

STATEMENT ON INVESTIGATION

Published pursuant to section 26(3) of *Ombudsman Act 1972*

18 December 2020

Investigation of procurement practices at a council

1. The Ombudsman investigated, upon referral by the Independent Commissioner Against Corruption, potential misconduct and maladministration arising from allegations that an employee of a council had directly engaged consultants on behalf of the council in the absence of a competitive procurement process, without reasonable justification. The Ombudsman also considered of his own initiative whether there had been administrative error.
2. The council's procurement policy (**the policy**) noted generally that open and fair competition is best achieved by undertaking a tender process to allow interested parties the opportunity to bid.
3. The policy also provided for the council's Chief Executive Officer (**CEO**) to approve a waiver of the policy, to allow direct purchasing in certain circumstances, provided that certain criteria were met. The relevant officer entered into pre-contractual negotiations with a supplier of services without a tender process, which led to the council contracting with that supplier. The officer stated that he intended to seek approval in respect of the waiver, but had not done so at the time. Shortly after, the parties agreed to vary and extend the services under a second engagement, at which time the officer commenced a process to seek approval for waiver from the CEO for this subsequent engagement. The approval process was not, however, completed, despite the officer preparing a memorandum with the assistance of other council staff. That said, it appears that the criteria for approving direct purchasing may have been met.
4. It was clear to the Ombudsman's investigation that the officer understood that there was a requirement for the council to approve an exemption for direct purchasing in the circumstances. Although the officer conceded that he failed to obtain approval from the CEO, he submitted that he was working under significant duress and work pressures at the time, and could not explain his omission.
5. Although the matter was finely balanced, and despite a concerning lack of rigour in ensuring the policy's requirements were followed, the Ombudsman did not conclude that the officer committed misconduct.
6. Regarding potential maladministration, the Ombudsman concluded that any mismanagement by the officer was not substantial. The Ombudsman noted that a financial consequence is not required in order to find that a public officer has committed substantial mismanagement in, or in relation to, the performance of official functions. For example, mismanagement of a direct purchasing policy may result in other, non-financial consequences, in particular other parties being denied an opportunity to provide competitive tenders in respect of services required by the council. There is a general public interest in the market being tested where appropriate to ensure that public money is efficiently spent.

7. Despite those matters, the Ombudsman considered that the following factors went to the question of whether the mismanagement was substantial:
 - there was evidence of a genuine intention on the part of the officer to obtain approval from the Chief Executive Officer to permit direct purchasing, which occurred relatively early in the contract phase
 - the criteria under which the Chief Executive Officer could have approved the waiver had he been requested to do so were likely to have been met, which included consideration of the relevance of the particular skills and experience of the contractor's principal officer
 - amounts paid to the supplier appeared to be within the acceptable range of those that would have been paid to an alternative contractor providing comparable services, and were not excessive on the whole, having regard to the nature of the projects being delivered.
8. Although finely balanced, the Ombudsman did not consider that the failure to obtain necessary approvals was substantial mismanagement which amounted to maladministration.
9. The Ombudsman considered that by failing to comply with the policy, the council acted in a manner that was wrong.
10. The Ombudsman also investigated the council entering into another contract with a different service provider. In that case, the approval for direct purchasing had been provided by the CEO, on the basis that the council considered that the relevant criteria had been met. However, on close examination of the circumstances and the wording of the policy, it appeared that the council had not applied the correct criteria in granting approval under the policy.
11. The Ombudsman noted that the words of the policy are important, and the deliberate words used ought to be afforded proper consideration. While there may be circumstances where a council considers it appropriate to depart from established policies in exceptional cases, in this case, the policy itself already contained provision for exemptions on grounds which had no application in this case.
12. While the Ombudsman did not consider that the officer committed misconduct or maladministration, the Ombudsman considered that by failing to comply with the policy in relation to the second procurement, the council acted in a manner that was wrong.

Outcome

The Ombudsman's final view was:

- the officer did not commit misconduct or maladministration in relation to the first procurement
- the officer did not commit misconduct or maladministration in relation to the second procurement
- by failing to comply with the policy in relation to the first procurement, the council acted in a manner that was wrong
- by failing to comply with the policy in relation to the second procurement, the council acted in a manner that was wrong.

To remedy the errors, the Ombudsman recommended that the council remind relevant officers of their obligations under the policy so as to ensure compliance with its terms.