

# A report of investigations into the City of Port Phillip

August 2009

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## LETTER TO THE LEGISLATIVE COUNCIL AND THE LEGISLATIVE ASSEMBLY

To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to section 25 of the *Ombudsman Act 1973* and section 103 of the *Whistleblowers Protection Act 2001*, I present to Parliament a report of investigations into the City of Port Phillip.



G E Brouwer

**OMBUDSMAN**

**12 August 2009**

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## CHRONOLOGY OF EVENTS

<b>May-June 2003</b>	External audit conducted of City of Port Phillip Building Maintenance Unit (Building Maintenance Unit)
<b>Late 2003/early 2004:</b>	Ms Caroline Shahbaz meets Mr David Spokes, then CEO of City of Port Phillip
<b>5 August 2004:</b>	First invoice paid to Ms Shahbaz's company, Corporate Power
<b>February 2005</b>	Expression of interest process for cultural change
<b>Mid 2005</b>	Mr Ray Nott commences full-time employment in Building Maintenance Unit
<b>18 November 2005</b>	The payment to Ms Shahbaz that brought the total payments to date to over \$100,000
<b>4 July 2006</b>	Legal advice provided to City of Port Phillip regarding interpretation of section 186 of the Local Government Act 1989
<b>1 August 2006</b>	City of Port Phillip calls for tender for cleaning services contracts previously held by Cleaning Contractor B
<b>September 2006</b>	First formal report in writing to the Executive Team on procurement issues ('Executive Report'); report indicates significant flaws in City of Port Phillip's procurement practices
<b>26 September 2006</b>	Co-ordinator Governance sends email to Executive Director advising that expenditure on Corporate Power's engagement had exceeded \$100,000; recommends that EOI/tender process be commenced
<b>23 October 2006</b>	Internal advice that City of Port Phillip needs to comply with section 186 otherwise be subject to several risks
<b>1 January 2007</b>	Cleaning Contractor A commences cleaning contract
<b>January 2007</b>	Manager X commences management of Building Maintenance Unit
<b>22 January 2007</b>	Ms Calder assumes responsibility for contracting and tendering
<b>February 2007</b>	First vendor report produced by City of Port Phillip; the report detailed expenditure over \$100,000 on individual vendors over the last two years and those likely to exceed \$100,000; it identified 22 potentially non-compliant arrangements
<b>March 2007</b>	Contract drafted and forwarded to Corporate Power; not executed due to Ms Shahbaz's reluctance to sign
<b>July-August 2007</b>	Tender process for building maintenance services
<b>28 August 2007</b>	Legal advice provided to Mr Spokes regarding section 186
<b>17 September 2007</b>	Council resolves to terminate services of Corporate Power
<b>September 2007</b>	Ombudsman receives disclosure concerning the conduct of Building Maintenance Unit officers
<b>4 October 2007</b>	Final payment to Ms Shahbaz bringing the total payments to \$620,735.50

<b>November 2007</b>	Second Executive Report on procurement matters submitted, with complete list regarding non-compliant vendors
<b>December 2007</b>	November Executive Report revised to include statistical analysis and include recommendation that Executive Team finalises action plan to address all non-compliances
<b>February 2008</b>	Mr Ray Nott and Mr John Tidey register a company together – Climate Change Australia
<b>April 2008</b>	Ombudsman receives disclosure concerning conduct of Mr Spokes
<b>2 May 2008</b>	Mr Nott's last day at City of Port Phillip as a permanent employee; remains working for City of Port Phillip two days per week as a contractor and continues his business association with Mr Tidey
<b>18 July 2008</b>	Ombudsman commences own motion investigation into procurement matters
<b>25 &amp; 26 July 2008</b>	<i>The Age</i> newspaper publishes articles regarding Mr Nott and Mr Tidey
<b>25 July 2008</b>	City of Port Phillip suspends Mr Nott's contract
<b>31 July 2008</b>	City of Port Phillip suspends issuing new work to Mr Tidey's company, TBS
<b>15 August 2008</b>	Report by external consultant after reviewing procurement practices
<b>27 August 2008</b>	First report to Audit Committee about the non-compliant vendors
<b>September 2008</b>	City of Port Phillip adds a conflict of interest policy to its People and Culture Policy, Employee Standards
<b>22 September 2008</b>	First report to Council regarding the non-compliant vendors
<b>20 January 2009</b>	Mr Spokes resigns from his position as CEO

## EXECUTIVE SUMMARY

1. In 2007 and 2008 I received disclosures from whistleblowers concerning the conduct of officers, including Mr David Spokes, the Chief Executive Officer of the City of Port Phillip. In both instances, the conduct related to procurement practices. I determined the disclosures to be public interest disclosures and investigated the allegations under the *Whistleblowers Protection Act 2001*.
2. During both investigations I identified other procurement matters that had been the subject of poor governance processes. These included:
  - poor tender and contract management practices
  - failure to act on conflict of interest matters
  - non-compliance with purchasing guidelines
  - poor record-keeping
  - several cases that raised questions about compliance with provisions of the *Local Government Act 1989*.
3. As a result of these issues I decided to undertake an investigation on my own motion under the *Ombudsman Act 1973* into procurement processes at City of Port Phillip. Local Government Victoria, at the request of the Minister for Local Government, was also about to investigate a number of matters that would have overlapped with my investigations. Given my investigations had already commenced, the Minister deferred his investigation until my report was completed.
4. I have amalgamated the issues identified by the three investigations into one report. The report discusses these issues in the context of four themes:
  - poor procurement and contract management
  - failure of governance
  - conflict of interest
  - staff misconduct.
5. A chronology of events precedes this summary.

### Poor procurement and contract management practices

6. My investigation identified a number of issues related to section 186 of the Local Government Act and that these have been a long-term problem at City of Port Phillip. Section 186 of the Local Government Act requires councils to go to tender for purchases above a prescribed amount. Up until August 2008 this was \$100,000. For purchases below this amount a council's procurement policies apply.

*My investigation identified a number of issues related to section 186 of the Local Government Act and that these have been a long-term problem at City of Port Phillip.*

7. A significant number of procurements were identified where there was:
  - no contract in place
  - a contract was in place but had expired; however services were continuing to be provided
  - no tender in place despite expenditure of over \$100,000
  - non-compliance with procurement guidelines.
8. My investigation identified that section 186 creates difficulties for councils in its application, particularly where the engagement is initially thought to be under \$100,000. I have recommended that Local Government Victoria review the support and guidance it provides to councils on the interpretation of section 186 and best practice in procurement.
9. This issue is highlighted in City of Port Phillip's procurement of the organisational development services of Ms Caroline Shahbaz, through her company Corporate Power.
10. Ms Shahbaz provided services that were sought by City of Port Phillip for which she was duly recompensed. During 2006 senior executives at City of Port Phillip were on notice that Ms Shahbaz's services had exceeded the tender threshold under section 186 of the Local Government Act. However, no one took responsibility for co-ordinating the management of the range of services provided by Ms Shahbaz and no written contract was ever put in place. This is unacceptable, particularly in light of the fact that by early October 2007, payments to Ms Shahbaz exceeded \$620,000.
11. I consider that City of Port Phillip mismanaged the procurement of Corporate Power's services. Poor governance of this process allowed expenditure of significant amounts of public funds to occur with little, if any, oversight.
12. Further examples of poor procurement and contract management processes were uncovered in my investigation into public interest disclosures made regarding the City of Port Phillip's Building Maintenance Unit.
13. I identified poor procurement practices associated with the tender process undertaken for the provision of cleaning services conducted in late 2006. During this process a senior manager and the CEO were inappropriately influenced by a desire to ensure that the incumbent contractor would not win the tender.
14. The key practices identified were:
  - City of Port Phillip engaged an independent consultant, Mr N, to assist with the tender; however the consultant's role was not clearly defined, nor communicated to the tender evaluation panel.
  - The tender specifications failed to identify that prior performance would be an assessment criterion.

*Poor governance allowed expenditure of significant amounts of public funds to occur with little, if any, oversight.*

*Further examples of poor procurement and contract management processes were uncovered in my investigation into public interest disclosures made regarding the City of Port Phillip's Building Maintenance Unit.*

*I identified poor procurement practices associated with the tender process undertaken for the provision of cleaning services conducted in late 2006.*

*My investigations also identified evidence of poor record-keeping practices contributing to poor contract management.*

*There is evidence that the oversight mechanisms in place at City of Port Phillip were not utilised effectively and that this may have delayed improvements being made to procurement processes.*

- There was no consistency in conducting reference checks for tenderers.
  - Natural justice was not afforded to the incumbent with respect to their alleged poor performance.
  - Failure to obtain reliable information, inadequate documentation of the process, and poor record-keeping practices was evident.
  - Inadequate feedback was provided to losing tenderers.
15. My investigation also found that one staff member regularly failed to obtain the required amount of quotes pursuant to the City of Port Phillip's Purchasing Guidelines. I also found that other Building Maintenance Unit staff were often not following the requirements for obtaining quotes, nor filing the quotes appropriately. This is of concern and I have recommended that City of Port Phillip review the Building Maintenance Unit's compliance with purchasing requirements.
16. The following issues contributed to deficient procurement practices:
- inattentive culture with respect to procurement practices
  - decentralised procurement model
  - lack of resources
  - lack of technical expertise
  - lack of training
  - inadequate oversight.
17. My investigations also identified evidence of poor record-keeping practices which contributed to poor procurement and contract management at City of Port Phillip.

### **Failure of governance**

18. Good governance is integral to the effective operation of any council. Principle four of City of Port Phillip's eight principles of good governance supports this, stating, 'Council decision-making will exhibit transparency, honesty and probity'. My investigations found that City of Port Phillip had not applied this principle to its governance of procurement.
19. I consider that City of Port Phillip, presided over by the then CEO, Mr David Spokes, failed to identify and, once on notice, failed to adequately deal with poor governance in procurement processes. There is evidence that the oversight mechanisms in place at City of Port Phillip were not utilised effectively and that this may have delayed improvements being made to procurement processes.
20. City of Port Phillip first became aware of a problem with council contracts in September 2006. City of Port Phillip took several months to obtain an accurate list of service providers (or 'vendors') that were potentially non-compliant. By December 2007, 202 vendors had been identified as receiving in excess of \$100,000 in the previous 2 years of which 56 vendors required corrective action.

21. I consider that City of Port Phillip lacked diligence in relation to compliance with section 186 of the Local Government Act. This is evidenced by:
  - the management of Corporate Power's engagement
  - City of Port Phillip's failure to allocate sufficient resources to the Governance and Community Relations division
  - a culture in which such matters were not actively examined
  - the failure to bring these issues to the Council's and the Audit Committee's attention.
22. City of Port Phillip failed to inform the elected Council or council's Audit Committee of the extent of the non-compliance issue as the problem became apparent. I consider that City of Port Phillip as a whole failed to properly manage important procurement issues as they arose. It took exposure of the procurement problems in the media to prompt senior management to report to the Council and the Audit Committee. It is apparent that City of Port Phillip attempted to resolve the matter discreetly instead of being transparent and taking responsibility for the error and actively addressing the underlying cause to prevent further potential breaches.
23. In this regard, the Audit Committee needs to be proactive in its audit role and to have in place processes that require non-compliance issues to be brought to the committee's notice.
24. In August 2008 City of Port Phillip commissioned its own independent review of procurement practices and I note that it has commenced implementing the resultant recommendations.
25. City of Port Phillip needs to strengthen the accountability of employees involved in procurement processes to ensure that good governance requirements are being adhered to. City of Port Phillip should undertake a review of its policies and practices, and where weaknesses are identified, institute action to rectify them.

## **Conflict of interest and staff misconduct**

26. My investigations identified a number of conflict of interest issues in relation to procurement and contract management which City of Port Phillip either failed to identify, or failed to respond to appropriately.
27. One tender evaluation panel member for a tender process, Mr Ray Nott, then the Building Maintenance Unit Co-ordinator, did not declare a conflict of interest when he was contacted to provide a reference for some of the tenderers. Mr Nott entered into an inappropriate relationship in January 2008 with one of City of Port Phillip's contractors, Mr John Tidey. Mr Tidey owned two companies which conducted building works for City of Port Phillip. In July and August 2007 Building Maintenance Unit undertook a tender process for 14 building maintenance services. On 27 August 2007 one of Mr

*City of Port Phillip failed to inform the elected Council or council's Audit Committee of the extent of the non-compliance issue as the problem became apparent. I consider that City of Port Phillip as a whole failed to properly manage important procurement issues as they arose.*

*My investigations identified a number of conflict of interest issues in relation to procurement and contract management which City of Port Phillip either failed to identify, or failed to respond to appropriately.*

*Mr Nott's relationship with Mr Tidey brings into question the integrity and probity of the contracts and works won by J&J Tidey and TBS Building Services.*

*Staff were focused on completing the tender and having valid contracts, and did not have the capacity to address probity issues. Documentation examined indicates that reference checking of tenderers was almost non-existent and that when it did occur, it was unreliable.*

*I was concerned that City of Port Phillip had not addressed the issue of conflict of interest adequately and I make a number of recommendations in this regard.*

Tidey's companies, TBS, won five of those building maintenance contracts. Mr Nott's relationship with Mr Tidey brings into question the integrity and probity of the contracts and works won by J&J Tidey and TBS Building Services. In my opinion both Mr Nott and Mr Tidey took advantage of the poor procurement processes to make money and expand their operations.

28. I identified a number of issues regarding the tender process in relation to those won by TBS, although I believe City of Port Phillip completing 14 tenders simultaneously contributed to the problems. The evaluation panel's decision-making was not recorded clearly. I am of the opinion that the tender documentation and requirements were overly onerous and this was confirmed by an independent consultant's report. Potentially, this contributed to a fewer number of tenders being lodged. Staff were focused on completing the tender and having valid contracts, and did not have the capacity to address probity issues. This led to their missing vital issues such as TBS, by its own admission, not being truthful about its employees in its tender submissions. Documentation examined indicates that reference checking of tenderers was almost non-existent and that when it did occur, it was unreliable.
29. My investigation also identified three other cases of City of Port Phillip failing to manage conflicts of interest. I was concerned that City of Port Phillip had not addressed the issue of conflict of interest adequately and I make a number of recommendations in this regard.
30. The evidence also points to Mr Nott having provided contractors with competitor quotes so they could underquote and secure lucrative works with council.

### **The future**

31. City of Port Phillip has accepted all my conclusions and recommendations. It has now adopted new governance principles and has confirmed its commitment to improving governance practices. City of Port Phillip has also adopted a new tendering policy with a strengthened accountability framework which clearly sets out the responsibilities of individual officers in carrying out tenders and executing contracts. In relation to the Purchasing Guidelines, it has strengthened restrictions in the purchasing system and clarified the record-keeping requirements for quotations.
32. City of Port Phillip has now committed to a centralised procurement process and has established a new contracts and tendering unit with additional resources to manage the process. City of Port Phillip has advised that the new unit will manage all aspects of procurement, including tender specifications, contract documentation, and probity. The new unit will also administer an up-to-date contracts timetable. I have recommended that Local Government Victoria be actively involved in supporting City of Port Phillip towards compliance with the Local Government Act.

33. The Mayor of City of Port Phillip has informed me that Council has also resolved to re-establish its Audit Committee and the new CEO, Ms Kay Rundle, has appointed a Manager of Internal Audit.
34. While a new contracts and tendering unit will assist in addressing its procedural problems regarding procurement, City of Port Phillip still needs to address the culture of, and staff attitudes towards, procurement within the council.
35. I note that the Chief Executive Officer and the three Executive Directors making up the Executive Team, during the period in which the events described in this report occurred, have now all resigned from their employment at City of Port Phillip. Therefore, I have made no recommendations in relation to their conduct.

*While a new contracts and tendering unit will assist in addressing its procedural problems regarding procurement, City of Port Phillip still needs to address the culture of, and staff attitudes towards, procurement within the council.*

## SECTION 22A OF THE WHISTLEBLOWERS PROTECTION ACT

36. This report is made pursuant to both section 25(2) of the *Ombudsman Act 1973* and section 103 of the *Whistleblowers Protection Act 2001* and the name of persons against whom the protected disclosures were made under the *Whistleblowers Protection Act 2001* have been included.
37. Section 22A of the Whistleblowers Protection Act provides I may disclose, in a report referred to in section 103 of that Act, particulars likely to lead to the identification of a person against whom a protected disclosure has been made if I determine it is in the public interest to do so and if I set out in the report the reasons why I have reached that determination.
38. Having considered the four matters referred to in section 22A(2), I have determined that it is in the public interest to identify a number of the subjects of protected disclosures in this matter by disclosing the following particulars: the name, occupation and personal details of the subject. I have made this determination for a number of reasons.
39. I consider that it is in the public interest for the subject of a protected disclosure to be identified in a report to Parliament when the report and the disclosure concern allegations of improper conduct by persons holding public offices of certain significance, such as senior staff of local councils. This is particularly so when the report indicates that there is merit in the allegations against the public officer.
40. This public interest is derived from the nature of such public offices. In this instance, the public interest arises from the importance of the roles, duties and responsibilities of the individual senior staff members to the City of Port Phillip and people of that city, and the need for a transparent accountability for the performance of those roles, duties and responsibilities for persons holding those significant offices.
41. I do not consider that the public interest identified above can be satisfied by any means other than by identifying the subject of the disclosure; confidentiality being not appropriate as it is, in the instances in this report, inconsistent with the identified public interest.
42. I also consider that it is in the public interest for the Parliament and the public to be informed of the result of an investigation into allegations of misuse of the powers provided to a public officer (whether senior or junior) whereby the public officer obtained significant personal advantage at the expense of his duties to the Council, the community and individuals in the community. This is particularly so when the investigation confirms those allegations.

43. While this public interest may not require the identification of the subject, in this instance it would not be possible to serve this public interest if the report did not identify the individual. This is because the report deals with facts and circumstances which have been the subject of media reports during the last eighteen months which have identified both the public body involved, and the subject, as well as the nature of the concerns that are the focus of the protected disclosures. Accordingly, I consider that even if my report to Parliament 'de-identified' the subject of the disclosure or attempted to maintain confidentiality in some other way, the subjects of the protected disclosures would still be readily identifiable.
44. The only way to avoid such identification would be to omit from any report to the Parliament any information relating to the practices undertaken by the subject. In my view, this would mean that I would not be able to make any meaningful report to the Parliament on the investigation of this subject. I consider that this would clearly be contrary to the public interest and that confidentiality in such circumstances would be inappropriate.

## INTRODUCTION

### City of Port Phillip

45. City of Port Phillip is an inner city bayside council situated on Port Phillip Bay. The organisational management of the council is conducted from premises located at 99a Carlisle Street, St Kilda.
46. The Council's *Annual Report 2007-2008* outlines the average number of employees during the financial year was 731. It also reported that its staff profile is 43 per cent full-time, 28 per cent part-time and 29 per cent casual.
47. During the period 2004 to 2007 City of Port Phillip was managed by a five person Executive Team with Mr David Spokes as the Chief Executive Officer. The Executive Team was reviewed in January 2007, resulting in a reduction from four Executive Directors to three, with a corresponding realignment of corporate portfolio functions. The restructure resulted in the departure of the then Executive Director Corporate Management. Corporate governance became the responsibility of Ms Sally Calder from that date.
48. From early 2007 the Executive Team comprised:
  - Mr David Spokes, Chief Executive Officer
  - Executive Director B, Community Development and Planning Services, this division includes – Community Development, Tourism, Health and Amenity, City Development, Environment and Renewal, Culture and Recreation
  - Ms Sally Calder, Executive Director, Organisation Systems and Support. Services in this division include – Organisation Development, Finance and Investments, Governance and Community Relations, Corporate Planning and Performance, Information Management
  - Executive Director A, Community Assets and Services. Services in this division include – Community Services, Asset Services, Customer Service, Buildings and Green Space and Infrastructure Services.<sup>1</sup>
49. Section 94A of the *Local Government Act 1989* defines the functions of the Chief Executive Officer. Those functions include the day-to-day management of Council's operations in accordance with the Council Plan and establishing and maintaining an appropriate organisational structure for the Council.
50. On 20 January 2009 Mr Spokes resigned as CEO. Ms Kay Rundle was appointed as the new CEO and commenced on 18 May 2009.

*On 20 January 2009 Mr Spokes resigned as CEO. Ms Kay Rundle was appointed as the new CEO and commenced on 18 May 2009.*

<sup>1</sup> City of Port Phillip *Annual Report 2006-07*.

## The investigations

51. Two of the investigations which are the subject of this report arose from public interest disclosures made under the *Whistleblowers Protection Act 2001*. As a result of information which came to light in the course of these investigations, I initiated a third investigation on my own motion under section 14 of the *Ombudsman Act 1973*.
52. During my investigations I interviewed and took sworn evidence from current and former officers, as well as other third parties. I also obtained and examined the following:
  - City of Port Phillip's Tender and Contract Management Guidelines
  - City of Port Phillip's Purchasing Guidelines
  - City of Port Phillip's Organisation Development Policy – Employee Standards
  - Local Government Victoria Procurement Best Practice Guidelines
  - Victorian Government Procurement Board (VGPB) Guidelines
  - Victorian Auditor-General Office's Good Practice Guide
  - City of Port Phillip's electronic financial systems
  - Audit Committee meeting minutes
  - Executive Team Reports
  - City of Port Phillip's Audit Report on Tendering Processes February 2008
  - Review of Tendering and Related Processes (external consultant's report) August 2008
  - Local Government Procurement Strategy September 2008 and Supporting Analysis August 2008
  - External Audit Report June 2003
  - Documents regarding the cleaning tender, including: advertisement, tender specifications, tender submissions, and the physical and electronic files regarding the tender.

## Disclosure regarding Building Management Unit

53. In September 2007 I received a disclosure concerning the conduct of officers of the Building Maintenance Unit at City of Port Phillip. The whistleblower alleged that:
  - Manager X, the Manager Buildings and Green Spaces, had failed to adhere to the tender process in relation to a cleaning contract tendered in 2006 to ensure that the incumbent contractor would not win.

*Two of the investigations which are the subject of this report arose from public interest disclosures made under the 'Whistleblowers Protection Act 2001'. As a result of information which came to light in the course of these investigations, I initiated a third investigation on my own motion under section 14 of the 'Ombudsman Act 1973'.*

- Mr Ray Nott, Building Maintenance Co-ordinator, was leaking competitor quotes to a favoured contractor.
- Mr Nott was not adhering to City of Port Phillip policy by failing to obtain the required amount of quotes for purchases under \$100,000.

54. I was satisfied on the information provided that the disclosure showed, or tended to show, that a public officer had engaged in improper conduct in their capacity as a public officer. I determined the disclosure to be a public interest disclosure under the Whistleblowers Protection Act. My investigation found evidence in support of these allegations.

### **Disclosure regarding Chief Executive Officer**

55. In April 2008 I received a disclosure alleging Mr David Spokes, the Chief Executive of City of Port Phillip, had engaged in improper conduct by:

- personally approving the payment of money to Ms Caroline Shahbaz and/or her company Corporate Power for services which have resulted in a substantial mismanagement of public resources
- not entering into a tender process for the purchase of services amounting to the value of \$100,000 or more, in breach of section 186 of the Local Government Act.

56. I determined the disclosure to be a public interest disclosure under the Whistleblowers Protection Act and investigated the allegations.

57. While my investigation did not establish that Mr Spokes had personally approved the payment of money to Ms Caroline Shahbaz, I did establish that no written contract was entered into between City of Port Phillip and Ms Shahbaz; no tender process was utilised; and the total expenditure on Corporate Power's services was in excess of \$620,000.

### **Procurement practices**

58. During the course of my investigations into the disclosures outlined above, I identified a number of areas of concern relating to various contract and tender processes at City of Port Phillip. I made the decision to conduct a separate investigation into procurement at City of Port Phillip under the own motion provisions of the Ombudsman Act. By letter dated 18 July 2008 I advised the Honourable Richard Wynne MP, Minister for Local Government, that I proposed to formally investigate these matters on my own motion. In response, the Minister advised that he had decided to defer any investigation that his department may be conducting pending the finalisation of my own motion investigation.

*I did establish that no written contract was entered into between City of Port Phillip and Ms Shahbaz; no tender process was utilised; and the total expenditure on Corporate Power's services was in excess of \$620,000.*

59. My objective was to examine and consider:
- the extent of non-compliance of procurement procedures, guidelines and legislation
  - the adequacy of those procedures
  - the manner in which City of Port Phillip had managed tenders which may have involved a conflict of interest
  - the reasons behind identified non-compliance with purchasing requirements
  - remedial action proposed by City of Port Phillip in relation to identified procurement issues
  - any other matters of concern that came to notice during the above process.
60. I note that during my investigation Mr Spokes resigned from City of Port Phillip effective from 20 January 2009 and I have taken that into consideration in formulating my recommendations.
61. These three investigations identified numerous examples of poor conduct and practices in relation to procurement at City of Port Phillip. Four themes emerged from my investigations:
- poor procurement and contract management processes
  - failure of governance
  - conflict of interest
  - staff misconduct.
62. This report outlines the outcomes of my three investigations and discusses them in the context of these four themes.

*Four themes emerged from my investigations:*

*1. poor procurement and contract management processes*

*2. failure of governance*

*3. conflict of interest*

*4. staff misconduct.*

## POOR PROCUREMENT AND CONTRACT MANAGEMENT PRACTICES

*My investigations identified a significant number of tenders and contracts where non-compliance with legislation and City of Port Phillip policies had occurred. City of Port Phillip's management of its contract with Corporate Power exemplifies this.*

### Corporate Power

63. My investigations identified a significant number of tenders and contracts where non-compliance with legislation and City of Port Phillip policies had occurred. City of Port Phillip's management of its contract with Corporate Power exemplifies this.

### Previous consultant

64. Consultant O began providing services promoted as focusing on people and relationships within the workplace to the then City of Port Melbourne<sup>2</sup> in the early 1990's. When Mr Spokes became the CEO of City of Port Phillip he engaged Consultant O as a mentor. In addition to weekly mentoring sessions with Mr Spokes, Consultant O ran workshops for staff and provided other consultancy services.
65. Consultant O stated that in early 2005 she decided not to continue providing services to City of Port Phillip because:
- she was unable to continue her association with the organisation as Ms Caroline Shahbaz, through her company Corporate Power, had begun providing similar services which conflicted with those she was providing
  - Mr Spokes had advised her that Ms Shahbaz would in the future lead the focus groups that she had previously led
  - Ms Shahbaz provided her with feedback from the employee focus groups indicating that they did not like her
  - she formed a view that Ms Calder and Ms Shahbaz were trying to move her out of the organisation.
66. It should be noted that the services provided by Consultant O were not comparable to the range of services ultimately provided by Ms Shahbaz over the course of her engagement. Therefore, it cannot be concluded that City of Port Phillip could have used the cost of payments made to Consultant O to estimate the potential cost of payments to Ms Shahbaz.

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<sup>2</sup> City of Port Phillip was established on 22 June 1994 after the State government amalgamated three former cities – St Kilda, South Melbourne and Port Melbourne.

## Engagement of Ms Caroline Shahbaz

67. In 2004 Ms Shahbaz was engaged by City of Port Phillip to provide consultancy services through her company, Corporate Power. This engagement continued until mid 2007, during which time payments were made to Ms Shahbaz totalling \$620,735.50. A written contract between Corporate Power and City of Port Phillip was never signed. A draft contract was prepared in March 2007, but was not executed because Ms Shahbaz had concerns about intellectual property. I note that Ms Shahbaz is no longer engaged by City of Port Phillip.
68. To understand how this situation evolved, my investigation examined City of Port Phillip's management of the procurement of the consultancy services provided by Ms Shahbaz.
69. Corporate Power has defined its aim as:
- ...to assist in improving the people part of your business through:
  - Assist [sic] leaders, corporations, groups and individuals
  - Embedding the vision, mission and stated values of your organisation into practical business outcomes
  - Develop [sic] the type of leadership essential for optimal organisational performance in the midst of constant change
  - Provide [sic] comprehensively integrated people management systems that allow you to effectively manage people: your greatest resource
  - Offer [sic] a suite of programs which are 'Beyond Training' to enhance individual and business performance in a continuously changing world
  - Improve [sic] cross-functional and multidisciplinary team performance within organizations.<sup>3</sup>
70. Ms Shahbaz stated that she met Mr Spokes at a networking meeting organised by Parks Victoria. While the exact date of this meeting is not known, it appears that it was around late 2003 or early 2004.<sup>4</sup> Ms Shahbaz says she discussed the services she provides with Mr Spokes at this function.
71. Ms Shahbaz said that she recalls Mr Spokes contacting her and inviting her to meet with him at City of Port Phillip to discuss organisational change and the services she provides. After one or two meetings Mr Spokes engaged her to run a one day workshop for the Executive Team on organisational change. Ms Shahbaz states that the members of the Executive Team were 'enthused' with the outcome of the workshop and that they 'made a collective decision to get me in to do some more work for them'.

<sup>3</sup> <www.corporatepower.biz>.

<sup>4</sup> The first invoices from Corporate Power were issued in August 2004 and from this it is concluded that the initial discussions with Mr Spokes occurred shortly prior.

*A written contract between Corporate Power and City of Port Phillip was never signed. A draft contract was prepared in March 2007, but was not executed because Ms Shahbaz had concerns about intellectual property. I note that Ms Shahbaz is no longer engaged by City of Port Phillip.*

72. After completing further work in late 2004 and early 2005, Ms Shahbaz said that she was asked to submit an expression of interest for future organisational development work with City of Port Phillip. It was her understanding that Consultant O and others had also been asked to submit expressions of interest.

### **Expression of interest process**

73. This process began in February 2005 when a letter calling for an expression of interest was sent to six organisations, including Corporate Power and Consultant O.
74. The letter specified the following areas where assistance was being sought:
- Assistance for our General Management Team to inspire their managers to take ownership of the practical nature of cultural change. This would take the form of coaching, mentoring and advice.
  - Ongoing development and advice for the Organisational Development team on embedding a “Web” culture into our systems and to how best support and partner with Managers to use the systems appropriately.
  - Further development and support for our 3<sup>rd</sup> level Managers for the practical application of cultural change.
  - Assistance with measures and “milestone” to determine how we are travelling.
75. The expression of interest process was co-ordinated by Manager Y, who was the contract manager for the purpose of the expression of interest process and reported direct to Mr Spokes.
76. On 15 March 2005, Manager Y prepared a report for Mr Spokes and Ms Calder summarising the expressions of interest received by City of Port Phillip at that time. It advises that expressions of interest had been received from Consultant O and three of the other companies, but that no response had been received from Corporate Power or the sixth consultant. The report included commentary on the submissions and expressed a view that the author was not convinced that any of the submissions adequately addressed a suitable methodology for City of Port Phillip. A number of recommendations were made, including requesting a submission from Ms Shahbaz for further consideration.
77. Ms Calder has stated that:
- It is inaccurate to say that [Manager Y] prepared a report on the EOI process for me. I had no involvement in the decision to initiate the EOI process nor did I have any involvement in requesting [Manager Y] undertake that process. Furthermore, [Manager Y] did not prepare the report for me nor was I shown the report.

78. I note that Ms Calder's denial of any involvement in the EOI process is not supported by the expression of interest report, which states that it was prepared for both Mr Spokes and Ms Calder.
79. Ms Shahbaz's submission was received late. Her expression of interest documentation was dated 20 March 2005. These documents provide a proposed implementation program together with the associated fees for Corporate Power's services. I note that the fees are quoted for individual services and that no defined quantum of costs is given. Manager Y prepared a supplementary report summarising Ms Shahbaz's submission. The supplementary report contained a rough assessment of costs, which indicated the overall costs would be in excess of \$58,000.
80. Manager Y said that the expressions of interest received were discussed at an Executive Team meeting. She believed it was the Executive Team that made the decision to engage Ms Shahbaz. Ms Calder, however, has denied being involved in the decision-making process in relation to Corporate Power's selection from the expressions of interest received in 2005 and cannot recall any discussions regarding the EOI process taking place in an Executive Team meeting.

### **Failure to enter a written contract**

81. Corporate Power was selected to provide services to City of Port Phillip through the process outlined above. However, this arrangement for the provision of services was not formalised in a written contract. It is evident from the documentation provided by Ms Shahbaz that there were significant costs associated with her engagement. However, the manner in which this information was presented makes it difficult to identify the total that could reasonably have been anticipated to be expended by City of Port Phillip during her engagement.
82. My investigation identified that the City of Port Phillip 'Tender and Contract Management Guidelines' (the guidelines), which were updated 21 December 2005, applied to the issues under investigation. The guidelines state they are designed 'to provide a comprehensive framework for the market testing of City of Port Phillip's requirements for the procurement of goods and services'
83. The guidelines apply to all procurements and provide directions for employees to follow. They refer to the need for a 'Short Form Contract' for 'all procurement where the value is less than \$100,000'. Further, the guidelines state: 'Where the value of goods or services is estimated to exceed \$100,000, City of Port Phillip policy is for the requirement to be the subject of a rigorous competitive process and that it is publicly advertised'.

*I note that Ms Calder's denial of any involvement in the expression of interest process is not supported by the expression of interest report, which states that it was prepared for both Mr Spokes and Ms Calder.*

*It is evident from the documentation provided by Ms Shahbaz that there were significant costs associated with her engagement.*

84. Mr Spokes was asked whether he had responsibility for the carriage and the engagement of Ms Shahbaz at this stage. Mr Spokes responded:

Not directly. I saw that as essentially being implemented by Sally Calder. ... Well, look, at the end of the day I have to take ... overall responsibility. But in terms of implementation, I – Ms Calder was acting on my instructions to put this in place; and my expectation was that appropriate procedures would be followed to do that. And she would have ongoing responsibility for management of that relationship and that contract on behalf of the Executive Team and myself, in an operational sense, because she was also part of the service for which we were contracting as providing advice direct to the Executive Team....

Also:

My expectation was that a contract would be signed; a – appropriate arrangements would be put in place for – in view of a schedule for payment, demonstration of services provided, and I guess effective administration from a financial – and a contract administration point of view.

85. Ms Calder has responded by saying that while she was ‘the person to deal with’ with respect to the staff survey conducted by Corporate Power in September 2004, from that point on, Mr Spokes assumed responsibility for the relationship with Corporate Power.
86. A draft contract, number 0922, was prepared and forwarded to Ms Shahbaz in March 2007, two years after Corporate Power was selected through the above EOI process. The contract was not executed owing to Ms Shahbaz’s stated concerns about intellectual property rights.
87. In response Mr Spokes has stated:

... notwithstanding the failure of Ms Shahbaz to formally execute the agreement it was [my view] (which may be a correct legal view) that the agreement applied to the arrangement and that acceptance of the contract by Corporate Power was implied, if indeed, acceptance was not expressly made through either words or by conduct.

*My investigation identified:*

- *poor governance practices*
- *a lack of organisational accountability*
- *a lack of understanding of good corporate governance in City of Port Phillip’s utilisation of Ms Shahbaz’s services.*

**The management of Corporate Power’s engagement**

88. My investigation identified:
- poor governance practices
  - a lack of organisational accountability
  - a lack of understanding of good corporate governance in City of Port Phillip’s utilisation of Ms Shahbaz’s services.
89. I consider that no one took responsibility to ensure that there was a written contract in place, or for monitoring expenditure against services provided by Corporate Power.

90. The majority of services provided by Ms Shahbaz were in relation to the provision of workshops, leadership development and organisational change on a non-individual basis. In this regard Mr Spokes said:

... I want to put on the record that in terms of value for money, it is that, a legitimate business expense and have we got value for money for it? I absolutely believe that we have, and we have got enduring value. In terms of the actual management of the finances, based on my experience of it and what you've presented to me, yes, it was mismanaged.

91. In addition to the services provided, City of Port Phillip executives were able to utilise Ms Shahbaz at their own discretion for professional development. Limited consideration appears to have been given to the expenditure involved or the need for an independent approval process. Expenditure of this nature and magnitude should not be decided, sought and approved by those benefiting from it. Some form of oversight is warranted in these circumstances. An example of this is provided in the section of this report titled 'Conflict of interest'.

92. Section 186 of the Local Government Act provides the legislative framework for contracts entered into by councils that are in excess of the prescribed amount. Section 186 states:

(1) Before a Council enters into a contract for the purchase of goods or services, or for the carrying out of works, to the value of \$100 000 (or such higher amount as may be fixed by Order in Council) or more, it must—

(a) give public notice of the purpose of the contract and invite tenders from any person wishing to undertake the contract; or

(b) give public notice of the purpose of the contract or the project to which the contract relates and invite expressions of interest from any person interested in undertaking the contract or all, or any part of, the project.

(2) If a Council invites expressions of interest—

(a) it must register those expressions of interest; and

(b) when it is ready to enter into the contract, it must invite tenders from some or all of those who registered their interest in undertaking the contract (or the part of the project to which the contract relates).

(3) The public notice, tenders and expressions of interest must be in the prescribed form (if any) and must contain any details that are prescribed.

*I consider that no one took responsibility to ensure that there was a written contract in place, or for monitoring expenditure against services provided by Corporate Power.*

(4) Nothing in this section requires a Council to accept the lowest tender or to accept any tender.

(5) This section does not apply if—

(a) the Council resolves that the contract must be entered into because of an emergency; or

(b) the contract is entered into with a Council acting as the agent for a group of Councils and the Council has otherwise complied with this Act; or

(c) the contract is entered into in accordance with arrangements approved by the Minister for the purposes of this subsection; or

(d) the contract is a type of contract that has been exempted from this section by the regulations.

*City of Port Phillip's total expenditure on Corporate Power's services was clearly well in excess of \$100,000. The fact that City of Port Phillip did not engage in a tender process raises the possibility of a breach of section 186 of the Local Government Act.*

93. Therefore, councils have discretion to establish their own policies for the procurement of goods and services with a value under the threshold amount. That is, how many oral or written quotes should be obtained or whether a tender process should be undertaken.

City of Port Phillip 'Purchasing Guidelines' details its processes in this regard.<sup>5</sup> I note that as of 5 August 2008, by Order in Council, the tender threshold was increased to \$150,000 for contracts for the purchase of goods and services and \$200,000 for contracts for the carrying out of works. However, at the time the events investigated took place, the tender threshold amount was \$100,000.

94. Finance records reveal that the first invoice from Ms Shahbaz was paid against invoice number 18052004 on 5 August 2004 and 18 payments totalling \$97,362 were made between 5 August 2004 and 10 November 2005.

95. By 18 November 2005 a payment against invoice 212392 for the sum of \$38,500 took the payments made to Ms Shahbaz to an amount in excess of \$100,000.

96. Over the next two years, payments to Ms Shahbaz continued for a variety of services. By 4 October 2007 these payments totalled \$620,735.50.

<sup>5</sup> The requirements are: one verbal or written quote up to \$1,000; two verbal or written quotes between \$1,000 - \$10,000 (plus details of quotations to be recorded in the Tender Register database); three written quotes between \$10,000 - \$50,000 (all written quotations to be lodged on the Tender Register Form); and three written quotes in response to a brief/specification between \$50,000 - \$100,000 (all written quotations to be lodged on the Tender Register Form). A Purchase Order must be raised or a contract to be considered for all purchases.

97. An examination of payments has identified that they were expended in the following areas:

**Table 1.**

CATEGORY	\$
Governance/Councillors team building	7,994.25
OD Development/Support	33,467.50
Performance dialogue and feedback/360	93,054.50
Operationalizing 8 behaviours / 8 and beyond	15,441.25
Change Agent Mgt – program and mentoring	134,934.25
Staff survey and focus group and staff speaks	96,745.00
BUKPI/CMB <sup>6</sup>	151,305.00
Coaching/mentoring/team building/leadership	87,793.75
<b>Total</b>	<b>\$620,735.50</b>

98. Expenditure within the category of coaching / mentoring / team building / leadership includes expenditure for payments made for individual mentoring of senior executives of City of Port Phillip.
99. City of Port Phillip's total expenditure on Corporate Power's services was clearly well in excess of \$100,000. The fact that City of Port Phillip did not engage in a tender process raises the possibility of a breach of section 186 of the Local Government Act. It appears that the CEO became aware of this problem in early 2006. City of Port Phillip's management of this issue is discussed further in the section titled 'Application of section 186'.

## Conclusions

100. Ms Shahbaz provided services that were sought by City of Port Phillip for which she was duly recompensed. I am informed that there remain some monies which are in dispute in relation to the Corporate Power's engagement; however that has not been taken into consideration in this investigation.
101. City of Port Phillip mismanaged the procurement of the services provided by Corporate Power. Poor governance of this process allowed expenditure of significant amounts of public funds to occur with little, if any, oversight.
102. No one took responsibility for co-ordinating the management of the range of services provided by Ms Shahbaz. This is unacceptable, particularly in light of the fact that by October 2007 payments to Ms Shahbaz exceeded \$620,000.

*City of Port Phillip mismanaged the procurement of the services provided by Corporate Power. Poor governance of this process allowed expenditure of significant amounts of public funds to occur with little, if any, oversight.*

*No one took responsibility for co-ordinating the management of the range of services provided by Ms Shahbaz. This is unacceptable, particularly in light of the fact that by October 2007 payments to Ms Shahbaz exceeded \$620,000.*

<sup>6</sup> Bottom Up Key Performance Indicator / City of Port Phillip Means Business.

103. City of Port Phillip's administrative and management systems should be reviewed to strengthen the accountability of employees involved in procurement processes. Good governance requires adherence to policies and procedures and the existence of mechanisms to identify non-compliance so that it can be dealt with promptly.

## **Recommendation**

### **Recommendation 1**

I recommend that City of Port Phillip establish processes and guidelines to ensure that the value of services provided by contractors are anticipated by the contract and approved prior to the service being provided.

### ***City of Port Phillip's response***

City of Port Phillip has accepted this recommendation.

## Contract and tendering issues

104. During my investigation it became evident that the Corporate Power engagement was not the only one of City of Port Phillip's procurements that had been the subject of poor governance processes. A significant number of other procurements were identified where there was:

- no contract in place
- a contract was in place but had expired, however services were continuing to be provided
- no tender in place despite expenditure of over \$100,000
- non-compliance with procurement guidelines.

## Contributing factors

105. I explored potential reasons for City of Port Phillip's mismanagement of procurement, including its culture. My investigation identified the following issues that contributed to non-compliance of section 186 and general procurement problems:

- inattentive culture with respect to procurement practices
- section 186 and 'service creep'
- decentralised procurement model
- lack of resources
- inadequate documentation and document management
- lack of technical expertise
- lack of training
- inadequate oversight (this issue is discussed in the following section titled 'Failure of governance').

## Culture

106. Ms Calder referred to the culture of the organisation as a contributing factor to the procurement issues. She said:

I think traditionally the City of St Kilda, which was one of the three cities that became Port Phillip, had a culture of, always had a, kinda had a cowboy culture about it. And it was celebrated for that. You know I think we were, organisationally people were far more interested in the outcome than the process. You know, in fact when I first went there I remember somebody saying that the culture of Port Phillip is fire, aim, ready, or something like that. And so I think, you know, culturally the place was far more interested in outcome than process, it had a bit of a reputation for being a risk-taking, go-getting, get things done, take on big brave projects. And it did that and it did that really successfully and that's part of the reason why it's been a successful council, but the thing it never got was that there are some things that you don't have discretion around, like

*A significant number of other procurements were identified where there was:*

- *no contract in place*
- *a contract was in place but had expired, however services were continuing to be provided*
- *no tender in place despite expenditure of over \$100,000*
- *non-compliance with procurement guidelines.*

*Ms Calder referred to the culture of the organisation as a contributing factor to the procurement issues.*

the Local Government Act is a good guide. If the Local Government Act says section 186 you kinda have to do it. So it never kinda got the notion of you can be brave and risk-taking but there are some boundaries of accountability. We actually have that as a stated behaviour in the organisation but we never did it.

107. The Building Maintenance Unit case study below also discusses attempts made by management to instigate cultural change within the organisation following amalgamation and how this impacted on procurement practices.

### **Section 186 and 'service creep'**

108. Several staff members were asked during interviews how long non-compliance with section 186 had been an issue at City of Port Phillip. The majority identified it as a long-term problem.

109. One staff member stated in City of Port Phillip's defence that it was not the only council to have this problem. He summarised the situation as follows:

I've seen a few councils and I really don't think Port Phillip from a, I know there's been some issues with contracts and all that sort of stuff, I honestly don't think we're much different than anyone else ... one of the things I do is run these reports, these vendor reports, as you've probably seen copies of, I don't think any other council runs those. And I think there'd be, out of 79 councils out there if you run vendor reports of how many times you've exceeded \$100,000 over all the creditors out there, and then did the analysis of whether there's contracts in place for all those, and that's basically what we did and that's when it hit the paper, that's the sort of thing that hits *The Age*. 'Oh, Port Phillip have got 90 vendors out there, 90 creditors out there, that we haven't, that they've spent over \$100,000 and they haven't entered into contracts with'. Some of that's factual, some of that's [*sic*] just reads good in the paper, but if a heap of other councils did the same reports they would come up with a heap-very much the same results. And what they don't say in the papers is that they don't say these are potentially non-compliant 'cos there's no guarantee that any of those are actually breaching the Local Government Act at all, you know, there's a whole legal argument about, you know, when you're entering into a contract and when it sort of starts and what you think about it, you know, what's foreseeable over time and obviously the \$100,000, now \$150,000, is over like the life of the contract, so it's not over one year, so you might pay someone something at 2002, and then by the time 2008 comes up you've actually paid that person \$200,000. But, you know, when you originally go to him in 2002 you may have only expected them to pay \$10,000. So there's a whole argument there.

*Several staff members were asked during interviews how long non-compliance with section 186 had been an issue at City of Port Phillip. The majority identified it as a long-term problem.*

110. Mr Spokes sought legal advice on the issue of non-compliance with section 186 of the Local Government Act in relation to Corporate Power. The advice was provided to Mr Spokes on 28 August 2007 and included the following opinion:
- if, at the time that Corporate Power was initially engaged, it was not reasonably foreseeable that \$100,000.00 or more would be paid to Corporate Power then no breach of section 186(1) of the LGA has occurred;
  - when, (in 2006) it became apparent that more than \$100,000.00 had already been paid to Corporate Power, it would have been prudent (though, perhaps, not legally necessary) to conduct a tender process before acquiring any more of the services of the type actually (and subsequently) provided by Corporate Power;
  - if, contrary to what has been said above, a breach of section 186(1) has occurred, no offence has been committed by Council or any member of Council staff, and
  - if, contrary to what has been said above, a breach of section 186(1) has occurred, it is theoretically possible (but practically unlikely) that any member of Council staff involved in procuring the services of Corporate Power may be surcharged under section 240A of the LGA.

111. City of Port Phillip's Finance Manager provided an example of the type of situation where a service 'creeps' towards and beyond \$100,000. He stated:

The big issue has crept up is getting expertise through consultants and people might have a little job to do and they don't have the staffing and resources, but they've got money in their budget for professional services, so they engage this person, you know for \$10,000-\$20,000 and that will help fill that gap and they'll get a strategy developed or policy developed and they can sort of get on with life because the reality is local government is a very very complex business to be in, there's a lot of pressure to get a lot of thinking work out for the councils to consider and adopt and line managers actually are forced often to utilise resources other than their own staff, and I think it's very, once you hear that someone's quite a good consultant and knows the business, well people continue to go back to that person. And unfortunately a lot of these engagements they add up and accumulate well over the limit

## Decentralised procurement model

112. Like any organisation, City of Port Phillip has undergone many restructures. Governance is one area that has been subject to change. City of Port Phillip initially started with dedicated units and staff to ensure compliance with compulsory competitive tendering requirements,<sup>7</sup> which commenced in 1994. In 1999 the government abolished compulsory competitive tendering and introduced Best Value legislation, which is still current.
113. The Governance and Community Relations Unit<sup>8</sup> at City of Port Phillip was established in or around 2002 and assumed responsibility for the following units: Governance, Community Governance, Property and Valuations, and Communications and Stakeholder Relations. The Governance Unit manages compliance, risk management, insurance, contracts and council meetings. Procurement and tendering were the responsibility of the Best Value Unit, which was staffed by one full-time and one part-time staff member. The Best Value unit was later disbanded, resulting in procurement and tendering becoming the responsibility of the Governance Unit in late 2007. The part-time staff member subsequently went on maternity leave and the full-time staff member joined another unit for a short time before leaving City of Port Phillip in late 2007. This left the Governance Unit with two full-time staff: a co-ordinator and a manager.
114. In August 2008 City of Port Phillip commissioned an external consultant to review its tendering and related processes. The review involved a sample of 11 tenders/contracts. The external consultant's report acknowledges that this sample was limited, however it considers that it was sufficient to give an overview of the strengths and weaknesses in City of Port Phillip's systems as they existed at the time.<sup>9</sup>
115. The August 2008 external consultant's report included comments from several staff members about procurement practices. One staff member quoted in the report stated:

Because of the devolution of responsibilities, there is no co-ordination. There is a laissez faire culture with too much discretion allowed and a lack of reporting.

*One staff member quoted in the report stated:*

*Because of the devolution of responsibilities, there is no co-ordination. There is a laissez faire culture with too much discretion allowed and a lack of reporting.*

<sup>7</sup> In summary, compulsory competitive tendering required 50 percent of a council's operating costs to be subject to a tendering process.

<sup>8</sup> The Governance and Community Relations Unit is, as of 18 February 2009, called the Governance and Risk Management Unit.

<sup>9</sup> A list of recommendations by the August 2008 external consultant's report is reproduced in the appendix. City of Port Phillip accepted all the August 2008 external consultant's report recommendations and advised it has completed 19 of the recommendations. It is still in the process of completing recommendations (h), (k) and (o).

116. This comment raises questions around the procurement model adopted by City of Port Phillip. The external consultant's report goes on to comment that:

The feedback from staff was consistent, with the main points being:

- a. staff are comfortable drafting specifications for tenders but consider that preparing the Conditions of Tender and Conditions of Contract is beyond their area of expertise;
- b. on occasions, there has been contradictory advice from the Governance and Community Relations Department/ Compliance and Risk Unit;
- c. there is a need for more staff training; and
- d. there is a preference for more of the processes to be centralised in the Compliance and Risk Unit.

117. Mr Spokes commented on the decentralised model adopted by City of Port Phillip in managing procurement:

I think there was a bigger system issue that we were trying to deal with, which was really getting the right balance between giving people the autonomy to do their job and you know effective accountability and reporting upwards and you know that was an aspect of that and the best value process had been completed but the contract management was fairly decentralised, I mean we've changed that subsequently. And I think you know like any system there are pros and cons. I mean one of the down sides of a decentralised model is that the resources can be distributed too widely and they don't have that central drive and control so I think it was probably more the latter rather than the actual quantum of resources but I mean you could always do with more.

118. In relation to the model in place Ms Calder stated:

We've now got a very clear delineation of duties where it is clearly my responsibility to ensure that all of the contract documentation and contract process is compliant and it has to be signed off by my department before it can proceed. So that's been a really great outcome, that we've finally been given that authority. And can I say it has taken the interest of the Ombudsman to actually get that agreement in the organisation. The organisation has always been, culturally, hugely resistant to centralised control of any kind of processes.

### **Lack of resources**

119. Lack of resources contributed to the delays in addressing the procurement issues once they had been identified. Ms Calder stated that the manager went on sick leave for one year and her part-time staff member went on maternity leave, leaving her with the co-ordinator as the only remaining staff member in that team. That staff member's role was split between governance responsibilities and assisting with the work provided by Ms Caroline Shahbaz.

*Lack of resources contributed to the delays in addressing the procurement issues once they had been identified.*

120. At interview, Mr Spokes acknowledged that one part-time person in the contracts and tendering unit was insufficient. The August 2008 external consultant's report further confirmed that City of Port Phillip is under-resourced in relation to experienced contracts and tendering staff.
121. Further, City of Port Phillip does not have contract management software and is therefore reliant on staff abiding by relevant guidelines and procedures. The August 2008 external consultant's report noted the following in this regard:
- a. staff have no tools to assist them in that task;
  - b. there is little or no central monitoring of contract management processes on an ongoing basis;
  - c. there is little or no reporting to senior management or Council as to the performance of contractors; and
  - d. occasional reviews by the internal auditor and Audit Committee are useful, but could be part of a more rigorous process.
122. In relation to contract management software, Mr Spokes said:
- That's one of the things we're turning our mind to, we haven't, we don't have an answer to that yet. I'm always resistant to someone trying to sell me a software package to do it all, I want to understand what the process steps are first, but we have another chapter and that's exactly one of the things that we're trying to develop.

### **Inadequate documentation and document management**

123. The August 2008 external consultant's report made the following observations regarding tender and contract guidelines and documentation:
- They are out of date in some instances.
  - There are multiple and obsolete versions of legal documents still being provided to tenderers, and subsequently being used to create contract documentation, despite City of Port Phillip's legal counsel supplying Port Phillip with an updated set of documents in September 2007.
  - There is scope to make current documentation less onerous in many cases. For example, some obsolete Services General Conditions being used impose 'partnering requirements' on contractors and some of the insurance requirements may be excessive.
  - There is significant repetition.
  - There are many instances of confusing terminology. For example, incorrect references to documents, multiple ways of referring to the council, extensive grammatical and formatting errors, multiple ways of referring to the staff member managing the contract, and multiple ways of referring to the contractor.

- There are instances where commitments have been given that do not conform to Port Phillip’s current practices, such as one Conditions of Tender reviewed stating that the unsuccessful tenderers will be notified of the winning price on request.
  - Greater use could be made of plain English to make the documentation more reader friendly.
124. The above analysis was based on its examination of 11 tenders, of which the external consultant could only locate five executed contracts. The remaining six tenders all had some kind of identified problem such as:
- incorrect legal names of the council and vendors in documents
  - required bank guarantees and insurance certificates not obtained
  - incorrect weightings which are inconsistent with City of Port Phillip guidelines
  - reports to Council missing important information.
125. The August 2008 external consultant’s report confirmed that staff had access to electronic versions of the above documents and modified them without consulting the Governance and Community Relations department. This in turn created different and obsolete versions.
126. These observations are supported by comments received from staff during the review:
- I would love to have a whole suite of templates – ranging from contracts for consultant services to tender panels to variation to contract scope templates to letter of acceptance and rejection as well as a variation register that would be standard for all contracts.
- Anything that would make it easier to administer contracts in a consistent way across the organisation.
- The current documentation is messy and confusing. There is a need for consistency and for documentation to be easily accessible and in one place. Currently, processes are all over the place and are a total mess. The organization is “not there” with TRIM.
127. My investigations also identified evidence of poor record-keeping practices contributing to poor contract management. An example of this is contained in the case study below relating to the cleaning contract tender conducted by the Building Maintenance Unit.

*A number of tenders examined had some kind of identified problem such as:*

- *incorrect legal names of the council and vendors in documents*
- *required bank guarantees and insurance certificates not obtained*
- *incorrect weightings which are inconsistent with City of Port Phillip guidelines*
- *reports to Council missing important information.*

*It would also appear that a lack of technical expertise may have contributed to the development of poor procurement and contract management practices at City of Port Phillip.*

### **Lack of technical expertise**

128. It would also appear that a lack of technical expertise may have contributed to the development of poor procurement and contract management practices at City of Port Phillip. City of Port Phillip's Finance Manager stated that he believed there was a general lack of understanding by staff and management of what the law required in relation to procurement processes. At an executive level, he stated:

I think sometimes the focus has been more on their general ability to manage and engage with the council [staff] rather than necessary solid technical understanding of the areas they're responsible for.

129. The August 2008 external consultant's report stated:

Port Phillip does *not have* a lack of procedures. In fact, its procedures may well be excessive in some cases.

There are however, indications of a widespread lack of understanding and non conformance to statutory and organisational requirements.

130. In regard to technical expertise at City of Port Phillip, Mr Spokes said:

I think it was certainly lacking at the normal staff level, I wouldn't, at one level I wouldn't necessarily expect it to be there ... I think at the executive and management level there was a, I think a reasonable level of knowledge about it although it was, I think a bit patchy, or variable I think is a better description.

### **Victorian Local Government Procurement Strategy**

131. In 2008 the Department of Planning and Community Development commissioned Ernst & Young to complete the *Victorian Local Government Procurement Strategy* project (the project). The project was completed and made public in September 2008. The objectives of the project were to:

provide strategic advice and recommendations on how to drive the efficiencies in council procurement practices while balancing effectiveness with social, environmental and economic objectives. The major outcome of this project will be the further development of strategic procurement policy and practices in Victoria that will work to reduce councils' costs and improve service delivery.

132. The scope of the project related to procurement practices and expenditure (called 'spend') of all local councils with detailed data gathering and interviews in 15 nominated councils. The project identified that:

Overall, procurement capability in local government is low relative to private and public sector organisations of similar size. Actual capability varies significantly between councils, however several weaknesses are common across most councils.<sup>10</sup>

<sup>10</sup> *Victorian Local Government Procurement Strategy* September 2008, page 16.

133. The project summarised the current procurement capability of local government, of which I note in particular:
- Councils operate mostly decentralised procurement; where centralised purchasing activities exist, there is little alignment to council strategy.
  - Procurement staff do not feel they receive sufficient recognition within their council for the broad range of responsibilities they manage.
  - Inconsistent sourcing practices and low levels of category management<sup>11</sup> are evident within and across most councils.
  - Many councils use incompatible systems and tools, resulting in manual processes and poor integration of systems, providing financial controls but limited insightful reporting.<sup>12</sup>
134. The project also identified the major areas that must be addressed to improve procurement capability, including:
- Develop and implement a formal procurement strategy which is aligned with council objectives.
  - Develop effective organisational procurement structures, including procurement reporting and the centralisation of key activities to ensure that procurement staff have sufficient authority to implement the procurement strategy
  - Clearly defined roles and responsibilities for procurement staff ...
  - Standardisation of specifications or adoption of agreed product catalogues for most council spend ...
  - Adoption of industry standard tendering guidelines and terms & conditions
  - Category management programs within each council to ensure more leverage and visibility of day-to-day expenditure ...
  - Performance measure to track and evaluate the effectiveness of procurement processes and compliance with these processes by council staff
  - Implementation of contract management processes to provide structured assessment of suppliers and major contracts to ensure that agreed services are provided and that financial and schedule risks are identified for the council
  - Implement or refine finance or procurement systems to enable automated business rules/workflow and facilitate category analysis/management.<sup>13</sup>

<sup>11</sup> The project divides procurement into several categories to manage, such as Roads & Streets, Facilities, Waste Management, Vehicles, etc.

<sup>12</sup> *Victorian Local Government Procurement Strategy* September 2008, page 17.

<sup>13</sup> Ibid. Table 8 'Improving Procurement Capability'. See 'Individual Councils' column, pages 23-25.

135. In my opinion, it may also assist councils to tender for common services and establish a panel of contractors. For example, a panel of several contractors that council staff can choose from for services such as: consultancies, graphic design, printing, architecture, etc. Where such panels are established, council staff could monitor the selection and use of contractors to ensure the contractor continues to provide value for money.

### **Lack of training**

136. The August 2008 external consultant's report makes reference to an internal audit that was conducted on contract management of parking services in September 2007. The audit report makes the following comments:

- staff are not aware [of] and using current contract management policies and procedures;
- lack of training for contract managers and supervisors;
- the need to provide insurance certificates of currency; and
- the potential for skills gaps in the long-term absence of the contract manager.

137. The report identified a need for a regular training program to ensure procurement requirements are understood and implemented. It stated that existing training 'appears to be "response based" rather than arising from training needs identified through a performance appraisal or other process. Attendees can "self nominate" and it appears that staff who need training could avoid attending'. The report further commented that 'while these were necessary, they were aimed at statutory aspects and staff feedback was that they were "legalistic". Such training needs to be supplemented by training by practitioners'.

### **Conclusions**

138. I consider that the issue of whether a council is in breach of section 186, if it did not initially intend its purchase to exceed \$100,000, is unclear. I believe it is more appropriate for Local Government Victoria to address this matter. Local Government Victoria is also best placed to support City of Port Phillip towards compliance with the Local Government Act.
139. City of Port Phillip should review its training requirements and devise a new training strategy. My investigators were informed on several occasions by City of Port Phillip employees of the need to have training in relation to procurement practices and obligations. A review of training requirements should include document management practices. This issue should be addressed as a matter of priority.

*Existing training 'appears to be "response based" rather than arising from training needs identified through a performance appraisal or other process. Attendees can "self nominate" and it appears that staff who need training could avoid attending.'*

*I consider that the issue of whether a council is in breach of section 186, if it did not initially intend its purchase to exceed \$100,000, is unclear.*

140. I consider City of Port Phillip should review its procurement policies, practices and guidelines in light of the outcomes of the Department of Planning and Community Development's project and Local Government Victoria's Procurement Best Practice Guidelines.
141. In his letter of 17 July 2009 the Mayor of City of Port Phillip informed me of the implementation of a comprehensive and ongoing staff training program.

## **Recommendations**

### **Recommendation 2**

I recommend that Local Government Victoria review the support and guidance it provides to councils on the interpretation of section 186 and best practice in procurement.

### **Recommendation 3**

I recommend that City of Port Phillip provide training to employees involved in procurement processes to ensure that good governance requirements are understood and strategies are developed so that this translates into improved governance practices.

### **Recommendation 4**

I recommend that City of Port Phillip review its procurement policies, practices and guidelines in light of the outcomes of Department of Planning and Community Development's project and Local Government Victoria's Procurement Best Practice Guidelines. City of Port Phillip should include more stringent reporting and monitoring mechanisms and report to its Council on any proposed changes prior to carrying out the necessary amendments.

### **Recommendation 5**

I recommend that Local Government Victoria be actively involved in supporting City of Port Phillip towards compliance with the Local Government Act.

### ***City of Port Phillip's response***

City of Port Phillip has accepted these recommendations.

*My investigation found evidence of staff failing to exercise diligence in their adherence to tender and contract management procedures and in some instances, showing total disregard for them.*

## **Building Maintenance Unit**

142. The following case study provides further examples which illustrate the poor contract management and procurement processes operating at City of Port Phillip. It arose from a whistleblower disclosure against officers of the Building Maintenance Unit. My investigation into this disclosure found evidence of staff failing to exercise diligence in their adherence to tender and contract management procedures and in some instances, showing total disregard for them.
143. The disclosure alleged:
- The Building Maintenance Co-ordinator, Mr Ray Nott, was not following City of Port Phillip's policy regarding having to obtain the required amount of quotes for purchases below \$100,000.
  - The Manager Buildings and Green Spaces, Manager X, had not adhered to the tender processes for a contract for the provision of cleaning services conducted in late 2006 to ensure that the incumbent contractor, Cleaning Contractor B, would not win the tender.
  - Mr Nott, in his role as Building Maintenance Co-ordinator, was providing favoured contractors with competitor quotes so that the preferred contractor could underquote. The third allegation is discussed separately in this report, in the section titled 'Staff misconduct'.
144. The Building Maintenance Unit is responsible for all building maintenance procurement at City of Port Phillip. Most building maintenance works are managed through a contract with the service provider. These works include painting, carpentry, graffiti removal, and plumbing.
145. Executive Director A engaged a contractor in 2003 to facilitate work regarding the renewal of City of Port Phillip's service provider contracts, some of which were managed by the Building Maintenance Unit. The contractor informed Executive Director A that he had identified several flaws in the contracts managed by the Building Maintenance Unit, such as inadequate practices and processes regarding contract management. The contractor also revealed that unit officers were aware of these flaws and not taking action to address them.
146. In addition to the issues raised by the contractor, Executive Director A was concerned that unit officers may have developed inappropriate relationships with contractors. The Building Maintenance Unit had been using the same contractors for many years, some longer than a decade. As a result of the close relationships that had developed between Building Maintenance Unit officers and contractors, Executive Director A became concerned that officers were giving work to the

contractors preferentially instead of following City of Port Phillip's purchasing policy. Consequently, Executive Director A initiated an audit of the Building Maintenance Unit to address these issues.

147. The audit was conducted by an external auditor in accordance with City of Port Phillip's Strategic Audit Plan. It was completed in June 2003 and identified a range of issues which needed to be addressed in order to strengthen the adequacy and effectiveness of Building Maintenance Unit processes and procedures. The key issues were: confirming compliance by contractors; establishing a bundling of unscheduled maintenance work; improving communication with City of Port Phillip facilities and contractors; and providing greater transparency of funds employed.
148. The report indicated that it did not identify any serious deficiencies in Building Maintenance Unit processes. Specifically, it stated that '[a]ll identified potential risks and process omissions are manageable and our proposed recommendations have been provided to mitigate potential risks'.
149. City of Port Phillip accepted the 16 recommendations from the audit and Executive Director A stated that he directed Manager X to implement them. Manager X had been a full-time employee of City of Port Phillip since September 2003. In January 2006 she commenced in the role of Manager Asset Planning. She took over the Building Maintenance Unit, in addition to her existing portfolio responsibilities, in January 2007. As a result, her title changed to Manager of Buildings and Green Spaces.
150. It appears that limited action was taken regarding the audit recommendations until Manager X inherited the Building Maintenance Unit in January 2007 – some three and a half years after the external audit was completed. This delay, and the fact that some recommendations were not implemented, is of concern.
151. In a written response to my concerns, both Manager X and Executive Director A outlined a number of steps taken between 2003 and 2006 to address the audit recommendations. These included implementation of a new asset management system; a building condition audit; and an update provided by the then manager of the department. However, I saw no evidence in either response that all 16 recommendations were implemented.

*It appears that limited action was taken regarding the audit recommendations until some three and a half years after the external audit was completed. This delay, and the fact that some recommendations were not implemented, is of concern.*

## Culture

152. Executive Director A believed that his concerns about close relationships between staff and contractors were confirmed by the 2003 audit and that changes were needed within the Building Maintenance Unit. This led to the creation of a new procurement strategy for the Building Maintenance Unit, which Mr Spokes instructed Executive Director A to implement. Mr Spokes said he told Executive Director A the new strategy needed to ensure that contracts were awarded on the basis of competitive prices, rather than on the basis of long standing relationships with particular contractors and that it should move away from lump-sum contracts, towards a schedule of rates process. Mr Spokes said he advised Executive Director A that a departmental restructure would be necessary in order to achieve these objectives. Mr Spokes said that he oversaw Executive Director A's implementation of these changes.
153. This resulted in a cultural change within the Building Maintenance Unit. Some Building Maintenance Unit staff interviewed during my investigation felt that the former officers were 'old school' and were unprofessional. In contrast, the former officers felt that the 'new school' were overly strict in the management of Building Maintenance Unit, both operationally and in terms of individual style. Operationally, Building Maintenance Unit officers' authority to approve contractors' invoices was reduced to \$5,000 and then to zero. Executive Director A stated the following during interview:
- I employed [Manager X] and I moved the building department out of its current area and moved it in with [Manager X] generally to destroy a culture as much as anything else because it had been an old culture and it had been embedded for a long time.
154. When asked what he meant by 'destroy a culture', Executive Director A said:
- I wanted to destroy a culture where it was only promoted that the contractors manage themselves. I didn't think that was a very healthy culture to have in an organisation where the builders knew more about what was going on in the city than what we did, where it was a very cosy relationship between the contract manager and the contractor, I'm very much more of an arm's length person with contractors. There were things happening that were too close. You know, [a particular unit officer] had contractors writing contracts that were going to be bidding on the contracts, so it was all that sort of stuff in that area. So it wasn't actually about getting rid of people, it was about giving people the chance to change, but then at the end of the day if they didn't change this is the way we were going to be. We were being clear that this was the new regime, this is where we were going, giving them the chance to be part of that.

155. In relation to the culture within the Building Maintenance Unit Mr Spokes said:

... it was clearly a contest occurring between the staff and the management and I know some of the staff certainly would have perceived [Manager X] as being you know pretty forceful and domineering and I was satisfied in the circumstances that she was delivering the mission that we had given her and some of the resistance she was getting was... uh...would... uh... was to be expected. In that context I mean yes there would have been discussions about culture. The clash of the old versus the new management and its just dealing with a different level of performance and accountability which is the thing I noticed.

156. Mr Nott commenced at City of Port Phillip under contract in early 2005. He was tasked with implementing a number of recommendations that arose from an audit of City of Port Phillip buildings. He became a full-time employee when he commenced in the Building Maintenance Unit in mid 2005. Mr Nott had a management role within the Building Maintenance Unit as Building Maintenance Co-ordinator. Despite the effort to change the culture in the Building Maintenance Unit, Mr Nott stated that Building Maintenance Unit officers did not always follow management directives. He said:

I am making an excuse for myself here. It is my fault; I should have been more diligent with those people within building maintenance. Unfortunately, I did not have the time to do it and I could not control it.

157. Manager X also confirmed at interview that Mr Nott did not manage the team as well as had been envisaged for that role. Both Manager X and Mr Nott stated that this was due to his commitment to a major building project – St Kilda Town Hall renovation. Manager X stated this is what led to the creation of a team leader position in Building Maintenance Unit.

## Conclusions

158. City of Port Phillip underwent a significant period of change following the amalgamation of the three former councils.
159. City of Port Phillip identified several issues that needed to be addressed within the Building Maintenance Unit. These issues related to unit processes and practices and the relationships between staff and contractors. However, the manner in which City of Port Phillip proceeded to implement changes in the Building Maintenance Unit created further problems. It would appear that City of Port Phillip management were so focused on removing the 'old school' that they failed to pay sufficient attention to the behaviours of some of the 'new school'. This resulted in relying on new staff that they believed could 'get the job done' without the necessary attention being paid to whether they were getting the job done properly.

*City of Port Phillip management were so focused on removing the 'old school' that they failed to pay sufficient attention to the behaviours of some of the 'new school'. This resulted in relying on new staff that they believed could 'get the job done' without the necessary attention being paid to whether they were getting the job done properly.*

## **Recommendation**

### **Recommendation 6**

I recommend that City of Port Phillip commission an external independent audit of the Building Maintenance Unit, as a follow-up to the audit conducted in June 2003. I also recommend that City of Port Phillip action the outcome of the audit within three months.

### ***City of Port Phillip's response***

City of Port Phillip has accepted this recommendation.

### Failure to obtain requisite number of quotes

160. The allegations made by the whistleblower identified a number of examples where Building Maintenance Unit staff failed to follow City of Port Phillip's procurement policies and procedures.
161. One allegation was that Mr Nott did not obtain the required amount of quotes according to council policy.
162. At interview Mr Nott acknowledged that he often did not obtain three quotes for the required value range when procuring services for Building Maintenance Unit. He stated that he was only provided with a copy of the purchasing guidelines shortly before he left City of Port Phillip in May 2008. He stated he was aware that he had the delegation to approve work up to \$25,000 and that generally he should be obtaining at least two written or oral quotes. He stated:
- No, I didn't always obtain the required quotes. One: I never had the time to do that, Two: the... um... you ran out of people to quote for you after a while because they get sick of quoting for you, so if they don't win the job and you continually ask them for a quote and not winning a job they will get sick of doing it and the other thing was no time to get the commitment to get three quotes on every job, there was always two quotes on a job, plus a verbal that, you know, from somebody else, that yeah, that it would cost X amount of dollars.
163. Mr Nott stated that he always obtained a written quote, regardless of the policy and that he usually obtained two quotes. He stated:
- I'll be honest with you, I would get two quotes. Right. I wouldn't get three because by the time you mess around and getting the third one it's just taking up too much time and once again going back to the St Kilda Town Hall I never had the time to do that.
164. Mr Nott resigned on 2 May 2008, during my investigation.

### Procedures

165. My investigation identified that staff from the Building Maintenance Unit generally did not obtain the requisite number of quotes. No one interviewed, except Mr Spokes, was able to tell my office what the Tender Register Database or the Tender Register Form were, or where these should be lodged. Mr Spokes was surprised that no one was able to provide basic information about City of Port Phillip's requirements, given that new management was put in place in the Building Maintenance Unit. He stated 'I'm very surprised. Well, I certainly have an issue with that'.
166. Quotes obtained for maintenance works were not always filed correctly. Some interviewees did not know where they should be filed, whilst others said they kept them in their desk drawers. Manager X stated that she assumed Building Maintenance Unit officers were placing the quotes on the relevant contract management file or the asset record file, but she did not know for certain.

*At interview Mr Nott acknowledged that he often did not obtain three quotes for the required value range when procuring services for Building Maintenance Unit.*

*Quotes obtained for maintenance works were not always filed correctly. Some interviewees did not know where they should be filed, whilst others said they kept them in their desk drawers. Manager X stated that she assumed Building Maintenance Unit officers were placing the quotes on the relevant contract management file or the asset record file, but she did not know for certain.*

167. The Building Maintenance Unit also followed its own practice for approving building maintenance works. Unit officers had authority to approve purchase orders up to the value of \$5,000. Approval for higher amounts could only be obtained from the team leader, co-ordinator and manager depending on the value. However, invoices could only be approved for payment by management. Manager X stated that when she became aware of the historical concerns about relationships with contractors, she began monitoring purchase orders more closely via the purchasing and asset management system.

## **Conclusion**

168. I am satisfied that Mr Nott failed to comply with City of Port Phillip policy in obtaining the required amount of quotes. Mr Nott did not make comment on any aspects of my report when given the opportunity to do so.
169. In his letter of 17 July 2009 the Mayor of City of Port Phillip informed me that the record-keeping requirements for quotations are now clarified in the Purchasing Guidelines.

## **Recommendation**

### **Recommendation 7**

I recommend City of Port Phillip review Building Maintenance Unit's compliance with purchasing requirements, including the obtaining and maintaining of quotes and other related documentation and develop a strategy to monitor and ensure future compliance.

### ***City of Port Phillip's response***

City of Port Phillip has accepted this recommendation.

## Failure to adhere to tender process for cleaning contract

170. The whistleblower also alleged that Manager X had not adhered to the tender processes for a contract for the provision of cleaning services conducted in late 2006 to ensure that the incumbent contractor would not win the tender.
171. A call for tenders for City of Port Phillip's cleaning services occurred on 1 August 2006. The incumbent cleaning contractor for City of Port Phillip was Cleaning Contractor B, having won all but one tender since 1994. Cleaning Contractor B was also the cleaning contractor for approximately six years for one of the former councils prior to amalgamation. Its contract for council buildings was due to expire at the end of December 2006 and its contract for public conveniences and barbeques was due to expire at the end of March 2007. Consequently, City of Port Phillip went to tender for the cleaning contract. The Building Maintenance Unit had overall responsibility for managing the contract and tender process.
172. Manager X established a tender evaluation panel (the panel) for the cleaning services tender. The panel consisted of five members: Manager X (chairperson), Mr Nott, the Governance Advisor, the Finance Manager, Mr N (an external independent consultant).
173. The Finance Manager's role was to conduct financial checks on the tenderers and provide financial advice based on the checks. He advised that he generally performed this role regardless of whether he was on a tender panel.
174. The Governance Advisor stated that he believed he was randomly selected for the panel as he had not been on a panel for some time. Although he thought that one of the reasons he had been chosen was that he was considered to have a conservative approach to his duties. He did not have a specific role, although the panel relied on him for governance or probity advice when needed.
175. Mr Nott was away ill during the evaluation phase and therefore had no input into the decision. He stated that his main role was to act on behalf of City of Port Phillip as the liaison officer for Mr N throughout the tender process. He stated that he obtained and forwarded any necessary information and documentation and facilitated feedback from council's sites and services.

*The Governance Advisor stated that he believed he was randomly selected for the panel as he had not been on a panel for some time. Although he thought that one of the reasons he had been chosen was that he was considered to have a conservative approach to his duties.*

176. The tender process for this contract involved:
- preparing the site and tender specifications
  - developing the evaluation criteria
  - establishing cost bench-marking
  - advertising an invitation to contractors to submit a tender
  - conducting site visits and briefing sessions for the tenderers
  - completing the tender evaluation process, including interviewing the tenderers
  - awarding the tender and negotiating the terms of the contract.
177. The Building Maintenance Unit received seven tender submissions, which was reduced to six after one was assessed to be non-conforming to the specifications. The panel then selected three tenderers for the next stage in the process: Cleaning Contractor A, Cleaning Contractor B and Cleaning Contractor C. The outcome of the panel's evaluation process was that it recommended that the contract be awarded to Cleaning Contractor A.
178. The elected Council considered the panel's report on 27 November 2006 and approved the recommendation to award the cleaning contract to Cleaning Contractor A. City of Port Phillip met with Cleaning Contractor A on 30 November 2006 to discuss contract negotiations and confirmed the discussions in a letter dated 1 December 2006. Cleaning Contractor A commenced its contract on 1 January 2007.

### **Investigation**

179. My investigation focused on the process that Manager X and the panel followed during the tender. During the investigation I identified six areas of the tender process that affected the evaluation of Cleaning Contractor B's tender. I discuss the six areas below:
- I. Unclear decision-making role of Mr N, the consultant engaged to assist with the tender
  - II. The assessment of risk implications if Cleaning Contractor B were awarded the tender
  - III. The discussion about whether Cleaning Contractor B should be recommended to the elected Council
  - IV. Issues in relation to Mr N's report to the panel
  - V. Mr Spokes' endorsement of the panel's recommendation
  - VI. Conflict of interest issue that was not appropriately actioned (this issue is discussed separately in the section of this report titled 'Conflict of interest').

## I. Decision-making

180. City of Port Phillip decided to use an independent consultant to assist with the cleaning tender. Manager X obtained the contact details of several consultants specialising in cleaning contracts from other councils. Manager X chose Mr N after seeking expressions of interest from several consultants. The terms and conditions of Mr N's engagement made no reference to a decision-making role regarding the evaluation of the tenderers. My officers asked Mr N about this at interview and he stated that he understood his role to include decision-making. In a written response he subsequently stated that he had a 'recommendation role'. Manager X's written response stated that Mr N was a member of the panel and therefore implicitly had a decision-making role.
181. My officers interviewed all the panel members. They were divided when asked whether Mr N had a decision-making role; two members of the panel, Manager X and Mr Nott, understood that Mr N's role included being part of the decision to recommend a preferred tenderer. However the other two members, the Finance Manager and the Governance Advisor, stated that they understood he was engaged as an expert in the cleaning field and they relied on his advice as an expert, but in their opinion he was not part of making the actual decision.
182. All panel members stated that the decision to recommend Cleaning Contractor A was unanimous by way of general discussion and agreement and not by way of casting a vote.
183. While I recognise the important role of an independent consultant during a tender process, it is apparent that in this instance Mr N's role and responsibilities were not clear.

## II. Assessment of risk implications

184. Manager X acknowledged that the contract with Cleaning Contractor B was not managed as well as it could have been, with no regular meetings taking place between the Building Maintenance Unit and Cleaning Contractor B. I note that this is despite the Building Maintenance Unit being alerted to several deficiencies relating to the Cleaning Contractor B contract by the external audit back in June 2003.
185. My officers examined Building Maintenance Unit's contract file on Cleaning Contractor B and noted that it was completely devoid of documentation from 2003 onwards. If any work had been conducted in relation to the Cleaning Contractor B's contract since 2003, it was not recorded in the contract file. The June 2003 external audit identified that contract files were stored off-site and not kept with the contract manager.
186. Mr Nott stated that he had a couple of informal meetings with representatives of Cleaning Contractor B, during which he informed them that City of Port Phillip were dissatisfied with Cleaning Contractor B's performance. He was unable to state when these

*While I recognise the important role of an independent consultant during a tender process, it is apparent that in this instance the consultant's role and responsibilities were not clear.*

*Building Maintenance Unit clearly failed to appropriately manage its contract with Cleaning Contractor B, particularly given it had concerns with Cleaning Contractor B's performance. Manager X agreed with this assessment.*

meetings occurred. There are no records of these meetings and Mr Nott was unable to provide any details of his discussions with Cleaning Contractor B, other than that he advised them that they should 'lift their game'.

187. The Building Maintenance Unit clearly failed to appropriately manage its contract with Cleaning Contractor B, particularly given it had concerns with Cleaning Contractor B's performance. Manager X agreed with this assessment. Manager X maintained that Cleaning Contractor B's performance remained poor, despite a unit report generated in August 2006 which stated, '[Cleaning Contractor B] have lifted their game but only to the expected base level, with the contract up for renewal'.
188. The panel's assessment of Cleaning Contractor B's performance as City of Port Phillip's incumbent cleaning contractor was based on the views of Building Maintenance Unit staff and the above unit report. It was influential in its decision not to recommend Cleaning Contractor B as the preferred tenderer. In relation to the 'risk implications' associated with awarding the contract to Cleaning Contractor B, the tender report provided to council stated:
- The current performance standards provided by this contractor are less than desirable and are taking considerable staff resources to ensure delivery. The poor reference checks obtained have indicated that this could be an ongoing problem.
189. Manager X stated that complaints against Cleaning Contractor B were 'terrible' and consistent:
- Consistent problems with non-performance, consistent problems with you know, even I think, God I'm trying to remember the amount of meetings that the guys had with them around their performance issues, just not performing, just not cleaning up to the standard, not even meeting the standards of the specifications, issues with their people on site not being totally uniform presentable, as you know, as per the normal standards that you'd like to see from a contractor. Etcetera, etcetera, etcetera.
190. She stated that the Building Maintenance Unit maintained a log of all the complaints against Cleaning Contractor B and the actions taken to address them. Manager X stated that she even reported Cleaning Contractor B's poor performance to the elected Council, although she was unable to provide any written evidence to support this. She said that it must have been an oral report and that she recalls it was shortly before the tender report was submitted. Manager X stated that City of Port Phillip does not maintain minutes of private councillor briefings.
191. In a written response to my office regarding my preliminary concerns, Manager X made no comment regarding the lack of documentation in relation to the Building Maintenance Unit's management of its contract with Cleaning Contractor B. She maintained that Cleaning Contractor B's performance was poor and that Building Maintenance Unit staff held discussions with Cleaning Contractor B.

192. The tender specifications indicated that all tenderers were required to provide references and that both current and past references would be checked. None of the panel members could recall which references were checked for Cleaning Contractor B, however Manager X stated that they would have been those provided in the tenderer's submission. I sought documentation regarding the references that were checked for each of the tenderers. Mr N confirmed that he was responsible for conducting the reference checks, but it appears he did not make any records of the information provided by the referees. He was only able to provide a handwritten copy of the list of references checked for Cleaning Contractors A, B and C. The references checked for Cleaning Contractor A and Cleaning Contractor C were all other councils with which the tenderers currently or formerly had contracts. I note that Cleaning Contractor B had at least one other current cleaning contract with a council other than City of Port Phillip.
193. The handwritten document provided by Mr N indicates that three City of Port Phillip facilities were checked as part of the current reference checks for Cleaning Contractor B. My officers queried the decision to check City of Port Phillip facilities as part of the reference checking and whether Cleaning Contractor B was aware that this was going to occur. It was clear that the panel had already considered Cleaning Contractor B's performance at City of Port Phillip as the incumbent contractor. Therefore, it did not appear reasonable that reference checks were conducted with City of Port Phillip facilities, as City of Port Phillip already knew that both the City of Port Phillip facilities contacted and Building Maintenance Unit were dissatisfied with Cleaning Contractor B's performance. Most of the panel members acknowledged this point when it was discussed during interview.
194. It is unclear whether Mr N checked the references provided in Cleaning Contractor B's submission as City of Port Phillip were unable to provide any supporting documentation of the reference checking process. In order to meet the tender specifications, Cleaning Contractor B was required to provide contact details for three referees. Cleaning Contractor B provided contact details for a university, a Victorian government department and a private company. However, the documentation provided by Mr N indicates that he only checked three current City of Port Phillip facilities. Of the current facilities checked, one was a child care centre; one was a maternal and child health centre; and a third was a community centre. These facilities demand the highest attention to cleaning, given the nature of the services provided, and did not appear to represent the range of City of Port Phillip facilities in which Cleaning Contractor B provides cleaning services.
195. Mr N stated in his written response to my report that 'records were made but that I cannot locate my files, some two years ago'. He also stated that '[Cleaning Contractor B's] references were verified for the City of Port Phillip at the request of the City of Port Phillip, not on the

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*It is clear that City of Port Phillip's contract management files were incomplete, irregular and generally of a poor standard.*

assumption of myself. Cleaning Contractor B had current references from the City of Port Phillip and one from [another council], with [a TAFE] checked as a past reference'. However, I found no evidence to confirm which references were checked nor their outcomes.

196. When asked who made the decision to choose which references would be checked, Manager X stated that no one made that decision because they should have checked the references provided in the tenderer's submissions. It is clear that this did not occur.
197. Manager X did not inform Cleaning Contractor B of City of Port Phillip's views on its performance during the tenderer interviews, nor was it provided with an opportunity to respond.
198. It is clear that City of Port Phillip's contract management files were incomplete, irregular and generally of a poor standard. In fact, documentation about the final three years of Cleaning Contractor B's contract is not on either the physical or electronic file and City of Port Phillip could not produce them.
199. As I have previously reported:
- The past performance of existing contractors is a valuable criterion to assess future performance and can support an assessment based on timeframe and price. It may result in the continuation of good service delivery for a new contractor to provide an improved service.
- While I accept that past performance may be caught by the description in Criterion 1, if it is the [agency's] intent to use past performance as part of the tender assessment in the future, then to assist transparency it should be made more explicit in the tender brief and explained at the tender briefing session. Tenderers should also be given a natural justice opportunity to respond to adverse interim positions or inconsistent information regarding their past performance. The tender interview can provide this opportunity. Past performance for non-current contractors can be assessed using external referee checks.<sup>14</sup>
200. The panel's report to council outlined 'risk implications' if Cleaning Contractor B were awarded the cleaning contract:
- It should also be noted that the financial checks have established that this tenderer utilises large numbers of sub-contractors. This implies that the labour component of the cost per hour could be overstated.
- The tender specifications required that the tenderer declare if any sub-contractors are proposed to be used. This information was not forthcoming in the tender documentation and, at interview; we were advised that no sub-contractors were to be used except for periodicals.

<sup>14</sup> Investigation into the Office of Housing's tender process for the Cleaning and Gardening Maintenance Contract – CNG2007, Ombudsman Victoria, October 2007, page 33.

201. Manager X acknowledged that she did not specifically seek a response from Cleaning Contractor B on its assumption that the labour component of the cost per hour could be overstated, as a result of the financial checks referred to in the panel's report. Cleaning Contractor B's response was not sought despite this issue being critical to the panel's determination.

### *III. Discussion about Cleaning Contractor B*

202. The whistleblower claimed that Manager X told a number of people prior to the tender process commencing that Cleaning Contractor B was going to lose the contract and be replaced by a preferred new contractor. The Director of Cleaning Contractor B had also been advised that Manager X had been 'bad-mouthing' Cleaning Contractor B before and during the tender process. Two other staff members stated on oath that they heard Manager X make negative comments about Cleaning Contractor B and say that it was not going to win the cleaning tender.
203. Manager X denied this claim and said that she only spoke to relevant staff in the context of handling complaints from City of Port Phillip facilities against Cleaning Contractor B. Manager X stated that the complaints themselves indicated Cleaning Contractor B's poor performance and if she had spoken ill of them it would have been in this regard. Manager X stated that as chairperson, her role was to convene the panel and that she would have led discussions about the arguments for and against each of the tenderers.
204. The panel member's responses varied regarding Manager X's comments about Cleaning Contractor B. The Governance Advisor recalls general discussion about Cleaning Contractor B's poor performance, but could not recall specific comments from any particular person. When asked whether there was a driver of the discussion about Cleaning Contractor B's poor performance, the Finance Manager stated:

I think it was fairly clear that the contract manager, [Manager X] was not that happy with their performance. She was a member of the panel; I think she might have been chairing the panel from memory.

205. When asked whether he believed any panel members had made up their mind prior to the evaluation, Mr N stated:

I would have to say that both [Manager X], Ray Nott and [Unit Officer A] were dissatisfied with the current service they were getting – [Cleaning Contractor B] and [another contractor]. You couldn't actually say that someone's made up their mind, but I deal with a lot of clients that deal with unsatisfactory service providers so they're either going to be satisfied or dissatisfied, there's no area in between, and I know they were dissatisfied with the service.

*Two other staff members stated on oath that they heard Manager X make negative comments about Cleaning Contractor B and say that it was not going to win the cleaning tender.*

206. The Finance Manager stated that he requested that the panel seek further references for Cleaning Contractor B, given that it was considering not recommending the incumbent contractor. Manager X stated that these additional references indicated that Cleaning Contractor B's performance was poor, however there were no records to indicate which City of Port Phillip facilities were checked and what the responses were, if any.
207. The Finance Manager stated that the evaluation of the tenderers essentially identified two companies from which City of Port Phillip had to choose: Cleaning Contractor B and Cleaning Contractor A. His preference was for Cleaning Contractor B. He believed that City of Port Phillip should generally choose the incumbent unless there was a major reason not to. He indicated that the alleged poor performance by Cleaning Contractor B in this instance was not really one of those major reasons, because cleaning is an area where there will always be complaints. However, the remainder of the panel were leaning towards Cleaning Contractor A. The Finance Manager stated that he was willing to agree with the recommendation because Cleaning Contractor A had better reference checks, presented very well in its tender and at interview; and it was going to bring some new technologies that Cleaning Contractor B did not have.
208. Manager X stated that Cleaning Contractor A's performance has been good since it started in January 2007. However, documentation obtained during the investigation indicated that a series of complaints had been made against Cleaning Contractor A by January 2008.

#### *IV. Consultant's report*

209. Mr N submitted a report to the panel which he stated contained his assessment of the tenders as an independent consultant. This report was provided to the elected Council, together with the panel's report. My investigation identified several issues in relation to Mr N's report:
- Most of the panel members (except Mr Nott, who was still away ill) understood that the report was provided by Mr N for the panel as his independent assessment of the tenderers. Manager X however, believed Mr N's report was prepared on behalf of the panel.
  - Mr N's report made comparisons between the tenderers and current servicing arrangements, despite the Building Maintenance Unit having established a new benchmark which all tenderers were to be assessed against. Email evidence obtained during my investigation confirms that Mr Nott was of the view that it was not the Building Maintenance Unit's aim to compare anything to the current servicing arrangements in the tender assessment process. Mr N could not explain why he had included comparisons with current servicing arrangements in his report.

- Mr N's report provided a brief analysis of the tenderer's submitted prices, which were summarised in a table. However, I note that the written analysis was inconsistent with the figures in the table. Mr N stated that the report provided a summary of all the figures and that his analysis was based on detailed figures provided by the tenderers. However, I note that none of the panel members, including Manager X, were able to offer any meaningful explanation for the inconsistencies in Mr N's report. There is also no documentary evidence of the panel's discussion of Mr N's report.
- Mr N's report also reveals that the tenderers were not informed that City of Port Phillip intended to use a benchmark to compare their submissions. Mr N acknowledged that with the benefit of hindsight, the tender specifications should have included the fact that City of Port Phillip intended to use a benchmark. This is particularly relevant given that the panel believed one tenderer was ultimately out of contention because its tender price was too high in comparison to the benchmark.

#### V. Mr Spokes' endorsement of the recommendation

210. The panel's report to the elected Council was prepared by Manager X and outlined the tender process, including its recommendation for the preferred winning tenderer. The tender report was examined by Mr Spokes prior to being submitted to the Council. Mr Spokes stated that he was 'relaxed' about the contract being awarded to a contractor other than Cleaning Contractor B because it was one of the contractors which City of Port Phillip had been using for a long time. He said it was often good practice to enter new relationships where the previous ones had become 'too cosy', providing that an appropriate process was followed.
211. When asked how he would have felt if Cleaning Contractor B had been recommended, Mr Spokes said he would have questioned this decision and taken steps to satisfy himself that the tender process had been 'robust' and that Cleaning Contractor B had not been recommended simply because the contract had been in place for a long time. Mr Spokes also said that he would have likely prepared a separate report to the elected Council outlining his view and concerns, including his own recommendation. He said if it had been a tender process that he was required to sign off on directly, as opposed to the cleaning tender which was Executive Director A's sign off, he would have considered a number of options. These options included asking the panel to reconsider the recommendation, asking the panel to reconvene to consider Mr Spokes' concerns, or engaging an independent consultant or advisor.

*The consultant's report also reveals that the tenderers were not informed that City of Port Phillip intended to use a benchmark to compare their submissions. The consultant acknowledged that with the benefit of hindsight, the tender specifications should have included the fact that City of Port Phillip intended to use a benchmark. This is particularly relevant given that the panel believed one tenderer was ultimately out of contention because its tender price was too high in comparison to the benchmark.*

## Conclusions

*City of Port Phillip failed to obtain sound information; failed to adequately document the process; and failed to properly deal with a conflict of interest that was identified. The deficiencies in process are significant enough to bring into question the validity of the council decision regarding awarding the tender.*

212. Manager X was responsible for City of Port Phillip implementing its new procurement strategy. Mr Spokes acknowledged that he gave Executive Director A and Manager X the mission of implementing certain changes within Building Maintenance Unit. These changes incorporated re-tendering for all building maintenance contracts and placing a focus on developing new contractual relationships. Cleaning Contractor B was one of the contractors with whom Mr Spokes and Executive Director A believed the former staff members had developed a 'cosy' relationship. It is clear that City of Port Phillip management had decided that existing contractors, such as Cleaning Contractor B, were to be challenged through a competitive tender process.
213. I am of the opinion that Manager X did not manage the tender process associated with the 2006 cleaning tender in a fair and consistent way. The panel did not follow a sufficiently clear process when assessing the tender submissions and it is evident that neither the panel members nor the tenderers were clearly informed about whether the tenderers were being assessed against current specifications or benchmarks. City of Port Phillip failed to obtain sound information; failed to adequately document the process; and failed to properly deal with a conflict of interest that was identified (this issue is further discussed in the section titled 'Conflict of interest'). The deficiencies in the process are significant enough to bring into question the validity of the council decision regarding awarding the tender.
214. While I believe it is useful for an independent consultant to be engaged to provide expert assistance in evaluating tenders, their role in the process must be clearly articulated and communicated. Further, any expert reports provided must be adequately scrutinised and validated.
215. In response to my draft report, Mr N stated that while he acknowledges that he 'should have mentioned certain points and references', he does not believe there were any serious errors in his report.
216. Manager X has also stated:
- [Her] position is that Mr [N]'s role was, in the final analysis, sufficiently understood by the panel and that the evaluation process was conducted fairly. To the extent to which some things could have been done better or some errors can now be found in Mr [N]'s Report, all tenderers were treated equally and, as the unanimous character of the panel's recommendation demonstrates, [Cleaning Contractor A] clearly emerged as the tenderer which best met City of Port Phillip requirements.
- The fact that the incumbent contractor [Cleaning Contractor B] had consistently performed its contractual obligations poorly was not hidden. It was properly taken into account in the evaluation process. Any suggestion that this unduly coloured [my] analysis or made [me] anything less than objective is strongly refuted.

217. In light of the evidence and the comments made by Mr Spokes, I am of the opinion that it was unlikely that City of Port Phillip was going to award a contract to Cleaning Contractor B.
218. In response to this view, Mr Spokes stated that at all times he had an open mind on the outcome of the tender, notwithstanding perceived shortcomings in past performance.

### Other issues raised

219. My investigation identified deficiencies in how City of Port Phillip responded to concerns raised by tenderers during the tender process.

220. In December 2006, Cleaning Contractor C and Cleaning Contractor B lodged complaints about the tender process. Executive Director A met with the Director of Cleaning Contractor B on 13 December 2006 to discuss its concerns. Cleaning Contractor B followed up with a letter from its solicitor on 21 December 2006. In summary, Cleaning Contractor B's concerns were:

- Council's requirement that all tender documents be returned with the tender submission, the tight timeframes, and the issue of the existing contract with Cleaning Contractor B not being appropriately finalised
- Manager X's alleged bias against Cleaning Contractor B
- Mr N's potential conflict of interest as he had past business dealings with Cleaning Contractor A
- City of Port Phillip's refusal to give Cleaning Contractor B a proper debrief and feedback opportunity
- City of Port Phillip's failure to release the winning tender amount
- Cleaning Contractor B's own query as to why it did not represent best value for money and whether Cleaning Contractor A was provided an opportunity to reduce its price.

221. City of Port Phillip's solicitor responded to Cleaning Contractor B's solicitor on 22 December 2006, asserting that the tender process was fair and that Cleaning Contractor B had no evidence to support the allegations raised. Cleaning Contractor B was not satisfied that the response provided was meaningful.

222. The tender panel's report to council had listed two risk implications in relation to Cleaning Contractor B:

1. alleged poor performance
2. alleged use of undeclared sub-contractors.

*My investigation identified deficiencies in how City of Port Phillip responded to concerns raised by tenderers during the tender process.*

223. My investigation confirmed that these two issues were essentially the main reasons the panel did not recommend Cleaning Contractor B in its report. This information was not passed on to Cleaning Contractor B by way of general feedback. Cleaning Contractor B was not made aware that these issues were of concern to City of Port Phillip during the tender process.
224. Cleaning Contractor C attempted to seek feedback from Manager X about the tender process. Manager X responded in an email to Cleaning Contractor C, stating:
- You will no doubt understand the limitations on information I can provide under the Local Government tendering guidelines. As such, I do not see that meeting with you would be useful. However, I am happy to take a telephone call from you on this basis.
- Suffice it to say, that the successful tenderer met all of our evaluation criteria as outlined in our tender documents. Again, thanks for your response.
225. City of Port Phillip obtained a financial check on Cleaning Contractor C. The report indicated that several aspects of Cleaning Contractor C's financial position were not strong. The report to council stated 'This company's financial position does not lend itself to their engagement as contractors without the provision of additional security such as a bank guarantee or other suitable mechanism'. This was essentially the main reason the panel did not recommend Cleaning Contractor C in its report. However, again this important and relevant information was not passed on to Cleaning Contractor C as part of City of Port Phillip's general feedback. Providing this information would not have revealed any information about the other tenderers and may have given useful feedback to Cleaning Contractor C.
226. Executive Director A met with the Managing Director of Cleaning Contractor C on 20 December 2006 to discuss its concerns. Executive Director A echoed Manager X's response, stating that he was only able to provide limited information. The file note of this meeting indicates that the main feedback provided to Cleaning Contractor C was that it 'did not stand out'. Cleaning Contractor C was dissatisfied with the outcome of the meeting and wrote a letter of complaint to Mr Spokes on 2 February 2007 seeking the following details: how the winning company was selected; where Cleaning Contractor C did not meet the criteria; the winning contract price; and a copy of Mr N's report provided to City of Port Phillip.
227. Mr Spokes responded to Cleaning Contractor C on 1 March 2007 with a letter drafted by City of Port Phillip's lawyers. The letter reiterated the same information provided by Executive Director A, although I note it denied there was a separate report from Mr N, which was clearly incorrect. Mr N's report was attached to Manager X's report to Council and he confirmed during interview, when presented with the document, that it was his separate report.

*Mr Spokes responded to Cleaning Contractor C on 1 March 2007 with a letter drafted by City of Port Phillip's lawyers. The letter reiterated the same information provided by Executive Director A, although I note it denied there was a separate report from Mr N, which was clearly incorrect.*

## Policies

228. The tender specifications stated the following:

Following award of the Tender, unsuccessful Tenderers will be notified of the name of the successful Tenderer. No other information regarding the successful Tenderer will be provided. All documents and other material submitted in response to this Tender become the property of City of Port Phillip, on submission, and City of Port Phillip may use such documents and other material for any purpose it sees fit.

229. The Tender and Contract Management Guidelines do not provide any procedures for handling complaints about the tender process. Instead, the Tender and Contract Management Guidelines provide 'principles' that City of Port Phillip will deal promptly with any complaints and that the CEO will determine the manner in which the complaint should be investigated and actioned.

230. In relation to the tender process, the Local Government Procurement Best Practice Guidelines state that councils should:

- notify unsuccessful tenderers of the outcome of the tender process promptly in writing
- advise unsuccessful tenderers of the reasons for the award of the contract
- deal promptly with any complaints about the tendering process
- record each complaint in writing
- give the complainant an opportunity to discuss his or her complaint with the CEO or a delegated senior officer.

231. I note the Local Government Procurement Best Practice Guidelines post-dates the cleaning tender process. However, I also note that other similar guidelines were in place at the time.

232. The Victorian Government Purchasing Board (VGPB) provides similar guidelines to the Local Government Procurement Best Practice Guidelines regarding feedback and complaint-handling. The VGPB also provides a template on its website for a probity plan. I note that item 38 on its probity plan states:

Debrief unsuccessful tenderers. This should be done by the Chair of the procurement team, with at least one other team member.

233. City of Port Phillip's Tender and Contract Management Guidelines states 'A probity plan is to be prepared for all requirements where a competitive tender is to be sought. A probity plan template is available'. The template was not attached to the guidelines. City of Port Phillip has confirmed that it did not have its own probity plan template and that it would use the VGPB template. A probity plan was not completed for the cleaning tender.

*City of Port Phillip has confirmed that it did not have its own probity plan template and that it would use the VGPB template. A probity plan was not completed for the cleaning tender.*

*Appendix seven of the Tender and Contract Management Guidelines outlines record-keeping requirements. My investigation identified that many of the requirements were not met in the cleaning contract tender.*

*I consider that the information City of Port Phillip provided to Cleaning Contractor B and Cleaning Contractor C after they lodged complaints was inadequate. In my view, City of Port Phillip should have provided reasonable feedback to both contractors, particularly Cleaning Contractor B, who had been City of Port Phillip's cleaning contractor for many years.*

## Record-keeping

234. Appendix seven of the Tender and Contract Management Guidelines outlines record-keeping requirements. My investigation identified that many of the requirements were not met in the cleaning contract tender. An examination of the tender and contract files, both hard copy and electronic, found the following deficiencies:

- The Tender Register Form and checklist were not located on the file.
- Only one meeting minute was located on the file, despite many meetings taking place during the tender process.
- There were no notes or records in relation to the reference checking.
- Some documents listed in the checklist were also not located on the file, such as: Quality and Risk Plan, Transition Plan for Entry, All Correspondence, and the Final Contract.
- Documents were not recorded sequentially, making it unclear whether any further documents were missing.
- The file also contained illegible handwritten notes and was generally kept in a poor condition.

235. The checklist states that it is the responsibility of the 'contract initiator' to ensure that the documents appear in the file. The checklist states that the contract initiator must 'ensure meticulous records of the contract are kept as per checklist above'. I also noted that City of Port Phillip is required to maintain records in accordance with the Public Record Office Standard PROS 98/01 'General Retention & Disposal Authority for Records of Local Government'.

236. Manager X acknowledged that she had responsibility to ensure that all relevant documents were placed on the file. During interview she claimed that all documents were maintained either on the electronic or hard copy file. When asked how often the panel met, she stated:

... I can't remember. There should be minutes on the file of all the meetings ... I suspect that they're recorded electronically.

237. Manager X also insisted that my investigation officers had not been provided with all documents recorded electronically:

It would have been my responsibility to make sure that everything was placed on the file. Yeah. So whose responsibility was it to give you the electronic copies as well as the hard copies?

## Conclusions

238. I consider that the information City of Port Phillip provided to Cleaning Contractor B and Cleaning Contractor C after they lodged complaints was inadequate. In my view, City of Port Phillip should have provided reasonable feedback to both contractors, particularly Cleaning Contractor B, who had been City of Port Phillip's cleaning contractor for many years.

239. Both Executive Director A and Manager X did not agree with my conclusion regarding their failure to provide reasonable feedback to Cleaning Contractor B. Manager X stated that 'it would not have been appropriate for her have [*sic*] had any role in relation to feedback'. She stated that '[Executive Director A] assumed responsibility for communicating with [Cleaning Contractor B]'. Executive Director A stated that Cleaning Contractor B 'was not really pursuing honest feedback but rather implicitly threatening some level of action if it was denied the new contract'.
240. I note that Executive Director A and Manager X resigned from their positions at City of Port Phillip, effective from 31 July 2009 and 7 August 2009 respectively. I therefore make no recommendations in relation to their conduct.
241. Overall, my investigation revealed that record-keeping in relation to the cleaning contract tender was poor. City of Port Phillip was unable to locate and provide any of the documentation listed above.
242. Good record-keeping should aim to maintain full and accurate records of the business undertaken to help ensure accountability. Good record-keeping practices are the responsibility of all government employees. In this instance I note City of Port Phillip had an appropriate policy in place. However, it did not ensure that council staff adhered to the policy.

## Recommendation

### Recommendation 8

I recommend that City of Port Phillip review and, where necessary, amend its Tender and Contract Management guidelines. The revised guidelines should address:

- a. documentation of the roles and responsibilities of all panel members, including any additional external members assisting in the process
- b. provision of an opportunity during the tender process for tenderers to respond to any concerns the panel may have
- c. clarification and strengthening of reporting and endorsement procedures
- d. documentation and record-keeping requirements
- e. consideration of how to measure past performance during the evaluation phase and how to conduct the assessment, including whether additional 'current' references will be checked
- f. tender feedback procedures.

### *City of Port Phillip's response*

City of Port Phillip has accepted this recommendation.

*Good record-keeping should aim to maintain full and accurate records of the business undertaken to help ensure accountability. City of Port Phillip had an appropriate policy in place. However, it did not ensure that council staff adhered to the policy.*

## FAILURE OF GOVERNANCE

### Principles of good governance

*City of Port Phillip has not been successful in managing procurement appropriately ... it has not applied good governance principles to its governance of procurement.*

243. City of Port Phillip's website lists eight principles of good governance which it has adopted. It states that City of Port Phillip will use these principles to develop and review governance activities and to assist in resolving governance dilemmas. It further states that 'Council will know it has been successful when it can demonstrate that it has applied these principles to its governance activities'. Principle four states that 'Council decision-making will exhibit transparency, honesty and probity'. It is my view that City of Port Phillip has not been successful in managing procurement appropriately and that it clearly has not applied principle four to its governance of procurement.
244. When the Corporate Power matter was raised in 2006, City of Port Phillip failed to inform the Council and the Audit Committee as soon as it was aware there was a problem. It is apparent that City of Port Phillip attempted to resolve the matter discreetly instead of being transparent, taking responsibility for the error, and actively addressing the underlying cause to prevent further potential breaches.

### Application of section 186

245. Mr Spokes said that he became aware that City of Port Phillip had 'a significant problem' with the procurement of Corporate Power's services in early 2006. He says that this prompted City of Port Phillip to seek legal advice on the application of section 186 of the Local Government Act. Written advice was provided dated 4 July 2006. It addressed the following four questions in general terms:

#### **Council question 1:**

A single department is paying a company less than \$100,000 each year, say \$40,000.00, but over 3 years it accumulates to \$120,000? Are we in breach of section 186 of the Local Government Act if we do not go through a public tender process?

*Response:*

... Everything turns, then, on what was reasonably foreseeable at the point of original engagement.

#### **Council question 2:**

Various departments across the organisation are using the same company where they are each paying under \$100,000 but for the organisation as a whole it accumulates to over \$100,000. Are we in breach of section 186 of the Local Government Act if we do not go through a public tender process?

*Response:*

... Put simply, the emphasis is on each contract and whether, at the point of entry, there:

- has been good faith (and not an attempt to try and avoid section 186(1), by converting a single contract into two or more individual contracts); and
- is reasonable foreseeability that each contract (entered into in good faith, and not out of an attempt to avoid section 186(1)) has a transactional value of less than \$100,000.

**Council question 3:**

Is there a minimum value where a signed contract is required?

*Response:*

Section 186 does not prescribe any minimum value. Nor does any other provision in the Local Government Act. ...

**Council question 4:**

What is the maximum period of time recommended for a contract, and is there legislation determining this – we thought that there was a maximum of 5 years but cannot find this in the legislation?

*Response:*

Again, this is not addressed by section 186. Nothing in the Local Government Act sets out any minimum or maximum period. ...

246. My investigation established that following the receipt of this advice, a number of communications regarding Corporate Power and section 186 took place between members of the Executive and members of the Governance Team. Further advice was also sought from Local Government Victoria. These communications discussed:

- whether City of Port Phillip’s management of Corporate Power’s engagement was ‘defensible’
- the potential consequences for City of Port Phillip if it was found to have breached section 186
- possible actions that might be taken to resolve the matter, such as entering a tender process or executing a written variation of Corporate Power’s unwritten contract.

247. It is clear from these communications that from 2006, Senior executives and members of the Governance Team were aware that a substantial amount of money had been spent on Corporate Power’s engagement without having gone to tender and without the execution of a written contract.

248. These communications and other evidence obtained during my investigations also indicated that there were tensions in the workplace environment at City of Port Phillip, particularly at an executive level.

249. My investigators also identified that there was serious disharmony between Mr Spokes and at least two of the senior executives (Ms Calder and the former Executive Director Corporate Management). This appears to have contributed to no one taking responsibility for ensuring the engagement of Ms Shahbaz was in accordance with good governance principles.

*Senior executives and members of the Governance Team were aware that a substantial amount of money had been spent on Corporate Power’s engagement without having gone to tender and without the execution of a written contract.*

*My investigators also identified that there was serious disharmony between Mr Spokes and at least two of the senior executives. This appears to have contributed to no one taking responsibility for ensuring the engagement of Ms Shahbaz was in accordance with good governance principles.*

250. The discord evident between a number of employees and Ms Shahbaz had an impact on the management of Ms Shahbaz's engagement with City of Port Phillip and the manner in which the section 186 issue was initially addressed.

## Conclusions

251. During 2006 City of Port Phillip was on notice that a substantial amount of public funds had been expended on Corporate Power's engagement and that City of Port Phillip was possibly in breach of section 186. Although there were a number of notifications and discussions surrounding this issue at the executive level, no substantive action was taken to address it.
252. In response to my draft report, Mr Spokes stated that the following steps were taken to ensure the engagement of Corporate Power was managed appropriately:
- A competitive selection process was initially adopted.
  - Responsibility for management of the relationship was allocated to Ms Calder.
  - Legal advice was sought in July 2006 and August 2007 regarding application of section 186.
  - Advice was sought from Local Government Victoria in February 2007 regarding application of section 186.
  - A written contract was prepared in 2007, which was signed by Mr Spokes and forwarded to Ms Shahbaz. Although Ms Shahbaz never signed the contract, Mr Spokes said that he believed that the contract regulated the relationship between City of Port Phillip and Corporate Power.
  - The approval process for payments to Corporate Power was centralised under the Manager of Organisational Development.
253. There is a broader issue embedded in this situation, that is, how section 186 of the Local Government Act is interpreted. This clearly had an impact on City of Port Phillip's handling of the matter. However, irrespective of whether section 186 was breached, no formal contract or contract variation was ever executed between Corporate Power and City of Port Phillip.

## Recommendation

### Recommendation 9

I recommend that, City of Port Phillip ensure performance plans of senior executives reflect knowledge of and compliance with procurement procedures as a performance measure.

### City of Port Phillip's response

City of Port Phillip has accepted this recommendation.

*Although there were a number of notifications and discussions surrounding this issue at the executive level, no substantive action was taken to address it.*

*There is a broader issue embedded in this situation, that is, how section 186 of the Local Government Act is interpreted. This clearly had an impact on City of Port Phillip's handling of the matter. However, irrespective of whether section 186 was breached, no formal contract or contract variation was ever executed between Corporate Power and City of Port Phillip.*

## Oversight mechanisms

254. At interview on 12 December 2008 Mr Spokes said in relation to City of Port Phillip's procurement practices:

I was surprised that over time with the extent of the non-compliance with some of those issues. I didn't have that sense at the outset. I felt that it was more likely some exceptional examples rather than more endemic as it turned out to be.

255. There were a number of oversight mechanisms in place at City of Port Phillip which had the potential to effectively monitor procurement practices and identify problem areas so as to facilitate improvement. Some of these, such as Executive Reporting and the Audit Committee, existed prior to the procurement problem being identified in 2006.

256. There is evidence that these oversight mechanisms were not utilised effectively at City of Port Phillip and that this may have delayed improvements being made to procurement processes.

## Executive Reports

257. The Executive Team consisted of all the executive directors and the CEO. Formal written reports to the Executive Team regarding procurement did not commence until September 2006. The first report stated that the reason for the report to the Executive Team was to advise:

- Council and legislative purchasing guidelines are not always adhered to within the organisation.
- Fostering a competitive purchasing culture throughout the organisation should result in better value for money when purchasing goods and services.
- Entering into agreements and contracts will provide better protection of Council's assets.

258. The report indicates that there were significant flaws in City of Port Phillip's procurement practices. In summary, the report went on to inform the Executive Team of the following:

- There are numerous companies engaging with council where there is no contract in place.
- Companies have been paid in excess of \$100,000 over a two year period without a tender process, possibly in breach of the Local Government Act.
- The contracts and purchasing process within City of Port Phillip is decentralised and it is therefore difficult to ensure that City of Port Phillip adheres to legislation and guidelines.
- There are examples of poor record-keeping of contract documentation, including contracts not being used at all in some cases, and lack of technical knowledge about procurement practices. Some staff are of the view that the

*There is evidence that oversight mechanisms were not utilised effectively at City of Port Phillip and that this may have delayed improvements being made to procurement processes.*

*Formal written reports to the Executive Team regarding procurement did not commence until September 2006. The first report stated that there were significant flaws in City of Port Phillip's procurement practices.*

threshold of \$100,000 only applies to purchases per year, whereas it actually applies to the whole purchase regardless of the timeframe.

- Some purchases that have not undergone a tender process have, over time, crept over \$100,000.
- Some purchases below \$100,000 are made without obtaining the relevant quotes and no contract or agreement is entered into.

*The situation with Corporate Power was the main reason for City of Port Phillip commencing a review of all contracts and service providers. However, I note that no further action was taken until February 2007.*

259. The situation with Corporate Power was the main reason for City of Port Phillip commencing a review of all contracts and service providers. However, I note that no further action was taken until February 2007, when the first vendor report<sup>15</sup> was produced identifying potential non-compliance.
260. This vendor report identified 22 service providers, whose engagement with Council was potentially non-compliant with legislative obligations and/or procurement policies. Later reports identified more than 200 service providers who were potentially non-compliant.
261. The next formal report to the Executive Team did not occur until more than a year after the September 2006 report, on 27 November 2007. The November report did not make reference to the February 2007 vendor report. The only report located which discusses the February 2007 vendor report is the report to Council on 22 September 2008 which stated:
- This audit further confirmed that there were a number of potentially non-compliant contracts (existing contracts had expired or had not been created as a result of a public tender process). There were also a number of vendors with whom the city did significant business and where no contract was in place.
262. Ms Calder said that at the request of the CEO she did not make a further report to the Executive Team until November 2007 and that in the intervening period, 'the Governance Unit continued to review vendor contracts, liaised with Executive Directors and Managers, and reported informally at Executive Team meetings'.
263. By November 2007 City of Port Phillip appeared to have established a process for identifying actual and potential non-compliant vendors. The report to the Executive Team in November 2007 outlined the following:
- Two types of reports were to be generated. The first detailing total actual expenditure over \$100,000 to a particular vendor over the previous two years, and the second showing vendors likely to exceed \$100,000 in the near future.

<sup>15</sup> The report details total expenditure over \$100,000 on a particular vendor over the last two years, accompanied by a second report detailing vendors likely to exceed \$100,000.

- The reports were to be distributed to each Director on a monthly basis and a Governance Team member was to meet with each Director to offer compliance advice and assistance.
  - The Executive Team undertook to monitor external expenditure arrangements on a quarterly basis.
  - Executive Directors were responsible for maintaining the currency of the reports and addressing any non-compliances and potential non-compliance issues as they arose.
264. The report included a vendor report listing 202 service providers where actual expenditure had exceeded \$100,000. A second vendor report was also included which forecast a further 49 service providers would potentially exceed \$100,000 in the near future. Since February 2007 City of Port Phillip has produced a quarterly report listing vendors that have a total of more than \$100,000 worth of purchases recorded against their name.
265. The finance department also produces a second similar report listing vendors that are approaching the \$100,000 figure. This report is also provided to the Executive Team quarterly for appropriate action.
266. The third Executive Team report dated 18 December 2007 was a revision of the November 2007 report. It included a statistical analysis of the vendor reports and recommended the Executive Directors finalise an action plan to address all non-compliances. The statistical analysis stated:
- Two hundred and two vendors have been paid in excess of \$100,000 over a two year period with a grand total of \$156 million.
  - Vendor split up is: Community Assets & Services 93 (46%), Organisational Systems & Support 65 (32%) and Community Development & Planning 44 (22%).
  - Forty two percent of vendors, who had been paid in excess of \$100,000 over a two year period, had no contracts.
  - Breakdown of non-compliance is: Community Assets & Services 37 (39%), Organisational Systems & Support 28 (43%) and Community Development & Planning 20 (45%).
  - Two point two million was spent on legal services for which tendering under section 186 of the Local Government Act is not required, however, no formal contracts existed.
  - Eight vendors required immediate action plans for addressing non-compliance, of which \$9.2 million was the most expensive and \$213,000 the least expensive.
267. The fourth Executive Team report of 26 February 2008 recorded an increase in the number of vendors who had been paid in excess of \$100,000 over two years from 202 to 214. However, it appears that work had been done to address the non-compliance, as the number

*The report prepared for the Executive in November 2007 included a vendor report listing 202 service providers where actual expenditure had exceeded \$100,000. A second vendor report was also included which forecast a further 49 service providers would potentially exceed \$100,000 in the near future. Since February 2007 City of Port Phillip has produced a quarterly report listing vendors that have a total of more than \$100,000 worth of purchases recorded against their name.*

of vendors without a current contract and requiring corrective action reduced from 56 to 54. The statistics for the remainder of the vendors state that 88 vendors had contracts in place, 72 vendors did not have contracts but did not require corrective action due to exemptions, completed contracts, or services no longer required. The report stated that Governance was aware of planned corrective action for 30 vendors, but required immediate updates on the remaining 24 vendors.

268. I note that City of Port Phillip took appropriate action to address the non-compliant vendors and services resulting in a significant improvement in less than six months. Table 2 also shows that City of Port Phillip only had five outstanding vendors/services to address as at October 2008.

**Table 2.**

Measure	Dec 2007	Feb 2008	May 2008	Oct 2008
Number of vendors >\$100K identified	202	214	208	157
Number of vendors with contracts	80 (39%)	88 (41%)	87 (42%)	90 (57%)
Number of vendors that do not need contracts	67 (33%)	72 (34%)	85 (41%)	62 (40%)
Number of vendors requiring corrective action	56 (28%)	54 (25%)	36 (17%)	5 <sup>16</sup> (3%)

*My investigation identified that at the time the non-compliance issue was initially identified City of Port Phillip did not take the matter seriously, as evidenced by the September 2006 Executive Team Report.*

269. My investigation identified that at the time the non-compliance issue was initially identified City of Port Phillip did not take the matter seriously, as evidenced by the September 2006 Executive Team report. Ms Calder stated the following at interview on 5 December 2008 in relation to the September 2006 report:

The responsibility for contracts and tendering compliance actually sat in [the former Executive Director Corporate Management's] division but having said that it would be fair to say that the culture of the organisation at that time was one of non-compliance and that whilst [he] had that responsibility I don't think that he would ever have felt that he really had organisational carriage to go in and you know make things happen. And if you read this report, it's kind of fairly instructive around that because it very very gently says we are in major problem, you know, there is a major problem here, there are no attachments which identify the problem relationships, there are no details about which contracts are in trouble and the recommendations are just uselessly soft.

<sup>16</sup> The value of the remaining five vendors are: Catering - \$152,012, Graphic design / printing - \$220,653, Recruitment - \$271,821, and two book supply vendors - \$270,521 and \$214,850.

270. Ms Calder also stated that ‘nobody really wanted to nail specific recommendations going forward’.
271. I questioned interviewees regarding the delay between Executive Reports between February and November 2007. Ms Calder was the only person who was able to provide an explanation for the delay. She said:

I provided advice to the CEO and said to him I think we need to make this a major, you know, this has to be my number one focus because we’re not compliant. You know we’re potentially at risk. I want to start auditing it on a fortnightly basis, working for the organisation to clean it up and reporting it fortnightly through to Executive Team. David [Spokes] was very keen that I not report it formally through ET, that I just get into the organisation and clean it up and not come to ET until I had it in better shape because he did not want to be in a position of having to go to Council with the full extent of the problem until we’d actually made some inroads. So between February and November we got better at our internal sort of auditing process and we really developed a system where we were identifying all of those contracts that were clearly not compliant and identifying all of that and then doing a forecasting report where we were identifying those contracts which were potentially going to become non-compliant. And it took us a while to sort of get better at that.

272. Ms Calder also identified other factors that contributed to the delay. These included staff being off-line attending workshops and training; the requirement for the Executive Team to spend many hours on the “cultural transformation”; attention required to be given to an investigation arising from complaints against Corporate Power; and conflict between Ms Calder and Mr Spokes.
273. Ms Calder stated during interview that City of Port Phillip now has a system in place that notifies the contract manager five months before a contract is due to expire. I note that this system relies on all contracts manually being entered into an excel spreadsheet. This procedure is based on a recommendation in the August 2008 external consultant’s report, which found:

Port Phillip’s latest Annual Report says that the necessary documents are available for inspection. The Register has generally indicated that no contracts have been entered into without going through the statutory process, but the Governance Co-ordinator is currently addressing this, albeit with difficulty due to the lack of systems to identify any breaches of the Act.

In this context, Port Phillip’s Tenders Data Base was established around 1995 and is extremely limited in terms of what it can provide. In many cases, little or no data has been provided to the Compliance and Risk Unit by the contract supervisor and in other cases, the data is of questionable accuracy.

The data base does not provide the Compliance and Risk Unit with information to enable the statutory reporting of breaches of the Act and it is *not* a contract management system.

*‘Port Phillip’s Tenders Data Base was established around 1995 and is extremely limited in terms of what it can provide. In many cases, little or no data has been provided to the Compliance and Risk Unit by the contract supervisor and in other cases, the data is of questionable accuracy.’*

## Audit Committee

274. Section 139 of the Local Government Act requires councils to establish an Audit Committee. City of Port Phillip has established an Audit Committee that comprises two independent external members and two councillors – the Mayor and Deputy Mayor. One of the external members is currently the Chair of the Audit Committee. Ms Calder became a member of the Audit Committee in 2007 when she replaced the former Executive Director Corporate Management. In 2008, following a change in the Charter of the Committee, Ms Calder was replaced by the Deputy Mayor but continued to attend meetings as a staff attendee.

275. Best practice guidelines for local government Audit Committees were promulgated in June 2000 by the then Department of Infrastructure. These guidelines were endorsed by the Municipal Association of Victoria and local government professionals and are available on the Local Government Victoria website.

276. The guidelines provide commentary on objectives of Audit Committees, committee membership and responsibilities.

277. My investigators reviewed minutes of Audit Committee meetings for the period 14 December 2005 to 11 June 2008 to identify whether the committee was made aware of a potential non-compliance with legislation or City of Port Phillip procedures. That review focused on arrangements between City of Port Phillip and Corporate Power. No reports on this issue were found prior to 11 June 2008. The minutes of that meeting record that Mr Spokes commented on media reports relating to Corporate Power. The following comments were attributed to Mr Spokes:

- The Minister for Local Government had initiated an investigation into possible breaches of the Local Government Act 1989 with respect to tendering of contracts and expenditure on vendors in excess of \$100,000.
- This issue was brought to Council's attention 12 months ago.
- Weaknesses in Council's systems were identified and business rules have been introduced to address the weaknesses.
- Council has introduced compliance reporting with respect to contracts, KPI's, risk, etc.
- The Executive Team receives a quarterly report on the spend level on vendors. This provides a trigger to alert management that a vendor is moving toward the \$100,000 amount and corrective action may be needed. An explanation is sought from the appropriate officer.

278. Further in the minutes it is stated that:

The Committee asked the CEO how disciplined the managers were on reporting non-compliance with legislation. The Committee was advised that the Executive Team discussed this issue monthly and that some managers were better than others

in addressing compliance, hence the introduction of the new reporting process.

The Committee suggested that the name of the item “Chief Executive Officer Issues” be amended to include Compliance Reporting.

279. Despite having knowledge since September 2006, no one from the Executive Team informed the Audit Committee of the procurement issues identified until a report on 11 June 2008. I note that the Audit Committee was only informed after the Minister for Local Government announced an investigation into possible breaches of the Local Government Act with respect to tendering of contracts and expenditure on vendors in excess of \$100,000.

280. It is of concern to learn of the late notification given some of the discussions had by City of Port Phillip with the Audit Committee. For example in an Audit Committee meeting on 12 December 2006 the CEO stated that ‘internal audits were now seen by the organisation as an opportunity for improvement’.

281. My investigators asked Mr Spokes why he did not inform the Audit Committee earlier. He said:

Look, in hindsight, I wish I had advised them earlier. I was aware the February audit had been conducted, it provided those results, which was about the management of the contracts, we were separately doing an audit of the vendors and how they were being managed, and didn’t connect the two events. Now I wish I had of. I mean I wasn’t trying to hide anything, I felt as though we had, you know, two processes in place that were taking their course. You know, I regret that that occurred. I wish I had of alerted and involved the audit committee in that process earlier but I felt we had a process that was dealing with the issue, was being addressed, and this audit had addressed related but different matters.

282. Mr Spokes also stated:

The internal Audit Committee, in some, you know, respects, was regarded as a, in some parts of the organisation, as something to be avoided.

283. Ms Calder said:

Culturally it should be, you know, your performance improver. If you’re an Executive Director you should be gagging to get the issues that you are concerned about in front of the audit committee to get their advice about how to improve your processes. In our organisation, and I suspect in many others, the audit committee has always been seen as something best avoided, you know, keep your head down, hope to Christ they don’t want to have a look at anything in your area, if you do have to get in there, you know, make yourself as little target as possible and just get through it. I mean that’s just the reality. In fact they should be a fantastic performance improvement tool.

*Despite having knowledge since September 2006, no one from the Executive Team informed the Audit Committee of the procurement issues identified until a report on 11 June 2008.*

*By 2007 it is clear that the business relationship between Ms Calder and Mr Spokes had become strained and difficult. Ms Calder stated that in September 2007 Mr Spokes had directly ordered her not to have any contact with any of the councillors.*

284. Mr Spokes was asked at interview on 12 December 2008 whether he expected Ms Calder to inform the Audit Committee of the potential non-compliance with section 186, given her division had overall responsibility of the matter. Ms Spokes said:

I wouldn't necessarily have expected her to do that possibly for the same reasons of what my own attitude was, but you know I think it was a mechanism that we could have made more use of. I regret that we didn't, but it wasn't in a sense of trying to avoid anything or hide anything.

285. Ms Calder was asked why she did not inform the Audit Committee about the procurement problems. She stated:

The fact that I was under instructions from my boss. And he would have found that grounds for my dismissal.

286. By 2007 it is clear that the business relationship between Ms Calder and Mr Spokes had become strained and difficult. Ms Calder stated that in September 2007 Mr Spokes had directly ordered her not to have any contact with any of the councillors. Ms Calder stated that as two of the councillors are on the Audit Committee, she was obviously prevented from informing them of the issue. She felt that she did everything she possibly could under the circumstances. She said that she sought legal advice about the issue and resolved that she needed to follow a lawful direction.

287. My investigation also identified that an internal audit was conducted on 'tendering processes' in February 2008. The report's Executive Summary states:

### **1.1 Introduction**

In accordance with the annual audit program, a review has been undertaken of the City of Port Phillip's tendering process, to assess whether the controls and processes are operating satisfactorily.

### **1.2 Project Overview**

The Local Government Act 1989 (the Act) requires that before a council enters into a contract for goods or services over \$100,000, the council must conduct a public tender.

In accordance with the annual report program, a review has been undertaken of the adequacy of the various procedures that have been put in place within Council to manage and control the tendering procedures and processes.

### **1.3 Audit Conclusion**

We have concluded that the City of Port Phillip's tendering processes are operating adequately. Our examination of two recent tenders undertaken identified one significant risk item of a contract officer negotiating prices with a selected Tenderer and a number of low risk areas of operation requiring improvement.

These improvements will strengthen and protect the probity of Council's tendering practices in the future. The key areas identified in our report are the need to:

- review section 7.1 'The Business Case' Tendering and Contract Management Guidelines to better reflect when a business case needs to be prepared;
- protect soft copies of tender documentation; and
- have the evaluation panel members approved.

288. Clearly this audit did not identify the issue of non-compliance with section 186 or any issues that the August 2008 external consultant's report subsequently identified. In fact, the body of the audit report states 'Our review of the City of Port Phillip's tendering process indicates that section 186 of the Local Government Act is being adhered to'.

289. Ms Calder stated the following in relation to the audit report:

The biggest issue with that report is that the organisation was asked to identify two contracts to review and clearly the two contracts that were chosen were contracts that were a) in place and b) had been through a public process ... it was very interesting when this report was released because of course when the Shahbaz story broke in May and then you know, the first thing the Audit Committee said well, the Audit Committee, you know, were very cross with the internal auditors that they had produced this sort of fairly okay report when in fact there was this whole other issue running and the internal auditors were quite mortified and beside themselves.

290. The August 2008 external consultant's report states that the conclusions reached in the internal audit report on 'tendering process' have been confirmed by its own review. It recommends that 'the internal auditor conduct a review of tendering and/or contract management processes of at least two tenders/contracts and that such reports be submitted to the Audit Committee'.

### **Involvement of Council**

291. My investigators were unable to establish the exact date that potential non-compliance with section 186 in relation to the Corporate Power contract was brought to council's attention. Council records suggest that it became aware in late 2006 of the potential for non-compliance with the Local Government Act and the lack of a duly executed contract.

292. The Mayor's file was examined by my investigators and it contains information that the Mayor and some councillors had knowledge of excessive expenditure on Ms Shahbaz in August 2007. The Mayor's file included substantial information relating to the obtaining of information from City of Port Phillip and legal advice on the application of the Local Government Act as applicable to the Corporate Power engagement. Further legal advice included how to remedy the situation and a view on what sanctions can be imposed on the CEO.

*The internal audit did not identify the issue of non-compliance with section 186 or any issues that the August 2008 external consultant's report subsequently identified. In fact, the body of the audit report states 'Our review of the City of Port Phillip's tendering process indicates that section 186 of the Local Government Act is being adhered to'.*

293. According to Mr Spokes the first time he formally informed the councillors of the identified procurement issues was on 29 August 2007 by means of a memo. That memo largely details the background and current situation regarding Corporate Power. The only mention of the potential non-compliance of section 186 with other contracts and vendors is the following statement:

Updating the register of all contracts over \$100k

Offering additional training in contract tendering

Reissue of professional services engagement template

Nevertheless there were issues relating to administration and organisation knowledge that were deficient. The current budget provides for a project to thoroughly review and update procedures in this area. The need for a renewed procurement strategy embedded in continuous improvement to replace best value has been previously advised to Council. I expect this to lead to establishment of a Procurement and Continuous Improvement Department at some point.

294. Mr Spokes also provided a document dated 20 September 2007, which was provided to Council outlining an action plan for several issues across City of Port Phillip, one of which was 'compliance with tendering policy'. However, the action plan only refers to remedies for seven contracts/vendors. The only comment it makes in relation to the other potentially non-compliant vendors is: 'There are some suppliers where the responsible manager has not been identified and are still being examined'. Despite Mr Spokes having extensive knowledge of the extent of the non-compliance, this clearly does not provide the councillors with sufficient information to understand the scope of the problem.

295. Mr Spokes stated that he gave an undertaking to the councillors to update them by November 2007. He stated he did this using the November 2007 Executive Team report. He confirmed that he did not provide the councillors with a copy of the attached detailed vendor report, which would have more clearly outlined the extent of the problem and that it extended far beyond just Corporate Power. He stated:

My memory would be that it was on the basis that we've identified that some vendors are not or potentially not compliant. We are not sure of the scale of that issue yet, we're developing a system to monitor that and I certainly committed to them that I would be reporting to them regularly on that and I'm pretty sure I said that I expected to have a system in place by November 07 that I can then be confident, that I can say I'll be able to give you this every quarter. That's my memory of how it occurred ... I think it would have been to all the councillors.

296. Mr Spokes did not provide another formal report to Council until 22 September 2008. This became a public briefing rather than a confidential briefing. One councillor stated in writing to me 'The Sept

*Mr Spokes confirmed that he did not provide the councillors with a copy of the detailed vendor report, attached to the November 2007 Executive Team report which would have more clearly outlined the extent of the problem and that it extended far beyond just Corporate Power.*

08 report certainly included material which was new to me'. This report included more detail, including: the number of potentially non-compliant contracts and vendors; the fact that corrective action plans are in place for all of them; a list of the recommendations from the August 2008 external consultant's report; and the status of implementing them. Mr Spokes was asked why he did not report to Council earlier and he replied:

With the benefit of hindsight, I wish I'd informed them earlier of that. I mean you always like to learn things out of these exercises and that's one of the things I've certainly learned from it, is the need to improve the structure of that formal reporting and, you know, early warning.

297. He also stated:

If I had of known at that time that it was widespread as it was I mean I would have done that more formally until I find out the information.

298. In relation to the 22 September 2008 report, Mr Spokes believed that it was his idea to formally report to an ordinary council meeting. However, Ms Calder stated that it was her idea to formally report to an ordinary council meeting:

The 22 September report was actually my idea ... I thought that it would be a useful thing for us to be public and transparent about what had actually happened, you know, as public and transparent as we could be, from February, and so I suggested that we put a report to the chamber. David had asked me to write a confidential report to councillors, but it was my view that we were better to make it a public report and just be open about, you know, what.

## Conclusions

299. There were a number of oversight mechanisms in place at City of Port Phillip, including the Audit Committee and Executive Reports, which could have provided valuable assistance in resolving procurement issues once members of the Executive identified a problem. However, City of Port Phillip failed to fully utilise these mechanisms, thus failing to apply the principles of good governance by demonstrating transparency, honesty and probity in its decision-making.

300. It is clear that poor governance practices contributed to City of Port Phillip not giving due attention to the requirements of section 186. I consider that City of Port Phillip as a whole failed to properly manage important procurement issues as they arose. City of Port Phillip should have addressed this issue by informing the Council and the Audit Committee as soon as it was brought to its attention. It is apparent that City of Port Phillip attempted to resolve the matter behind closed doors instead of being transparent, taking responsibility for the error, and actively addressing the underlying cause to prevent further potential breaches.

*There were a number of oversight mechanisms in place at City of Port Phillip, including the Audit Committee and Executive Reports, which could have provided valuable assistance in resolving procurement issues once members of the Executive identified a problem. However, City of Port Phillip failed to fully utilise these mechanisms.*

*Poor governance practices contributed to City of Port Phillip not giving due attention to the requirements of section 186. City of Port Phillip as a whole failed to properly manage important procurement issues as they arose.*

301. The Audit Committee needs to be proactive in its audit role and to have in place processes that require non-compliance issues to be brought to the Committee's notice.
302. I also consider that the internal audit reviewing two tenders/ contracts was insufficient and City of Port Phillip should review a more comprehensive sample that is representative of the number of contracts in place. The City of Port Phillip internal auditor should audit the vendor report as part of its regular audit program to ensure its accuracy and to identify any vendors that should have gone through a tender or purchasing process.

## **Recommendations**

### **Recommendation 10**

I recommend that the CEO provide the Audit Committee with regular reports that reflect compliance / non-compliance with laws, legislation and policies.

### **Recommendation 11**

I recommend that the Audit Committee conduct a review of procedures to ensure that instances of non-compliance with legislation or policies are identified and brought to its attention.

### **Recommendation 12**

I recommend that compliance of procurement processes with procurement legislation and procedural obligations becomes a standard item on the agenda of the Executive Team meetings at City of Port Phillip.

### **Recommendation 13**

I recommend that City of Port Phillip's Finance Unit regularly report to the Executive Management Team and the Audit Committee.

### **Recommendation 14**

I recommend that City of Port Phillip maintain a register of tender and procurement non-compliance issues, which is reported quarterly to the Audit Committee and the Council.

### ***City of Port Phillip's response***

City of Port Phillip has accepted these recommendations.

## CONFLICT OF INTEREST

303. A 'conflict of interest' occurs where there is a conflict between a personal interest and a public duty.<sup>17</sup> Fundamentally, a public official should not allow a conflict of interest to go unidentified or untreated. During my investigations conflict of interest issues were identified in relation to procurement at City of Port Phillip. A number of these were known to executive staff, yet they failed to take appropriate action.

### Conflict of interest policies and procedures

304. The August 2008 external consultant's report makes the following comment in relation to conflicts of interest:

Section 81 of the Act relates to the Register of Interests and requires that councillors and 'nominated officers' conform with the disclosure requirements of the Act.

In this context, 'nominated officers' means:

- a. the CEO;
- b. any staff member with management responsibilities who reports directly to the CEO;
- c. any staff member whose total annual remuneration exceeds the prescribed amount (currently \$100,000); and
- d. any other member of the Council staff nominated by the Council.

At present, it is possible for a staff member who is not a 'senior officer' to have responsibility for being a member of a TEP [tender evaluation panel] and/or manage a contract. In the case of a TEP, Port Phillip requires that the staff member disclose any conflict of interest but this does not apply to a staff member managing a contract. (The legislative requirement is to 'avoid' rather than 'disclose').

In an extreme case, a staff member could be the supervisor for a service provided by a company in which he or she held shares or was a director.

A means of increasing transparency and identifying potential conflicts of interest in the tendering process, particularly in relation to membership of TEPs and contract management, would be to require staff who are regularly members of TEPs or who manage contracts to be designated as 'nominated officers'.

305. City of Port Phillip did not have a conflict of interest policy in August 2008 when my investigators requested a copy. In September 2008 City of Port Phillip added a conflict of interest policy to its People and Culture Policy, Employee Standards. The policy requires all conflicts of interest to be recorded for *all* staff in the Staff Interest Declaration Register kept by the Statutory Functions Unit.

*During my investigations conflict of interest issues were identified in relation to procurement at City of Port Phillip. A number of these were known to executive staff, yet they failed to take appropriate action.*

<sup>17</sup> See my report *Conflict of interest in local government* March 2008.

306. City of Port Phillip staff were interviewed after the September 2008 policy was implemented. Interviewees were asked whether there was a central register for recording conflicts of interest. None of the staff interviewed were aware of a register.
307. The following are a series of examples of conflicts of interest which I identified over the course of my investigations regarding procurement at City of Port Phillip.

### **Overseas workshop**

308. Ms Shahbaz offered a training workshop through Corporate Power which was conducted in India. The workshop was called the 'Hero's Journey' and was designed as a specialist leadership program. During the investigation I became aware of a trip to India made in 2006 by Ms Calder. Ms Shahbaz, the provider of the service, has stated that the course is not subject to a commercial charge, rather participants were provided with the opportunity to contribute what they considered the service was worth. As an indicator Ms Shahbaz provided an example of receiving a pedicure and manicure from a client in return for participation.
309. Ms Calder has acknowledged this arrangement and said that she accepts that Ms Shahbaz's method of seeking remuneration was out of the ordinary, but that it was not something of her making.
310. An examination of the Corporate Power invoices received by City of Port Phillip identified an invoice dated 20 February 2007 addressed to Ms Calder with a service description of Hero's Journey dated 1 November 2006 in the sum of \$2,750. This invoice was for the fee for Ms Calder's attendance at the overseas workshop. It was generated by Corporate Power in response to Ms Calder's calculation of what she considered was the appropriate commercial rate for the services she had received and was paid for out of council funds.
311. My investigation established that Ms Calder had discussed the trip with Mr Spokes and that agreement was reached that Ms Calder would be required to pay for all costs associated with the trip other than the workshop fee, such as the airfare. While the workshop fee of \$2,750 was paid by City of Port Phillip, the other expenses associated with the trip were met by Ms Calder.
312. Mr Spokes and Ms Calder did not discuss the amount Ms Calder would be approving to be paid out of council funds for the workshop fee. Ms Calder said that:
- while the CEO may not have been aware of the actual arrangements made for the payment of Ms Shahbaz, there was, in my view, an agreement that City of Port Phillip would meet the cost of the service provided by Ms Shahbaz.

*Mr Spokes and Ms Calder did not discuss the amount Ms Calder would be approving to be paid out of council funds for the workshop fee.*

313. Ms Calder was interviewed on 24 July 2008 in relation to the trip and the payment of \$2,750 to Corporate Power. During the interview Ms Calder said:

...And I did try to pin her down what is the fee. And it was kind of, 'Well, what ever you want to offer' kind of business. And I didn't want to get into a messy kind of relationship with her. I wanted it to be an extension of the professional development, and it's "let's charge – let's pay the standard rate that we've been paying for 2 years." I did check with Gary, whose name I can't remember, and we established together that they were the hours, that was the fee, and that's what we'd both pay, because we'd both been paying the same rate within our organisations. So I mean if I'd said to her, 'I'm not going to pay a fee,' that would have seemed bizarre to me, you know, because that was not the relationship. I was not there on some personal thing with her. I was there as part of my extended professional development, and I kept it at that - at that level. So I don't know what other people do, and I don't know what would have happened if I hadn't paid anything.

314. In response to that interview, on 6 August 2008 Ms Calder sent an email to my office. The following is an excerpt from that email:

Executive staff were required to attend individual coaching with Caroline Shahbaz. Some of this coaching was in preparation for, and as follow on from, the "Rites of Passage" workshop that Ms Shahbaz conducted with the organisation's Executive team in September 2005. Some was to address other issues that came up throughout the course of Ms Shahbaz's work in the organisation.

The "Heroes Journey" workshop I attended in India was the next phase of the 'Rites of Passage' program which all executive attended. I discussed the program with the CEO, who supported my attendance. We determined that it would be appropriate for me to pay all of my personal costs.

In determining an appropriate fee, I also conducted due diligence with a colleague, an Executive Director at the then DSE, who attended the year before. The cost to the organisation for the two week program was a fee of \$2,500. The program required a two hour session with Ms Shahbaz in Melbourne, to negotiate the goals of the program. In my case, these were directly related to the performance development plan I had developed with the CEO in 2006, as result of my performance to date, and my most recent 360 degree performance feedback information. Two hours of individual coaching on these issues were received on the program, and a follow up two hour session was held on return. Total personal coaching was thus six hours.

In addition to the individual coaching received, course participants received daily group coaching. Of about 5 hours per day.

As I paid all my own costs for the trip (airfares, accommodation and expenses) in accordance with our organisational policy, I was not required to complete an approval for overseas travel form.

The fee for professional coaching by Ms Shahbaz at that time was \$375 per hour, or \$412 with inclusion of GST. The cost of the six hours was therefore approximately \$2500.

In summary:

- The fee paid was for one on one coaching at Ms Shahbaz's normal hourly rate.
- The program was part of my personal development plan approved by the CEO.
- It was an extension of work the entire executive had undertaken in the prior year.
- The program fee was paid for in accordance with Council established purchasing guidelines and delegation.
- The fee was consistent with that proposed by fellow corporate clients.

315. I have a number of concerns in relation to this matter. In particular I note:

- While Ms Shahbaz stated the service provided was at no charge, and it was optional for participants to pay, it is reasonable to conclude that there was an expectation that some form of payment would be made.
- Ms Calder determined the amount of money that she considered was suitable to pay Ms Shahbaz.
- Ms Calder approved her own expenses.

## Conclusions

316. I consider that whilst Ms Calder has relied upon the Purchasing Guidelines and her delegated authority to approve expenditure of up to \$300,000<sup>18</sup> in this case, her conduct was inappropriate because she had a conflict of interest that she failed to address. Furthermore, it is inappropriate for a public officer to make a judgement as to the value of a service where there have been no previous commercial negotiations about these fees. It is my view that such expenditure must be referred for independent endorsement and that council policy should reflect that process.

317. In his letter of 17 July 2009 the Mayor of City of Port Phillip informed me that it has strengthened the restrictions in the purchasing system, including a requirement that each purchase order must now be authorised by two officers.

318. I note that Ms Calder left her position at City of Port Phillip, effective from 26 June 2009. I therefore make no recommendation in relation to her conduct.

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<sup>18</sup> City of Port Phillip Purchasing Guidelines.

*It is inappropriate for public officers to make a judgement as to the value of a service where there have been no previous commercial negotiations about these fees or to approve their own expenses.*

## **Recommendation**

### **Recommendation 15**

I recommend that City of Port Phillip amend the delegations of employees to ensure that it is clear that expenditure cannot be approved by the beneficiary of the goods and services. Staff instructions should also be amended accordingly.

#### ***City of Port Phillip's response***

City of Port Phillip has accepted this recommendation.

## The cleaning contract

319. I provided the following definition of conflict of interest in my report *Conflict of interest in local government* tabled in March 2008:

The expression 'conflict of interest' may be more fully expressed as a 'conflict between personal interest and public duty'. The fundamental ethical rule is that a public official should not allow a conflict to exist between personal interest and public duty.

320. An examination of City of Port Phillip's file regarding the cleaning tender discussed in the previous section identified an email from Mr N to Mr Nott dated shortly after the tender was awarded. The email stated:

In accordance with our conversation of today I advise that two to three years back I sold a cleaning contract to [Cleaning Contractor A]. I advised Ms [X] and yourself of this at one of our meetings. I nor my wife or my Company have any interest in any cleaning contract or business as declared in my confidentiality declaration for Council. I am prepared to sign a statutory declaration and/or meet with any Council representative to confirm the above.

321. My investigation identified that Cleaning Contractor B raised this issue during a meeting it had on 13 December 2006 with Executive Director A as a conflict of interest claim. Executive Director A requested the claim be raised with Mr N, who then sent the above email to Mr Nott as his explanation. During interview Executive Director A stated that he did not conduct any further enquiries with Mr N or with Cleaning Contractor A and was satisfied that Mr N did not have a conflict of interest based solely on Mr N's email.

322. Mr N, Manager X and Mr Nott could not recall when the specific meeting took place during which Mr N mentioned his association with Cleaning Contractor A. However, it is clear from the evidence that the meeting occurred prior to the awarding of the contract. Neither Manager X nor Mr Nott took any action in relation to identifying whether a conflict of interest issue existed, nor did they inform the rest of the panel as to whether there was potential for the conflict to impact on the selection process.

323. My investigation also revealed that Mr N had previously dismissed Cleaning Contractor B from a cleaning contract with another government agency. Manager X stated that she was aware of Mr N's previous involvement with Cleaning Contractor B and also took no action in this regard.

324. The panel members were not aware of any conflict of interest issues until it was raised during their interviews with my officers. All stated that they were concerned about the probity of the process given the panel relied on Mr N's advice. They all agreed that City of Port Phillip should have ended Mr N's engagement on the tender as soon as it became aware of this issue.

*The tender panel members were not aware of any conflict of interest issues until it was raised during their interviews with my officers. All stated that they were concerned about the probity of the process given the panel relied on Mr N's advice. They all agreed that City of Port Phillip should have ended Mr N's engagement on the tender as soon as it became aware of this issue.*

325. At interview Mr Spokes stated:

If this has come out subsequently, you know, it does leave a concern about is the [sic] has the process been, you know, clearly it's not as compliant with the processes as it should be leaves a doubt about the probity of the decision. As I said I haven't reviewed the information since I last saw it and certainly when I did see it at the time I had no reason to do anything other than be very relaxed about the recommendation that was being made on the basis of it's the assessment of the contracts and the performance.

326. Mr Spokes stated that Manager X should have raised the conflict of interest issue with the panel. The panel should then have decided whether there was a conflict of interest and what action, if any, should have been taken. He stated that he is concerned that this did not happen.

327. Manager X also said that there was a 'lack of any real basis for suggesting that Mr N had a perceived conflict of interest'. She said that someone in Mr N's position should be expected to have had dealings with many of those who submit tenders. Manager X said that there was no indication that any dealings Mr N might have had with Cleaning Contractor B or Cleaning Contractor A gave rise to a conflict of interest on his part.

328. Most interviewees did not have a clear understanding of what a conflict of interest is.

329. The confidentiality statement that Mr N signed only requires him to attest to the following:

I have no pecuniary or personal interest which I have not fully disclosed to the City of Port Phillip in any of the organisations that may benefit directly or indirectly from the information.

330. City of Port Phillip's Tender and Contract Management guidelines do not outline any process for managing conflict of interest issues other than declaring that it is one of the essential principles of probity. City of Port Phillip also does not have a separate conflict of interest policy. City of Port Phillip does not have any established process that outlines, for example, whether the conflict of interest issue needs to be declared in a specific document; whether the issue is placed in a register; how that issue will be addressed; whether any particular person needs to prepare any written response; how records regarding the issue will be maintained; and any penalties for breaches of the policy.

*Most interviewees did not have a clear understanding of what a conflict of interest is.*

*I am concerned that City of Port Phillip staff were unable to identify a conflict of interest issue and take appropriate action.*

## Conclusions

331. I am concerned that City of Port Phillip staff were unable to identify a conflict of interest issue and take appropriate action.
332. In March 2008 I tabled a report in Parliament about *Conflict of interest in the public sector*, wherein I stated:
- Despite generally sound principles in the Code, the cases examined during my enquiry demonstrate that the day-to-day practices of public sector employees on occasion fall short of the standards required. Indeed, I find particularly troubling the widespread, mistaken belief that a conflict of interest is not of concern if there is no actual wrongdoing.
- Many public sector employees fail to understand that the ‘perception’ of a conflict of interest – even when the conduct of a public officer is nothing short of exemplary – is as damaging to public trust as any misconduct. There can be no artificial distinction between ‘actual’ and ‘potential’ conflict of interest. Both give rise to the same corrosive outcome – loss of public confidence in government administration.
333. It is apparent that Manager X, Mr Nott and Executive Director A also do not understand this distinction.
334. In my opinion a clear conflict of interest issue arose during the tender process and Manager X failed to take appropriate action. Further, I am of the opinion that despite the fact that Mr N was not a City of Port Phillip employee, he was engaged by City of Port Phillip to perform public duties and had a responsibility to formally declare the above information at the earliest opportunity. Both Manager X and Mr Nott should also have identified the matter as a conflict of interest issue and raised it with the panel for action. Executive Director A also failed to manage the matter appropriately when it was brought to his attention. I noted Mr N’s statement during interview:
- You’re looking at a potential conclusion here that’s not correct. I mean I would be foolish to put that in writing if I had any interest in any company or anything like that.
335. I also consider that City of Port Phillip should develop a conflict of interest policy. In this regard I note the Victorian Government Purchasing Board (VGPB) provides a template for government agencies to use that requires non-public servants to declare a number of matters and agree to certain undertakings. The VGPB’s form is clearly wider in scope and would be more appropriate in a tender situation as it would place a greater onus on a non-public servant to disclose any conflicts of interest.
336. Mr N, Executive Director A and Manager X did not agree with my comments about their lack of understanding of the definition of a conflict of interest. Each attempted to detail why Mr N did not have a conflict of interest.

337. Mr N's written response also denied having dismissed Cleaning Contractor B from another government agency. It should be noted that this information was volunteered by Mr N during interview. Specifically, he stated:

I'll throw another one into the mix for you. It's no wonder [Cleaning Contractor B] haven't raised the fact that I terminated them from three buildings at [a university]. Their perception was that they were treated unfairly and blackened my name in the marketplace for years.

338. City of Port Phillip clearly has inadequate conflict of interest practices and no conflict of interest training program for staff. The appropriate handling of conflict of interest issues is important to the integrity of any procurement process.

*The appropriate handling of conflict of interest issues is important to the integrity of any procurement process.*

### **Printing services**

339. It was brought to my attention that a former staff member, Mr Z, was conflicted in the procurement of printing services on behalf of City of Port Phillip by using a company (Company Z) which he was the proprietor of at the time. Mr Z ceased working at City of Port Phillip in late 2007.
340. In September 2006, the Finance Manager, became aware of the conflict. He sent an email to the Executive Director Corporate Management outlining the history of City of Port Phillip's engagement of Company Z and noting that Mr Z had never disclosed the fact that he was a director and major shareholder in the company. The Finance Manager indicated that City of Port Phillip had spent approximately \$98,000 on Company Z's services since 2001. While acknowledging that there was no evidence that Company Z was not price competitive, the email stated that, 'There can be no doubt that the initial use of this supplier was influenced by [Mr Z] and he has carried on influencing the use of this supplier as evidenced by the usage patterns in Assist and more recently OD [Organisational Development]'.
341. The Finance Manager went on to recommend that the CEO should be informed; that appropriate disciplinary action should be taken against Mr Z; and that City of Port Phillip needs to deactivate Company Z as a supplier. He concluded:
- Please note that I am not on a witch hunt, this clearly constitutes a significant misuse of a position of trust in the organisation to derive personal financial benefit and were it to be exposed in the public domain the organisation could suffer significant loss of reputation.
342. During interview the Finance Manager explained what occurred next:
- This was taken to the Chief Executive Officer and the advice I got, I was actually quite shocked, is that all we had to do was, the debate became about because he wasn't a senior officer in terms of the Local Government Act, i.e. nobody seemed to think

there was anything really wrong with it. I said well you know it's fundamentally a conflict of interest in my view. The issue is that the CEO basically referred it back to the Director who [Mr Z] was reporting to, Sally Calder. She contacted me on the phone one day and I think I was at the South Melbourne market and she phoned me on my mobile, she said she's gonna have a word to [Mr Z] about it and the outcome of that was, I said it was a conflict of interest and she said he's not a senior officer, but the outcome was that we just have to stop using this company. I think that was agreed. Subsequently this company has been re-engaged.

343. At interview Mr Spokes had no recollection of being informed about this matter, although he acknowledged he may have been informed. Ms Calder has responded that she has no recollection of the above mentioned telephone conversation. However, she stated that when she became aware of the matter she asked Manager Y to bring her documentation regarding recent purchases from Company Z. Following this, she says she met with Mr Z and Manager Y. At this meeting, Ms Calder says she advised Mr Z of his obligation to declare conflicts of interest and told Manager Y to ensure that Mr Z was not involved in future purchasing decisions. Ms Calder was initially unable to remember which documents she examined to satisfy herself that City of Port Phillip underwent a proper process, nor did she make any kind of record regarding the conflict of interest.
344. Ms Calder later recalled that she spoke to Mr Z on 5 December 2006 and that the documents she examined were purchase orders. She said that the purchase orders showed that a number of quotes had been received, that Company Z had submitted the lowest quote and that each stage in the process had been signed off by three different people. Further, Ms Calder stated that she advised that Company Z should not be used by City of Port Phillip and gave Mr Z a verbal warning. Ms Calder has acknowledged that she did not maintain any record of her dealings with Mr Z. Ms Calder also agreed that she should have documented her actions and examined a larger sample of contracts and quotes.
345. During interview, Manager Y stated that she was managing City of Port Phillip's human resources area when Mr Z had commenced working for her in approximately late 2005. Manager Y stated that she had nothing to do with any payments made to Company Z and had no involvement in the discussion of the conflict of interest matter beyond one meeting with Ms Calder.
346. Manager Y stated that Mr Z had made it well known to staff at City of Port Phillip that he had a company called Company Z and did not feel like it had been a secret. Her recollection of the meeting with Ms Calder and Mr Z was that he was concerned that City of Port Phillip believed he had not made it known. Manager Y stated that during the meeting Ms Calder reassured Mr Z by saying that she did know and that there was no issue. Manager Y does not know what happened after that meeting and she stated that she was not asked to obtain

any documentation relating to payments, as claimed by Ms Calder. Manager Y stated that she felt reassured that Ms Calder had the issue “in hand” and that there was no problem.

347. Payment records indicate that the last payment to Company Z was on 28 December 2006. However, my investigation identified that City of Port Phillip subsequently re-engaged Company Z and payments recommenced on 26 June 2007. My investigators were informed that the rationale for re-engaging Company Z was that Mr Z was no longer working for the organisation. The total payments City of Port Phillip made to Company Z is \$216,210.17 from 22 March 2001 to 19 February 2009. City of Port Phillip still uses Company Z.

## Conclusions

348. In my report *Conflict of interest in Local Government* I also commented about misuse of positions:

There are numerous instances where council officers have persuaded themselves, and sometimes their managers, that such small benefits cause no harm, or in some way enhance council relationships with the community. In some cases it appears that small ‘cells’ exist with a culture that tolerates these abuses. This is particularly disappointing given that most workers in local government are acutely aware of their public obligations.

349. While the evidence indicates that City of Port Phillip identified the conflict of interest, it identified it five years after it arose and when it did become aware of it, management of the issue was inadequate and ineffective. Ms Calder acknowledged that City of Port Phillip should have identified this issue earlier. It is clear that City of Port Phillip did not, and still does not, consider engaging an employee’s private company to be a serious issue. In my opinion Mr Z would have had an added advantage when submitting quotes for works given his intimate knowledge of City of Port Phillip’s operations.
350. Not only did City of Port Phillip not maintain any record of the handling of the conflict of interest, but it did not investigate how City of Port Phillip came to engage Company Z in the first instance, or speak to all relevant staff members involved. Ms Calder has stated that she verbally warned Mr Z but no record of this action was made.
351. Furthermore, City of Port Phillip failed to recognise its lack of policy in this regard and did not pursue an appropriate management response for a further two years.
352. In his letter of 17 July 2009 the Mayor of City of Port Phillip informed me its conflict of interest policy has been revised and will be relaunched, together with training, as part of a new staff code of conduct.

*While the evidence indicates that City of Port Phillip identified the conflict of interest, it identified it five years after it arose and when it did become aware of it, management of the issue was inadequate and ineffective.*

## **Recommendations**

### **Recommendation 16**

I recommend that City of Port Phillip develop a conflict of interest policy and institute regular conflict of interest training for all staff. A draft of the policy should be provided to my office within three months.

### **Recommendation 17**

I recommend that City of Port Phillip review the engagement of Company Z to ensure that a current contract is in place.

### ***City of Port Phillip's response***

City of Port Phillip has accepted these recommendations.

## Building maintenance contracts

353. During my investigations I became aware of an alleged conflict of interest matter between Mr Nott and one of City of Port Phillip's contractors, Mr John Tidey. Mr Tidey owns J&J Tidey (a steel fabricator) and TBS Building Services, which are both contracted to City of Port Phillip. J&J Tidey has been conducting work for City of Port Phillip for at least eight years and for six years had preferred contractor status. TBS Building Services commenced work for City of Port Phillip in June 2007.
354. Mr Nott resigned from City of Port Phillip in early May 2008. My investigation confirmed that subsequently the Building Maintenance Unit continued to engage Mr Nott two days per week as a contractor to provide services, including those relating to the St Kilda Town Hall renovation.
355. At interview, Mr Nott stated that he came to know Mr Tidey whilst working at City of Port Phillip. He confirmed that as well as working two days per week for City of Port Phillip as a contractor, he completed approximately 20 hours work for TBS Building Services. In relation to this, he stated:
- I sent a letter to the City of Port Phillip and offering my bank records and everything else I could offer them to say I never received any money off them and I wasn't on the payroll of them [sic]. I did do some consulting work for him for about two to three days. He won work with the Port Phillip Housing Association and he did ask me to go across to his offices and put together the structure that his men could operate under for the Port Phillip Housing Authority. In other words, service books, the whole lot that they required, which he did not know how to do and I done that, I've done that before. I declared that to City of Port Phillip and told them what I was doing and got a letter back from the City of Port Phillip saying that was okay to do that. I spent I think maybe a total of 20 hours putting it altogether for him and that was basically it for the housing authority.
356. Executive Director A stated that Mr Nott had informed him, while Mr Nott was still an employee, that he may hear 'gossip' about an alleged relationship between Mr Nott and Mr Tidey. Executive Director A stated that Mr Nott informed him that there was no substance to the allegation. Executive Director A stated that he took no further action because no formal complaint was ever received about the matter.

## The tender process

357. Between 2006 and 2007 City of Port Phillip put out to tender all building maintenance contracts. A key feature of the new tenders for the building maintenance contracts was the introduction of a panel of contractors for particular works. For example, City of Port Phillip has a panel of three contractors to choose from for: plumbing and gas-fitting services, carpentry and handyman services and electrical

*Members of the Tender Evaluation Panel were required to sign a conflict of interest and confidentiality declaration. Mr Nott completed this declaration but did not disclose any relationship with J&J Tidey or TBS Building Services.*

*The Building Maintenance Unit tendered for 14 building maintenance contracts simultaneously. Manager X stated that she recommended that City of Port Phillip stagger the tenders over a period of time because of limited organisational resources. Mr Spokes confirmed that this recommendation was discussed. However, he stated that he felt there was a sense of urgency to completing the tender process and awarding the contracts given the number of building maintenance contracts that had expired.*

services. It also has a panel of two contractors for painting services. On 27 August 2007 TBS Building Services won contracts through a tender process: plumbing (as part of a panel of three contractors), carpentry (as part of a panel of three contractors) and painting (as part of a panel of two contractors).

358. Members of the Tender Evaluation Panel were required to sign a conflict of interest and confidentiality declaration. Mr Nott completed this declaration but did not disclose any relationship with J&J Tidey or TBS Building Services.
359. The call for tenders for City of Port Phillip's building maintenance services occurred on 14 July 2007. The report to Council dated 27 August 2007 regarding the building maintenance contracts provided the 'background and context' for the tenders. It indicates that the Council intended to tighten the structure of building maintenance contracts with a view to providing more certainty in planning future maintenance costs; enhancing asset reporting and benchmarking; and improving service delivery. The Tender Evaluation Panel interviewed comparatively few of the tenderers.
360. The Building Maintenance Unit tendered for 14 building maintenance contracts simultaneously. Manager X stated that she recommended that City of Port Phillip stagger the tenders over a period of time because of limited organisational resources. Mr Spokes confirmed that this recommendation was discussed. However, he stated that he felt there was a sense of urgency to completing the tender process and awarding the contracts given the number of building maintenance contracts that had expired.
361. My investigation focused on the five contracts won by TBS: plumbing and gas (contract 1004), specialist cleaning (contract 1007), painting (contract 1009), carpentry and handyman (contract 1010) and tiling (contract 1012).
362. The Council report stated that the tender evaluation panel (the panel) comprised: Manager X, Mr Nott, External Consultant C and External Consultant D. The panel utilised other Building Maintenance Unit staff 'in evaluating the relative merits of the tenders'.
363. The Council report discusses the number of submissions received. City of Port Phillip received more than 200 requests for the tender documentation, but only received 51 submissions. Some tenders received few submissions, with the lift maintenance and auto doors contracts only receiving one submission each. The glazing contract received no submissions at all. Mr Nott stated that he believed the tender specifications drafted by External Consultant C were very complicated and this was one of the reasons City of Port Phillip received few submissions.
364. The panel agreed to weight the evaluation of the tender submissions as follows: experience and demonstrated ability at 50 per cent, price at 30 per cent, and systems and processes of business management

at 20 per cent. In addition, each tender evaluation included a series of mandatory assessment areas on a pass or fail basis: financial viability, insurances, corporate management and technical back-up, personnel skills and qualifications, OH&S and industrial relations, risk management, infrastructure and quality systems.

365. The August 2008 external consultant's report examined the report to Council regarding the building maintenance tenders and I agree with its comment:

While the Council report contains much relevant information:

- a. there is no summary of the scoring conducted by the TEP [Tender Evaluation Panel];
- b. there is no summary of the referee checking; and
- c. the report does not indicate the term of the contract(s).

In addition, two contracts were awarded to "[Trader A]" and "[Trader B]". Those terms are probably trading names and not legal entities. The report should have clearly identified the legal name of the proposed contractor.

### Use of consultants

365. My investigation identified that External Consultant D is used by different areas of City of Port Phillip for various consultancy services. External Consultant D is one of the vendors that is engaged without a contract and although it has earned in excess of \$100,000 over a two year period, has never participated in a competitive tender for the services it provides. In fact, External Consultant D stated that he does not work off agreements or contracts, but rather on a handshake:

Ninety per cent of my work is done without a formal tender and half of my work, so of that ninety, about half is done on a 'can you look at this' for any organisation. I never work with contracts and I just negotiated a contract, at the moment, for an organisation, I'm trying to work it by and large on a handshake, it's a \$400,000 deal. I have found that contracts haven't necessarily saved me in the past.

### Evaluation of tender submissions

366. My examination of the evaluation process largely relied on evidence taken during interviews, as the relevant City of Port Phillip file lacked sufficient detail. For example, there were no minutes of meetings or discussions between panel members regarding the tender submissions. Manager X acknowledged that the 'processes should have been documented much better'. All panel members stated during interviews that they each examined the submissions individually first and then came together as a group to discuss their initial thoughts. Other than External Consultant C, none of the members of the tender panel maintained their own separate notes or reports from their individual assessments. The decision-making was carried out by the panel as a group. Manager X states that all members of the Tender Evaluation Panel 'signed off' on the final report.

*My investigation identified that External Consultant D is used by different areas of City of Port Phillip for various consultancy services. External Consultant D is one of the vendors that is engaged without a contract and although it has earned in excess of \$100,000 over a two year period, has never participated in a competitive tender for the services it provides.*

*I identified that significant alterations had been made to reports prepared by External Consultant C, on the tender submissions.*

*When External Consultant C's original versions were produced at interview, none of the panel members knew who had made the alterations or the reasons why.*

367. External Consultant C carried out the majority of its role from Queensland by telephone and only attended one panel meeting. External Consultant C assessed the tender submissions and forwarded his own individual report on each of them to City of Port Phillip. My investigation established that the reports provided by External Consultant C to the panel via email were not placed on the Council file intact. I identified that significant alterations had been made to External Consultant C's reports on the tender submissions, which suggests that someone used External Consultant C's report as a template to record the panel's scoring.

368. During interviews, panel members either identified the copies of the documents on the file as those forwarded by External Consultant C or said that they were not familiar with them. When External Consultant C's original versions were produced at interview, none of the panel members knew who had made the alterations or the reasons why. Manager X later stated in a written response that External Consultant C's document was used as the basis for the collective score of the Tender Evaluation Panel. My investigation was unable to determine who had made the copies of the documents located on the file or the intent behind the changes.

369. No panel member, other than External Consultant C, retained a copy of their individual scoring for the tenderers. The difference between External Consultant C's evaluation of TBS' submissions compared to the panel's evaluation warrants comment. I summarise the evaluations below:

**Table 3.**

Contract	Consultant C's evaluation	Panel's evaluation
Plumbing	TBS ranked last out of four submissions	TBS ranked first
Specialist cleaning	Only two submissions received with TBS failing many criteria and ranked second	TBS ranked first
Painting	TBS ranked third out of five <sup>19</sup> submissions	TBS ranked second out of six submissions
Carpentry	TBS ranked third out of four submissions	TBS ranked second out of five submissions
Tiling	TBS ranked second out of two submissions	TBS ranked first out of two submissions

<sup>19</sup> The documentation examined indicates that the number of submissions External Consultant C evaluated and the number the panel evaluated was different for painting and carpentry.

370. My investigation identified the following issues in relation to TBS' submission:
- TBS provided company financial data for J&J Tidey, as TBS had only just been set up and had no company financial data.
  - TBS' lack of financial data and stability was of concern in the specialist cleaning evaluation, but not in the others.
  - Certification of one qualified employee was not obtained at the first contract management meeting.
  - All of TBS' documentation was dated the day before the tender closed.
  - Complaint procedure was poor.
  - The contract between TBS and its sub-contracted plumber states that it is drawn on 23 August 1999, but dated 7 August 2007 (three days before the tenders closed).
  - TBS' risk management plan does not fully address the requirements in the tender specifications.
  - TBS' 'Project Delivery Process' does not adequately address the 'work processes' requirement in the tender specifications.

### Reference checking

371. As stated in the August 2008 external consultant's report, details of reference checks were not included in the report to Council. The reference checking was generally extremely poor. Many references were recorded as not being checked because referees did not return calls or provide responses within the timeframe available. Panel members indicated that it was not possible to follow up every reference, on account of the number of tenders completed simultaneously.
372. In relation to the part of the tender documents where the references were listed, Mr Nott stated:
- The biggest problem I found with it was that they [the panel] didn't even go to that part [of the tender documents], it was basically if they had all their OHS stuff right, that was in format, what their costings were and all the rest of it there was a document about that thing, we didn't read the whole document word, for word, for word, for word.
373. Manager X in response commented that it would be quite wrong if a reader was left with an impression that Mr Nott's account was typical of the approach of Tender Evaluation Panel members. Manager X further commented that she spent many hours wading through tender submissions.
374. Three tenderers provided Mr Nott's name as a referee. One of these was TBS. It used Mr Nott as a referee in its submissions for carpentry, plumbing and painting services. External Consultant C proceeded

*The reference checking was generally extremely poor. Many references were recorded as not being checked because referees did not return calls or provide responses within the timeframe available.*

*Three tenderers provided Mr Nott's name as a referee. One of these was TBS. External Consultant C proceeded to check these references with Mr Nott, despite the fact that he was a panel member. This was clearly inappropriate; however it appears that no one on the panel queried the reference checks.*

to check these references with Mr Nott, despite the fact that he was a panel member. This was clearly inappropriate; however it appears that no one on the panel queried the reference checks.

375. During interview External Consultant D agreed that it would be unusual for a member of a panel to be a reference for a tenderer. He also acknowledged the lack of reference checking and said he would normally like to see at least one reference checked for each tenderer.
376. Mr Nott also acknowledged that it was inappropriate for him to act as a referee whilst being a panel member but said that he had not thought about it at the time. He further stated that the tenderers did not seek his permission to list him as a referee but that he had provided his honest opinion about them when asked.

### **Mr Nott's evidence**

377. Mr Nott was asked whether he had preconceived ideas about who should get the tender. He denied that he had preconceived ideas about TBS. However, he acknowledged he had already decided that one of the tenderers, whom he had previously had dealings with, should not get a contract. He said that he had the experience to tell that this contractor's work was flawed.
378. During interview Mr Nott also stated that the panel did not examine the tender submissions thoroughly and tended to concentrate on key aspects such as costings.

### **Mr Tidey's evidence**

379. Mr Tidey stated during interview that he was aware City of Port Phillip wanted to push out some of its old contractors and introduce new ones. However, Manager X has denied that City of Port Phillip intended to terminate old relationships with contractors and begin new ones. It should be noted that Mr Tidey did steel work for City of Port Phillip without a contract and was engaged on a case-by-case quote basis under the purchasing guidelines. As he had obtained his building licence in approximately 2004, this meant he had the opportunity to branch out into the area of building maintenance work. Mr Tidey confirmed during interview that he established TBS for the purpose of tendering for the 2007 building maintenance services. He stated that he decided to apply for all the services that were aligned with trade: plumbing, painting, tiling, electrical, specialist cleaning, carpentry.
380. Mr Tidey stated that at the time he put in his submissions, he actually only had two employees working at TBS. He did not have employees qualified in all the trades necessary for the City of Port Phillip contract and explained that he engaged others as necessary. In relation to the preparation of the tender submission, Mr Tidey said that he 'made things up as [he] was going along'. For example, Mr Tidey said that he listed the names of a few boilermakers working

*Mr Tidey stated that at the time he put in his submissions, he actually only had two employees working at TBS. He did not have employees qualified in all the trades necessary for the City of Port Phillip contract and explained that he engaged others as necessary. In relation to the preparation of the tender submission, Mr Tidey said that he 'made things up as [he] was going along'.*

with him as his carpenters in his submission. He also said that he called a friend who had plumbing qualifications and asked if he could put his name down as his plumber.

381. Mr Tidey also stated that he considered building maintenance services to be 'easy' and therefore did not pay too much attention to the tender documentation or his level of experience. In relation to whether he had experience with specialist cleaning he stated:

Well it's not rocket science. You get up there with a broom and clean the roof, it's just, no, no I had no experience, I'm not a carpenter, I'm a boiler-maker, I mean I can do carpentry, I'm not a painter, I'm a boiler maker, but I can do painting.

382. The Australian Securities and Investment Commission's (ASIC) searches revealed that Mr Tidey is the registered proprietor of the following companies:

- J&J Tidey Pty Ltd
- TBS Pty Ltd
- Climate Change Pty Ltd – Director with Mr Nott<sup>20</sup>
- Environmental Coatings Pty Ltd.

383. In this regard Mr Nott stated:

I deny that I am the Co-owner of Climate Change Australia ... I have no shares in either company and I was appointed as director to manage the companies after I left City of Port Phillip full time employment.

384. The Australian Securities and Investment Commission records Mr Nott as Director, appointed on the 28 February 2008, holding 450 ordinary shares. This is the same number of shares held by Mr Tidey. I also note that Mr Nott did not resign from City of Port Phillip until the end of May 2008.

385. Mr Tidey confirmed that J&J Tidey is his original steel fabrication company. Mr Tidey also stated that he intended to cease operating TBS due to negative attention resulting from *The Age* articles. However, Mr Tidey has set up a new company, Environmental Coatings, in which Mr Nott is also involved. Mr Nott's relationship with Mr Tidey clearly brings into question the integrity and probity of the contracts and works won by J&J Tidey and TBS Building Services.

*Mr Nott's relationship with Mr Tidey clearly brings into question the integrity and probity of the contracts and works won by J&J Tidey and TBS Building Services.*

<sup>20</sup> See page 98 for further discussion about Climate Change.

### Management of TBS contract post tender

386. The working arrangements in place at the time of this contract were such that, when a City of Port Phillip staff member or facility needed a building maintenance job completed, they would contact a Building Maintenance Unit staff member. The Building Maintenance Unit staff member would then issue a 'work order' to the vendor, outlining the works that needed to be completed. A work order would then be 'raised' against the relevant asset, which also had its own hard copy file. Any Building Maintenance Unit staff member could raise and complete a work order, although the responsibility of the work order usually rested with the relevant Building Maintenance Unit contract manager. Once the work was completed the vendor would submit an invoice to City of Port Phillip. At this point a 'purchase order' was raised and paid. The purchase order was raised against a contract number. The work order and the purchase order operated on different computer systems. Building Maintenance Unit staff members had authority to approve a purchase order up to \$5,000. Any purchase orders above \$5,000 were escalated through the management chain. At the time, Mr Nott had delegated authority to approve work orders up to \$25,000. Manager X stated that her role included monitoring all work orders raised.
387. When several staff and contractors were asked how City of Port Phillip decided which works would go to which contractors in a panel arrangement, most replied that they did not know, despite Manager X stating that it had been explained to staff on a number of occasions. External Consultant D said that he designed the process. He explained that tenderers were all required to submit a schedule of rates and fixed rates for different types of works. The cheapest tenderer for that particular work required would be chosen each time. For example:

**Table 4**

Property	Contractor A	Contractor B	Contractor C
Libraries	\$5,000	\$6,000	\$7,000
Markets	\$7,000	\$5,000	\$6,000
Community	\$6,000	\$7,000	\$5,000

388. Therefore, Contractor A would be awarded works for Libraries, Contractor B would be awarded works for Markets, and Contractor C would be awarded works for Community.
389. City of Port Phillip explained that some minor or *ad hoc* works do not have an applicable contract with either a fixed rate or schedule of rates component. In these cases, the Purchasing Guidelines would apply in relation to the number of quotes required.

390. It should be noted that many Building Maintenance Unit staff did not know that the above matrix was how works were awarded. In response Manager X has stated that a number of attempts were made to explain to staff the matrix and its effect and that many Building Maintenance Unit staff were aware that the matrix was how works were awarded.

### Payments to TBS

391. I obtained a list of payments made to both of Mr Tidey's companies. The first payment made to TBS Building Services was on 28 June 2007. I noted that City of Port Phillip paid J&J Tidey and TBS Building Services the following amounts in each of the following financial years:

**Table 5.**

Financial Year	J&J Tidey	TBS Building Services
2000/01	\$225,171.29	-
2001/02	\$207,667.90	-
2002/03	\$220,817.30	-
2003/04	\$219,854.00	-
2004/05	\$138,484.41	-
2005/06	\$206,537.33	-
2006/07	\$394,400.15	\$113,489.57
2007/08	\$131,315.16 <sup>21</sup>	\$1,452,721.60 <sup>22</sup>

392. I note that a portion of the above payments to TBS were funded for capital works, including the St Kilda Townhall renovation, and were not part of the five contracts won in the 2007 tender process. An examination of the City of Port Phillip file relevant to the St Kilda Townhall renovation did not contain any quotes. Therefore, there is no record on the file of how TBS was awarded those works. As discussed in the section titled 'Poor Procurement and Contract Management Practices', the quotes obtained for works were not always filed correctly.
393. Mr Nott acknowledged that TBS got most of the building maintenance works and said this was because other contractors could not supply people, did not have equipped vehicles, were not reliable and wanted to use sub-contractors. Mr Nott also considered that Mr Tidey was the only person the Building Maintenance Unit could rely on. Manager X also confirmed that one of the other contractors was not given works because, 'it developed a tendency to resile from the rates submitted as part of the tender submission or (once engaged) expressed discontent when carrying out an assigned task'.

<sup>21</sup> It should be noted that City of Port Phillip made three payments to J&J Tidey in October 2008 totalling \$124,273.60 in settlement of outstanding invoices for completed works.

<sup>22</sup> It should be noted that City of Port Phillip made payments to TBS between 1 July 2008 and 26 February 2009 totalling a further \$693,743.58.

*My investigation identified that many of the Building Maintenance Unit staff interviewed, former and current, as well as other contractors, knew or suspected that Mr Nott was awarding most works to TBS.*

*When Unit Officer K began questioning the relationship between Mr Nott and Mr Tidey and why TBS was given most works he stated that he was 'screamed at and abused' by Mr Nott in front of a contractor.*

394. My investigation identified that many of the Building Maintenance Unit staff interviewed, former and current, as well as other contractors, knew or suspected that Mr Nott was awarding most works to TBS. Manager X has stated that no one approached her about the volume of work being assigned to TBS Building Services or made any complaint about Mr Nott's relationship with the principal of TBS Building Services. In response, Mr Nott said that the, 'former and current Building Maintenance Unit staff including myself awarded works to the company who could perform the works as stated'.
395. Unit Officer K, a Building Maintenance Unit staff member between July 2007 and February 2008, stated that he did not know of the relationship between Mr Nott and Mr Tidey at first, but soon learned that Mr Tidey was 'untouchable' and that a person could not question any anomalies about process or the awarding of works. He said that Mr Nott would advise the Building Maintenance Unit administrator to enter the job details into the system and at the same time advise her which contractor was getting the work. Unit Officer K stated that Mr Nott would override the relevant contract manager, who would normally organise the works.
396. When Unit Officer K began questioning the relationship between Mr Nott and Mr Tidey and why TBS was given most works he stated that he was 'screamed at and abused' by Mr Nott in front of a contractor. Unit Officer K said that this was 'the straw that broke the camel's back' and that he resigned the same day.
397. Mr Nott denies raising his voice to Unit Officer K in front of a contractor.

### **Climate Change Australia**

398. On 25 February 2008, Mr Nott and Mr Tidey registered a company called Climate Change Australia,<sup>23</sup> which they intended to use to sell an insulation paint product. Mr Nott had become aware of the insulation paint when he attended a demonstration of it which its supplier carried out at City of Port Phillip in January 2008. Mr Nott thought this would be a good business opportunity and approached Mr Tidey with the proposal; as a result, Climate Change Australia was established.
399. However, Mr Nott stated that following the demonstration, City of Port Phillip asked TBS to purchase the insulation paint directly from the supplier, as it wanted to commence using the product. An examination of City of Port Phillip records shows that the first payment relating to use of the insulation paint was made to TBS in April 2008. While Mr Nott stated that he and Mr Tidey commenced promoting the product to other councils through Climate Change Australia, there is no record of City of Port Phillip having made any payments to Climate Change Australia involving the use of this product.

<sup>23</sup> Mr Nott was still a full-time employee at City of Port Phillip at this time. He resigned on 2 May 2008, but continued to be engaged by City of Port Phillip as an independent contractor two days per week to complete projects he had commenced while he was a full-time employee.

400. Mr Nott and Mr Tidey subsequently sourced another paint product which they thought would complement the insulation paint. This product was an anti-graffiti paint. Mr Nott was aware that City of Port Phillip had a graffiti problem and organised two demonstrations of the anti-graffiti paint for City of Port Phillip staff, sometime between mid May and mid June 2008. During interviews, people present at the demonstrations stated that no reference was ever made to Climate Change Australia by Mr Nott.
401. Mr Nott said that City of Port Phillip then asked for quotes on three different jobs using the anti-graffiti paint. However, as a result of the publication of *The Age* articles regarding the relationship between Mr Nott and Mr Tidey, these jobs did not proceed.
402. Mr Nott maintained that a number of City of Port Phillip staff, including Manager X and Executive Director A, knew about his company with Mr Tidey and the products Climate Change Australia was going to use for City of Port Phillip painting works.
403. Mr Nott stated that he documented his approach to Mr Tidey about starting Climate Change Australia in a file note dated 26 January 2008 on City of Port Phillip letterhead. He stated that he provided a copy of the file note to Manager X, which I have also obtained. Manager X and Executive Director A both denied that they knew about Mr Nott and Mr Tidey's Climate Change Australia company. Manager X questioned the veracity of what Mr Nott said about the file note, stating that the letterhead on the file note was only given to Mr Nott in approximately February 2008, when the Building Maintenance Unit moved offices.
404. In relation to Climate Change Australia, the evidence provided by Mr Nott conflicts with that of City of Port Phillip staff interviewed. Mr Nott states that City of Port Phillip was aware of his involvement with Climate Change Australia and the services it was providing. However, City of Port Phillip disputes this. In any case, if the works involving the graffiti paint had gone ahead, Mr Nott would have gained a direct financial benefit.

#### Current status

405. I understand that Mr Nott was immediately suspended as a contractor on 25 July 2008 after *The Age* articles were published. City of Port Phillip also suspended issuing any new works to TBS. However, City of Port Phillip allowed TBS to complete any existing works at that time. I understand that City of Port Phillip has now completed a new tender process for the five contracts that TBS won and Council has resolved to award new contracts for the five services, while TBS is on suspension.

*In relation to Climate Change Australia, the evidence provided by Mr Nott conflicts with that of City of Port Phillip staff interviewed. Mr Nott states that City of Port Phillip was aware of his involvement. However, City of Port Phillip disputes this. In any case, if the works involving the graffiti paint had gone ahead, Mr Nott would have gained a direct financial benefit.*

## Conclusions

*Issues relating to probity and examining the veracity of claims made by TBS about its employees in its tender submissions were not addressed in the process, nor was there any capacity to have those issues considered. City of Port Phillip did not follow a probity plan for the tender process.*

406. It would appear that City of Port Phillip attempted to run a more transparent tender after the difficulties it experienced with the cleaning services tender. One of the ways City of Port Phillip tried to do this was to engage two external consultants. However, in my opinion the process was still significantly flawed because of the following:
- With limited resources, City of Port Phillip attempted to complete 14 tenders simultaneously and quickly, which impacted on the tender evaluation.
  - The panel's decision-making was not recorded clearly, including whether External Consultant C's tender evaluations were considered.
  - The tender documentation may have deterred a number of contractors from submitting a tender, thus allowing TBS a greater opportunity to be included in the shortlist.
  - Mr Nott was not objective when evaluating the submissions.
  - City of Port Phillip was focused on completing the tender and having valid contracts. Issues relating to probity and examining the veracity of claims made by TBS about its employees in its tender submissions were not addressed in the process, nor was there any capacity to have those issues considered.
  - City of Port Phillip did not follow a probity plan for the tender process.
  - Reference checking of tenderers was either non-existent or unreliable.
407. There did not appear to be any monitoring or reporting of works awarded to TBS or whether it was performing in accordance with its contracts. This appears to have been a consistent deficiency across all building maintenance contractors.
408. In response to my conclusion that he was not objective in evaluating tender submissions, Mr Nott said, 'I was one of a panel. I did not or could not influence panel members'. Mr Nott also denied having a conflict of interest.
409. Given City of Port Phillip initiated the works involving the insulation paint through TBS, I consider that it would not be unreasonable for City of Port Phillip to be under the impression that TBS was to provide the anti-graffiti painting service, not Climate Change Australia. In light of Mr Tidey's statement that he believed money was interchangeable between his companies, I am of the view that Mr Nott attempted to obtain painting works from City of Port Phillip using the anti-graffiti paint product through TBS, the profits from which would ultimately go to Climate Change Australia. Mr Nott was

still contracted to City of Port Phillip two days per week during this time, as a consequence he had a conflict of interest with respect to his involvement in the proposed painting works by TBS/Climate Change Australia.

410. In my opinion both Mr Nott and Mr Tidey took advantage of an opportunity to make money and expand their operations. It is difficult to reconcile assertions that most Building Maintenance Unit staff members and contractors knew about their relationship and that management did not.
411. Mr Nott denies he took advantage of an opportunity to make money and expand his operations.
412. Mr Tidey did not wish to provide a response to any of the issues relating to him that were raised in my report.

## Recommendations

### Recommendation 18

I recommend that City of Port Phillip review the five contracts won by TBS Building Services and take appropriate action. The review should take into account the administrative issues discussed in my report.

### Recommendation 19

I recommend that City of Port Phillip review its Tender and Contract Management Guidelines to strengthen the practice regarding reference checking.

### *City of Port Phillip's response*

City of Port Phillip has accepted these recommendations.

*In my opinion both Mr Nott and Mr Tidey took advantage of an opportunity to make money and expand their operations. It is difficult to reconcile assertions that most Building Maintenance Unit staff members and contractors knew about their relationship and that management did not.*

## STAFF MISCONDUCT

### Quote disclosure

*I received a whistleblower disclosure involving an allegation that Mr Nott, in his role as Building Maintenance Co-ordinator, was providing favoured contractors with competitor quotes so that the preferred contractor could underquote.*

413. I received a whistleblower disclosure involving an allegation that Mr Nott, in his role as Building Maintenance Co-ordinator, was providing favoured contractors with competitor quotes so that the preferred contractor could underquote.
414. My investigation officers interviewed Contractor E, the preferred contractor named in the disclosure. He admitted that Mr Nott had provided him with competitor quotes on two occasions. Contractor E stated that in February 2006 Mr Nott provided him with council estimates for works at two children's centres.
415. With respect to the latter, Contractor E provided my office with the details of the works he was asked to quote and stated that he was aware that two other quotes were obtained and their content. He stated Mr Nott provided him with copies of the two quotes, which he then produced to my office. Contractor E stated that Mr Nott informed him that he wanted a council contractor to do the works, rather than an external provider, and this is why he showed him the quotes. Contractor E was the successful contractor for the renovations being provided at one of the children's centres.
416. By mid 2007 City of Port Phillip was ending Contractor E's services along with a number of other contractors. He was dissatisfied about the manner in which City of Port Phillip was ending his services and at this time raised the issue, together with the matter concerning the quotes, with the then Mayor of City of Port Phillip. Contractor E stated that the Mayor informed him that it would be more appropriate for him to raise his concerns with Mr Spokes. Contractor E stated that he did not pursue the matter with Mr Spokes because he believed no action would be taken.
417. My officers interviewed Mr Nott and he denied the allegation. He stated that if Contractor E had copies of competitor quotes, then he must have obtained them from the Committee of Management of the children's centre. Mr Nott denied ever having seen the two quotes and believed that City of Port Phillip was not aware of the two quotes. In relation to the two competitor quotes he was questioned as follows:

Investigator:

So who asked these people to quote?

Mr Nott:

The Committee of Management. I never got these quotes.

Investigator:

So you've never seen these quotes before?

Mr Nott:

No, nothing.

Investigator:

Not before today?

Mr Nott:

No, because they're not council contractors. So they would have got this group ... to quote on the work, and they would have got this company, and what they've asked council to do is provide them with a third quote from a council contractor. And [Contractor E] was a council contractor and he would have quoted the works. So what was the allegation made against me on that?

Investigator:

The allegation is that you provided these quotes to [Contractor E] so he could underquote them both. He did end up getting that job.

Mr Nott:

No, I would say no. Because I would never even have got those. They would never have given them to me for a start. The Committee of Management wouldn't give me those quotes.

418. The Committee of Management of the children's centre is independent of City of Port Phillip. The Committee of Management entered into a memorandum of understanding with City of Port Phillip about the management of the works, as City of Port Phillip was contributing some funding towards the renovations.
419. The key facts in the memorandum of understanding between City of Port Phillip and the City of Port Phillip facility were:
- The children's centre accepted City of Port Phillip's offer to provide project management services.
  - Mr Nott had been appointed as the project manager.
  - The contract for the completion of the works was held between City of Port Phillip and the successful building contractor.
  - City of Port Phillip was responsible for all payments to the building contractor.
  - City of Port Phillip was aware that the initial quotes obtained for the works were between \$60,000 and \$65,000.
420. At interview, a member of the Committee of Management advised that the Committee of Management obtained two quotes for the works and decided to ask City of Port Phillip to obtain a third quote, given that council was subsidising part of the costs for the works.
421. The member of the Committee of Management stated on oath that the quotes were definitely provided to a City of Port Phillip officer in person, although she could not recall the name of the officer.

Although the member of the Committee of Management no longer had any documentation regarding communications with City of Port Phillip, she recalled having a conversation with another Committee of Management member about the fact that the Committee of Management had just provided City of Port Phillip with an opportunity to underquote the first two quotes and thus award the works to a contractor that City of Port Phillip knew.

*During the course of my investigations, other City of Port Phillip contractors provided evidence that Mr Nott had leaked quotes on at least one other occasion to a contractor other than Contractor E.*

422. Unit Officer A, Unit Officer B (former unit officers) and Unit Officer C (who was still employed by the Building Maintenance Unit at the time) were interviewed about the alleged disclosure of competitor quotes. Unit Officer B was employed in the Building Maintenance Unit at the time these events occurred. I note that Unit Officer B and Unit Officer C were aware that Contractor E had been provided with quotes. Unit Officer A and Manager X denied any knowledge of the matter.
423. During the course of my investigations, other City of Port Phillip contractors provided evidence that Mr Nott had leaked quotes on at least one other occasion to a contractor other than Contractor E. Mr F is a painter who completed approximately 12 works for Building Maintenance Unit, although not under contract. Mr F stated under affirmation that on or about 20 February 2006 Mr Nott had divulged to him the amount of a quote from Contractor G for works at City of Port Phillip premises in Port Melbourne. Contractor G is a former long-term painting contractor to City of Port Phillip. Mr F said that Mr Nott advised him that the Port Melbourne job would be his if he could underquote it. Mr F subsequently provided a cheaper quote and won the job.
424. Contractor G stated that he was aware that Mr Nott was divulging his quotes to competitors, of which one was Mr F. Contractor G stated that Unit Officer A told him that Mr Nott was divulging his quotes. Contractor G stated that in mid 2007 he raised the issue with Mr Nott, who denied the allegation.
425. The former Building Maintenance Unit manager became a unit officer after Manager X took over. He stated that he was aware of the allegations that Mr Nott divulged competitor quotes and sent Executive Director A an email expressing concern about a lack of process in the Building Maintenance Unit regarding such allegations and maintained his own file note of the subsequent discussion with Executive Director A. The former Building Maintenance Unit manager's recollection of the discussion was that Executive Director A said he was aware of the matter already and that the aggrieved contractor could contact him direct if he was concerned.
426. Executive Director A's recollection of the discussion is that the former Building Maintenance Unit manager would not provide him with specific details of the allegations, only 'obscure references to the tendering processes and that eventually the issue "just died"'.

## Conclusions

427. The summary of the evidence obtained in relation to this allegation is:

- A statement from Contractor E under oath that Mr Nott provided him competitor quotes on one occasion and informed him of quotes on another occasion.
- Copies of the two disclosed quotes that were provided to Contractor E, and which Contractor E produced to my officers.
- A statement from a member of the Committee of Management that the quotes for the children's centre were provided to a City of Port Phillip officer in person.
- Mr Nott was the project manager for the works and was responsible for obtaining the third quote.
- A statement from Mr F under affirmation that Mr Nott also informed him of competitor quotes.
- Mr Nott denied that he revealed any quotes to competitors.

428. Mr Nott responded by stating 'I do not agree with your findings. I consider more information is required for you to make an informed decision'. However, he did not provide any other information for me to consider nor did he make comment on any particular aspects of the evidence.

429. The sworn evidence of two former contractors and supporting documentation in the form of the two disclosed quotes, all point to Mr Nott having provided favoured contractors with competitor quotes so the preferred contractor could underquote, despite Mr Nott's denial.

430. My investigation confirmed that the Building Maintenance Unit continued to engage Mr Nott two days per week as a contractor. I understand that City of Port Phillip has suspended Mr Nott's contract.

## Recommendations

### Recommendation 20

I recommend that City of Port Phillip conduct staff training about the process for identifying, recording and addressing allegations of staff misconduct and breaches of council policy.

### Recommendation 21

I recommend that City of Port Phillip review its engagement of Mr Nott as a contractor.

### *City of Port Phillip's response*

City of Port Phillip has accepted these recommendations.

*The sworn evidence of two former contractors and supporting documentation in the form of the two disclosed quotes, all point to Mr Nott having provided favoured contractors with competitor quotes so the preferred contractor could underquote.*

## SUMMARY OF RECOMMENDATIONS

I recommend that:

1. City of Port Phillip establish processes and guidelines to ensure that the value of services provided by contractors are anticipated by the contract and approved prior to the service being provided.
2. Local Government Victoria review the support and guidance it provides to councils on the interpretation of section 186 and best practice in procurement.
3. City of Port Phillip provide training to employees involved in procurement processes to ensure that good governance requirements are understood and strategies are developed so that this translates into improved governance practices.
4. City of Port Phillip review its procurement policies, practices and guidelines in light of the outcomes of Department of Planning and Community Development's project and Local Government Victoria's Procurement Best Practice Guidelines. City of Port Phillip should include more stringent reporting and monitoring mechanisms and report to its Council on any proposed changes prior to carrying out the necessary amendments.
5. Local Government Victoria be actively involved in supporting City of Port Phillip towards compliance with the Local Government Act.
6. City of Port Phillip commission an external independent audit of the Building Maintenance Unit, as a follow-up to the audit conducted in June 2003. I also recommend that City of Port Phillip action the outcome of the audit within three months.
7. City of Port Phillip review Building Maintenance Unit's compliance with purchasing requirements, including the obtaining and maintaining of quotes and other related documentation and develop a strategy to monitor and ensure future compliance.
8. City of Port Phillip review and, where necessary, amend its Tender and Contract Management guidelines. The revised guidelines should address:
  - a. documentation of the roles and responsibilities of all panel members, including any additional external members assisting in the process
  - b. provision of an opportunity during the tender process for tenderers to respond to any concerns the panel may have
  - c. clarification and strengthening of reporting and endorsement procedures
  - d. documentation and record-keeping requirements

- e. consideration of how to measure past performance during the evaluation phase and how to conduct the assessment, including whether additional 'current' references will be checked
  - f. tender feedback procedures.
9. City of Port Phillip ensure that performance plans of senior executives reflect knowledge of and compliance with procurement procedures as a performance measure.
  10. The CEO provide the Audit Committee with regular reports that reflect compliance / non-compliance with laws, legislation and policies.
  11. The Audit Committee conduct a review of procedures to ensure that instances of non-compliance with legislation or policies are identified and brought to its attention.
  12. Compliance of procurement processes with procurement legislation and procedural obligations becomes a standard item on the agenda of the Executive Team meetings at City of Port Phillip.
  13. City of Port Phillip's Finance Unit regularly report to the Executive Management Team and the Audit Committee.
  14. City of Port Phillip maintain a register of tender and procurement non-compliance issues, which is reported quarterly to the Audit Committee and the Council.
  15. City of Port Phillip amend the delegations of employees to ensure that it is clear that expenditure cannot be approved by the beneficiary of the goods and services. Staff instructions should also be amended accordingly.
  16. City of Port Phillip develop a conflict of interest policy and institute regular conflict of interest training for all staff. A draft of the policy should be provided to my office within three months.
  17. City of Port Phillip review the engagement of Company Z to ensure that a current contract is in place.
  18. City of Port Phillip review the five contracts won by TBS Building Services and take appropriate action. The review should take into account the administrative issues discussed in my report.
  19. City of Port Phillip review its Tender and Contract Management Guidelines to strengthen the practice regarding reference checking.
  20. City of Port Phillip conduct staff training about the process for identifying, recording and addressing allegations of staff misconduct and breaches of council policy.
  21. City of Port Phillip review its engagement of Mr Nott as a contractor.

## Appendix

### August 2008 external consultant's report recommendations

It is recommended that:

- a. Port Phillip's Tendering and Contract Management Guidelines be comprehensively reviewed with a view to:
  - bringing them up-to-date;
  - simplification;
  - removal of onerous conditions;
  - minimising duplication;
  - clarifying aspects such as the weightings that apply to evaluation criteria;
  - incorporating the "conclusions" in this report;
- b. on completion of the review, the documentation required to be available on the Intranet be presented in a "user friendly" format and be the subject of staff training;
- c. as a matter of urgency, non compliant "contracts" on the Vendor Compliance Report be investigated individually and the following corrective action taken where required:
  - the contracts be extended; or
  - a Deed of Novation be prepared and Ministerial approval sought; or
  - the "contracts" be terminated; or
  - arrangements be made to call tenders for the service;
- d. a separate investigation be conducted in respect of a number of specific contracts including, but not necessarily limited to
  - domestic refuse collection (C0652);
  - food production service (C0767);
  - civil infrastructure maintenance and construction services (C0920);
  - parks and open space maintenance services (C0754);
  - sports field maintenance (C0756);
  - natural heritage areas maintenance (C0756);
  - community and child care centre ground maintenance (C0757);
  - (iv – viii. being contracts originally awarded to [X] but where [Y] is now the contractor);
  - three related contracts originally awarded to [Y];
  - to ensure that contract documentation exists or if necessary, is created, executed and exchanged;

- e. in the short to medium term while tenders are being advertised, that all documentation be checked by the Compliance and Risk Unit before advertising;
- f. a separate review be conducted on the extent of compliance with Port Phillip's requirements in relation to the use of TRIM and vital records;
- g. in terms of organisational structure, senior management consider implementing a centralised model in accordance with Attachment 6 of this report;
- h. management investigate options for a contract management system;
- i. the Organisation Development Department, in conjunction with the Compliance and Risk Unit, develop and implement an ongoing staff training programme aimed at ensuring relevant staff are familiar with statutory requirements, industry best practice and Port Phillip's requirements and that such training programmes include presentations by legal practitioners *and* trainers with practical experience of managing tendering processes and in managing contracts;
- j. staff who are regularly members of TEPs and/or manage contracts be appointed by the CEO as "nominated officers" pursuant to Section 81 of the Act;
- k. where relevant, the position description of Executive Directors and Managers be amended to include a clause requiring them to exercise appropriate oversight of tendering and contract management processes;
- l. on an annual basis, the internal auditors review the tendering and/or contract management practices of two contracts, one of which should be a major contract;
- m. the internal auditor's report(s) be referred to the Audit Committee;
- n. additional tender/contract documents be obtained from [Solicitor] (refer Conclusion 20); and
- o. [Solicitor] review the documentation used by Port Phillip in relation to funding of community groups.

## OMBUDSMAN'S REPORTS 2004-09

### 2009

An investigation into the Transport Accident Commission's and the Victorian WorkCover Authority's administrative processes for medical practitioner billing

*July 2009*

*Whistleblowers Protection Act 2001*

Conflict of Interest and Abuse of Power by a Building Inspector at Brimbank City Council

*June 2009*

*Whistleblowers Protection Act 2001*

Investigation into the alleged improper conduct of councillors at Brimbank City Council

*May 2009*

Investigation into Corporate Governance at Moorabool Shire Council

*April 2009*

Crime statistics and police numbers

*March 2009*

### 2008

*Whistleblowers Protection Act 2001*

Report of an investigation into issues at Bayside Health

*October 2008*

Probity controls in public hospitals for the procurement of non-clinical goods and services

*August 2008*

Investigation into contraband entering a prison and related issues

*June 2008*

Conflict of interest in local government

*March 2008*

Conflict of interest in the public sector

*March 2008*

### 2007

Investigation into VicRoads driver licensing arrangements

*December 2007*

Investigation into the disclosure of electronic communications addressed to the Member for Evelyn and related matters

*November 2007*

Investigation into the use of excessive force at the Melbourne Custody Centre

*November 2007*

Investigation into the Office of Housing's tender process for the Cleaning and Gardening Maintenance Contract - CNG 2007

*October 2007*

Investigation into a disclosure about WorkSafe and Victoria Police handling of a bullying and harassment complaint

*April 2007*

Own motion investigation into the policies and procedures of the planning department at the City of Greater Geelong

*February 2007*

### 2006

Conditions for persons in custody

*July 2006*

Review of the Freedom of Information Act

*June 2006*

Investigation into parking infringement notices issued by Melbourne City Council

*April 2006*

Improving responses to allegations involving sexual assault

*March 2006*

### 2005

Investigation into the handling, storage and transfer of prisoner property in Victorian prisons

*December 2005*

Whistleblowers Protection Act: Ombudsman's Guidelines

*October 2005*

Own motion investigation into VicRoads registration practices

*June 2005*

Complaint handling guide for the Victorian Public Sector 2005

*May 2005*

Review of the Freedom of Information Act: discussion paper

*May 2005*

Review of complaint handling in Victorian universities

*May 2005*

Investigation into the conduct of council officers in the administration of the Shire of Melton

*March 2005*

Discussion paper on improving responses to sexual abuse allegations

*February 2005*