

## 14. CHRISTCHURCH CENTRAL CITY ELECTRIC SHUTTLE PASSENGER SERVICE CONTRACT

<b>General Manager responsible:</b>	General Manager City Environment Group, DDI 941-8608
<b>Officer responsible:</b>	Unit Manager, Transport and Greenspace
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### PURPOSE OF REPORT

1. The purpose of the report is to seek a decision to enter into negotiations with Red Bus Limited (Red Bus) in respect of the current Christchurch Central City Electric Shuttle Passenger Service Contract (Shuttle Bus contract) that will expire on 30 June 2010.

### EXECUTIVE SUMMARY

2. Red Bus has been involved in the shuttle bus service since its inception in 1998. The current contract with Red Bus is dated 25 May 2005. Through this contract a free inner city shuttle bus service is provided to visitors and residents of the city. The value of the contract is approximately \$1 million a year.
3. The initial contract was awarded to Red Bus as they were the only company that submitted a proposal for the provision of the service. The current contract was publicly tendered, with two companies submitting tenders for consideration. The tender was awarded to Red Bus, and the contract granted for a period of five years. It is due to expire on 30 June 2010.
4. Red Bus is a Council Controlled Trading Organisation (CCTO). All of its shares are held by Christchurch City Holdings Limited (CCHL). The equity that CCHL holds in Red Bus is listed as one of the Council's strategic assets in its 2009-19 LTCCP.
5. For these and other reasons set out in this report, it is recommended that the Council enter into negotiations with Red Bus for a new contract to replace the one that is due to expire.

### FINANCIAL IMPLICATIONS

6. Red Bus is monitored by CCHL. Its financial results are included in the Council's group accounts. There will be an effect on Red Bus if they do not have the Shuttle Bus contract. They have four dedicated buses that provide the Shuttle Bus service and employ drivers for that purpose. While they may be able to redeploy the buses and drivers there is no certainty around this.
7. It is likely that any decision to award the contract to a company other than Red Bus would affect not only the financial position of that organisation but also that of the Council and group.
8. If the recommendations contained in this report are adopted by the Council it is proposed that the General Manager City Environment be authorised to appoint a panel for the purpose of entering into negotiations with Red Bus and include an external industry expert and be supported by appropriate legal advice.

### Do the Recommendations of this Report Align with 2009-19 LTCCP budgets?

9. Yes, the shuttle bus service is budgeted on the current contract terms in the LTCCP.

### LEGAL CONSIDERATIONS

10. The issue is whether or not the Council is able to enter into negotiations with Red Bus for a new contract, rather than going through a contestable tender process. Given the special relationship that it has with Red Bus and CCHL, entering into negotiations, the former is an option that is legally open to the Council to pursue.

### The Council's Statutory Obligations

11. The power of general competence contained in section 12 of the Local Government Act 2002 (LGA02) enables the Council to carry on or undertake any activity or business, do any act, or

enter into any transaction. The LGA02 gives the Council the rights, powers and privileges that it needs to do so. However, the exercise of the Council's powers is subject to the provisions contained in the LGA02 and in any other legislation, and the general law.

12. One of those provisions is section 101(1) of the LGA02. It states that the Council must manage its expenses, assets and general financial dealings prudently and in a manner that promotes the current and future interests of its community.
13. Advice provided by the Council's Legal Services Unit and by its external strategic legal adviser, Simpson Grierson, in relation to a similar situation concerning the City Care Limited maintenance contracts (which were considered by the Council in September 2008) is that the Council is able to negotiate a new contract with a body such as Red Bus provided all of the Council's statutory obligations are satisfied. Those statutory obligations include complying with the decision-making requirements in sections 76-82 of the LGA02.
14. Under section 76(1), a local authority must first decide on the applicability of the provisions in sections 77, 78, 80, 81, and 82 to the particular decision to be made, then decide under section 79 how to achieve compliance with those provisions (see *Whakatane DC v Bay of Plenty RC 9/4/09*, Duffy J, HC Rotorua CIV-2007-463-606). This includes the following decision making processes:
  - (a) Sections 77 and 78 are the primary sections applicable in this instance. The significance of the matters affected by the decision (in order to ensure that the level of compliance with sections 77 and 78 is largely in proportion to significance) is discussed further below.
  - (b) Before making its decision the Council must identify all reasonably practicable options for achieving its objectives and assess those options by considering:
    - (i) The benefits and costs of each, in terms of the present and future social, economic, environmental and cultural wellbeing of the Councils district;
    - (ii) The extent to which community outcomes would be promoted or achieved in an integrated and efficient manner;
    - (iii) The impact of each option on the Council's capacity to meet future and present needs in relation to its statutory responsibility;
    - (iv) Any other matters that in the Council's opinion are relevant.
15. The Whakatane case confirmed that it is up to the Council to determine how it achieves compliance with the provisions of the LGA02. The Council is able to judge for itself:
  - (a) The extent to which different options are to be identified and assessed;
  - (b) The degree to which benefits and costs are to be quantified.
16. Here there are only two options in relation to the decision to be made: negotiate with Red Bus or run a competitive tender. The principal objective in this matter is to ensure that any terms and conditions agreed upon between the Council and Red Bus represent value for money. They should be no less favourable than those terms and conditions that the Council would have obtained had it conducted a competitive tender process. This is prudent financial management.
17. In addition to identifying and assessing all reasonably practicable options, the Council must give consideration to the views and preferences of persons and organisations likely to be affected by, or to have an interest in, the decision that the Council ultimately makes. In the present instance, these would include other contractors wishing to compete with Red Bus for the Shuttle Bus contract, as well as Red Bus itself. It is likely that the views of other contractors would favour the Council making a decision to put this contract out for tender instead of negotiating in the first instance with Red Bus.

### Reasons for Entering into Negotiations with Red Bus

18. The Council must have regard to section 14 of the LGA02. This requires the Council to conduct its business in an open, transparent and democratically accountable manner and in accordance with sound business practices. Simpson Grierson advises that often the best way of ensuring compliance with section 14 is to seek competitive tenders in an open market.
19. However, Simpson Grierson also recognises that there may be good reasons for not going to the market. These include:
  - (a) The fact that Red Bus is a CCTO and a strategic asset;
  - (b) By supporting Red Bus's business the Council is showing prudent stewardship and the efficient and effective use of its resources; and
  - (c) The benefit that the Council derives as a shareholder (through CCHL) of Red Bus. The Council is entitled to take such benefits into account.
20. To ensure that the Council's process is transparent, these reasons are acknowledged and recorded.
21. The Council will ensure sure that the terms and conditions of any contracts entered into with Red Bus are consistent with sound business practice and will include an industry expert to provide confirmation that the contract will need give value for money.
22. The industry expert will also be required to confirm any terms and conditions agreed upon by the Council and Red Bus are similar to those that the Council would have obtained in the market from a competitive tender process.

### Significance

23. The Council's policy on determining significance is set out in its 2009-19 LTCCP. The policy includes a list of assets that the Council considers to be strategic assets. These include the equity that CCHL holds in Red Bus. The significance policy states that "where a proposal requires a decision by the full Council the Council will treat as significant any proposal or decision that does not flow consequentially from a decision in an LTCCP, (as amended) an Annual Plan or any process involving a public hearing. This decision is one to be made by the full Council and may also be one that flows consequentially from the LTCCP.
24. The free shuttle service (and impliedly the continuation of that service) is budgeted in the LTCCP (see pages 77 and 80), but the decision to be made by the Council is whether it should enter into negotiations with Red Bus in respect of the contract or whether it should seek competitive tenders, to continue to run the free shuttle service. Arguably, that decision is not one that flows consequentially from the shuttle service being included in the LTCCP.
25. If the decision is to be treated as significant (because it does not flow consequentially from the LTCCP) then the Council's policy does not require it to carry out a special consultative procedure in relation to such a decision. In this particular instance, where the decision is essentially a commercial decision for the Council there is little to be gained from carrying out an SCP, or other general consultation with the public.
26. Turning to the general approach to determining significance set out in the policy (and the LGA02) the Council's decision does not have a high degree of significance in terms of:
  - (a) Its impact on the wellbeing of Christchurch; or
  - (b) The costs to or capacity of the Council to provide for the wellbeing of the City.

27. In relation to the likely impact on and consequences for any persons who are likely to be particularly affected by, or interested in the issue, proposal, decision or matter, the Council acknowledges that this would include other contractors wishing to compete with Red Bus for the Shuttle Bus contract. However, as those person/companies are not currently involved with the contract, and could not have an expectation that Council would run a tender for this process the impact and consequences for them is not likely to be significant. Red Bus itself, is an affected party so far as its continued viability is concerned
28. Consideration has also been given to the possible effect of section 97 of the Act. This requires explicit provision in the LTCCP for a decision to alter significantly the intended level of service for any significant activity undertaken by or on behalf of the Council. The advice on this point is that although the contractor may be different as a result of any decision made by the Council, the intended level of service will not be significantly altered. Therefore, section 97 would not apply.

### **Conflict of Interest**

29. The matter of whether or not a conflict of interest exists in this matter has also been considered. Notwithstanding the fact that the Council is not a shareholder in Red Bus, the company is nevertheless a CCTO. The Council indirectly controls the shares held by Christchurch City Holdings Limited, which is itself a CCTO. The Council will be considering issues relating to the delivery of services that could affect the financial position of Red Bus.
30. The office of the Auditor-General in looking at conflicts of interest affecting public entities in its report on the policies and practices of the three Auckland District Health Boards. The report notes that the existence of a conflict of interest does not have to cause problems, it just needs to be identified and managed carefully. The Auditor-General's view is that managing a conflict of interest requires careful judgement and involves a balance between the need to reduce risk and the need for an organisation to operate effectively.
31. Council staff intend to manage this issue by the recruitment of an independent member of the panel appointed to conduct the negotiations with Red Bus. The panel will also undertake the competitive tender process, if that is required at the end of the negotiation process.

### **Contractual Obligations**

32. The 2005 contract with Red Bus agreed to an extension of the contract beyond 2008 for two further 1 year periods, the second of which expires on 30 June 2010. There are no other contractual obligations that would require the Council to negotiate solely with Red Bus.

### **Auditor-General's Guidelines for Procurement**

33. The Auditor-General's office has issued updated guidelines for the procurement of goods and services by public entities, including local authorities. The Auditor-General clearly intends that organisations such as the Council will comply with the provisions of the Guidelines.
34. The Auditor-General's Office expects a public entity, when selecting the method to be used to engage with the potential suppliers of goods or services, to consider:
  - (a) The need, wherever possible, to promote open and effective competition throughout the procurement process; and
  - (b) The value of, and risk associated with, the procurement.
35. The guidelines also state that open tender or proposal processes are used to promote transparency and value for money. It is the view of the Auditor-General's office that these processes are most appropriate for middle to high value procurements where there are a number of potential suppliers in the market. Although closed tender or proposal processes may be appropriate in some circumstances, limited use should be made of this method and when it is, the public entity should document its reasons for doing so. It should also properly justify using a closed tender or proposal method.

36. "Value for Money" is defined in the guidelines as meaning:

*"The use of resources effectively, economically and without waste, with due regard for the total costs and benefits of an arrangement and its contribution to the outcomes the entity is trying to achieve.*

*The principle of value for money when procuring goods or services does not necessarily mean selecting the lowest price but rather the best possible outcome for the total costs of ownership (or whole-of-life cost).*

*Value for money is achieved by selecting the most appropriate procurement method for the risk and value of the procurement, and not necessarily by using a competitive tender".*

37. The Council's objective is to obtain value for money in respect of the Shuttle Bus contract. Council staff are of the view that given the nature of the relationship with Red Bus, it is appropriate for the Council to enter into negotiations with that company, provided due regard is given to the total costs and benefits that would accrue and that the best possible outcome is achieved.
38. Council staff recommend that the Council enters into negotiations with Red Bus before a decision is made whether or not to award contracts to Red Bus, or to then conduct an open tender process.

#### **ALIGNMENT WITH STRATEGIES**

39. The proposal that the Council enter into negotiations with Red Bus is not in breach of any policy or strategy for the procurement of goods and services by the Council.

#### **CONSULTATION FULFILMENT**

40. There is no statutory obligation imposed on the Council to consult before it makes a decision on this matter. However, it must give consideration to the views and preferences of persons and organisations likely to be affected by, or to have an interest in, the decision that the Council ultimately makes. Staff have considered this issue and believe that the likely views and preferences of other bus operators would be to favour a competitive tender process, but conversely any company selected for a direct negotiation process would likely prefer that process. Therefore further discussion would yield little additional information.
41. Internal advice has been provided by the Transport and Greenspace Unit, the Legal Services Unit and Procurement and Purchasing.

#### **STAFF RECOMMENDATION**

It is recommended that the Council resolves to:

- (a) Authorise the General Manager City Environment to appoint a panel comprising Council staff members and an external industry expert to enter into negotiations with Red Bus Limited for a new Shuttle Bus contract.
- (b) Direct the panel to follow the Auditor - General's "Procurement Guidelines for Public Entities (June 2008).
- (c) Authorise the General Manager City Environment to sign either:
- (i) A new Shuttle Bus contract with Red Bus Limited on terms recommended by the panel, if entering into a contract with Red Bus Limited is recommended by the panel;
  - (ii) To instigate a competitive tender process for the new Shuttle Bus contract, if this is recommended by the panel.
- (d) Authorise the General Manager City Environment to sign a new Shuttle Bus contract with the successful tenderer following completion of that process.

## BACKGROUND (THE ISSUES)

42. The free Central City Shuttle Bus operation commenced in 1998 using, what were then, state of the art electric powered buses. The original concept for the service was as a three way partnership between the Council, Red Bus and the bus manufacturer, Designline (from Ashburton). The objectives for the service included to further improve and add to the central city image, in relation to easier access to various activities in the city for both residents and visitors, allowing people to use a wider parking catchment for the city, promote environmentally friendly transport and also promote public passenger transport.
43. Some of the original aims of the shuttle bus service are still found in the 2009-19 LTCCP in the references to public transport infrastructure. The free central city shuttle is one of the services that supports the bus system and in providing this service the Council is trying to achieve a safe, attractive and convenient service that is free to users and connects key attractions (see pages 77 and 80 of the LTCCP).
44. The initial contract to run the shuttle service was for a period of five years. It was awarded to Red Bus (who at that time were Christchurch Transport Limited) as they were the only company that submitted a proposal for the provision of the service, even though 10 companies were provided with the proposal documentation. The first contract was extended for a further 6 months to allow contract negotiations to be completed. The next five-year period (expiring on 30 June 2010) was publicly tendered, with two companies submitting tenders for consideration. The tender was awarded to Red Bus.
45. Red Bus is a Council Controlled Trading Organisation (CCTO), and all of its shares are held by CCHL. Its Statement of Intent for the year ending 30 June 2010 states that one of its objectives is "to operate and grow a successful, sustainable and innovative business in providing passenger transport and associated infrastructural ownership and services." The forecast ordinary dividend for 2009/10 is \$1.3 million, and for 2010/11, \$550,000.
46. The form of the contract originally entered into with Red Bus needs to be updated to reflect the current requirements of both parties. It is appropriate that a new contract is negotiated, either with Red Bus (or with any other contractor that successfully tenders for the contract, if that is the end result of this process).
47. The decision to be made by the Council is whether or not to enter into negotiations with Red Bus for a new Shuttle Bus contract or to open it up for tender by way of a competitive process. In the normal course of events, the competitive tender process would usually be applied to a contract like this.
48. In this case, the fact that Red Bus is CCTO and the Council's interest in the organisation is a strategic asset means that there are other considerations to be taken into account.
49. Red Bus does not exist purely to carry out work under contract to the Christchurch City Council. Its vision is "to be recognised as leading the way in passenger transport" and achievement of the vision means that Red Bus will be recognised as the preferred urban passenger service operator by the Regional Council, among other things. Its key objectives include building strong and positive relationships with the regional and local councils. The company has annual revenue of \$37 million and employs more than 450 people.
50. The Council could support Red Bus with its vision and its objective "to operate and grow" its business by maintaining this contract. Such a move could be seen as prudent stewardship and the efficient and effective use of the Council's resources. The benefits of a strong, financially sound organisation which is also a strategic asset, is one of the matters that the Council is entitled to take into account when considering whether or not to enter into negotiations with CC, or to seek competitive tenders.
51. As indicated earlier, the Council also has an obligation to undertake any commercial transactions in accordance with sound business practices. It is recommended that a panel be appointed to enter into negotiations with Red Bus and at the end of the process to provide independent confirmation that the contracts negotiated represent value for money.

52. The panel should also aim to achieve agreed terms and conditions similar to what the Council would have obtained in the market from a competitive tender process.
53. As well as complying with the relevant provisions in the Local Government Act 2002, the Council is required to have regard to its own procurement policies and strategies. If a decision to negotiate only with City Care was inconsistent with these, then under section 80 of the Act the Council would have to identify any inconsistency and the reasons for it and then indicate its intention to amend the policy or strategy to accommodate the Council's decision.
54. The Council has a policy in respect of the competitive tendering of Council services. It states that all Christchurch City Council services where possible should be tested against those provided by the private sector and contracted out where appropriate. Although it is a CCTO, City Care is not an "in-house" provider. If negotiations with City care fail to produce a satisfactory outcome, it would be appropriate to then go to an open tender process.
55. The Council also has a policy of preferring local firms. Negotiating with Red Bus would not be inconsistent with that policy.
56. In June 2008 the Auditor-General's Office issued new guidelines for the procurement of goods and services by public entities. A "public entity" includes a local authority.
57. This document sets out the Auditor-General's view of the good practice that public entities should adopt to procure goods or services. It outlines expectations that the Auditor-General may use when carrying out performance audits or enquiries. The principles on which the guidelines are based should be considered when a public entity is considering any funding arrangement with an external party, including procuring goods or services.
58. The principles are summarised as follows:
  - (a) Accountability. Public entities should be accountable for their performance.
  - (b) Openness. They should be transparent in their administration of funds.
  - (c) Value for money. Public entities should use resources effectively, economically and without waste. The principle of value for money for procuring goods or services does not necessarily mean selecting the lowest price, but rather the best possible outcome for the total cost of ownership.
  - (d) Public entities must act within the law, and meet their legal obligations.
  - (e) Fairness. Public entities have a general public law obligation to act fairly and reasonably. They must be, and must be seen to be, impartial in their decision making.
  - (f) Integrity. Anyone who is managing public resources must do so with the utmost integrity.
59. The Council's procurement unit has looked closely at the Auditor General's guidelines and is satisfied that provided the appropriate steps are taken to ensure that, in particular, the principle of getting value for money is met then a decision to negotiate a new contract with Red Bus can be managed in accordance with those guidelines.
60. An important point to remember is that a decision to enter into negotiations with Red Bus will not mean that the Council is bound to complete a contract with that organisation. The Council will be free to undertake a competitive tender process if it cannot be satisfied that the terms and conditions agreed to with Red Bus give value for money.

## THE OPTIONS

### ASSESSMENT OF THE MOST PRACTICABLE OPTIONS

#### Option 1 - Entering into negotiations with Red Bus:

61. Matters to be considered in relation to this option are:
- (a) The organisation is a CCTO;
  - (b) The Council's equity in Red Bus is a strategic asset;
  - (c) The Council would be supporting Red Bus's business;
  - (d) A strong dividend stream contributes to the financial strength of the Council group;
  - (e) Possible redundancies would be avoided;
  - (f) The Council would be supporting its community;
  - (g) Provided the negotiated contracts give value for money there should be no impact on the Council's statutory responsibilities;
  - (h) Disaffected contractors could challenge the Council's decision to negotiate only with Red Bus;
  - (i) If suitable terms and conditions can't be negotiated, then the Council still has the option of going to the market.
62. Dealt with properly this option will comply with the provisions of the LGA02 and the Auditor General's guidelines. It acknowledges that Red Bus is a CCTO and a strategic asset. The advice from Council staff is that provided the appropriate steps are taken to ensure that any recommendation following the negotiation process is independently verified as being in accordance with sound business practice then it is open to the Council to adopt this option. The independent consultant engaged on the panel will be able to do this.
63. It is important to note that any decision to enter into negotiations with Red Bus will not bind the Council to contractual arrangements with that organisation. If the recommendations of staff are adopted, then it is open to the General Manager City Environment to undertake a competitive tender process once the outcome of negotiations with Red Bus are known.

#### Option 2 - Adopting a competitive tender process:

64. Matters to be considered in relation to this option are:
- (a) Could be the best way to ensure compliance with the Council's statutory responsibilities;
  - (b) May result in the Council obtaining the best contractual terms and conditions;
  - (c) The successful tenderer may not be based in Christchurch or in New Zealand. This may have an adverse effect on the local economy;
  - (d) There may be redundancies if Red Bus was to lose the Shuttle Bus contract;
  - (e) The emergence of another Canterbury-based contractor may provide a boost to the local economy;
  - (f) Red Bus is strong enough to continue developing its business despite the potential loss of this contract;



- (g) There would be a reduction in the level of dividends derived from Red Bus, at least in the short term;
  - (h) The Council could be criticised for not supporting a local based business; and
  - (i) Lack of support from its own Council could reflect badly on Red Bus.
65. It is acknowledged that in the normal course of events this would be the most appropriate method of dealing with the matter. However, it is the advice of Council staff that the Council is entitled to take into account the fact that Red Bus is a CCTO and a strategic asset. For the reasons set out in this report, Option 2 is not recommended.

**PREFERRED OPTION**

66. The preferred option is option 1.