigid agreements.
- 448 Valid amendments are common for work that is beyond the original scope of that specified in the contract. If an amendment affecting the contract price is determined to be valid, the contractor must provide a detailed breakdown of the proposed cost increases to demonstrate that there are no unwarranted extras built into the amended price.

Pricing

Our Specific Expectations

- 449 We expect that a council would be able to demonstrate that the contract provides for:
- the basis of payment – by whom, to whom, and for what; and
 - the mechanism(s) for regulating the charges (price) for the services to the council and customers.

Why Are These Expectations Important?

- 450 The payment mechanism devised for contracts should link payments to performance of service, including performance against predetermined standards.
- 451 It is important to design a contract monitoring system that is simple enough to operate in a busy working environment, yet is capable of ensuring that significant financial penalties are imposed for substandard service.
- 452 To ensure that there are effective commercial incentives upon the contractor to meet the required standards, the conditions set out in the contract must be clear and enforceable, and the deductions arising must be significant enough to prompt either avoidance of substandard service or corrective action.
- 453 The pricing structure adopted should be clear, and consistent with the local authority's strategic objectives for service delivery, its fee structure and its charging policy, and must comply with all the relevant legislation regarding local authority fees.
- 454 Given the monopolistic nature of regulatory functions, controls are needed to prevent unreasonable price charging. The manner for pricing different components should be designed to ensure that the interests of the community and other stakeholders are protected. How Queenstown applied controls to pricing by the contractor is summarised in Appendix C on pages 108-109.

Contractor Performance

Our Specific Expectations

- 455 We expect that a council would be able to demonstrate that it has addressed and (as necessary) ensured that the contract provides for:
- the required competencies of the contractor (which can be managed either at the tendering stage or at the contract finalisation stage, or both);
 - the required performance measures and standards for all services to be provided;
 - the procedures for how the performance of the contractor will be evaluated;

- the required quality assurance programme;
- the mechanism(s) for defining, controlling and managing poor performance or non-performance, and the contractor's reporting requirement to the council;
- the required standards and mechanisms for collecting, managing and storing information in relation to the contract; and
- the independent status of the contractor.

Why Are These Expectations Important?

- 456 The success or failure of any service contract can be dependent on contractor qualifications and experience. When describing qualifications, care must be exercised to avoid using qualification criteria that are not based on the contractor's ability to provide the service or that limit competition.
- 457 Required performance measures and standards should be a central part of the contract. A more detailed examination of our expectations about performance standards is set out in the next section on monitoring.
- 458 Performance standards should be at least as high as those established for local authority employees who formerly provided the service(s).
- 459 Designing service specifications is not easy, especially if no formal specifications existed before contracting out. There are also choices to be made (e.g. whether specifications should be spelled out in terms of outcomes or processes).
- 460 Part of successful contract administration is selecting the appropriate monitoring method that will provide the most timely and accurate information to the local authority at the least cost. However, the evaluation system should be structured so that it will not interfere with service delivery.
- 461 Contractors providing complex or highly visible services should be required to have a quality assurance programme in place to ensure that the service is provided as specified. The contractor should be required to include at least the following:
- an inspection system covering all the performance requirements in the scope of work – specifying the areas to be inspected on either a scheduled or unscheduled basis, the individuals responsible for the inspection, and the frequency of those inspections;

TENDERING AND CONTRACTING

- a method of identifying poor performance or non-performance; and
 - a description of the type of corrective action to be taken if poor performance or non-performance is established.
- 462 The local authority needs to have legal redress in the event of the contractor failing to meet the terms and conditions of the agreement.
- 463 The contract should describe the penalty clauses that will apply when poor performance or non-performance is established.
- 464 The information collected by the contractor in carrying out the required activity forms a significant asset for the local authority. Accordingly, there should be a range of requirements on the contractor regarding:
- checking for the authenticity of all information received;
 - the need for confidentiality of all information received;
 - the need to complete and update all computer and other records as deemed necessary and make them readily available to the local authority; and
 - the need to disclose particular information to the public as required under the Local Government Official Information and Meetings Act 1987.
- 465 A specific clause is needed in the contract to establish the contractor as an entity completely separate from the local authority.

Obligations of the Parties

Our Specific Expectations

- 466 We expect that a council would be able to demonstrate that the contract provides for:
- the responsibilities of the local authority;
 - the exclusions under which the contractor can carry out work for clients other than the authority, and the steps required to address conflicts of interest;
 - the responsibilities of the contractor to comply with all other legislative obligations in carrying out the contract;
 - the required level of indemnity that the contractor must provide;

TENDERING AND CONTRACTING

- the terms and conditions of any insurance that the contractor must obtain;
- the requirement for the contractor to prepare a set of procedures for a range of extreme events (force majeure) or a default contingency plan; and
- the respective rights and responsibilities of the contractor and the authority on matters of intellectual property and information databases.

Why Are These Expectations Important?

- 467 The local authority assumes its own set of contractual duties and obligations. Its principal obligation is to ensure and pay for satisfactory service. In addition, there may be obligations regarding the provision of support service, or the use or lease of equipment or facilities. The contract should include processes for defining responsibilities that might arise under circumstances not expressly foreseen by the contract.
- 468 Regulatory functions have an impact on citizens' rights and property rights if due process exists. A contractor must act impartially in the same way as the authority is required to.
- 469 The contractor should expressly be obliged to comply with all applicable laws (such as employment law), and to respond to legal obligations in the same way that the authority would have to in matters such as requests for information. A particular aspect of the latter is providing information free on the request of a statutory body that is entitled to it. The contract should also specify any requirement to have regard to; for example, the Treaty of Waitangi.
- 470 Indemnification clauses are intended to protect the local authority in the event of negligent performance or non-performance by the contractor, or breach of some other legal obligation.
- 471 Establishing appropriate insurance coverage is a key aspect of the contract agreement. Every service contract should require the contractor to obtain insurance sufficient to protect the local authority. The insurance verifies that the contractor has the financial capability to compensate the public and the local authority for injury or damage arising from the contractor's negligence, and to protect the assets of the local authority from damage claims resulting from such negligence.
- 472 It is important to tailor the insurance coverage to meet the risk factors inherent in each service. Too little coverage may lower the contract cost because of lower premiums but it can create other risks for the council.

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- Too much coverage may limit the number of bidders, and the added premiums will surely be passed on to the local authority in the contract price.
- 473 The local authority should ensure that all responsibilities of both parties are clear for a range of extreme events – such as earthquake, flooding, fire or contractor failure.
- 474 However, the contractor should expressly be excused from failing to perform because of conditions beyond its control. Care should be taken that activities that the council wants the contractor to be responsible for in such circumstances are not excluded by the general exclusion.
- 475 Any contract involving a regulatory function should have a contingency plan to provide for continuation of service if the contractor defaults.
- 476 The authority needs to retain ownership of its intellectual property and any databases, although the maintenance of them may well be contracted out to the contractor. The condition that any database (e.g. for PIMs or LIMs) should be in when the contract expires needs to be fully set out. The council should establish procedures for assessing that condition.
- 477 The implications of the Privacy Act 1993 in respect of personal information must also be addressed.

MEMO:

Contract Terms and Conditions

- *Have we developed a comprehensive contract document that is designed to achieve all the required and desired outcomes?*
- *Have we engaged suitable contracting and legal expertise to ensure that our contract document is rigorous and practical?*

Managing and Monitoring the Contract

478 Our overall expectation for contract management and monitoring is that the local authority will provide suitable resources and establish suitable processes, and have access to sufficient information from the contractor, to allow it to assess, validate and audit the contractor's performance.

Our Specific Expectations

479 We expect that a council would be able to demonstrate that it has:

- provided resources and established processes to enable it to monitor and manage the relationships between policy and implementation of regulatory controls, as well as the delegation structure and its influence on the contract;
- provided resources and established processes to enable it to monitor and evaluate the contractor's performance against the performance measures and standards in the contract;
- determined who (i.e. the council or the contractor) is responsible for the long-term monitoring of such matters as the environment and health;
- identified how it will handle any gap in the assurance available to it – i.e. the difference between the assurance inherently available when council staff were performing the function and the assurance available from the contractor's performance (even if the contractor fully meets the contract terms and conditions);
- resources and procedures for dealing with poor performance or non-performance by the contractor;
- set up a regular system of reporting and/or communicating with the contractor;
- established procedures for assessing the required condition of any asset to be returned to the authority at the end of the contract period;
- established and documented procedures for a range of extreme events; and
- established an acceptable format for reporting to the public the performance and costs of the contract.

Why Are These Expectations Important?

Managing

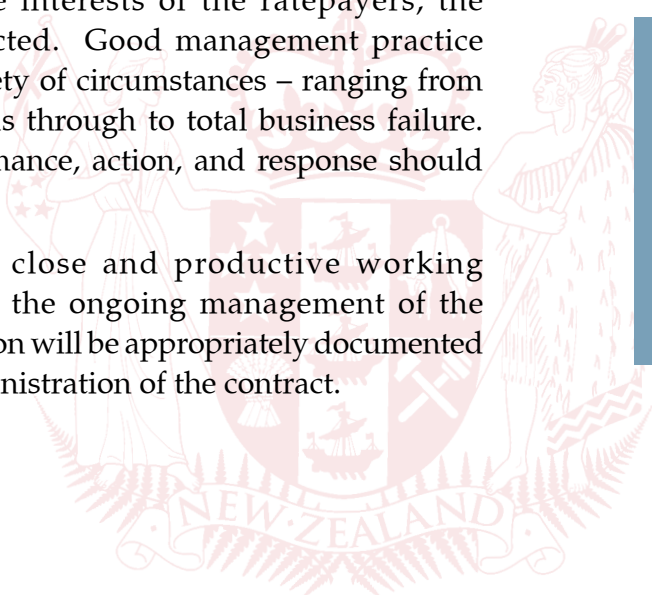
- 480 The local authority should have resources available and procedures in place to effectively manage, monitor, audit and review the activities of the contractor. This should be a focus of the authority in order to provide assurance that all performance standards are being met, and all legal obligations complied with to the necessary standard.
- 481 In local authorities with small or moderate degrees of contracting out, contract managers are often employees who assume contract administration duties in addition to their regular assigned duties. As the contracting out extends, or as the contracts become more complex, the idea of a full-time contract manager might become more applicable.

Monitoring

- 482 A contract management system is held together not by forms, surveys, or other paperwork, but by those responsible for managing the contract. Effective contract management relies more upon the skills of the monitor than on the particular monitoring methods or forms used.
- 483 Nevertheless, part of successful contract administration is selecting the monitoring method that will provide the most timely and accurate information to the local authority at the least cost.
- 484 During the start-up period of a contract, the contract manager may need to monitor fairly intensively. However, the object is to help the contractor to get on the right path – not to interfere with the contractor’s work.
- 485 In gathering information, the local authority has several choices. It can use:
- direct monitoring – which occurs while the work is being performed;
 - follow-up monitoring – which occurs after the work is completed;
 - monitoring by exception – which may use both direct and follow-up monitoring but is triggered by specific complaints about service; and
 - scheduled and random monitoring.

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- 486 Monitoring can be one of the most labour-intensive aspects of contract administration, and funds and personnel need to be carefully rationed and put to best use. Contract managers need to balance the time and money required to monitor a contract against the potential for disruption of essential service delivery.
- 487 Careful monitoring is necessary to make sure that the contractor meets the performance measures and standards. When performance drops below what is required, the contract manager must act quickly to prevent further decline and ensure that minimum standards are returned to as soon as possible.
- 488 The local authority and the contractor should share information about performance in order to minimise the data collection burden. The authority must have access to information on the management and operation of the contract to ensure protection of the long-term interests of the ratepayers and levels of customer service.
- 489 For the purposes of monitoring and audit, the council should have open access to the contractor's records.
- 490 The authority needs to avoid situations where the contractor can potentially influence policy to increase or decrease regulatory workloads (e.g. numbers of consents to be issued). Similarly, changes to council policy and delegations that create a similar effect need to be understood and monitored in order to avoid unforeseen effects on the contract.
- 491 A key responsibility for the local authority is to assess the quality of customer service throughout the contract period, to ensure that the required level of service is being delivered and accurately reported.
- 492 In the event of non-performance by the contractor, the local authority will be responsible for ensuring that the interests of the ratepayers, the community and customers are protected. Good management practice requires procedures in place for a variety of circumstances – ranging from failure to meet minor quality standards through to total business failure. A grading or scale of levels of performance, action, and response should be defined and implemented.
- 493 Effective communications foster a close and productive working relationship between the partners in the ongoing management of the authority's interests. Each communication will be appropriately documented as an agreed basis for the ongoing administration of the contract.



MEMO:

Contract Management and Monitoring Issues

- *Have we made use of the considerable material available on how to monitor contracts?*
- *Does the contract manager understand the concepts of the contract, the allocation of responsibilities, the contractor's duties, the risk allocation and the critical success factors?*
- *Do we have the capability to monitor and evaluate the contractor's performance as required by the contract agreement?*
- *Do we have the resources and procedures for dealing with poor performance or non-performance by the contractor?*
- *Can we set up a regular system of reporting and/or communicating with the contractor?*
- *Can we establish documents and procedures for a range of extreme events?*
- *Have we an acceptable format for reporting the performance and costs of the contract to the public?*

HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

501 This part describes the key events in the Council’s steps to contract out the performance of its regulatory functions.

Previous Experience

502 When Queenstown was still a borough (i.e. before 1989) the Council contracted out many activities, including the maintenance of its parks and reserves. Then in 1994 it sold the in-house infrastructural maintenance operation. These contracts gave the Council experience in the implications of using private sector contractors instead of its own staff.

503 In 1994 the Council also contracted out its Harbourmaster responsibilities, which it considers provided an insight into the risks associated with regulatory functions and the impact that different forms of management have on those risks.

The First Steps

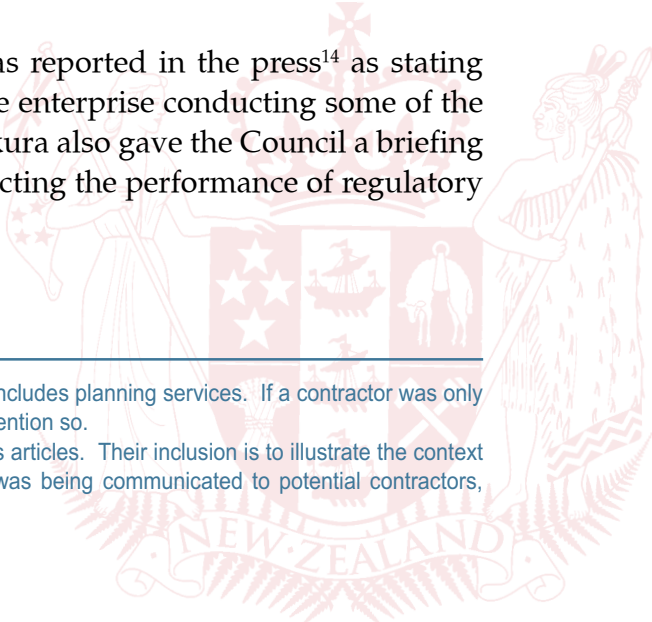
504 In November 1997 the Council received a number of unsolicited offers to enter into contractual arrangements for the delivery of various services:

- the Joyce Group (a company performing regulatory functions for the Papakura District Council) offered to contract to perform the Council’s regulatory functions;¹³
- the Council’s Manager of Regulatory Services offered to deliver the services under contract; and
- another company expressed an interest in delivering professional engineering services.

505 During the same month the Mayor was reported in the press¹⁴ as stating that he was a strong advocate of private enterprise conducting some of the Council’s services. The Mayor of Papakura also gave the Council a briefing on his Council’s experience with contracting the performance of regulatory functions to the Joyce Group.

13 In this part the performance of regulatory functions includes planning services. If a contractor was only interested in the planning services we specifically mention so.

14 This is one of several references in this part to press articles. Their inclusion is to illustrate the context for what was happening at the Council and what was being communicated to potential contractors, ratepayers, etc through the media.



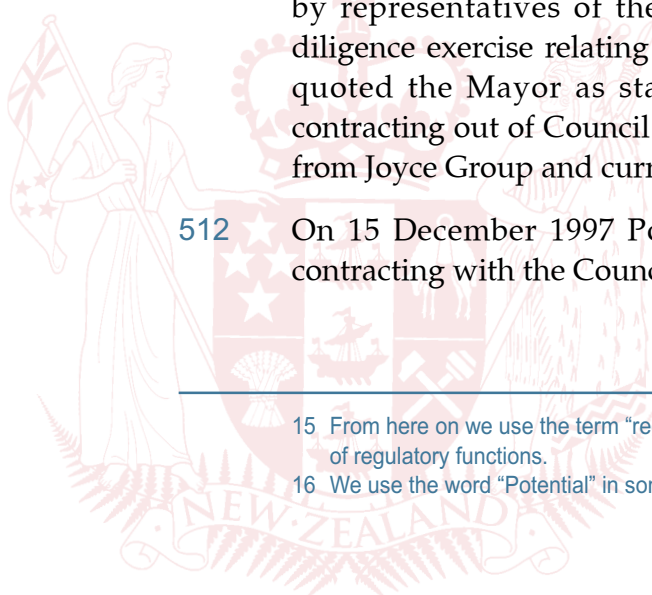


HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

- 506 On 28 November 1997 the Council resolved to review all its services with the aim of contracting them out. It agreed that:
 - the professional engineering services would be the pilot project and that the target date for the contract to commence was 1 July 1998;
 - a project subcommittee of the Council would seek advice on the development of a template for contracting of service delivery, and the project-specific contract; and
 - the successful contractor would be required to engage existing Council staff.
- 507 The Council’s Chief Executive Officer resigned in November 1997 and an acting CEO was appointed.
- 508 On 1 December 1997 the Mayor was quoted in the press as saying that the 1994 contract for the infrastructural maintenance operation was a satisfactory precedent for considering contracting-out proposals. A councillor was also quoted in the press as stating that he had been working on contracting out of professional engineering services for the last six months. A further article appeared outlining the 28 November 1997 resolutions discussed above. It was reported that contracting out of services was seen as a way of halting rate increases.
- 509 On 4 December 1997 the Joyce Group presented a proposal to the Council to deliver regulatory services¹⁵ under contract. (For the purposes of the narrative, Joyce Group is “Bidder A”.)
- 510 On 8 December 1997 Potential Bidder B¹⁶ expressed interest in contracting for the delivery of various council services.
- 511 On 12 December 1997 the Mayor informed council staff of a pending visit by representatives of the Joyce Group who were to undertake a due diligence exercise relating to regulatory services. The next day, the press quoted the Mayor as stating he was taking a “holistic approach” to contracting out of Council services, and that proposals had been requested from Joyce Group and current Council staff.
- 512 On 15 December 1997 Potential Bidder C made known its interest in contracting with the Council.

¹⁵ From here on we use the term “regulatory services” as a convenient abbreviation for the performance of regulatory functions.

¹⁶ We use the word “Potential” in some cases to indicate that the party did not in the event submit a bid.

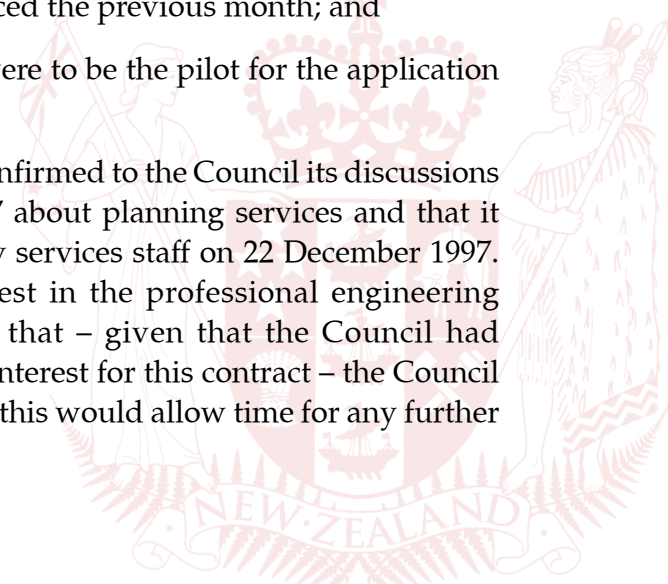


HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

- 513 On 16 December 1997 CivicCorp (Bidder D) wrote to the Council requesting due diligence by 22 December 1997, and seeking confirmation that the closing date for submission of proposals was 30 January 1998. CivicCorp was a company formed by Mr. Kampman – the Council’s former Manager of Regulatory Services – and Mr. Eyles – a former Council employee with experience in providing services under contract to public sector organisations.
- 514 Also on 16 December 1997 Potential Bidder E advised the Council of its interest in bidding for the contract to deliver regulatory services.
- 515 Again on 16 December 1997 the Mayor was reported in the press as saying that if the Council contracted out all services, council staff numbers would reduce from 87 to 25.

Due Diligence Begins

- 516 The Joyce Group conducted due diligence on 16 and 17 December 1997.
- 517 On 17 December 1997, Bidder F requested a meeting with the Council – in response to an earlier press article on contracting out the professional engineering services. A press article reported that three parties were bidding for a contract to deliver those services, and that a decision by a Council subcommittee was imminent. It was also reported that for regulatory services one potential bidder (Joyce Group) had already undertaken due diligence and another (CivicCorp) had requested due diligence.
- 518 On 18 December 1997 it was reported in the press that the Mayor had stated that:
- the Council intended to review regulatory services, and that a review of in-house services had been announced the previous month; and
 - professional engineering services were to be the pilot for the application of the contracting out model.
- 519 Also on 18 December 1997, Bidder F confirmed to the Council its discussions with the Mayor on 15 December 1997 about planning services and that it had requested to meet with regulatory services staff on 22 December 1997. Bidder F further confirmed its interest in the professional engineering services contract as well and noted that – given that the Council had already received three expressions of interest for this contract – the Council may not wish to hurry any decision as this would allow time for any further proposals to be submitted.



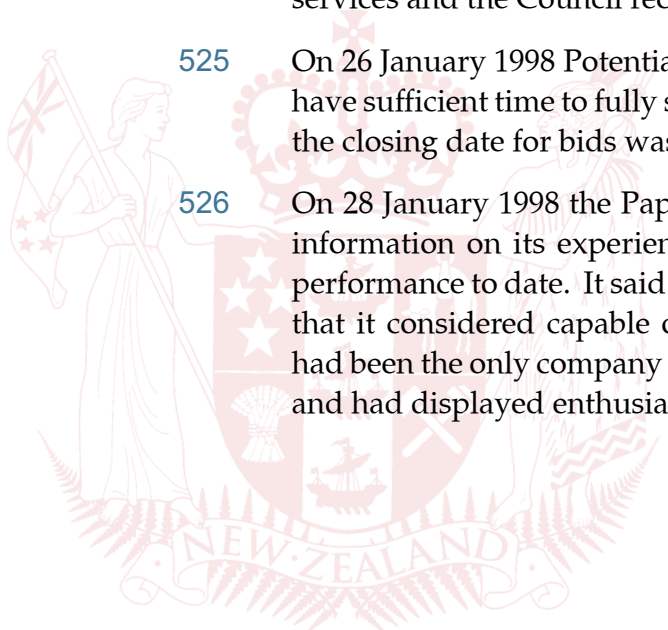


HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

- 520 On 19 December 1997 Bidder G submitted a proposal for the contract to deliver regulatory services. Joyce Group also advised that its bid would be with the Council by 25 January 1998.
- 521 On the same day a ratepayer asked councillors during the public session of the Council meeting whether or not they had given full consideration to the issue of contracting out the delivery of regulatory services. They were asked in particular about the speed with which a decision would be made, and the experience of the Joyce Group. They were also asked whether or not sections 33, 34 and 35 of the Resource Management Act 1991 precluded contracting out of these services. This questioning was reported in a press article the next day, 20 December 1997.

Setting the Closing Date for Bids

- 522 On 13 January 1998 a press article quoted the Mayor as stating that bids for regulatory services would close on 16 January 1998. On the same day Potential Bidder B advised the Council that it did not intend to bid for the contract. It noted that savings could only be achieved if there were clear specifications, well-defined performance standards, and a competitive environment. It also expressed concerns that current processes might actually lead to increased user charges and a reduction in service delivery standards.
- 523 On 21 January 1998 the Council received the formal bid from Bidder F for regulatory services.
- 524 On 22 January 1998 a Council staff member made a bid for the contract to deliver the parking enforcement and dog control parts of the regulatory services and the Council received the CivicCorp bid for regulatory services.
- 525 On 26 January 1998 Potential Bidder E withdrew on the basis that it did not have sufficient time to fully scope the issues, based on its understanding that the closing date for bids was 29 January 1998.
- 526 On 28 January 1998 the Papakura District Council sent the Council further information on its experience of contracting out regulatory services, and performance to date. It said that while it had approached several companies that it considered capable of delivering council services, the Joyce Group had been the only company that had offered an efficient, cost-saving service, and had displayed enthusiasm and commitment.



Chief Executive Officer Input

527 In early February 1998 the council appointed a new Chief Executive Officer (CEO) who promptly prepared for the Council a regulatory services restructuring report. The report:

- described the key factors in assessing the appropriateness of contracting out services;
- detailed those functions that could not be contracted out;
- discussed three characteristics of effective consultation with staff on the impacts of contracting out;
- explained that the cost/benefit analysis would be based on the criteria developed for assessing the contract proposals, which were also listed;
- noted that some of the criteria were in conflict and the councillors would need to give preference to some, and weighting to others;
- described the tendering process as having to date resulted in 7 expressions of interest and 5 final bids;
- discussed the establishment of contract administration and monitoring positions within the Council which would focus on planning and regulatory issues; contractor performance; and public enquiries; and
- noted that performance measures were yet to be finalised.





HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

528 The CEO circulated this report to staff and undertook to meet with them at least twice more, and to present staff feedback to the Council’s contract evaluation subcommittee.

Short-listing Bidders

529 In early February 1998 the Joyce Group and CivicCorp were told that they were the short-listed bidders and on 9 February 1998 the CEO provided them both with the restructuring report.

530 On 11 February 1998 the CEO responded to an approach from a firm that had expressed interest in contracting for planning services that the Council would only consider its proposal if all other aggregated bids (i.e. to contract regulatory services in their entirety) were declined.

531 On 12 February 1998 the bid from Bidder F was formally declined on the basis that:

- Joyce Group and CivicCorp had direct experience on the delivery of all on-site operations;
- the approach was considered too conservative; and
- the bid exposed the Council to greater risk in terms of staffing issues.

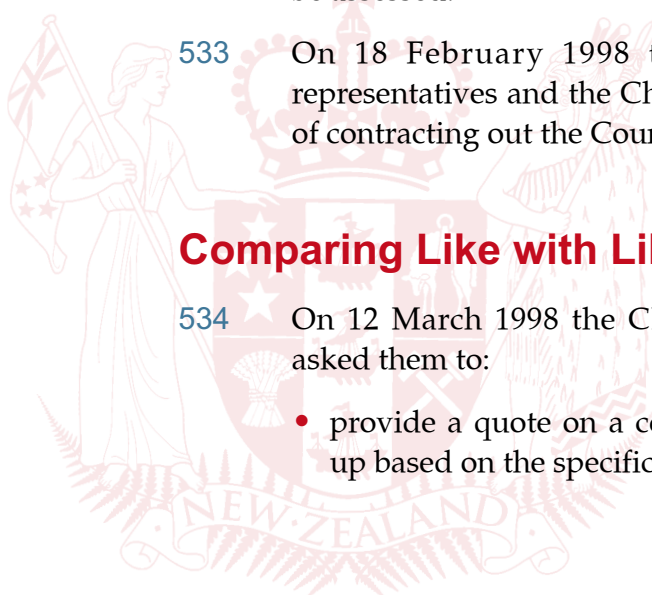
532 On the same day the CEO issued a memo to staff asking for submissions on the restructuring report by 23 February 1998 (later changed to 2 March 1998). The memo also advised staff that five bids had been received and that two had reached the final evaluation stage. Copies of this memo were also sent to the Joyce Group, CivicCorp and the Local Government Officers Union, along with the criteria against which the two bids were to be assessed.

533 On 18 February 1998 the CEO arranged to meet with business representatives and the Chamber of Commerce to discuss the implications of contracting out the Council’s regulatory services.

Comparing Like with Like

534 On 12 March 1998 the CEO wrote to Joyce Group and CivicCorp and asked them to:

- provide a quote on a common scope of services (which he had drawn up based on the specification used by CivicCorp); and



HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

- provide their financial information on a standard financial analysis form – noting that the fees each intended to charge must meet the Council’s funding policy.

535 On 25 March 1998 the CEO advised councillors that – given the size of the report on contracting out regulatory services and the relatively short time to read and consider it, as well as to receive the presentations by Joyce Group and CivicCorp – more time would be needed to reach a final decision.

Selecting the Preferred Bidder

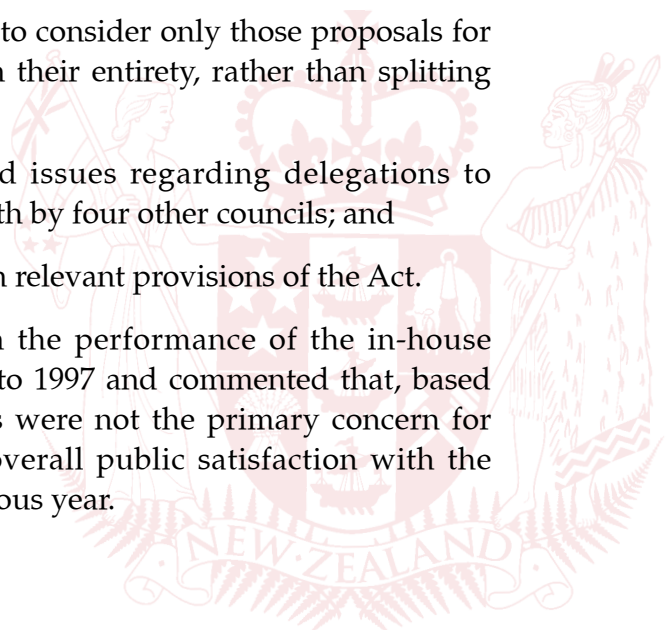
536 On 27 March 1998 the CEO gave the Council a report in which he recommended that it agree:

- that the circumstances surrounding the contracting out of regulatory services were such that tendering according to the delegations manual was not the most appropriate way to proceed;
- that Joyce Group be selected as the preferred bidder;
- that user charges be increased and that this be included in the 1998/99 draft annual plan;
- to the appointment of additional monitoring staff, including a planning manager; and
- to adopt a revised policy on contracting out to ensure that competition was encouraged, and that future tendering processes would aim to stimulate wide interest and therefore encourage a range of quality bids.

537 The CEO’s report:

- provided reasons for his preference to consider only those proposals for a contract for regulatory services in their entirety, rather than splitting the services;
- warned the Council of unresolved issues regarding delegations to contractors that were being dealt with by four other councils; and
- included consideration of matters on relevant provisions of the Act.

538 The report also contained details on the performance of the in-house regulatory services section from 1995 to 1997 and commented that, based on Council surveys, regulatory issues were not the primary concern for ratepayers. The CEO reported that overall public satisfaction with the Council had risen to 63.5% in the previous year.





HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

539 The CEO also reported on the evaluation of the financial benefits of the two bids. This included information on:

- contract length;
- the impact on corporate overheads;
- actual contract costs;
- additional costs associated with the contract, e.g. Council monitoring costs;
- a financial analysis of the two bids undertaken by an independent adviser; and
- risk analysis and proposed solutions on –
 - controlling costs (resolved by regular monitoring and fixed fees where practicable);
 - errors (resolved by insurance cover and audits);
 - performance failure (resolved by monitoring and, if persistent, termination of contract);
 - the impacts of changes to legislation;
 - the implications of contractors not employing current Council staff; and
 - the employment approach being taken by each bidder to the current staff.



HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

- 540 On 30 March 1998 the CEO wrote to Joyce Group and CivicCorp with a list of questions to assist them to prepare for their presentations to the Council. The answers, along with information already submitted against the evaluation criteria, would be used in the selection process.
- 541 Joyce Group and CivicCorp made their presentations to the Council on 31 March 1998.
- 542 Following the presentations the Council decided to award the contract to deliver regulatory services to CivicCorp.

Events Before the Contract Began

- 543 The decision was reported in the press on 1 April 1998. The report stated that the Council had placed considerable weight on the fact that CivicCorp was a local company and that staff were committed to contracting out under CivicCorp. It was reported that the contract would be signed by 30 June 1998.
- 544 On 9 April 1998 the Medical Officer of Health for Otago and Southland contacted the Council to ask for details of the scope of services to be contracted out.
- 545 On 20 April 1998 another potential contractor enquired about the possibility of securing a contract to deliver only parking enforcement services.
- 546 On 14 May 1998 the CEO publicly released, through the media, financial details of the contract with CivicCorp. The details released were:
- *In the first year of the contract the Council will pay Civic Corp \$1,126,760 for regulatory services, an estimated \$636,000 for assisting in finalisation of the Proposed District Plan, and 5% of parking revenue (estimated at \$36,000). Civic Corp will also retain all fees charged for services (excluding parking) but the level of fees will be the same as in 1997/98 unless the Council resolves to change them.*
 - *The fixed fee of \$1,126,760 will be held for 3 years. The fee for completing the Proposed District Plan will reduce after the first year as the District Plan becomes operative.*
- 547 On 18 May 1998 the CEO said in a letter to a ratepayer that public consultation on regulatory services would only be required if there was a decline in service delivery, and that service delivery would be enhanced under the contractual arrangements with CivicCorp.

HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

- 548 On 26 June 1998 the Council:
- appointed CivicCorp employees as “officers” of the Council and delegated certain powers and functions to particular individuals in this capacity;
 - noted the drawing up of two protocols relating to monitoring the contract and CivicCorp’s relationship to the Council; and
 - targeted expected savings of \$800,000 from contracting out regulatory services.
- 549 The contract with CivicCorp took effect on 1 July 1998.

Events After the Contract Began

User Charges

- 550 In August 1998 CivicCorp received a complaint from a person about the increase in charges for consents since the introduction of contracting out. CivicCorp’s reply noted by way of background to the current charging position that the Council had:
- traditionally subsidised resource consents, particularly for subdivisions; and
 - introduced earlier in 1998 a policy for recovery of the costs of general enquiries.
- 551 In September 1998 a dispute arose between the Council and CivicCorp about the level of charges – which CivicCorp had increased purportedly relying on provisions in the contract. The CEO wrote to CivicCorp reminding it that it had undertaken to hold the existing fees and charges structure for the first year of operation. He said that this undertaking – expressed to councillors by CivicCorp when they were bidding – had been the single most significant factor (along with staff issues) in CivicCorp being awarded the contract.
- 552 In its response to the CEO, CivicCorp justified its charges going up and said it interpreted the contract as saying CivicCorp would take over a number of employees and functions – not the positions – from the Council.
- 553 Shortly afterwards a joint CivicCorp and Council press release was issued announcing that CivicCorp was to revert to using pre-contracting out charge-out rates for consent applications.

HOW QUEENSTOWN WENT ABOUT CONTRACTING OUT

Contract Disclosure

554 In December 1998 the CEO made the contract details public under the Local Government Official Information and Meetings Act 1987.

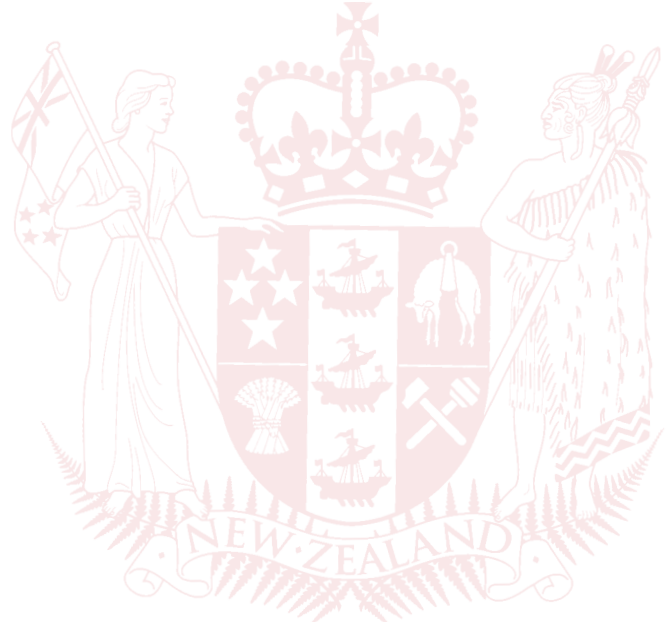
Delegation Issues

555 Two challenges were received querying the right of persons employed by CivicCorp to exercise authority as “officers” of the Council. The Council’s solicitor responded to the challengers and they have not pursued the matter.

Savings From Contracting Out

556 A report by the CEO to the Council’s meeting of 23 April 1999 asserted that *[t]here have been substantial savings through contracting out*. In the context of actual performance for 1998-99, the report refers to an indication of *operational savings from contracting out, in excess of the budget adjustments identified above, of \$466,750*. Those budget adjustments were stated to be reductions in regulatory budgets (excluding the Proposed District Plan) between 1997-98 and 1998-99 of *\$416,949 (net of revenue changes)*.

557 Those figures were produced in connection with formulation of the Council’s 1999-2000 Annual Plan. It was not part of our audit to verify them. However, we observe from the published draft plan that the forecast operating result of the Resource Management and Regulatory Services activity was expected to change from a deficit in 1998-99 of \$633,500 to a surplus of \$241,000 in 1999-2000.





HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 601 In this part we have endeavoured to provide some background to the motivation behind some of the events. To that end we have included not only material from the Council's files but also information gained from interviews with councillors and council staff.

Corporate Planning

What Did the Council Tell Us?

Strategic Positioning

- 602 The Council told us that it understood contracting out as it had had considerable experience with it. Thus, if an alternative to in-house provision of services became available (as happened in 1997), and a council like Papakura using an alternative said that it was better off than with in-house provision, the Council was ready (i.e. strategically positioned) to look at contracting out. However, the Council said that this did not mean it had predetermined to contract out, it was just willing to see how some bids from external suppliers compared against in-house provision.
- 603 We were told that one of the motivating factors behind the Council considering contracting out regulatory services was its general dissatisfaction with the in-house services being provided over at least 18 months and frustration over the time and cost of developing the new District Plan.

Operational Positioning

- 604 The Council also placed some store in operational (as well as strategic) reasons for looking at contracting out regulatory services. For example, the Council told us that planning, and subsequent action, was associated with a perceived need for the Council to take advantage of a number of factors – including the need to relocate offices, and the need to consider the numbers of staff that might need to be accommodated.
- 605 We were also told that the decision to contract out regulatory services before contracting out professional engineering services, contrary to the original plan, was due to the skills and experience of the newly appointed CEO. He had fully considered all the options for the delivery of regulatory services in his previous position with the Wellington City Council.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 606 In addition, we were told that the choice of a new CEO was made with a view to further contracting out services and down-sizing Council staff. Candidates were required to have a commitment to this approach.

How Did the Council Measure Up Against Our Expectations?

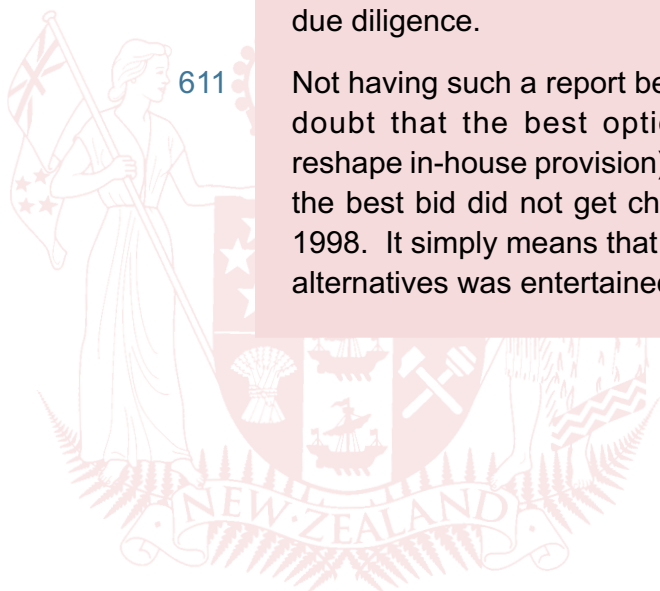
- 607 We acknowledge the Council's record in contracting out operational services. However, in terms of when or where changes to the provision of regulatory services might occur, before February 1998 none of the Council's strategic planning documents, annual planning documents, or management/business planning documents make any detailed reference to contracting out regulatory services.

- 608 Despite the performance of in-house provision being of concern to the Council, we saw no management reporting in 1997 that comprehensively analysed what could be done to alter performance levels.

- 609 In February 1998 the new CEO prepared a comprehensive report which discussed a variety of issues associated with contracting out regulatory services and solutions for those risks.

- 610 Following the presentation of this report, the Council was in a much better position to understand the contracting-out option for regulatory services. This type of report needed to be prepared much earlier in the process – certainly before potential contractors were invited to undertake due diligence.

- 611 Not having such a report before potential contractors are bidding creates doubt that the best option (e.g. contract out all or only part, or reshape in-house provision) has been achieved. This does not mean that the best bid did not get chosen when the decision was made in March 1998. It simply means that only one pathway for the consideration of the alternatives was entertained.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

How Did the Council View Its Position 8 Months Into the Contract?

- 612 We were told that, having moved to the delivery of resource consent administration (and other regulatory services) by contract, the Council now had more control over the costs associated with these activities.
- 613 We consider that the lump sum payment approach in the contract (see paragraph 546) is capable of controlling the Council's costs over the duration of the contract. The appointment of a policy manager demonstrates the Council's understanding of the potential for high-level conflict of interest issues where the contractor is involved in both developing the District Plan and administering consents. However, the quality of the plan and the required outcomes will only be able to be determined some time in the future.
- 614 In overall policy terms, the Council considers that it will continue to make key policy decisions and that the role of the contractor is to implement these policies – not create them, even indirectly. Therefore, the Council considers that there is no real change in the service delivery arrangements except that they are under contract rather than in-house.
- 615 The contract reinforces the Council's view that it is responsible for policy functions and CivicCorp is responsible for service-delivery and administration functions.
- 616 In terms of the District Plan, the Council considers that the arrangement with the contractor and the new council monitoring team (including the policy manager and contracts manager) provide more controls over policy development than existed before contracting out. The Council also considers that its corporate planning processes have been simplified, since corporate planning is now the responsibility of a small number of staff with dedicated tasks supported by targeted Council subcommittees.
- 617 We consider that the establishment of specific management positions, directed at the contractual arrangements (e.g. the contracts manager), and the overall reorganisation of Council committee structures and responsibilities, reflect a strong intent to comprehensively manage and monitor the contract.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

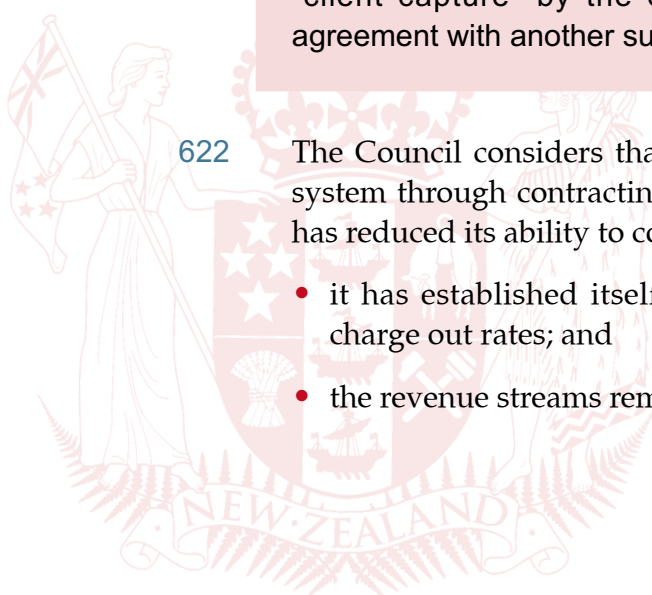
- 618 The Council considers that the move to contracting out will not prevent it from being responsive to future changes in the market place. The types of changes it sees include:
- legislative changes, for example in building certification, that may reduce a council’s role in an activity area; and
 - the food industry entering into a stage of progressive self-certification.

619 The contract does not commit the Council to provide CivicCorp with work beyond the scope of services defined in the contract. Changes to the scope of services will have to be negotiated as requirements change. This would be usual in any service-delivery contract tied to the implementation of statutory requirements.

- 620 The Council considers that contracting out will not reduce its ability to change priorities and directions in the medium to longer term, for two reasons:
- some direction-setting already occurs through the influence of third parties, regardless of whether or not contracting out exists – e.g. through appeals against the District Plan; and
 - it has the ability, at the end of the contract period, to write a revised contract or enter into a contract with another supplier.

621 We agree that the Council could write a different contract in the future, but we believe that inevitably there will be some element of “client capture” by the original contractor and a completely new agreement with another supplier would not be easy to achieve.

- 622 The Council considers that it has moved much closer to a full user-pays system through contracting out. It does not consider that contracting out has reduced its ability to control revenue streams because:
- it has established itself clearly as the fee-setter and the controller of charge out rates; and
 - the revenue streams remain essentially the same.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 623 The dispute between the Council and CivicCorp over user charges (see paragraphs 550-553) clearly established the Council as the controller of costs payable by users.
- 624 The Council also considers that it has fixed its costs while being able to influence enhancements to service level performance through the pricing method in the contract.
- 625 The terms and conditions of the contract have:
- moved the Council to a full user-pays approach to service delivery; and
 - established a fixed cost regime that should protect it from the financial effects of fluctuations (especially increases) in demand for services.

Legal and Other Risks

What Did We Find at Queenstown?

- 626 The CEO prepared his 27 March 1998 report to enable the Council to decide:
- whether to contract out regulatory services; and
 - which of two bidders it preferred.
- 627 The report:
- addressed the costs and benefits of using council staff to provide regulatory services as opposed to contracting out, as required by section 247D of the Act;
 - outlined the consultation with staff that had occurred on the issue and noted that explicit consultation with the public had not occurred;
 - recorded the CEO's reasoning for his recommendation that the Council not tender the contract;¹⁷ and

¹⁷ Section 247E(2) of the Act requires local authorities to consider whether to tender contracts which involve significant expenditure, having regard to objectives stated in their annual plans, and to record in writing any decision not to put a contract out to tender.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- recommended that the Council select one of two bidders as its preferred supplier of regulatory services, subject to the satisfactory conclusion of detailed negotiations.

628 The Council addressed many liability risks by considering the impact on its insurance arrangements. The insurance implications were the subject of contract negotiations between the Council, its legal advisers, and CivicCorp. In essence, the Council has used its own insurance to provide cover for the contractor and recovers the cost from CivicCorp.

629 The Council did not specifically provide an indication of risk assessment to the potential contractors. However, the final two short-listed bidders were experienced in regulatory matters, and the risks involved would have been clear to them from the scope of services specified.

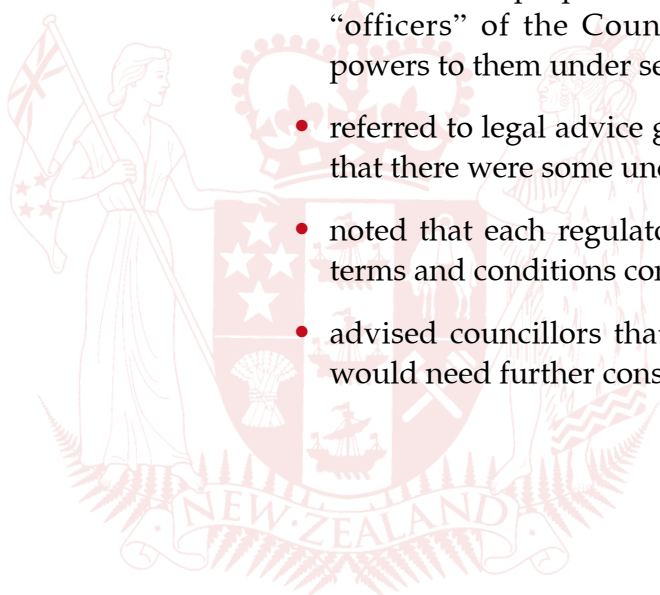
630 The Council did not develop an understanding of the issues and concerns of private sector contractors. It received some feedback from bidders, but most of the feedback related to the specifics of the Council’s tendering arrangements. For example:

- Potential Bidder B opted out, noting that savings are usually only achieved with clear specifications and defined performance standards in a competitive environment (see paragraph 522); and
- Potential Bidder E pulled out because of the short time for submitting bids (see paragraph 525).

Delegations

631 The CEO’s report:

- outlined the proposal to appoint individual staff of the contractor as “officers” of the Council for particular purposes, and to delegate powers to them under section 715 of the Act;
- referred to legal advice given to other councils on this subject and noted that there were some uncertainties;
- noted that each regulatory Act would need to be checked for detailed terms and conditions concerning delegations;
- advised councillors that some matters regarding the legal framework would need further consideration; and



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- said that a detailed resolution setting out specific delegations under relevant Acts would be submitted to the Council in June 1998.

After the Contract was Awarded to CivicCorp

632 Following the Council’s decision on 31 March 1998 to award the contract to CivicCorp, it sought advice from its solicitor on the legal framework required to implement its decision. The Council’s solicitor and the CEO negotiated the terms and conditions of the contract with representatives of CivicCorp and CivicCorp’s legal adviser during April 1998.

633 The arrangements between the Council and CivicCorp consist of:

- The contract between the Council, CivicCorp, and the two Directors of CivicCorp (as guarantors), signed on 8 May 1998, under which CivicCorp agrees to provide “regulatory services” in return for payment by the Council for a 5-year period.
- The “Scope of Services” document scheduled to the contract, defining the “regulatory services” to be provided and performance measures (as may be amended from time to time by mutual agreement).
- A Council resolution of 26 June 1998, resolving to execute warrants appointing individual employees of CivicCorp “officers” of the Council.





HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- Warrants executed by the CEO and the Mayor appointing individual CivicCorp employees as “officers” of the Council and “appointing and authorising those officers” to various positions under regulatory legislation (for example, “Enforcement Officer under the Resource Management Act 1991”).
- Delegations to CivicCorp, and individual directors of CivicCorp, under section 715 of the Act, section 34 of the Resource Management Act 1991, and section 78 of the Building Act 1991 (in some cases through the CEO) of functions, powers and duties necessary for CivicCorp to perform regulatory functions on behalf of the Council.
- Protocols prepared as part of the contract for “Contractor/Council interaction” and “Reporting Responsibilities”.

Part Six

The Contract

634 Under the contract, CivicCorp is responsible for:

- resource consent administration;
- building control (including plumbing and drainage) administration;
- bylaw and general enforcement;
- dog and animal control;
- parking administration;
- dangerous goods and hazardous substances;
- environmental health;
- liquor licensing;
- committee management and attendance at certain meetings of committees and the Council;
- road legislation management; and
- District Plan development.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

How Did the Council Measure Up Against Our Expectations?

- 635 The Council did not seek advice from its solicitor on legal issues involved in contracting out regulatory services before it decided to invite bids for the work in December 1997, or before it decided to award the contract to CivicCorp on 31 March 1998.
- 636 However:
- the CEO is a lawyer and his report to the Council for its meeting of 27 March 1998 did address legal issues and the requirements of the Act concerning contracting out; and
 - the Council obtained advice from its solicitor on the issues involved and assistance with negotiating the terms and conditions of the contract after it decided to award the contract to CivicCorp.
- 637 The CEO has 20 years' experience in local government, including running the Environmental Control Business Unit of the Wellington City Council. He was aware of legal advice given to other councils on uncertainties concerning contracting out regulatory functions – particularly about a council's ability to delegate powers to contractors to issue and cancel building and resource consents, set fees, and take enforcement action. The CEO told the Council that such issues needed further investigation. The CEO recommended that the Council award the contract to its preferred bidder subject to satisfactory conclusion of detailed negotiations.
- 638 The CEO and the Council's solicitor told us that they were confident that any legal difficulties with the framework chosen could be resolved. They considered that if a CivicCorp employee's authority to issue enforcement notices was successfully challenged, the CEO could resume signing all such notices.
- 639 We have some concerns about the legal framework used by the Council in the light of legal advice we have received on the limits on contracting out regulatory functions. The issues are summarised in Appendix B on pages 105-107.
- 640 We are also concerned that the legal advice was taken very late in the process. Good management practice would have seen legal advice being sought as part of the corporate strategic planning process. A "fix it if challenged" approach overlooks the infringements of individual rights and liberties which would result from unauthorised exercise of statutory power and the associated legal risks to the Council.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

641 We consider that a council considering contracting out a significant activity should seek legal advice on the issues involved before deciding to contract out. This is especially so in the case of an activity such as regulatory functions, given that few councils have contracted out those functions to the extent that the Council has, and given the uncertainty about the scope of some of the relevant policy in the Act.

Access to Information

642 For the purposes of the Local Government Official Information and Meetings Act 1987 (LGOIMA), any information held by CivicCorp to which the Council is, under the contract, entitled to have access, is deemed to be held by the Council. Such information is therefore open to request by a member of the public.

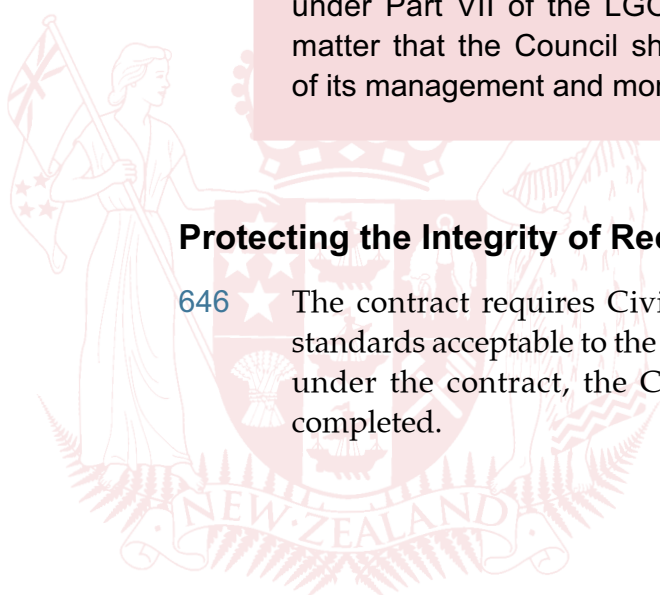
643 The contract provides that all information generated under the contract remains the property of the Council at all times. The contract also requires CivicCorp to keep confidential all information that is not freely available to the public and to not divulge such information without the prior written consent of the Council.

644 We understand that the Council handles all LGOIMA requests, with involvement of CivicCorp staff as appropriate.

645 We found no evidence that the contract arrangements have had any adverse effect on public access to information. Members of the public are entitled to request information held by CivicCorp from the Council, as owner of the information, and are entitled to attend meetings of the Contracts Committee (subject to the Council’s power of exclusion under Part VII of the LGOIMA). However, access to information is a matter that the Council should keep under continuous review as part of its management and monitoring arrangements.

Protecting the Integrity of Records

646 ★ The contract requires CivicCorp to establish record-keeping systems to standards acceptable to the Council. As owner of the information generated under the contract, the Council is responsible for archiving files once completed.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 647 The Council and CivicCorp had no procedures in place at the time of the audit but indicated that they intended to develop a protocol on the subject.
- 648 The contract provides that copyright in all information made by CivicCorp in performing services under the contract belongs to the Council.

Complaints

- 649 The contract requires CivicCorp to provide services to the level that is acceptable to Queenstown ratepayers and residents, and to improve existing levels of satisfaction. The scope of services requires CivicCorp to handle public complaints, and contains performance measures and standards for user satisfaction with CivicCorp's services.
- 650 To the extent that acts of CivicCorp are done or omitted by its staff in their capacity as duly appointed "officers" of the Council, they are within the jurisdiction of the Ombudsmen under the Ombudsmen Act 1975. We expect that the Council itself would undertake proper review of all complaints directed to it about the actions of CivicCorp.
- 651 Complaints about services is a matter that the Council should keep under continuous review as part of its management and monitoring arrangements.

Consultation

Consultation with the Public

What Did the Council Tell Us?

- 652 The Council told us that it chose not to carry out consultation with the public as it already had a mandate to act from ratepayers through ratepayer demands that rates be kept as low as possible. The Council considers that there was general understanding in the community that it was the Council's intention to keep rates as low as possible through initiatives such as contracting out.

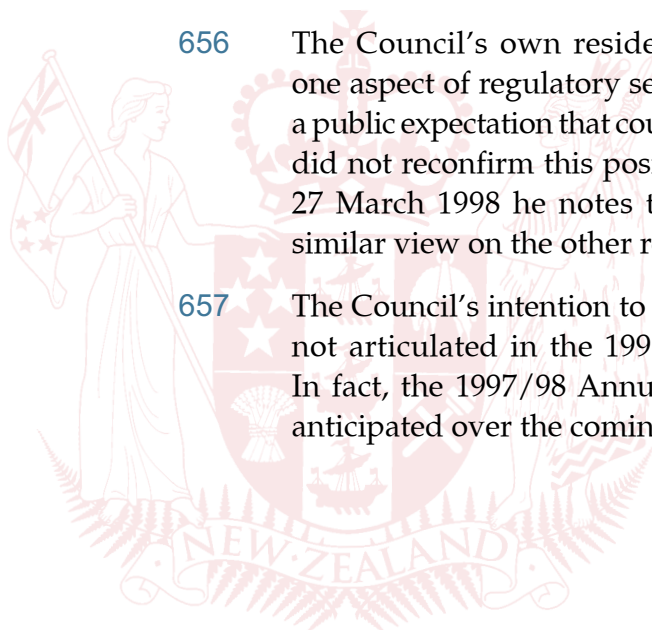


HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 653 The Council believed that it responded adequately to feedback from the community on contracting out. It considered contracting out was an appropriate response to submissions from ratepayers during the Annual Plan process that rates should be kept as low as possible. The Council also believed that if savings similar to those made in Papakura could be achieved in Queenstown through contracting out, then it had an obligation to take the same course as soon as possible.
- 654 The Council told us that the public interest in such matters as the protection of the environment is well covered through other mechanisms. For example, a clean environment is what helps drive economic growth (tourism numbers) in the region so there are natural in-built checks and balances in environmental considerations. These checks and balances are not lessened by contracting out, thus precluding a need for wide public interest consultation about whether the service is to be provided by a contractor or in-house.
- 655 The Council also believed that:
 - interest groups have the opportunity through mechanisms such as district planning appeals to influence the Council and (consequently) the actions of the regulatory service providers, whether or not those services are delivered by a contractor or in-house; and
 - there was no legal obligation to consult as only the service-delivery mechanism was changing.

How Did the Council Measure Up Against Our Expectations?

- 656 The Council’s own resident satisfaction survey showed that on at least one aspect of regulatory services – building inspection services – there was a public expectation that council staff would undertake this work. The Council did not reconfirm this position with the public, and in the CEO’s report of 27 March 1998 he notes that it is fair to assume that the public hold a similar view on the other regulatory services.
- 657 The Council’s intention to consider contracting out regulatory services was not articulated in the 1996/97 and 1997/98 Strategic and Annual Plans. In fact, the 1997/98 Annual Plan stated that no significant changes were anticipated over the coming year.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 658 Within a matter of weeks of the public being made aware through press reports that the Council was considering contracting-out proposals, the Council began considering specific proposals.
- 659 It appears to us that any public consultation that did take place (e.g. discussions/questions at open Council meetings) only occurred once the fundamental decision had been made to entertain proposals for contracting out.
- 660 According to the Council's satisfaction surveys¹⁸ the level of consultation may have been satisfactory to the ratepayers. Nevertheless, we do not consider that the general mandate to reduce rates would constitute the justification for any particular action that might as a consequence produce such a reduction.

Consultation with Council Staff

- 661 Consultation by the Council with its own staff was largely limited to the provision of information, rather than the opportunity to enter into discussions and debates about the implications of contracting out. We are not surprised that staff dissatisfaction with this approach led to incidents such as in-house regulatory services employees being quoted in the press as saying a ratepayers poll had showed 69% of those polled were against contracting out.
- 662 The information available to staff was constantly changing. For example, at a briefing on 1 December 1997 staff were informed that the professional engineering services contract was likely to be the pilot for contracting out. Yet within 12 days the regulatory services staff were told to prepare for a due diligence visit from Joyce Group on the full range of regulatory services the following week.

¹⁸ The 1998 residents satisfaction and opinion survey (which covered the 1997-98 financial year and therefore the period concerned with the contracting-out decision) showed:

- Satisfaction with being kept informed up 6.5% on the year before and 12% over 1995.
- Community consultation satisfaction up 6% on the year before and 13.5% over 1995.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 663 In our view, the consultation undertaken with staff during this time was not consistent with accepted good management practice and was not conducive to achieving the most effective and efficient outcome.
- 664 However, the new CEO demonstrated his commitment to consulting with staff. On 12 February 1998 he agreed to at least two meetings with staff, and gave an undertaking that their views would be presented to the Council evaluation subcommittee. He also showed staff the evaluation criteria being used by Councillors to select the successful bidder.

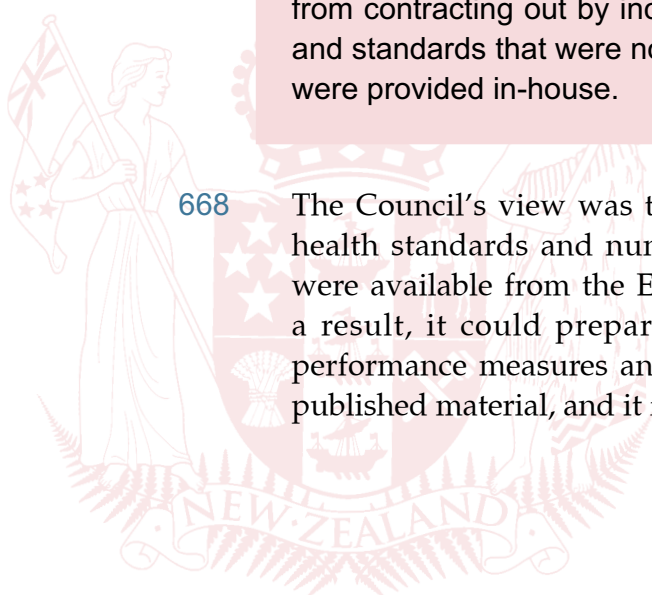
Interested Other Parties

- 665 The Medical Officer of Health for Otago and Southland had concerns about potential conflicts of interest but had to ask for information on the contract’s scope of services. It was not until April 1998 that he saw the extent of what was being contracted out.

- 666 We saw no evidence of consultation with any other parties that could be expected to have an interest in the Council’s proposals for contracting out. Many such parties (for example regional councils and health authorities) might have had useful views to offer, apart from their need to know how they might be affected. It is possible that their views might have assisted in establishing, for example, the evaluation criteria and forward-looking performance measures.

- 667 The Council’s objective was to ensure that no-one was disadvantaged from contracting out by including in the contract performance measures and standards that were no less strict than were used when the services were provided in-house.

- 668 The Council’s view was that extensive documentation was available on health standards and numerous publications on environmental matters were available from the Environmental Risk Management Authority. As a result, it could prepare the scope of services – and the associated performance measures and standards – in sufficient detail from existing published material, and it felt no need for consultation.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

- 669 In our view that approach precluded any opportunity to think more widely about performance measures and standards (especially for long-term outcomes), audit procedures, and the like, and to discuss them with the interested parties. The lack of consultation left the Council open to being criticised that the planning and contract design phases of the process were not complete and, as a consequence, that the most efficient and effective option may not have been chosen.

Day-to-day Service Users

- 670 The new CEO contacted sections of the business community to discuss contracting out of regulatory services. The Council considered that service levels (consent processing times, etc) would not decrease and consent costs would not rise (other than as part of increasing user-pays implementation), so that it saw little need to specifically consult these users in 1997.

- 671 In our view, wide and early consultation with day-to-day users of regulatory services may have helped to establish improved baselines for performance measures and standards and user expectations about service delivery before contracting out.





HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

How Did the Council View Its Position 8 months into the Contract?

- 672 The level of consultation on service delivery through the Annual Planning process has increased since 1997. The 1998/99 Annual Plan states that, in its commitment to generate savings and improve services, the Council has or is to contract out regulatory services, professional engineering services and, within the next 12 months, parts of the Corporate Department.
- 673 The 3-year financial forecasts for Resource Management and Regulatory Services compare current figures with those for the 3 years ahead. The figures in the 1998/99 Annual Plan reflect the impact of contracting out, and provide considerable useful detail. For example, the Plan notes that regulatory enquiries for building control are now an item under “contract” and will be paid for externally, rather than included in “overall costs” (as they were when delivered in-house).
- 674 The CEO’s report to the Council on contracting out of professional engineering services (when it occurred later on in 1998 and after the regulatory services experience) specifically records the degree to which public feedback on the issue had been received.¹⁹
- 675 The way in which the contracting out arrangements for professional engineering services were handled is an indication of an improved approach to consultation by the Council.

Business Planning

What Did the Council Tell Us?

- 676 The Council told us that, before contracting out, it was:
 - dissatisfied with the delivery, not the nature, of its services; and
 - unhappy with the costs and rate at which services (such as issuing of consents) were being delivered.

¹⁹ There were no written submissions.



HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

677 The example given to us was its experience with processing consent applications in-house under a user-pays system, where the Council could not accurately allocate (and therefore pass on to the applicant) the true and full cost of processing applications.

678 The Council had big peaks and troughs in the volume of consent applications. Contracting out would transfer from the Council to the contractor the business risk of not always being able to match processing volumes with staff numbers.

How Did the Council Measure Up Against Our Expectations?

679 Before contracting out:

- the business of regulatory services and development of the District Plan was documented by providing details in Annual Plans about what was to be achieved – including performance goals, measures and standards; and
- the Council had undertaken user satisfaction surveys, and had in-house statistical records, which were used to assess performance.

680 In the CEO's 27 March 1998 report the objectives to be achieved through contracting out were:

- financial benefits (savings);
- performance standards that at least met the legal requirements;
- the retention of control over policy; and
- various other benefits.

681 In his report the CEO also explicitly considered the advantages and disadvantages of different service-delivery options as the Council was required to do under section 247D(2) of the Act.

682 The Council clearly articulated the goals it wanted to achieve through contracting out the provision of regulatory services – but not until well after it had determined to set itself on that course and was considering the bids received.

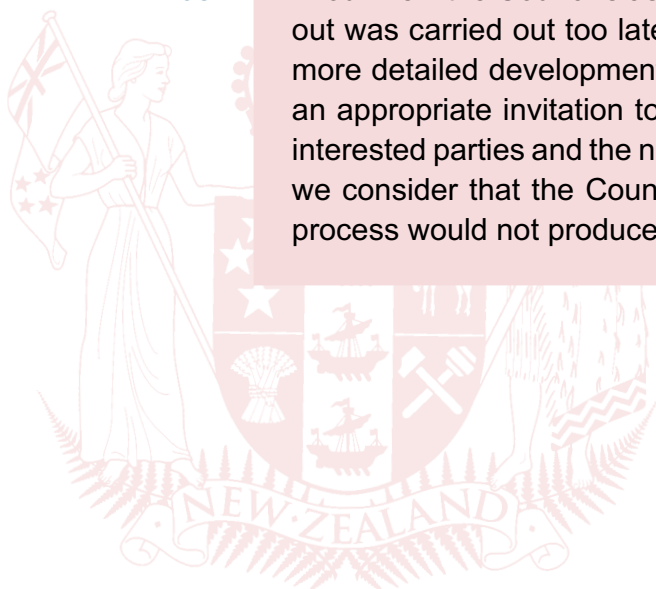


HOW QUEENSTOWN MEASURED UP – LAYING THE GROUNDWORK

Value for Money Analysis

How Did the Council Measure Up Against Our Expectations?

- 683 In 1997 the Council had data on quantities, costs, and most aspects of service performance. It had sufficient cost information to compare the two short-listed bids with in-house provision. The CEO’s 27 March 1998 report noted that the Council would need to increase staff numbers and have more resources if it was to improve service delivery under the in-house model.
- 684 The level of information on the Council’s in-house service delivery was sufficient for both of the short-listed bidders to put in tenders. The Council regularly collected some information on the quality aspects of service levels. However, it was not until the 1998 satisfaction survey that it sought specific feedback on resource consent management (which reported a satisfaction level of 50.5%).
- 685 The Council considered the merits of bundling all regulatory services into one contract when, at an earlier period, it had debated the idea of single-function contracts (e.g. for dog control or parking) and had rejected the latter option.
- 686 In respect of contract duration, the Council decided that the realities of contracting regulatory services required a 5-year minimum contract period with a similar period for right of renewal.
- 687 In our view the Council’s assessment of value for money from contracting out was carried out too late in the process. An earlier assessment, and more detailed development of any analysis that could have been part of an appropriate invitation to tender, may have increased the numbers of interested parties and the number of detailed tenders. As a consequence, we consider that the Council increased the risk that the contracting out process would not produce the maximum benefits possible.



Preparing for the Tender

What Did the Council Tell Us?

- 701 The Council considered, in its assessment, that the market for the contracted delivery of regulatory services was restricted to contractors with experience in handling all services from one site. Also, there was no established contractor market for regulatory services within New Zealand. Accordingly, a [more] formal tender process was inappropriate.
- 702 The Council considered that its “tendering process” was adequate. It reported, in March 1998, that it had attracted *strong interest from its process and that there were 5 bids and two earlier expressions of interest*. In light of this, it considered further formal bidding unnecessary, as it would have led to additional cost and delay without any obvious benefit.
- 703 The Council was not concerned that only two of the original bidders and potential bidders – Joyce Group and CivicCorp – submitted bids that it was prepared to consider. It had always intended to short-list on the basis of demonstrated experience of all regulatory services, and only Joyce Group and CivicCorp met this criterion.
- 704 The Council was not concerned about the lack of a formal plan for communication with bidders. It considered that the expressions of interest received from several serious bidders were evidence that those that needed to know about the proposal were sufficiently informed through press material. The Council also considered that its communication process was direct and responsive – it always being willing to meet with parties at short notice to discuss the contracting-out process.

How Did the Council Measure Up Against Our Expectations?

Up to February 1998

- 705 The Council did not acquire any extra resources or experience to manage the contracting-out process. The acting CEO (in charge during December 1997 and January 1998) was not part of the decision-making process. Management decisions relating to the contracting process appear effectively to have been made by the Mayor.



HOW QUEENSTOWN MEASURED UP – TENDERING AND CONTRACTING

706 The initial closing date for bids for regulatory services was 16 January 1998. However, potential bidders only became aware that the Council intended to contract out regulatory services in mid-December 1997.

707 We consider that the Council:

- did not develop, sufficiently early in the process, a suitable bidding process or proper tender documentation; and
- put in place very little in the way of a management and control framework to manage the contracting-out process.

After February 1998

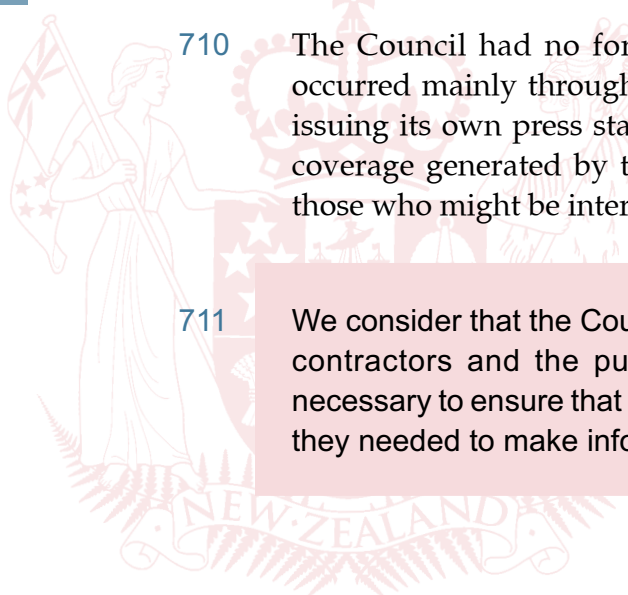
708 The Council acquired, through the appointment of the new CEO, additional experience in the consideration of options for delivery of regulatory services. It also began to use its Evaluation Subcommittee, and created evaluation criteria. From this point there was sufficient experience in the process and systems to manage the process.

709 Nevertheless, the somewhat late introduction of this rigour to the process leaves us with some doubts as to whether the contracting-out process produced the maximum benefits.

Communications Strategy

710 The Council had no formal communications strategy. Communication occurred mainly through public reaction to media interest, or the Council issuing its own press statements. The Council was reliant upon the press coverage generated by the Mayor’s statements to attract the attention of those who might be interested.

711 We consider that the Council’s approach to communicating with potential contractors and the public lacked the formal, systematic approach necessary to ensure that the various parties had access to the information they needed to make informed judgements.



HOW QUEENSTOWN MEASURED UP – TENDERING AND CONTRACTING

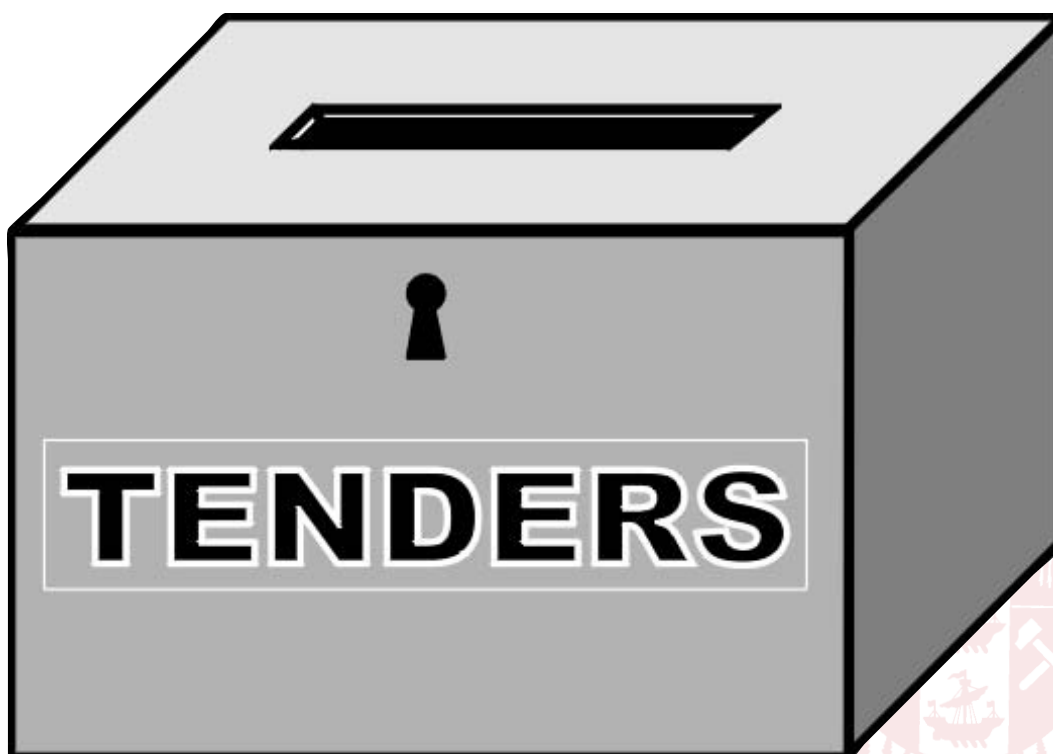
Conducting the Tender

What Did the Council Tell Us?

- 712 The Council told us that it did not adopt a formal tendering process because it did not consider that a “mature” consulting or contracting market existed which could undertake all the services required within the regulatory area.
- 713 The Council considered that it only had an obligation to react to the market that existed, and that it did not have the responsibility to create a market or wait for a market that may or may not develop.

How Did the Council Measure Up Against Our Expectations?

- 714 Part Five describes how the Council conducted the tender.





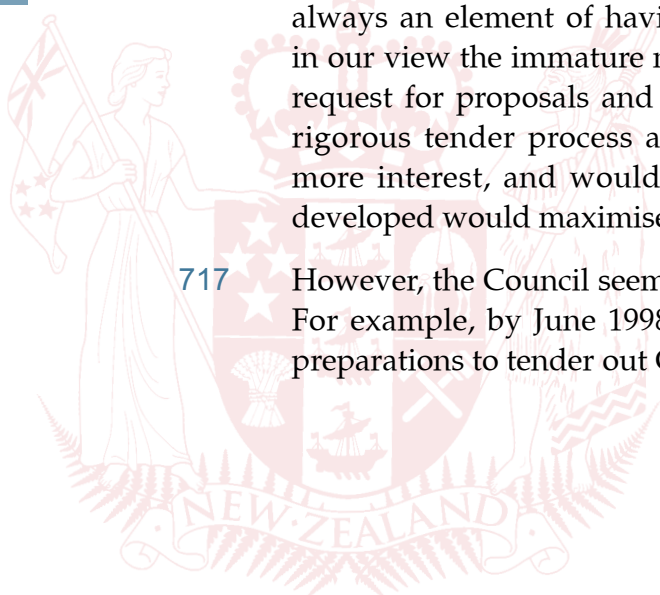
HOW QUEENSTOWN MEASURED UP – TENDERING AND CONTRACTING

715 We consider that the Council did not conduct the tender to a high standard, for the following reasons:

- It did not manage the timing particularly well. The chosen period – over Christmas/New Year – may not have been the optimal time. At least one bidder expressed dissatisfaction with the process, and in particular the time constraints on preparing a bid.
- The Council did not provide tenderers with every opportunity to know exactly what scope the prospective contract covered. Consequently, early bids (like that of Bidder F) involved a certain amount of global costing, which had the potential to reduce their competitiveness.
- It was only once the Council had short-listed two bidders that it provided a full scope of services and established payment options.
- While no bidders were actually prevented from bidding, or denied access to information, the Council did not conduct the tender using a recognised method, such as an open public tender. Hence the process lacked rigour.
- While the Council established an Evaluation Subcommittee and a set of non-price attributes (criteria) were developed against which the two bids were assessed, the evaluation criteria were not weighted. Weighting was left to individual councillors. When comparing the two final bids, significant informal weightings were applied to such factors as local knowledge and staff retention.

716 We can appreciate that being a frontrunner means that that there is always an element of having to accept the “existing” market. However, in our view the immature nature of the market meant that a more detailed request for proposals and a marketing strategy were called for. A more rigorous tender process and clearer criteria may well have resulted in more interest, and would have given more assurance that the options developed would maximise the benefits of taking this approach.

717 However, the Council seems to have learnt from the regulatory experience. For example, by June 1998 there had been a noticeable improvement in preparations to tender out Corporate Services.



HOW QUEENSTOWN MEASURED UP – TENDERING AND CONTRACTING

Contract Terms and Conditions

How Did the Council Measure Up Against Our Expectations?

- 718 We consider that, overall, the contract terms and conditions²⁰ met our expectations.
- 719 The essential contract details were completed in time for the 1 July 1998 start date. Some matters relating to management and monitoring were left to be negotiated at a later stage. For example, both parties agreed to develop and record a protocol detailing performance standards and develop an audit programme and time-line. The impact of this deferral on managing and monitoring the contract is discussed in paragraphs 723-726.
- 720 The Council did not take the opportunity to make the contractor responsible for more than just service outputs.²¹ However, it has tied the contractor to a degree of non-output performance measurement based on whether:
- any contact with the contractor by the Parliamentary Commissioner for the Environment is rated as satisfactory (by letter of representation from the Commissioner); and
 - the Council gets favourable recognition in any reports by the Commissioner or other such public officials.
- 721 However, we observed that, several months after the signing of the contract, councillors were being asked what improved performance measures they would like to see being used in connection with the contract.
- 722 The move towards increased emphasis on outcome reporting is still in its infancy, and contracting out provides an opportunity for this to be developed. Other councils should look at what improvements they can make to non-output related performance measures and standards at the time of any change to contracting out services.

20 The wording of some parts of the contract may be of interest to some readers, so we have reproduced extracts in Appendix A on pages 103-104.

21 Such as processing a certain number of consents.



HOW QUEENSTOWN MEASURED UP – TENDERING AND CONTRACTING

Managing and Monitoring the Contract

How Did the Council Measure Up Against Our Expectations?

- 723 The Council has established dedicated positions – such as the policy and contracts managers – and established procedures to monitor and manage the relationships between policy and implementation of regulatory controls. It has also committed itself to employing additional resources – such as external auditors – to assess the quality of decision-making over resource consents.
- 724 The Council evaluates contractor performance monthly against a standard reporting format. For example, in the January 1999 monthly report to the Council, CivicCorp reported on the level of its performance improvement to date. (The improvement reported was that statutory deadlines were now met 97% of the time, up from only 67% when the services were being carried out in-house. However, with no arrangements established for auditing contractor performance, the Council had to accept the improvement reported at face value.)
- 725 The Council has established:
 - procedures for assessing the required condition of the asset (which is essentially information) that is to be transferred back at the end of the contract period; and
 - through the annual plans, a forum for reporting performance and cost information about the contract to the public.



- 726 We consider that:
 - The establishment of specific management positions, directed at the contractual arrangements (e.g. the contracts manager), and the overall reorganisation of management structure and responsibilities, reflect a strong intent to comprehensively manage and monitor the contract.
 - The Council has not established and documented procedures for a range of extreme events. For example, there is no contingency plan if the contractor were to go bankrupt.
 - As of February 1999 there was still no detail of, for example, what audit specifications are to be attached to the contract.

Appendices

APPENDIX A

Extracts from the Queenstown Contract

Service Levels

CivicCorp will at least maintain the present levels of service to both the ratepayer and public at large and will develop, enhance and improve upon the delivery of such services through the term of this agreement or any renewal thereof. Priorities for enhancement of services will be agreed between the parties.

CivicCorp acknowledges that performance standards in regard to the delivery of the regulatory services to Council are to be audited and the achievement of such standards required by Council are an integral part of this agreement and persistent failure by CivicCorp to meet the performance standards required by Council is a ground for termination of the agreement.

The standard to be applied in assessing the quality of performance by CivicCorp in the delivery of the services shall be based on fairness and objectivity.

Employees

CivicCorp will within fourteen (14) days of the date of this agreement offer employment to each of Council's employees identified in a list of employees which has been produced to Council by CivicCorp ("the Selected Employees") upon terms and conditions which are overall no less favourable than the terms and conditions upon which each of the Selected Employees is presently employed by Council (including the honouring of the Employees accrued sick and long service leave entitlements and the Selected Employees long service continuity) and upon CivicCorp notifying Council that it has concluded an employment contract with any of the Selected Employees (the "Accepting Employees") Council shall release each of the Accepting Employees from their employment with Council with effect from the 30th day of June 1998 or such later date as CivicCorp and Council may agree.

APPENDIX A

Indemnity and Insurance

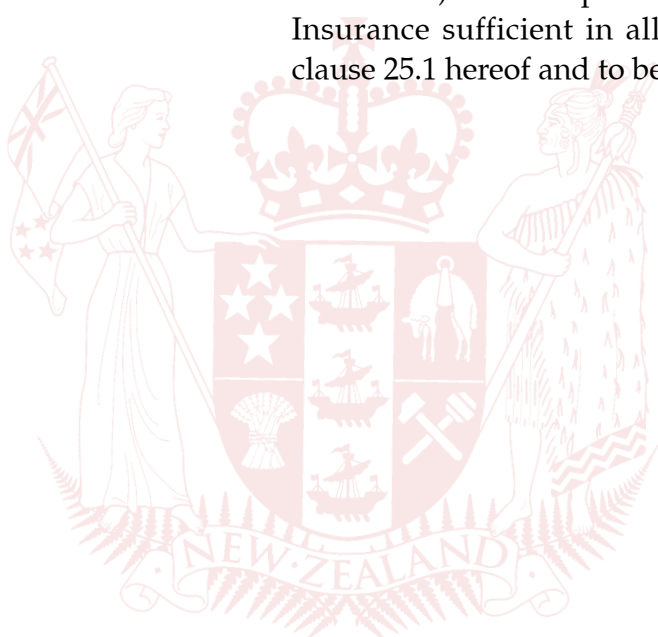
CivicCorp shall at all times indemnify the Council in respect of any claims made against Council by any third party for loss or damage or expense suffered or incurred by the third party as a direct or indirect consequence of any act, error or omission made or committed by CivicCorp and its employees, agents or subcontractors in the provision of the Services herein PROVIDED HOWEVER CivicCorp shall not have liability to indemnify Council for any liability for any acts or omissions of Council where the loss or damage is due to Council having made a decision not in accordance with the advice or recommendation of CivicCorp.

Council shall take out and maintain at Council's cost at all times during the term of this Agreement and any renewal hereof and for a period of ten (10) years following termination of this Agreement Public Liability and Professional Indemnity Insurance sufficient in all respects to cover CivicCorp's liability under clause 25.1 hereof.

CivicCorp shall in each year of the term hereof pay to Council that portion of the premium in respect of the cover undertaken to be maintained in clause 25.2 hereof which is on an actuarial basis attributable to the costs of the provision of insurance cover for the indemnity given by CivicCorp in clause 26.1 hereof.

Upon termination of this Agreement CivicCorp may elect to pay to Council in one sum its liability for premiums assessed in accordance with actuarial scales for the ensuing ten years.

CivicCorp may, notwithstanding the above provisions, elect to take out its own alternative insurance cover (subject to such cover being acceptable to Council) so as to provide Public Liability and Professional Indemnity Insurance sufficient in all respects to cover CivicCorp's liability under clause 25.1 hereof and to be for the term as detailed in clause 25.2 hereof.



APPENDIX B

Legal Issues Arising from the Appointment of Contractors as “Officers” of a Local Authority

Some of the Acts which confer regulatory functions on a local authority provide that only “officers” of the authority may perform those functions. The contract between the Council and CivicCorp provides for the Council to appoint employees of CivicCorp as “officers” of the Council. Those employees then carry out functions of the Council under a formal delegation given by the Council. This raises two issues:

- whether a council can address the limits of the contracting out power by appointing a contractor, or an employee of a contractor, as a council “officer” for particular purposes; and
- whether a council can “delegate” functions and powers to persons outside the council.

The issues are inter-related because section 715 of the Local Government Act 1974 (the Act) permits delegation only to council members and officers. Accordingly, the answer to the second issue depends not only on the scope of the power of delegation but also on whether a council can appoint a non-employee as an “officer”.

Appointment of Officers

A valid appointment of a person as an officer of a local authority requires express authority for such an appointment in either the Act or in the relevant regulatory Act.

The Act authorises local authorities to appoint or employ “staff” and to delegate powers of the council to “officers” of the council, but does not contain a separate power to appoint “officers” for particular purposes. The use of the terms “staff” and “officer” in the Act is not consistent.

It is unclear whether the appointment of a person as an “officer” under another regulatory Act necessarily means that the person must already be, or becomes by virtue of the appointment, an employee of the council.

APPENDIX B

The meaning of “officer” may vary according to the statutory context. Accordingly, before determining whether a contractor can perform a specific function on behalf of a local authority, it is necessary to consider the particular provisions under which an officer may be appointed.

Regulatory Acts that contain a power to appoint officers may be contrasted with those which authorise a council to delegate regulatory functions to “officers” already appointed. Acts that do contain a separate power of appointment include:

- Health Act 1956;
- Transport Act 1962;
- Litter Act 1979;
- Civil Defence Act 1983;
- Sale of Liquor Act 1989;
- Dog Control Act 1996; and
- Hazardous Substances and New Organisms Act 1996 (“HASNO”, which is to replace the Dangerous Goods Act 1974 in stages).

Careful analysis is necessary of each power of appointment, to determine whether a council can appoint a non-employee as an officer for the purposes of the Act in question. For example, section 5(2) of the Litter Act appears to indicate that a Litter Control Officer who is not already an employee becomes an employee of the council on being appointed.

Some of the regulatory Acts that do contain a power of appointment make it clear that an officer need not be a council employee (for example, HASNO, Sale of Liquor Act).

Acts which do not contain a separate power of appointment, but which authorise councils to delegate functions to council officers or authorise officers to perform certain functions, including enforcement functions, include:

- Resource Management Act 1991; and
- Building Act 1991.

Similarly, the following Acts confer powers on local authority inspectors or officers or employees but do not contain separate powers to appoint such persons:

- Reserves Act 1977;
- Food Act 1981; and
- Fencing of Swimming Pools Act 1987.

If an officer's authority to perform a regulatory function under the last-mentioned Acts were challenged, a council could not rely on the Act in question as authority for the appointment. The authority to appoint an officer for the purpose of performing that function would instead have to be found in the Act. Such authority is not readily apparent. A challenge for lack of authority could be made against either the "officer" concerned or the local authority that appointed and authorised the officer.

Power of Delegation

Some regulatory Acts expressly permit delegation of functions, duties and powers to officers of a local authority or – in some cases – to persons other than members or officers.²² The scope of an authority's power of delegation under section 715 of the Act appears, however, to be more restricted, referring only to the delegation of "powers". Section 247D does not permit the contracting out of powers (as opposed to functions). It is arguable, from this distinction, that statutory powers must be exercised by the local authority itself and that powers may be delegated under section 715 only to those officers who are employees of the authority or who are validly appointed as "officers" of the authority under another Act.

Section 247D(2)

Section 247D(2) of the Act requires a local authority to consider the costs and benefits of contracting out against using its own staff. If a proposed arrangement would require a local authority to appoint employees of a contractor as council officers and authorise them to perform particular functions, this may partly defeat the purpose of contracting out. If there is a cost to a council in doing so, that cost needs to be considered in making the decision.

²² See, for example, section 34 of the Resource Management Act.

APPENDIX C

Council Controls Applied to Pricing by the Contractor

Through Setting Policy

The Council will set the fees for services by resolution. The Council will audit regularly to ensure that fees are being levied properly. Penalising applicants who live outside the Queenstown Lakes district will not be permitted. The Council should expect that greater use of user-pays will encourage applicants to improve the quality of their applications. This will mean that less time is taken in processing and costs should reduce.

In addition, the Council should eliminate opportunities for the contractor to inflate costs to applicants unreasonably or “cut corners” in the service provided. This can be done by:

- agreeing the parking enforcement standards for both on-street ticketing and waivers;
- retaining responsibility for setting discretionary fees;
- agreeing that the contractor can use an hourly chargeout rate for actual costs so that applicants who provide good information and comply with the District Plan have some control over the time taken to complete a consent; and
- auditing regularly the contractor’s performance against the measures and standards proposed in the “Scope of Services” document.



Through the Pricing Structure in the Contract

As described in paragraph 546, the contract provides for a pricing structure that is a mixture of:

- fixed amounts for services purchased by the Council from the contractor;
- retention by the contractor of a fixed percentage of parking revenue recovered; and
- retention by the contractor of all user charges, the rates of which are fixed by the Council.

Through Specification in the Scope of Services

The following are examples of the controls specified in the “Scope of Services” that forms part of the contract.

District as One Entity

The Queenstown Lakes District is to be treated as one entity. The Council will not accept charges which discriminate on the basis of the physical location of a property. For example, travel and telephone costs to attend inspections in a remote part of the District should not be charged differentially to applicants. This provision should ensure that excessively high costs to attend remote sites do not encourage avoidance of the law.

Audit

Three forms of audit are envisaged:

- independent audit of the substance of an issue by either the contractor or the Council;
- audits by Council staff – either the policy manager or the contracts manager; and
- audits of the quality of contractor systems by the Council to test whether the contractor can identify and resolve problems as they arise.

Unreasonable Bills

All bills should be reviewed to ensure that they are reasonable. Situations may arise where objectors or other parties use unreasonable methods to frustrate applications. Fees billed to applicants should be reviewed to ensure that they do not unreasonably penalise the applicant.

Performance Measurement

Performance measures and standards applied to user charges include, for example, for Building Control and Resource Consent Administration, that:

- fees are billed accurately; and
- the actual “on cost” is billed.