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COUNCIL PROCUREMENT AND CONTRACT MANAGEMENT PRACTICES - CONTRACTS FOR CONSULTANCY AND PROFESSIONAL SERVICES

Purpose

The purpose of this circular is to inform the sector of issues the Division of Local Government has identified as a result of a recently completed investigation of a council's procurement and contract management practices in relation to consultancy and professional services.

Issues identified by the investigation

In September 2011, the Division of Local Government reported on an investigation of a council under section 430 of the *Local Government Act 1993* (the Act).

The investigation arose from concerns about the council's practices in relation to the engagement of contractors to provide professional and consultancy services.

The investigation identified three particular concerns about the council's practices that have a broader relevance to the sector, as follows:

- Treatment of the status of temporary contract personnel.
- Variation of contracts.
- Appointment of temporary contract personnel to identified positions within the council's organisational structure.

Treatment of the status of temporary contract personnel

The justification used by the investigated council for its failure to comply with its statutory obligations and the requirements of its own procurement policy and associated procedures with respect to the contracts was that they were employment contracts and thereby exempt from these requirements.

The weight of evidence examined by the investigation tended to support the view that the contracts in question were contracts for services and not employment contracts. They were therefore subject to the statutory tendering

requirements and the requirements of the council's procurement policy and associated procedures.

The question of whether a contract is an employment contract or a contract for services is often a difficult one to determine. The Courts have held that there are a number of indicia of an employment relationship. These relate to such things as, but are not limited to:

- the level of control and authority exercised,
- whether the services are provided exclusively,
- whether the principal/employer dictates the place and hours of work,
- whether the worker is in business on their own account,
- whether workers compensation payments are made,
- whether income tax is withheld.

Councils should have in place appropriate systems for determining the nature of the relationship they have with the person or entity they have entered into the contract with, and for ensuring that the council complies with its statutory and other obligations arising from that relationship. It should be noted that this may be a different person or entity to the one performing the services for the council under the contract. This will normally be the case where the contract in question is a "labour hire" contract.

It should be remembered that where the contract in question is an employment one, and thereby exempt from the obligation to tender under section 55, where the person has been appointed to a position within the council's organisation structure for a period of 12 months or more, the council will still be obliged to appoint that person using a competitive merit selection process pursuant to sections 348 and 349 of the Act. This requirement is discussed further below.

Even in circumstances where sections 55 or 348 and 349 do not apply, councils should, as a matter of appropriate practice, put in place procedural requirements to ensure that engagements are made on merit, pursuant to an open, transparent and competitive process, and that the council achieves the best value for money outcome.

Variation of contracts

The investigated council's failure to comply with its statutory tendering obligations could also be attributed to its practice of entering into contracts with an approved value that fell below the \$150K tendering threshold and allowing expenditure under the contracts to escalate above the threshold.

The investigation found that the propensity to vary contracts could be attributed to poor or non-existent planning or scoping of engagements, open-ended arrangements with undefined or poorly defined deliverables, poor cost controls and the ready availability of the option to extend or vary engagements.

Councils should review their processes to ensure that they require the adequate initial scoping of engagements, ongoing monitoring and management of the

services provided and appropriate controls over the extension or variation of engagements.

Councils should also ensure that staff delegations to approve the extension or variation of contracts are defined by reference to the total value of expenditure under a contract (inclusive of all variations) and not just the value of the variation being approved.

Appointment of temporary contract personnel to identified positions within a council's organisational structure

The investigation also found that in two cases, temporary contract personnel were appointed to positions in the council's organisational structure and held those positions for a period exceeding 12 months without a competitive recruitment process, in breach of council's obligations under sections 348 and 349 of the Act.

Councils should be mindful that where they appoint a contractor to an identified position in their organisation structure for a period exceeding 12 months, notwithstanding the status of the contractor, councils will still be obliged to comply with the requirements of sections 348 and 349 with respect to that appointment.

Division's monitoring of councils' practices

In light of the issues identified in the investigation, it is intended that future Promoting Better Practice reviews will monitor the following practices:

- the treatment of the status of temporary contract personnel;
- the variation of contracts;
- the appointment of temporary contract personnel to identified positions within a council's organisational structure.

For more information, please contact John Davies on telephone 02 4428 4139.



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