

- 4.001 This article reproduces the Executive Summary from our separately published report of the same title.<sup>1</sup>

## Impetus for Change

- 4.002 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?

- 4.003 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)).
- 4.004 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.
- 4.005 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.

---

<sup>1</sup> ISBN 0 477 02865 9, November 1999.

- 4.006 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.
- 4.007 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

- 4.008 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.
- 4.009 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.
- 4.010 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.<sup>2</sup>

<sup>2</sup> 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.

## Conclusions

- 4.011 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.
- 4.012 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.
- 4.013 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.

### Key Considerations in Contracting Out

- 4.014 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.

4.015 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.

4.016 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*

4.017 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.

## 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

4.018 We recommend that, if a local authority is considering contracting out its regulatory functions, it should:

- 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.

4.019 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.

